



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

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no. JA 56/24

In the matter between

PHAHLANE JOHANNES KGOMOTSO

Appellant

and

SOUTH AFRICAN POLICE SERVICE

First Respondent

**SAFETY AND SECURITY BARGAINING
COUNCIL**

Second Respondent

NKOPANE JOYCE N.O.

Third Respondent

MINISTER OF POLICE

Fourth Respondent

Heard: 16 September 2025

Delivered: 5 February 2026

Coram: Nkutha-Nkontwana JA, Chetty AJA et Tokota AJA

Summary: Labour Relations Act – dismissal for misconduct – CCMA has jurisdiction to determine the fairness of dismissal and not legality – LRA mechanisms to be used to challenge LRA breach for LRA remedy.

Pleadings – Labour Court – Jurisdiction – to be assessed on basis of pleaded cause of action not substantive merits of case – it is impermissible for a party to recharacterise or expand an unfair-dismissal dispute into a legality challenge extraneous to the pleadings – the illegality claim, in any event, is untenable.

Review – Reasonableness test – high threshold – judicial deference is required, and interference is justified only where the decision is one that no reasonable decision-maker could reach.

Minority judgment – unlawful dismissal – anyone, not being the President, purporting to act in terms of section 207 of the Constitution acts unlawful and such act is a nullity – Labour Court has no jurisdiction to entertain an unlawful dismissal dispute.

ORDER

Chetty AJA delivers a majority judgment in which Nkutha-Nkontwana JA concurs. Tokota AJA concurs in the order, but for reasons distinct from the majority. The following order therefore reflects the unanimous outcome of this Court, notwithstanding the difference in reasoning:

The appeal is dismissed with no order as to costs.

JUDGMENT

TOKOTA, AJA

- [1] Appellant joined the South African Police Service (the SAPS) on 8 November 1985. He was dismissed by the National Commissioner of Police on 7 August 2020 on account of the alleged misconduct. At the time of his dismissal, he was an Acting National Commissioner in the SAPS, and he was on suspension, having been suspended by the Minister of Police. He referred a dispute of unfair dismissal to the Safety and Security Bargaining Council (the Bargaining Council) for conciliation. The conciliation failed and the dispute remained unresolved. It was then referred to arbitration. The arbitrator issued an award upholding the dismissal on the basis that it was both procedurally and substantively fair. The Labour Court dismissed his application for the

review of the award with no order as to costs. This appeal is against that order with leave of this Court.

- [2] I set out herein the chronological events which culminated in the appellant's dismissal. On 8 November 1985, the appellant joined the SAPS. In the years following his appointment, he was promoted to various police ranks and ultimately to the rank of Lieutenant General in 2007.
- [3] On 12 July 2010, the appellant was deployed, as a Divisional Commissioner Personnel, to the Division of Forensic Services, which was responsible for a panoramic image capturing system for the visual representation of crime scenes. In 2013, this Division identified a need to procure a 360 x 180 panoramic image capturing system, including the maintenance of the equipment provided for under the Criminal Justice System Budget.
- [4] On 21 November 2013, an invitation to bid was then issued calling upon the bidders to submit their bids under Bid No. 19/1/9/1/187 TR [13] for the Supply and delivery of 360 x180 Panoramic Image Capturing System for visual presentation of Crime and Crash Scenes (360-degree panoramic camera equipment), including a three (3) year Maintenance Contract: Criminal Record and Crime Scene Management: Division Forensic Services. The two bidders shortlisted, Ethemba Forensic Group (Pty) Ltd (Ethemba) and Forensic Data Analysis (Pty) Ltd (FDA), were visited at their sites by the Bid Evaluation Committee (the BEC) on 11 April 2014 and 14 April 2014, respectively.
- [5] On 28 July 2014, the bidding process was finalised and the bid was awarded to Ethemba by the Bid Adjudication Committee.
- [6] On 22 August 2014, FDA addressed a letter to the Divisional Commissioner for the Supply Chain Management in which it disputed the award of the bid to Ethemba. On 4 September 2014, this letter was forwarded to the appellant for his attention in his capacity as the Divisional Commissioner for Forensic Services.

- [7] On 22 October 2014, the appellant sent a letter of complaint to Forensic Services, stating that the bid offer was not compliant with the specifications and recommending that the contract with Ethemba be withdrawn.
- [8] On 5 November 2014, the Divisional Commissioner for Supply Chain Management addressed a letter to the BEC directing that the committee should reconvene and provide a report about the alleged misleading and non-compliant offer by Ethemba
- [9] On 14 November 2014, the BEC reconvened and it concluded that both bidders were compliant. On 20 November 2014, the BEC recommended that the matter be referred to the legal division for guidance.
- [10] On 10 March 2015, the appellant addressed a further letter to the Supply Chain Management Division, maintaining that the bid from Ethemba was non-compliant with specifications. He pointed out certain shortcomings of the Ethemba bid. He stated that Forensic Services could not be placed at risk, stating that *"under no circumstances will the expert status of crime scene experts be compromised"*. He concluded by saying that his division did not support the award made by the Bid Adjudication Committee.
- [11] On 31 March 2015, the Supply Chain Management Division addressed a letter to Ethemba, pointing out the alleged shortcomings and inviting it to respond thereto. On 7 May 2015, Ethemba responded by furnishing an expert report from Dr Weiss addressing the concerns, maintaining that the bid was compliant. This information was forwarded to the appellant for his attention on 13 May 2015. No response was forthcoming in this regard.
- [12] On 27 July 2015, the Acting Divisional Commissioner for Supply Chain Management addressed a letter to Forensic Services, pointing out that its reluctance to place orders with Ethemba was putting the SAPS at risk of litigation. Further correspondence followed from the Division Supply Management in this regard without any response from the appellant's Division.

- [13] On 25 September 2015, the appellant addressed a letter to Technology Management Services requesting that an amount of R46million from the funds that were allocated to procure a 360-degree panoramic camera system be used to cover the costs of Forensic light sources, since there was still a contractual dispute about the bid awarded to Ethemba.
- [14] On 14 October 2015, the appellant was appointed by the President as the Acting National Commissioner of the SAPS. The duration of this acting appointment is not stated in the papers.
- [15] On 10 February 2016, one retired Brigadier John Lambert, working for Ethemba, addressed a letter to the Acting Divisional Commissioner for Forensic Services demanding placement of the orders in accordance with the contract. No orders were placed. On 29 March 2016, Ethemba, through Brigadier Lambert, once again addressed a letter of final demand for the placement of orders by Forensic Services. He pointed out that the matter could be resolved without the intervention of the Public Protector.
- [16] On 25 April 2016, the Managing Director of Ethemba wrote a letter to the Acting Divisional Commissioner for Forensic Services, Lt. General Mokwana, and proposed a joint meeting to resolve the dispute. On 29 April 2016, the Acting Divisional Commissioner Forensic Services, Major General Ngokha, addressed a letter to the Divisional Commissioner for Supply Chain Management and recommended that, in view thereof that the two divisions were not in agreement about the validity of the award, the matter should be referred to CSIR for an independent assessment of the compliance or otherwise of the bid specifications.
- [17] On 14 July 2016, lawyers for Ethemba served the appellant, in his official capacity as the Acting National Commissioner for the SAPS, with the notice in terms of s. 3 of the Institution of Legal Proceedings Against Certain Organs of State Act¹, informing him that Ethemba has accepted the repudiation by the SAPS and thereby cancelled the contract and would claim damages accordingly. They threatened to serve summons imminently.

¹ Act 40 of 2002.

- [18] On 29 September 2016 the Forensic Services Division received a letter from the National Treasury advising it to request SABS for scientific and industrial research to independently verify compliance with specifications.
- [19] On 30 September 2016, the appellant, in his official capacity as the Acting National Commissioner, was served with summons from Ethemba claiming damages in the amount of R14 879 500.
- [20] On 1 June 2017, the appellant was suspended by the Minister of Police without loss of his benefits.
- [21] On 6 July 2020, the appellant was served with a notice to expeditious process to appear before Lt. General Riet, having been charged with misconduct. He was subsequently found guilty and dismissed by the National Commissioner of Police. As pointed out above, he referred a dispute of unfair dismissal to the Bargaining Council.
- [22] The arbitrator found that the dismissal was both substantively and procedurally fair. The arbitrator found that *"it is common cause that on 14 October 2015 the applicant [appellant] was appointed as the National Commissioner of South African Police Services"*. She found that although the appellant claimed that at the time of the case against the SAPS by Ethemba he was no longer in charge of the Division, as a Divisional Commissioner, as the overall head of the SAPS he ought to have found out what was happening to the matter. The arbitrator acknowledged that the appellant, at that time, was the Accounting Officer and, as such, he had a responsibility to find out what was happening with the contract.
- [23] The appellant then took the arbitration award on review before the Labour Court. The Labour Court (per Davey AJ) dismissed the application with no order as to costs. The Labour Court subsequently refused leave to appeal, hence it was granted by this Court.
- [24] The Labour Court dealt with the review on the basis of reasonableness or otherwise of the arbitrator and concluded that the findings of the arbitrator were reasonable and that there was no reason to interfere with the award.

[25] In view of the fact that I am satisfied that the appeal can be disposed of on a point of law, I have decided not to traverse all the grounds of appeal. Furthermore, I will refrain from dealing with the merits of the case for the reasons that will follow. The point of law was pertinently raised in the review papers, but was not dealt with by the Labour Court. The point is whether it was lawful for the Minister of Police to suspend the appellant, who was the Acting National Commissioner at the time, and whether the National Commissioner was empowered to charge and dismiss him since he was never removed by the President as the Acting National Commissioner. I may mention at this stage that the point of suspension has become moot in view of the dismissal.

[26] From the pleadings in the Labour Court, one is able to glean from the appellant's grounds of review what the cause of action was. These grounds form the basis of his cause of action. From paragraphs 85 to 90 of the founding affidavit, the nub of the complaint was that the allegations raised against him related to his position as the Acting National Commissioner, not as the Divisional Commissioner. In paragraph 86 he says "*As such only the President of the Republic of South Africa (the President) can take such action against me for conduct which relates to averred misconduct committed by me as the National Commissioner of the SAPS.*" He states that the presiding officer of the disciplinary enquiry was "extremely" aware of this fact. Except for a bare denial and a rider that the appellant's sense of impunity should be frowned upon, these allegations are not dealt with pertinently by the respondents. In *Makhuva v Lukoto Bus Service (Pty) Ltd and others*² the Learned Acting Judge said:

"In the course of argument I put it to counsel for applicants that, where a deponent is under a duty to admit or deny or to confess and avoid a direct allegation, a reply that the allegations are 'taken note of' would, in the circumstances, amount to an admission. See in this respect the case of *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E - D where it is stated that whilst 'quiescence is not necessarily acquiescence', a

² 1987 (3) SA 376 (V) at 386 D – F.

party who does not make a firm repudiation of an allegation when bound to do so incurs the risk of an adverse inference being drawn against him.”

[27] Furthermore, in paragraphs 89 -90 appellant stated:

“From the mentioned examples in the Commissioner’s award, it is clear that the Commissioner held the view that I had certain duties as the National Commissioner which I did not conform to, and these averred failures led to her finding that I was guilty of the first charge.”

[28] Paragraph 90 thereof states:

“The Commissioner should at this point have concluded that action should have been taken against me by the President, as the President was the only person who could take such action. The Commissioner, however, failed to recognise this fact and found me guilty of alleged omissions during the term as National Commissioner. The Commissioner did not have the power to venture this far and as such exceeded her powers and acted irregularly and unlike a reasonable Commissioner”.

[29] The first charge related to a conduct which was alleged to have brought the SAPS into disrepute in that, between 2013 and 2016, the appellant acted intentionally or negligently in the repudiation in respect of the contract between Ethamba and the SAPS, resulting in fruitless expenditure of R24 494.080.65.

[30] In the answering affidavit of the respondents, the allegations contained in paragraphs 89 to 90 mentioned above were not pertinently dealt with. The response was that it had always been the theme of his [appellant’s] case that he should not be charged. It is further stated “[t]hus the applicant has always held himself as one above discipline”.

[31] Again, in this Court, the above point was pursued in the heads of argument by Counsel for the appellant. Counsel for the first respondent did not find it necessary to respond to this point in her heads of argument and simply took the attitude that this point was new and that it was raised for the first time on appeal. As can be gleaned from the above quoted paragraphs, the point was indeed raised before the Labour Court. However, even if it was raised for the

first time on appeal, it is a legal point and this Court would have directed the parties to deal with it as it was covered in the pleadings.

[32] In *CUSA v Tao Ying Metal Industries and others*³ Ngcobo J stated:

'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law.'

[33] In *Paddock Motors (Pty) Ltd v Igesund*⁴ Jansen JA said:

'... it would create an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part ...'

[34] Consequently, this Court is obliged to decide the merits or otherwise of the point.

[35] In *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and another*⁵ Van der Westhuizen J, writing for a unanimous Court, said:

'In Barkhuizen Ngcobo J noted that this Court may consider a point of law that is raised for the first time if the point is covered on appeal by the pleadings and its consideration on appeal involves no unfairness to the other parties. Khumalo supports this. In Lagoonbay this Court stated that it must be in the interests of justice, which takes into account the public interest and whether the matter has been fully and fairly aired, to hear a new argument for the first time. In this case the issue was not properly raised on either the facts or the law.'

[36] It is now timely to look at the relevant legal framework. Section 207 of the Constitution of the Republic of South Africa, 1996, (the Constitution) provides that '[t]he President as head of the national executive must appoint a woman

³ 2009 (2) SA 204 (CC) at para 68 (*CUSA*). See also: *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and another* 2016 (1) SA 621 (CC) at para 63.

⁴ 1976 (3) SA 16 (A) at 23 F.

⁵ 2016 (1) SA 621 (CC) at para 63.

or a man as the National Commissioner of the Police service, to control and manage the police service.' This is the express primary power of the President

[37] Section 6(1) of the South African Police Service Act⁶ (the Police Act) provides:

'There shall be a National Commissioner of the Service who shall be appointed in accordance with section 207(1) of the Constitution of the Republic of South Africa, 1996.

6(2) There shall be a Provincial Commissioner of the Service for each province who shall be appointed by the National Commissioner subject to section 207 (3) of the Constitution of the Republic of South Africa, 1996'.

[38] Section 7 of the Act provides for the terms of office of National and Provincial Commissioners. It provides:

'(1) Subject to this Act, the person who is appointed as National or Provincial Commissioner shall occupy that office for a period of five years from the date of his or her appointment or such shorter period as may be determined at the time of his or her appointment by—

(a) the President, in relation to the National Commissioner; or

(b) ...'

In terms of ss.3 of s. 7, the President may, in writing and two months before the expiry of the period of five years or such extended period as the case may be, inform the National Commissioner of his intention to extend the period.

[39] The power to suspend⁷ and remove the National Commissioner vests in the President.⁸ Section 8(7) provides that the *President* '*...may, upon receipt of a*

⁶ Act 68 of 1995.

⁷ Section 9 provides:

"(1) If the ... is of the opinion that the National Commissioner ... is guilty of misconduct or is not able to carry out the duties of his or her office efficiently, the President ...may establish a board of inquiry consisting of a judge of the Supreme Court as chairperson and two other suitable persons to—

(a) inquire into the alleged misconduct or incapacity;

(b) compile a report; and

(c) make recommendations.

(2) The President ... may, after hearing the Commissioner concerned, pending the outcome of the inquiry referred to in subsection (1), suspend him or her from office.

(3) A Commissioner who is suspended from office under subsection (2), shall, during the period of such suspension, be entitled to any salary, allowance, privilege or benefit to which he or she is

recommendation contemplated in subsection (6), remove the Commissioner concerned from office, or take any other appropriate action.' In my view, it follows that if the power to appoint an Acting National Commissioner vests in the President, as was the case in this matter, then the power to remove or suspend that Acting National Commissioner cannot shift to another functionary such as the Minister of Police or the National Commissioner. The power to appoint a Provincial Commissioner is vested in the National Commissioner.⁹ The appointment of such Acting National Commissioner is for such period as the post of a permanent National Commissioner is still vacant or such other period as the President may consider appropriate, and, the removal of such Acting National Commissioner, to make way for the newly appointed one, vests in the President as corollary power.

- [40] The power to dismiss the National Commissioner of the SAPS is a corollary of the power to appoint and is an executive action that does not constitute administrative action, and could only be reviewed on the grounds of legality principle. It has been held that *'[t]hese powers to appoint and to dismiss are conferred specially upon the President for the effective business of government ...'*¹⁰
- [41] The power to appoint the National Commissioner of Police is expressly conferred on the President in terms of the Constitution and Police Act, respectively and the power to remove him or her is implied in the respective Acts. 'As a general rule, express powers are needed for the actions and decisions of administrators. Implied powers may, however, be ancillary to the express powers or exist either as a necessary or reasonable consequence of the express powers. Thus, 'what is reasonably incidental to the proper carrying out of an authorised act must be considered as impliedly authorised'.¹¹ Accordingly, even though the power to dismiss is not expressly

otherwise entitled as a member, unless the President or the National Commissioner, as the case may be, determines otherwise."

⁸ Ss 8(3)(a) and 8(7) of the Police Act

⁹ Section 207(3) of the Constitution.

¹⁰ *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (*Masetlha*) at para 77.

¹¹ Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2012) at 43-4.

provided in the Constitution, it follows that such power is implied as a necessary corollary to the power to appoint.

[42] According to De Ville:

“[w]hen powers are granted to a public authority, those granted expressly are not the only powers such public authority will have. The powers will include those which are reasonably necessary or required to give effect to and which are reasonably or properly ancillary or incidental to the express powers that are granted.”¹²

[43] If regard is had to the above quotations, it is clear that, although the dismissal, when it was referred to the Bargaining Council, was couched as an unfair dismissal, from the outset the appellant’s cause of action was based on the fact that the dismissal by the Commissioner of Police was unlawful. Instead of the word ‘unlawful’ he used the word ‘irregularly’.

[44] When the President exercises his powers to dismiss the Commissioner of Police, he exercises an executive power, not an administrative action. His decision can only be reviewed on the grounds of legality.¹³ Therefore, anyone purporting to act in terms the powers vested in the President acts unlawfully and such act is a nullity.

[45] It seems to me that the referral to the Bargaining Council purporting to be based on unfair dismissal was in fact a referral of unlawful dismissal. It was therefore couched in such a manner that it should not oust the jurisdiction of the Bargaining Council. It is therefore evident to me that the cause of action was based on unlawful dismissal, which is outside the provisions of the Labour Relations Act¹⁴ (the LRA).

[46] The rule of law prohibits the exercise of power that is not conferred on the functionary. The invalidity of such conduct flows from the Constitution itself and courts merely confirm invalidity thereof by a declaration. The principle of legality requires that a functionary can exercise only those powers conferred

¹² De Ville *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths, 2003) at 108.

¹³ *Masethla* (id fn 10) at para 77.

¹⁴ Act 66 of 1995.

by statute and no more.¹⁵ However, the authority conferred on the President must be exercised lawfully, rationally and in a manner consistent with the Constitution.¹⁶ Procedural fairness is not a requirement. In *Masethla*¹⁷ the court said:

‘It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action’.

- [47] The authority in section 85(2)(e) of the Constitution is conferred in order to provide room for the President to fulfil executive functions and should not be constrained any more than through the principle of legality and rationality.
- [48] In view thereof that the exercise of power to dismiss the National Commissioner of Police falls outside the realm of the LRA, the Labour Court has no jurisdiction to entertain the review thereof. The Labour Court derives its power from s157 of the LRA.¹⁸ The LRA makes no provision for unlawful dismissal.
- [49] In *Steenkamp and Others v Edcon Limited*¹⁹ Zondo J, as he then was, delivering the majority judgment, referred to the principle, which is trite, namely, that the pleadings determine the cause of action. The court held that if an employee wants his/her dispute to be entertained by the Labour Court he/she must categorise it as unfair dismissal. The difficulty in the present matter is that the appellant has elected to categorise his dismissal as unlawful. Although the appellant did not mention by name the section of the Constitution in terms of which he could have been dismissed it is obvious that he must have contemplated section 207 read with section 9 of the Police Act.

¹⁵ *Department of Transport and Others v Tasima (Pty) Limited* (CCT5/16) [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) at para 81.

¹⁶ See: *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) and *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

¹⁷ *Masethla* (id fn 10) at para 77.

¹⁸ Section 157 provides: ‘1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.’

¹⁹ (2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC) (*Steenkamp*) at para 103.

This must be so especially if regard is had to his contention that only the President could dismiss him.

- [50] It is clear to me from his founding affidavit that the main cause of his action is the alleged unlawfulness of his dismissal. The LRA did away with unlawfulness of dismissal and replaced it with unfairness. Therefore, the Labour Court, as a creature of statute does not have jurisdiction to make a declaratory order for unlawfulness of dismissal.²⁰ Anyone, not being the President, purporting to act in terms of s207 of the Constitution acts unlawful and such act is a nullity.
- [51] Accordingly, in my view, in light of the fact that the cause of action was predicated as unlawful dismissal before the Labour Court, that court had no jurisdiction to entertain the dispute. Once it is decided that the court has no jurisdiction to entertain the dispute, it is not necessary to deal with the merits. That must be left to a court which has jurisdiction. This must be so because where the court has no jurisdiction its order is a nullity and it is not even necessary to have it set aside.²¹
- [52] In *Communication Workers Union and another v Telkom SA Ltd and another*²² Southwood J said:

‘A court must have jurisdiction for its judgment and/or order to be valid. If the court does not have jurisdiction its judgment and/or order is a nullity. No pronouncement is required. It is simply treated as such. *Lewis & Marks v Middel* 1904 TS 291 at 303; *Suid-Afrikaanse Sentral Ko-Operatiewe Graanmaatskappy Bpk v Shifren and Others and the Taxing Master* 1964(1) SA 162 (o) at 164 G-H; *Trade Fairs and Promotions (Pty) Ltd v Thomson and Another* 1984(4) SA 177 (W) at 183D-E.

Jurisdiction in this context means ‘the power invested in a court by law to adjudicate upon, determine and dispose of a matter’ (*Ewing Mc Donald & Co Ltd v M & M Products Co*, 1991(1) SA 252 (A) at 256G).’

²⁰ See: *Steenkamp* (ibid). See also: *Leshabane v Minister of Human Settlements and Others* [2023] ZALCJHB 341; [2024] 3 BLLR 306 (LC); (2024) 45 ILJ 833 (LC).

²¹ *Favish Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) at para.14; *Communication Workers Union and another v Telkom SA Ltd and another* 1999 (2) SA 586 (T).

²² 1999 (2) 586 (T) at 593 G – J.

- [53] The Supreme Court of Appeal in *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala N.O. and others*²³ also held that where the court has no jurisdiction, its order is a nullity and it is unnecessary to have it first set aside as it is ineffectual. The Constitutional Court distinguished Motala from the case of *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni*²⁴. The distinction lies in whether the power exercised is invested in another functionary or not and whether the court has such power. If the court has the jurisdiction to determine the issue and the power to make the order, as happened in *Ndabeni* it is immaterial whether or not the order is considered to be wrong, it has to be obeyed and cannot be regarded as a nullity.
- [54] In light of the above the incoming National Commissioner of Police had no power to discipline and dismiss the appellant. The dismissal was therefore unlawful. Counsel for the first respondent submitted that, at the time of his dismissal, the appellant was not the Acting National Commissioner of Police. There is no merit in this argument. Once the appellant was appointed by the President, the duty to remove him also vested in the President. His dismissal was in conflict with the rule of law and specifically the principle of legality. These principles require administrative functionaries to exercise only public powers conferred on them and nothing more.
- [55] In light of the above, the Labour Court should have dismissed the application on the grounds of lack of jurisdiction. Once it is found that the actions of the functionaries are illegal, *cadit quaestio* it is the end of the case. The appeal therefore cannot succeed.
- [56] What remains is a question of costs. In labour matters, the rule that costs follow the event does not apply. In *Member of the Executive Council for Finance, KwaZulu-Natal v Wentworth Dorkin N.O. and another*.²⁵, Zondo JP, as he then was, explained the reason for the departure as follows:

²³ 2012 (3) SA 325 (SCA) at para 14.

²⁴ [2022] 5 BLLR 393 (CC); (2022) 43 ILJ 1019 (CC); 2022 (10) BCLR 1254 (CC); 2023 (4) SA 421 (CC).

²⁵ (2008) 29 ILJ 1707 (LAC) at para 19.

“The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers’ organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court.’²⁶

[57] The rule of practice described above has become a norm and I see no reason to deviate from the norm.

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

Order

1. The appeal is dismissed with no order as to costs.

B. R. Tokota

Acting Judge of the Labour Appeal Court of South Africa

CHETTY, AJA (Nkutha-Nkontwana JA concurring)

[59] I have considered the judgment of my colleague Tokota AJA (to which I will refer to as the first judgment) pursuant to a point of law being raised by the appellant. My colleague reaches the conclusion that the appeal should be

²⁶ See also: *Martin Vermaak v MEC for Local Government and Traditional Affairs, North West Province* (JA15/2014) [2017] ZALAC 2 (10 January 2017).

dismissed, as do I. However, we differ in our reasoning. The first judgment has set out the background events giving rise to the charges being levelled against the appellant. I shall not repeat those facts, save to make reference to them where necessary.

[60] It is noteworthy that the first judgment refers to the appellant as having been appointed by the President as the Acting National Commissioner of the SAPS on 14 October 2015. The contention of the appellant is that he impugns the SAPS's authority to discipline him in accordance with the South African Police Service Discipline Regulations, 2016, when, at the time of the alleged misconduct, he had been serving as the Acting National Commissioner and thus could only be disciplined or removed from the SAPS exclusively by the President in terms of s 9 of the Police Act, read with s 207(1) of the Constitution. The facts, however, indicate that the genesis of the charges against the appellant arose from the period prior to his appointment as the Acting National Commissioner.

[61] Before proceeding to consider the import of ss 8 and 9 of the Police Act²⁷ to the present context, I accept that, as the first judgment contends, s 207(1) of

²⁷ Sections 8 and 9 of the Police Act provide as follows:

'8. Loss of confidence in National or Provincial Commissioner.—

(1) If the National Commissioner has lost the confidence of the Cabinet, the President may establish a board of inquiry consisting of a judge of the Supreme Court as chairperson, and two other suitable persons, to—

- (a) inquire into the circumstances that led to the loss of confidence;
- (b) compile a report; and
- (c) make recommendations.

(2)(a) If a Provincial Commissioner has lost the confidence of the Executive Council, the member of the Executive Council may notify the Minister of such occurrence and the reasons therefor.

(b) The Minister shall, if he or she deems it necessary and appropriate, refer the notice contemplated in paragraph (a) to the National Commissioner.

(c) The National Commissioner shall, upon receipt of the notice, establish a board of inquiry consisting of not more than three persons, of which the chairperson shall, subject to paragraph (d), be a person who, for at least 10 years after having qualified as an advocate or an attorney, practised as such, to—

- (i) inquire into the circumstances that led to the loss of confidence;
- (ii) compile a report; and
- (iii) make recommendations.

(d) The National Commissioner may appoint any other person suitably qualified in law as chairperson of the board of inquiry.

(3)(a) The President or National Commissioner, as the case may be, may, after hearing the Commissioner concerned, pending the outcome of the inquiry referred to in subsection (1) or (2)(c), suspend him or her from office.

the Constitution provides for the prerogative of the President, as head of the national executive, to appoint the National Commissioner. This power is also located in s 6(1) of the Police Act.

[62] It is not disputed that the appellant was appointed as the Acting National Commissioner by the President, although it is apparent that s 207(1) of the Constitution makes no provision for the appointment of an Acting National Commissioner nor is there any reference to an acting appointment in s 6(1) of the Police Act. Similarly, Chapter 9 of the Police Act, which deals with appointments and terms and conditions of service, makes no reference to acting appointments.²⁸

[63] The Constitutional Court in *Masetlha*²⁹ noted that although s 209(2) of the Constitution³⁰ only speaks of the power of the President to appoint the head of the intelligence services and makes no mention of the power to dismiss, it found that the power to appoint implied the power to dismiss. The Constitutional Court held, with reference to the intelligence services, which, in my view, is equally applicable to the police service, the following:³¹

(b) A Commissioner who is suspended from office under paragraph (a), shall, during the period of such suspension, be entitled to any salary, allowance, privilege or benefit to which he or she is otherwise entitled as a member, unless the President or the National Commissioner, as the case may be, determines otherwise...

9. Misconduct by or incapacity of National or Provincial Commissioner.—

(1) Subject to this section, subsections (1) to (8) of section 8 shall apply *mutatis mutandis* to any inquiry into allegations of misconduct by the National or Provincial Commissioner, or into his or her fitness for office or capacity for executing his or her official duties efficiently.

(2) The board of inquiry established by virtue of subsection (1) shall make a finding in respect of the alleged misconduct or alleged unfitness for office or incapacity of executing official duties efficiently, as the case may be, and make recommendations contemplated in section 8 (6) (b).

(3) If the National Commissioner has lost the confidence of the Cabinet or a Provincial Commissioner has lost the confidence of the Executive Council or the National Commissioner, as the case may be, following on an inquiry in terms of this section, the provisions of section 8 (7) shall apply *mutatis mutandis*.'

²⁸ See, however, s 32(2) of the Public Service Act 103 of 1994, which deals with acting appointments provides as follows:

'(2)(a) An employee may be directed in writing to act in a post subject to such conditions as may be prescribed.

(b) Such acting appointment shall be made—

(i) in the case of the post of head of department, by the relevant executive authority;

(ii) in the case of any other post, by the employee occupying the post, unless otherwise determined by the head of department.'

²⁹ *Masetlha* (id fn 10) at paras 66–68.

³⁰ Section 209 of the Constitution deals with the establishment and control of intelligence services.

³¹ *Masetlha* (id fn 10) at para 68.

'Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people. That is why the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into s 209(2) of the Constitution. There is no doubt that the power to appoint under s 209(2) of the Constitution and the power under ISA implies a power to dismiss.'

[64] The appellant, who initiated the litigation giving rise to this appeal, has not included as part of the record or exhibits, the written confirmation by the President of his acting appointment, the terms or the duration. Ideally, this would have been sourced from a Presidential Minute. Section 101 of the Constitution provides:

'(1) A decision by the President must be in writing if it -

(a) is taken in terms of legislation; or

(b) has legal consequences.

(2) A written decision by the President must be counter-signed by another Cabinet member if that decision concerns a function assigned to that other Cabinet member...'

[65] Had the President been cited as a party, or joined in the litigation, such details may have been placed before the court. The absence of the President as a party to these proceedings is a matter which assumes particular relevance, as the first judgment reaches its conclusion, not on the basis of an unfair dismissal as pleaded by the appellant, but on the ground of a breach of the principle of legality. I deal with this in greater detail below.

[66] The appellant was asked to 'step-aside' from his duties as the Acting National Commissioner by the Minister of Police on 1 June 2017, followed by his suspension on 7 June 2017. The appellant's version is that since the date of his suspension to the date of his dismissal on 7 August 2020, he was neither involved nor participated in the execution of any official duties in the police

service, nor was he contacted in relation to the contractual dispute between the SAPS and Ethemba. The latter was the successful entity to have been awarded the contract to supply specialised photographic equipment to the SAPS and, in particular, to the Forensic Services department, headed, at the time, by the appellant.

- [67] It is revealing that during the entire period which the appellant was on suspension, he elected not to approach the courts to challenge the lawfulness of his suspension on the basis that it was effected by the Minister of Police and not the President, whom the appellant now contends is the only person with the authority to affect his tenure while he was the Acting National Commissioner. This much is clearly articulated in the appellant's heads of argument, where it is contended that:

‘As the appellant was appointed Acting National Commissioner on 14 October 2015, it connotes that any misconduct on his part from the date of his appointment could only be exclusively dealt with by the President of the Republic as provided for in section 9 of the South African Police Act...’

(My emphasis.)

- [68] The absence of any action by the appellant to challenge the legality of his suspension is at odds with the approach taken in *Masetlha*, where Mr Masetlha was informed in a letter by the Minister that he had been suspended as the Director-General of the Intelligence Agency. Three weeks after his suspension, Mr Masetlha approached the court, seeking to review and set aside his suspension as being unlawful. He did not proceed with that application, as the President recorded in writing that the decision to suspend was his decision and not that of the Minister. Mr Masetlha rejected this explanation, contending that it was an attempt to disguise the unauthorised actions of the Minister. He launched another review application taking aim at the suspension. Ultimately, the Constitutional Court was not called upon to rule on the issue of the lawfulness of his suspension in light of the finding that his dismissal was a rational exercise of the President's executive powers, *albeit* that there was no hearing afforded to Mr Masetlha prior to the decision to dismiss being made.

[69] The comparison to *Matsetlha* serves to illustrate that apart from the appellant taking no steps to challenge his suspension, his reliance on the principle of legality, namely that only the President had the power to discipline him in accordance with s 207(1) of the Constitution, is raised as a belated tactic to challenge, what the respondent contends, is an otherwise procedurally and substantively fair dismissal.

[70] In the recent decision of *Sibiya v South African Police Department and Others*,³² a full court refused to interdict the National Commissioner of Police who issued a 'stay at home' order to the Deputy National Commissioner, pursuant to certain allegations of impropriety being levelled against the latter and pending an on-going investigation. It was contended that the 'stay at home' order (similar to the 'step aside' order issued by the Minister of Police to the appellant) exceeded the National Commissioner's powers and offended the rule of law principle, as he was not afforded a reasonable opportunity to make written representations prior to the decision. The court rejected this argument, notwithstanding the Discipline Regulations, promulgated in terms of the Police Act, making no provision for such an order. This, however, the court held, '*does not mean that such an instruction by a senior officer to a subordinate cannot be made*'.³³ Such orders were demonstrated by the Commissioner to be '*suitable, necessary, reasonable, relevant, rational and proportional under the circumstances*'.³⁴ This put paid to any complaint regarding the 'step-aside' instruction. In the present case, the appellant was content to allow the process to unfold without any demur on his part in respect of the decision to cause him to 'step-aside'.

[71] The first judgment states '*that if the power to appoint an Acting National Commissioner vests in the President, as it was in this matter, then the power to remove or suspend the Acting National Commissioner cannot shift to another functionary such as the Minister of Police or the National Commissioner*'. As pointed out earlier, there was no challenge to the lawfulness of the appellant's suspension. The first judgment, therefore, seeks

³² (123874/2025) [2025] ZAGPPHC 910 (9 September 2025) (*Sibiya*).

³³ *Sibiya* (ibid) at para 64.

³⁴ *Sibiya* (ibid) at para 63.

to pronounce on a matter which was not part of the dispute before this Court. I allude to further instances below where, respectfully, similar missteps occur.

- [72] I accept, on the basis of authority, including *CUSA*³⁵ that this court is at large to consider a point of law which is apparent on the papers but not pursued by the parties. The over-arching basis for doing so is to ensure a just result, provided there is no unfairness to other parties. It is to the latter aspect that I turn my attention. The primary point at which I depart from the reasoning and order of the first judgment is the assertion that a:

‘point of law was pertinently raised in the review papers but was not dealt with by the Labour Court. The point is whether it was lawful for the Minister of Police to suspend the appellant, who was at the time the Acting National Commissioner, and whether the National Commissioner was empowered to charge and dismiss him since he was never removed by the President as the Acting National Commissioner.’

- [73] In support of this assertion, the first judgment makes references to extracts from the award of the third respondent (the arbitrator) in which the latter found that, at the time of the appellant’s appointment as the Acting National Commissioner, he was aware that the contract with Ethemba was extant, and had not been set aside.³⁶ Notwithstanding that he was no longer responsible for the operational activities of the Forensic Services Division, the arbitrator found that in his new role as the Accounting Officer of the SAPS, the appellant had a ‘greater responsibility’ to enquire into what had transpired regarding the contract and under a duty to protect the finances of the State. The arbitrator considered this to be an aggravating factor.³⁷

³⁵ *CUSA* (id fn 4).

³⁶ During his testimony at the arbitration, the appellant conceded that he had received the summons in which Ethemba cited him as the defendant, in his capacity as the acting National Commissioner. The summons appears to have been served via the sheriff in September 2016, at the time when the appellant was appointed as the acting National Commissioner. His version was that counsel for the SAPS mistakenly attributed the charges against him in his capacity as the acting National Commissioner, whereas the charges related to his tenure as Divisional Commissioner.

³⁷ The arbitrator concluded at para 109 of the award that the misconduct for which the appellant was found guilty ‘was serious as he had a responsibility to ensure that the finances of the respondent are not wasted. What I find aggravating is the fact that from 2015 October the applicant was appointed as acting National Commissioner. He was the accounting officer for the South African Police Services and I am of the view that he had a greater responsibility to ensure that the finances and assets of the respondent were protected. He failed to do this...’

[74] In light of this conclusion, the appellant, in his founding affidavit, assumes that this statement by the arbitrator demonstrates that he strayed beyond the limits of his jurisdiction and

‘should at this point have concluded that action should have been taken against me by the President, as the President was the only person who could take such action. The Commissioner however failed to recognise this fact and found me guilty of alleged omissions during my term as National Commissioner.’

[75] He contends that the arbitrator exceeded his powers by referencing acts performed by the appellant whilst he was the acting National Commissioner.

[76] I am not persuaded by the correctness of this argument, and less by the acceptance thereof in the first judgment.³⁸ The appellant was appointed the Acting National Commissioner in October 2015. Whether he was promoted or seconded to this position is not clear, but he asserts in his founding affidavit that he ‘relinquished’ his position as Divisional Commissioner: Forensic Services. Major General Manamela was then appointed to act in his stead. An appointment to act is self-evidently a temporary measure, with no degree of permanency. If the President, pursuant to s 207(1) of the Constitution, decided to appoint another individual as National Commissioner, the appellant would have reverted to his role as Divisional Commissioner: Forensic Services, or transferred to some other position. The contention that he ‘relinquished’ his role as a Divisional Commissioner was also his evidence at the expedited proceedings in terms of regulation 9(1) of the Discipline Regulations and at the arbitration. This assertion formed the basis for the appellant’s contention that once he was appointed as the Acting National

³⁸ Paragraphs 85-86 of the appellant’s founding affidavit in the review application only serve to cloud the basis for the purported reliance on the principle of legality, which the first judgment considers having been ‘pertinently’ raised. The charges levelled against the appellant related to misconduct committed (or which stemmed) from his tenure as Divisional Commissioner: Forensic Services. He assumes, however, that such alleged misconduct also relates to his tenure as acting National Commissioner. This is apparent from the following paragraphs of the founding affidavit:

‘85. It was further trite during the disciplinary hearing, as well as the arbitration proceedings, that the allegations against me were raised against me in lieu of the position which I have as the Divisional Commissioner : Forensic Services.

86. As such, only the President of the Republic of South Africa [the President] can take action against me for conduct which relates to overt misconduct committed by me as the National Commissioner of the SAPS.’

Commissioner, any negligence or misconduct ascribed to the Forensic Services Department, including the failure to revert to correspondence or to take any steps to set aside the contract between the SAPS and Ethemba could not be attributed to him. There is nothing on record to indicate that his role as Divisional Commissioner had come to an end on the assumption of the acting appointment.

[77] The overlap between the two consecutive positions occupied by the appellant, that of Divisional Commissioner: Forensic Services and Acting National Commissioner, cannot be interpreted as altering the fundamental basis of the charges levelled against him, which related to misconduct as a result of the breach of the contract between the SAPS and Ethemba. The breach is attributed to the SAPS for failing to order equipment from Ethemba, as it was contractually obliged to. The breach is alleged to have spanned the period from 31 March 2015 to 29 March 2016, during which period the SAPS ignored demands for payment as a result of the breach. Although the appellant was the Acting National Commissioner from 14 October 2015 onwards, it is nonsensical to infer that he would have lost all accountability for anything which he performed as a divisional commissioner. It appears to me that the genesis of the appellant's assertion that he was being disciplined for acts performed when he was the Acting National Commissioner arises from the later date of 29 March 2016, which was misinterpreted as forming part of the charge against him. The evidence at the arbitration was only that he had knowledge in 2016 of a letter of demand having been issued against the SAPS by Ethemba's attorneys claiming damages for breach of contract. It is common cause that he did nothing to arrest the situation. It is this that leads the appellant to assert that the charges levelled against him related to his role as the Acting National Commissioner and thus, by implication, only the President had the authority to initiate disciplinary proceedings against him.

[78] In my view, the above contention is misplaced and out of context when viewed against the charges and the appellant's response to them, as articulated both at the disciplinary hearing and the arbitration. A fair reading of the arbitration record indicates that at no stage prior to the hearing before this Court did the

appellant pertinently raise the point that his dismissal was unlawful on the grounds that it violated the principle of legality.

[79] Throughout the arbitration proceedings and the disciplinary enquiry, the appellant took issue with the procedure followed at the expeditious enquiry convened in terms of regulation 9, arguing that the chairperson was biased and lacked the necessary status as a higher ranking officer to chair the enquiry; that he should have been permitted legal representation; that he had been 'misled' as to the purpose of the enquiry; that the institution of the charges had been preceded by an undue delay; and that the resort to an enquiry under regulation 9, rather than regulation 8, was for an ulterior purpose. He likened the proceedings against him to a '*kangaroo court*', adding that the '*abuse of Regulation 9 cannot be allowed to continue*'. The appellant's attorneys called upon the SAPS to abandon the current disciplinary proceedings and 'for de novo proceedings to be commenced, should the employer still be so inclined'.

[80] The point I emphasise is that at no time was a challenge mounted to the lawfulness of the proceedings nor was it contended that the appellant could not be disciplined in accordance with the Discipline Regulations. His complaint at that stage was that the SAPS ought to have proceeded in terms of regulation 8. It is only in this Court that the appellant contends that, as opposed to being disciplined in terms of the Discipline Regulations, a board of inquiry in terms of s 9(2) of the Police Act, chaired by a judge, ought to have been established. As stated earlier, the only hint in his founding affidavit traversing the contention that the President had exclusive authority to exercise discipline over him is tucked away in an oblique reference to the misconduct being committed while he was the Acting National Commissioner. This was the high watermark of the appellant's purported reliance on a challenge based on a breach of the principle of legality, drawing on the Constitutional Court's *dictum* in *Masetlha*. It is a salutary principle that litigants should state clearly in their pleadings the grounds on which their case is based. I am therefore not surprised that the respondent's counsel did not

respond to this point, as it did not form part of the appellant's case before the arbitrator.

[81] Turning to the charges, the appellant was served with a notice in terms of regulation 9(2)(b) of the Discipline Regulations, in which he was notified of three charges levelled against him, constituting serious misconduct. The notice, dated 6 July 2020, was issued by Lt General J Riet, who was assigned to chair the expeditious process, to commence on 13 July 2020. The appellant was informed that he could be represented by a fellow employee or a union representative.

[82] The charges against the appellant were the following:

‘Charge 1

Contravening regulation 5(4)(x) of the SAPS Discipline Regulations, 2016 “Any act of misconduct which detrimentally affects the image of the service or brings the service into disrepute or which contains an element of dishonesty” in that between 2013 to 2016 you acted intentionally or negligently in the repudiation / non-compliance in respect of the contract 19/1/9/1/187 TR (13) purchase of 360 degree panoramic cameras resulting in a loss/fruitless expenditure in the amount of R24 494 080.65

Charge 2

Contravening regulation 5(4)(x) of the SAPS Discipline Regulations, 2016 “Any act of misconduct which detrimentally affects the image of the Service or brings the service into disrepute or which contains an element of dishonesty in that you made a misrepresentation to National Treasury by shifting funds in the amount of TR (R46 000 000.00) allocated for the purchase of the 360 degree panoramic cameras whilst knowing that the failure to perform in terms of contract 19/1/9/187 TR(13) was the subject of pending litigation.

Charge 3

Contravening regulation 5(4)(x) of the SAPS Discipline Regulations, 2016 “Any act of misconduct which detrimentally affects the image of the service or brings the service into disrepute or which contains an element of dishonesty in that you Failed to comply with section 44 of the Public Finance

Management act in that you wilfully/negligently failed to exercise a legal obligation with regard to the repudiation/non-compliance with contract 19/1/9/187 TR(13) resulting in fruitless expenditure in the amount of R24 494 080.65.'

- [83] Following an enquiry in terms of the Discipline Regulations, the appellant was found guilty of the first and third counts on the basis that he was responsible for the non-performance of the contract by failing to issue orders for equipment from Ethemba. The appellant was afforded an opportunity to make written submissions in respect of an appropriate sanction, but declined to do so, contending that the procedure resulting in him being found guilty was tainted by unfairness. He also threatened an impending legal challenge to halt the disciplinary process. Absent any legal restraint, the chairperson of the enquiry forged ahead and concluded that the appropriate sanction in light of the misconduct committed was the appellant's dismissal from the service in accordance with regulation 12(e) of the Discipline Regulations. The sanction of dismissal was ratified by the incumbent National Commissioner on 7 August 2020.
- [84] It is pertinent that following the handing down of the sanction, the appellant referred '*an unfair dismissal dispute to the Council*'. The pre-arbitration minute concluded between the parties, and which served to crystallise the issues in dispute, reaffirmed that the issues which the arbitrator was asked to determine related to whether the appellant's dismissal was substantively and procedurally fair, and whether dismissal was the appropriate sanction. In addition, the arbitrator was also called upon to determine whether the presiding officer at the enquiry, Lt General Riet, was biased against the appellant. At no stage during the pre-arbitration process did the appellant challenge the lawfulness of the procedure embarked upon leading to his dismissal.³⁹

³⁹ *Albeit* with reference to pre-trial as opposed to pre-arbitration proceedings, see *Telkom SA SOC Ltd v Van Staden and Others* (2021) 42 ILJ 869 (LAC) para 16 which noted that '*a pretrial agreement is a consensual document which narrows down the issues in dispute between the parties so as to limit the scope of litigation. Such an agreement binds the parties and the court in the same way as pleadings. Where parties have concluded such a minute, the issues as set out in pleadings have not been abandoned but -*

[85] As stated earlier, the appellant, on legal advice, contended that the enquiry should have proceeded under regulation 8 rather than regulation 9. That argument is fundamentally different from the challenge mounted in this Court relating to the lawfulness of the procedure based on a legality challenge, and the contention that the President, as the head of the executive, should have initiated proceedings in terms of s 9 of the Police Act and established a board of inquiry presided over by a judge. The point I make was set out by the Constitutional Court in *Gcaba v Minister for Safety and Security and Others*,⁴⁰ which held that:

‘Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case.’ (Footnote omitted.)

[86] The arbitrator was not asked to determine a dispute based on a legality challenge and whether the President ought to have subjected the appellant to an enquiry convened by a board of inquiry in terms of s 9 of the Police Act. It also begs the question that even if a legality challenge were to be raised before the arbitrator, whether he had any jurisdiction to pronounce on the matter or whether such a challenge should properly have belonged in the high court. This dichotomy was recognised by the Constitutional Court in *Masetlha*,⁴¹ where Moseneke DCJ said that:

“the premises upon which the issues were to be advanced had been refined and limited by the terms of the minute, which is the very purpose of the minute... It was therefore inappropriate to fall back on the generalities of averments about procedural and substantive unfairness. Were that approach to be permissible, there would be no point at all to efforts to narrow issues and trim down the scope of contestations. It was suggested in argument on behalf of Louw that the contention on behalf of SAB was that Louw had narrowed his cause of action; that understanding is incorrect. The argument, properly understood, was that the terms of the minute narrowed the permissible grounds upon which the cause of action was to be presented.” (Footnotes omitted.)

⁴⁰ [2009] ZACC 26; 2010 (1) SA 238 (CC) at para 75. See also *SA Breweries (Pty) Ltd v Louw* (2018) 39 ILJ 189 (LAC) (*SA Breweries*) paras 14-15.

⁴¹ *Masetlha* (id fn 10) at para 63. See *Steenkamp* (id fn 20) where the Court said the following in relation to the importance of how a case is framed in order for the Labour Court to have jurisdiction over the particular dispute. At para [106] the Court pointed out that Section 189A of the LRA deals with unfair dismissals, and conspicuously absent is any provision “*that every employee has a right not to be dismissed unlawfully. If this right had been provided for in section 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for a right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal as a consequence of a dismissal effected in breach of a provision of the LRA.*”

'The power and indeed obligation of the President to appoint the head of an intelligence service is not sourced from a private law relationship. It is a public law power. In other words, this dispute between the parties is not merely about a breach or wrongful termination of an employment contract. It is rather about whether public authority has been exercised in a constitutionally valid manner. That much is quite apparent from the very claim and relief that the applicant is pursuing.' (My emphasis.)

- [87] The underlying premise for the contention that any attempt at the discipline or dismissal of the appellant triggers a hearing in terms of s 9 of the Police Act lies in his contention that by virtue of him being the Acting National Commissioner, only the President could remove him pursuant to s 207 of the Constitution. Neither s 8 nor 9 of the Police Act, which must be read with s 207(1) of the Constitution, makes any reference to these processes applying to an Acting National Commissioner. It was not the case of the appellant in this court that the above-mentioned sections of the Police Act apply equally to both an incumbent National Commissioner and to those who may be acting in that capacity.
- [88] Turning to the conclusion in the first judgment that the '*Minister had no power to suspend the appellant and the National Commissioner had no power to discipline and dismiss him*' (which grounds were not raised before the arbitrator), the point which arises is following the 'step-aside' and subsequent suspension of the appellant, what was his status at the time when the disciplinary enquiry under regulation 9 commenced? At that stage, it emerges from the record (although without any exact date being apparent) that General Sithole had already been appointed by the President as the new National Commissioner. The appellant, as from the date of his suspension, would have ceased to hold the status and title of 'Acting National Commissioner'. His status was that which he held prior to being assigned to act as the National Commissioner - that of the Divisional Commissioner: Forensic Services. It is not apparent from the record whether that position too had been permanently filled.⁴²

⁴² In *POPCRU and Another v MEC for the Department of Transport, Safety and Liaison: Northern Cape and Others* [2015] ZALCJHB 272 the issue arose whether a head of department had the power

[89] The inescapable fact is that by the time the enquiry commenced in 2020 into the allegations of serious misconduct against the appellant, he was no longer the Acting National Commissioner, as this would have been incongruous with the factual position where a National Commissioner had already been appointed by the President. On this ground alone, the contention that a board of inquiry ought to have been convened at the behest of the President, in terms of the Police Act, read with s 207 of the Constitution, cannot be sustained. In my view, the employer was perfectly entitled to subject the appellant to an enquiry in terms of its Discipline Regulations, as it would have for any other officer accused of serious misconduct falling within the ambit of regulation 5(4). Moreover, as I have pointed out earlier, the appellant's legal representatives raised procedural challenges to the enquiry, not that he should not be disciplined under the Discipline Regulations.

[90] The implication of the order reached in the first judgment is that the President erred in not subjecting the appellant to the disciplinary regime set out in s 9 of the Police Act. As I have already alluded to, the challenge to the dismissal on the basis of legality was not squarely canvassed in the founding affidavits in the review application nor pertinently before the arbitrator or the Labour Court. Reference to this is obliquely contained in the heads of argument by way of reference to the dictum in *Matsetlha*. Where a party wishes to raise a challenge based on a fundamental breach of the rule of law, this should be fully canvassed and argued in the appropriate forum, rather than being tucked away in the heads of argument.⁴³ I disagree with the first judgment that this ground of legality was 'pertinently' raised in the enquiry, before the arbitrator or in the court *a quo*.

to suspend and institute disciplinary proceedings against a person who had been appointed as the acting head of the department while the former had been on leave. The court concluded that the head of department had no authority to institute disciplinary proceedings against the applicant in respect of misconduct which arose during his duties as acting accounting officer. This case is distinguishable from the facts of the present matter where the acts of misconduct are alleged to have taken place as the time when the appellant was Divisional Commissioner: Forensic Services and not attributable to his role as the Acting National Commissioner.

⁴³ See: *SA Breweries* (id fn 42) at para 4 where Sutherland JA said the following:

'To state the obvious, litigation is complex. Among the duties of legal practitioners is to conduct cases in a manner that is coherent, free from ambiguity and free from prolixity. True enough, the holy grail of translating what is complex into simplicity is not always attainable, but the ground rules are irrefrangible: say what you mean, mean what you say and never hide a part of the case by a resort to linguistic obscurities. The norm of a fair trial means each side being given unambiguous warning of the case they are to meet.'

[91] For reasons canvassed earlier, *Masetlha* is distinguishable from the facts in the present matter, if for no other reason than that Mr Matsetlha was the head of the intelligence agency at the time when he was suspended and eventually dismissed. The appellant, conversely, was the Acting National Commissioner when he was asked to step-aside and then suspended. By the time he was subjected to a disciplinary enquiry, he ceased to occupy any acting position, as the President had by then appointed a new National Commissioner in terms of s 207(1) of the Constitution. Mr Masetlha, in contrast, launched a full-frontal attack against the President and the Minister of the Intelligence Services, contending that the manner of his dismissal breached the principle of legality. He sought his reinstatement.

[92] In the present case, neither the President nor the incumbent National Commissioner, who initiated the disciplinary enquiry and ratified the decision of Lt General Riet to dismiss the appellant, were cited as co-respondents or joined in the proceedings. They were therefore not called upon to make submissions as to why the removal of the appellant was not dealt with in terms of s 207 of the Constitution, read with s 9 of the Police Act.

[93] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*⁴⁴ the Constitutional Court held that:

‘Generally, a party must be joined in proceedings if it has a direct and substantial interest in any order the court might make, or when an order cannot be effected without prejudicing it.’

[94] A direct and substantial interest has been interpreted to mean an interest in the subject-matter of the litigation, and not a mere financial or academic

⁴⁴ [2011] ZACC 33; 2012 (2) SA 104 (CC) at para 44.

interest.⁴⁵ Joinder must be a matter of necessity, not convenience, unless the court is satisfied that a party has waived the right to be joined.⁴⁶

- [95] As stated earlier, the first judgment concludes that the Minister had no power to suspend the appellant and that the incoming National Commissioner had no power to discipline and dismiss him. In this court, the appellant, in his heads of argument, seeks that the order of the Labour Court be set aside and replaced with an order that the arbitration award be reviewed and set aside; the appellant's dismissal be declared procedurally and substantively unfair; and that he be reinstated.
- [96] Neither the arbitrator nor the Labour Court was asked to rule on the issue of the suspension or the powers of the National Commissioner to discipline a former acting National Commissioner. The first judgment infers that the President, by omission or otherwise, permitted or endorsed the suspension and removal of the appellant in circumstances where only the President could exercise such powers. In this context, and in light of the fact that neither the President nor the National Commissioner is a party to this appeal, the following extract from *Fischer and Another v Ramahlele and Others*⁴⁷ becomes relevant:

'[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those

⁴⁵ *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC) at para 23 :

'A party is entitled to join and intervene in proceedings where they have a direct and substantial interest in the matter. A person is regarded as having a direct and substantial interest in an order if that order would directly affect that person's rights or interests. The interest must generally be a legal interest in the subject-matter of the litigation and not merely a financial interest. In this matter, the prejudice being suffered by Fidelity and SANSEA is a financial interest and does not relate to a right or legal interest.' (Footnotes omitted.)

⁴⁶ *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) at para 12; *Bowring NO v Vrededorp Properties CC* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) at para 21.

⁴⁷ [2014] ZASCA 88; 2014 (4) SA 614 (SCA).

issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.”

[97] The finding that the incoming National Commissioner had no power to discipline and dismiss the appellant was not an issue which the arbitrator was asked to determine. In *Bondev Midrand (Pty) Ltd v Puling and Another and a Similar Case*⁴⁸ it was pointed out that courts ‘*should refrain from dealing with legal issues unnecessary to determine in order to properly deal with a matter before it*’. The Constitutional Court in *Albutt v Centre for the Study of Violence and Reconciliation and Others*,⁴⁹ held that:

⁴⁸ [2017] ZASCA 141; 2017 (6) SA 373 (SCA) at para 9.

⁴⁹ [2010] ZACC 4; 2010 (3) SA 293 (CC) at para 82.

‘Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal...Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted...’

[98] In light of the conclusion I reach on the point in limine, *albeit* for different reasons to my colleague Tokota AJA, I proceed to consider the merits of the appellant’s dismissal which was dealt with extensively in the heads. The first judgment adopts the view that it is not necessary to consider the merits as the Labour Court had no jurisdiction to entertain a claim based on the unlawfulness of a dismissal. It reasons that “*anyone, not being the President, purporting to act in terms of s.207 of the Constitution acts unlawfully and such act is a nullity.*” I disagree in as much as neither the arbitrator nor the Labour Court were called upon to pronounce on the issue of the lawfulness of the dismissal. They approached the matter on the basis of an unfair dismissal. It was only in this Court that the unlawfulness and legality challenge evolved.

[99] I consider it prudent and in the interests of justice that the issue of the appellant’s claim to have been unfairly dismissed be disposed of in its entirety. The administration of justice will not be served if the appellant, in light of this court not considering the merits, were to be left with the perception that his challenge to the merits was side-stepped. The principle of finality in litigation cannot be overstated.

[100] In broad terms, relying on *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁵⁰ the appellant contends that the decision reached by the arbitrator is so unreasonable that no decision-maker could have reached the same decision in the circumstances.

[101] The appellant was charged with three counts of misconduct falling under regulation 5(4)(x) of the Discipline Regulations. The chairperson, Lt General Riet, considered the factual evidence placed before him and concluded that Ethemba was awarded the bid to supply the SAPS with 360-degree

⁵⁰ [2007] ZACC 22; 2008 (2) SA 24 (CC).

panoramic camera equipment, as per the specifications in contract 19/1/9/1/187TR(13). It is common cause that Ethemba subsequently sued the SAPS for damages based on the repudiation of the contract through the SAPS's failure to place any purchase orders for the equipment, as it was contractually obliged to. The claim was eventually settled, with the SAPS paying an amount of R24 494 080 in damages. The appellant was found guilty on the first and third counts, with the chairperson concluding, in terms of what he referred to as a 'liability test', that the non-performance of the contract could, from inception, only be attributed to the appellant. In determining an appropriate sanction, Lt General Riet found that the appellant breached the SAPS Code of Conduct, which required every member of the service to utilise all available resources efficiently, responsibly and cost effectively and to act in its best interests.⁵¹ The enquiry concluded that the sanction of dismissal from the SAPS was justified.

[102] The appellant, at the arbitration, challenged the procedural fairness of his dismissal: he challenged the authority of Lt General Riet to preside over him; that Lt General Riet was biased; and that the employer resorted to convening the enquiry incorrectly utilising regulation 9 instead of regulation 8.

[103] Aggrieved at his dismissal, the appellant referred the matter to arbitration before the Bargaining Council. The appellant was represented by counsel, which representation he was denied at the expeditious process. The appellant contended that he was not aware that the expeditious process, falling under regulation 9, was a formal disciplinary enquiry. The notice of the enquiry was served on the appellant and his attorneys and informed him that he could be represented by a fellow employee or a union representative. The latter would not have been applicable in the case of the appellant, as he formed part of senior management. This did not deter the appellant, whose attorneys wrote to the SAPS contending that the regulation 9 process was being abused, as the SAPS was seeking to 'evade' the problems it could encounter under a regulation 8 process.

⁵¹ Regulation 2(3)(b) of the Regulations for the South African Police Service relating to the Code of Conduct for Members of the Service, GN R529, GG 27642, 10 June 2005.

- [104] The election of which process to follow is that of the employer. Both the chairperson of the disciplinary enquiry and the arbitrator were satisfied that the regulation 9 process was sanctioned by the appellant's supervisor; that the misconduct attributed to the appellant fell within the definition of 'serious misconduct', as contemplated in regulation 5(4)(x) and that Lt General Riet, who was assigned to preside over the process, was of a rank higher than a brigadier. Whatever the appellant's personal perceptions of the individuals involved in this process were, those views are immaterial and irrelevant, provided that there was compliance with the statutory prescript of regulation 9.
- [105] To the extent that the appellant claims not to have been aware of what the process entailed in an expeditious hearing, it was submitted by the respondents that such a claim rang hollow as the appellant was the Acting National Commissioner at the time of the promulgation of the Discipline Regulations on 1 November 2016. Regulation 1 defines the 'employer' as the 'National Commissioner or any person delegated by him or her to perform any function in terms of these Regulations'. The record indicates that the issue of legal representation was raised by the appellant but after being refused legal representation, the appellant elected to proceed. The hearing had a ring of informality, with Lt General Riet essentially gathering evidence or ascertaining from the appellant his response to the charges. To the extent that this process was more 'streamlined' than a conventional enquiry.
- [106] This is consistent with the standard required for procedural fairness at disciplinary enquiries, as articulated by Van Niekerk J in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others*,⁵² prior to the present amendments to the Code of Good Practice.⁵³
- [107] The complaint of any procedural short-comings of the expeditious process must have regard to the appellant having been granted the fullest opportunity to present his case, where the record displays no hint of any animosity or bias

⁵² (2006) 27 ILJ 1644 (LC).

⁵³ See A van Niekerk 'The Evolution of the Right to Fair Procedure in Dismissals for Misconduct' (2024) *Acta Juridica* 55.

towards the appellant. On the contrary, it indicates a respectful, cordial interchange between the presider and the appellant. The allegation of bias appears to be built on the foundation that Lt General Riet was now in charge of the Supply Chain Division, which the appellant contends ought to have been disciplined, rather than him for the consequences arising from the repudiation of the contract with Ethemba. There was no evidence to support this assertion. Further, any averment of bias cannot hold, particularly in light of Lt General Riet accommodating the appellant to place further information before him, even after the conclusion of the enquiry. This conduct is inconsistent with someone who has a preconceived agenda or bias towards an employee.

[108] In any event, the appellant had ample opportunity to seek Lt General Riet's recusal, which he did not. I agree with the sentiment expressed by the arbitrator, with reference to *Bernert v ABSA Bank Ltd*,⁵⁴ that this complaint of bias appears to stem more from an adverse finding against a disgruntled litigant than anything of substance at the enquiry. I am satisfied that the arbitrator correctly concluded, on the evidence before him, that there was no procedural unfairness at the enquiry. This accords with the finding by the court a *quo* that the dismissal was procedurally fair with no reasonable basis on which to support the claim that Lt General Riet was biased.

[109] The arbitrator delivered a well-reasoned, comprehensive award after hearing the evidence of the employer's witnesses, including Dr Weiss, the CEO of Weiss AG, and the inventor of the Cevitta panoramic camera system, which was the subject matter of the successful bid by Ethemba. Dr Weiss explained that he also founded Spheron VR, whose camera system, SpheroCam, was put forward by the unsuccessful competitor, Forensic Data Analysis (FDA). He gave a detailed analysis of the competing camera systems and confirmed that both Ethemba and FDA were afforded equal opportunities to demonstrate their systems to the members of the Bid Evaluation Committee (BEC). He further confirmed that his camera system complied with all the specifications set out in the bid document and rejected the suggestion, eventually advanced

⁵⁴ [2010] ZACC 28; 2011 (3) SA 92 (CC).

by the appellant (after it was raised by FDA), that the camera system selected by the BEC was non-compliant with the end user's requirements. In summary, the complaint advanced by the appellant, while he was Divisional Commissioner: Forensic Services, was that the Civetta camera system was not fit for purpose and would compromise the evidence-gathering abilities of the SAPS, rendering it susceptible to being rejected in court. As a result of the SAPS and the Forensic Services failing to place orders for the purchase of the cameras, as they were contractually obliged to, Ethemba sued for damages on the basis of a repudiation of the supply service contract.

[110] The arbitrator thereafter considered the evidence of Lt General Kruser, the Divisional Commissioner in charge of Supply Chain Management, who testified to events leading up to the issuing of the bid for the supply of the 360-degree panoramic camera equipment, which was to capacitate the Forensic Services component of the SAPS. The evidence of the appellant at the arbitration was that his department, Forensic Services, was instrumental in contributing to the drawing up of the specifications for the camera system. Following the advertisement of the tender, Ethemba was awarded the contract, with a total value of over R92 million. The evidence at the arbitration was that 65 cameras were to be ordered within the first year of the contract, with the balance to be supplied in the remaining year. The contract was concluded with Ethemba on 28 July 2014, with a requirement being that orders would be placed shortly thereafter. Almost two months after the successful awarding of the bid to Ethemba, FDA wrote to Lt General Kruser requesting information in terms of the Promotion of Access to Information Act⁵⁵, seeking documentation pertaining to Ethemba's successful bid as well as the evaluation of the competing bids. The letter from FDA contends that Ethemba's bid ought to have been rejected on the basis that it did not comply with the bid specifications. Such complaints are not uncommon from a disgruntled tenderer. FDA proceeded to explain at some length, as well as providing a detailed analysis, of why its camera system ought to have been preferred over that of Ethemba.

⁵⁵ Act 2 of 2000.

- [111] The complaint lodged by FDA was subsequently brought to the attention of the appellant, who took up the issue of the camera system's non-compliance with much zeal, setting out several shortcomings found with the equipment. It is not clear from the record what expertise the appellant relied on in advancing the complaints regarding the Civetta system or why these complaints did not surface prior to FDA's letter. The appellant recommended that the contract awarded to Ethemba be withdrawn '*since the bid offer was misleading and not compliant with the specifications*'. This constituted the first step by the appellant leading to his eventual dismissal.
- [112] Following the letter from FDA, Ethemba was invited to address the concerns raised, in particular that the cameras were not according to the required specification. Their response of 7 May 2015 was forwarded to the appellant on 13 May 2015, with the request that he revert to the Supply Chain Services Division on or before 20 May 2015. The response of the appellant, after having received the letter, was on 4 June 2015 that he would respond to the contents of the response '*at an opportune time*'. A further reminder was sent to him on 27 July 2015, drawing to his attention that the failure or reluctance to place orders with Ethemba was placing the State at risk of being sued for damages. A further letter was sent to the appellant on 2 October 2015 and was met with no response from him. It is common cause that the appellant was appointed Acting National Commissioner on 14 October 2015.
- [113] An opinion was eventually sought from the Legal Services Component of the SAPS regarding the insistence of the Forensic Services department on the cancellation of the contract, emanating from the appellant's refusal to place orders for the camera equipment at the time when he was Divisional Commissioner: The opinion was sent to the appellant, who was at that stage the Acting National Commissioner. The stance adopted by Forensic Services was that the product produced by Ethemba was non-compliant, implying that the administrative decision taken by the BEC was invalid. Attention was directed to the decisions of *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*⁵⁶ and *MEC for Health, Eastern Cape and Another v Kirland*

⁵⁶ 2004 (6) SA 222 (SCA).

Investments (Pty) Ltd t/a Eye and Lazer Institute,⁵⁷ which held that the State could not simply ignore an invalid decision taken by it and until the invalid decision is set aside by judicial review, it continues to exist and has legal consequences. Importantly for the divisions and administrators involved in the procurement of the camera system to be used by Forensic Services, their attention was pertinently drawn to the observations by the Constitutional Court in *Kirland*⁵⁸ that '*government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision...*'. The opinion concluded with the recommendation that the SAPS would be duty-bound to initiate review proceedings if it believed that the administrative decision to award the contract to Ethemba was invalid. Despite this advice, issued on 1 June 2016, no steps were taken by Forensic Services to rescue the situation, notwithstanding the knowledge that Ethemba had issued a demand for payment of R14,8 million based on breach of the contract. Summons for this amount was ultimately issued in September 2016.

- [114] It was common cause that during the period when the appellant served as Divisional Commissioner: Forensic Services, he took no steps to set aside the contract with Ethemba, despite his views that their product was non-compliant. Even after he was appointed as the Acting National Commissioner, he simply took no steps to address the SAPS's failure to place orders with Ethemba, as it was contractually obliged to. His attitude was to simply ignore a validly binding contract, despite legal advice on the consequences of such conduct. Having regard to the evidence before the arbitrator, it appears that the appellant's complaint with the evaluation process was that a member of Forensic Service, who was to have been part of the evaluation team, was relegated to the status of an observer. What impact this had on the procurement process is uncertain. Whatever impact it had did not justify the supine approach of the appellant to ignore the reality of the contractual obligations on the State, non-compliance with which would result in the State being sued for damages.

⁵⁷ [2014] ZACC 6; 2014 (3) SA 481 (CC) (*Kirland*).

⁵⁸ *Kirland* (ibid) at para 64.

- [115] The arbitrator found no evidence to indicate that the appellant at any stage thereafter responded to the letter from Ethemba, despite undertaking to do so at an 'opportune moment'. The arbitrator proceeded to find that the appellant's conduct was reckless in light of the threatened legal action, which eventually materialised, resulting in the State eventually settling the dispute and paying an amount of R24 494 080 to Ethemba, without receiving anything in return. The arbitrator rejected the appellant's version that he was ignorant of the letters written to him drawing his attention to the grave consequences of ignoring the demand by Ethemba's attorneys.
- [116] It was further found that at no stage of the process, in which the appellant disputed Ethemba's contention that their product was compliant with the bid specifications, did the appellant seek to have the camera equipment subjected to an independent assessment, including by the CSIR, as had been suggested by the National Treasury. Despite his evidence that he was vigilant that the State should not have to incur wasteful expenses on cameras that were non-compliant, the appellant's actions or inaction resulted in significant wasteful expenditure.
- [117] The arbitrator further found that the appellant, although aware that the contract with Ethemba had not been set aside, even while he was the Accounting Officer of the SAPS by virtue of his appointment as Acting National Commissioner, took no steps to address the consequences of the contract. He adopted the view that this was no longer his responsibility. The arbitrator found this conduct, *albeit* that he was no longer Divisional Commissioner: Forensic Services, to be aggravating. The arbitrator rejected the contention that there was no link between the inaction of the appellant and the loss incurred by the State.
- [118] In light of all of the evidence presented, the arbitrator found that the employer had succeeded in proving on a balance of probabilities that the appellant 'intentionally' caused the non-compliance in respect of the contract with Ethemba, resulting in a loss of approximately R24,5 million. While the disciplinary enquiry found the appellant guilty on count three relating to a

breach of his duties under the Public Finance Management Act⁵⁹, the arbitrator concluded that the evidence pertaining to this count would essentially be the same as that required to sustain a finding on count one. For this reason, the arbitrator concluded that a finding of guilty on count three would amount to undue splitting of charges.

[119] In determining that the sanction of dismissal was appropriate when having regard to the circumstances of the matter, the arbitrator noted the appellant's attitude in not appreciating the wrongfulness of his conduct and seeking to apportion blame to everyone else but himself and failing to show any remorse for his actions. Notwithstanding the appellant's evidence that he saw no impediment to his reinstatement, the arbitrator, relying on authority from this court, concluded that such an option of *'allowing the employee back into the fold'* was untenable.

[120] The arbitrator accordingly concluded that the appellant's dismissal was both procedurally and substantively fair.

[121] On review to the Labour Court, the appellant canvassed the same issues he did in the arbitration, contending that the finding which the arbitrator made was one which no reasonable decision-maker could reach. The Labour Court considered the application of the Discipline Regulations, in particular regulation 9, which applied to the enquiry chaired by Lt General Riet. The Labour Court concluded that regulation 9 applied to specific circumstances and found no basis to set aside the expeditious process.

[122] It was contended that the arbitrator made a finding in relation to the second charge levelled against the appellant. There was no merit to this ground, as the arbitrator confined himself to the first and third charges, eventually finding that the evidence could only sustain a finding of serious misconduct on the first charge. The appellant had 'intentionally' caused the non-compliance in respect of the contract to purchase the 360-degree cameras from Ethemba, and had failed to take any steps to mitigate the damages or avoid the litigation which was launched by the aggrieved contracting party. The Labour Court

⁵⁹ Act 1 of 1999.

found that the findings of the arbitrator were supported by the evidence and that the decision to find the appellant guilty on the first count was a reasonable decision. In particular, the Labour Court confirmed the finding of the arbitrator that the appellant provided no evidence or explanation as to why he did not place orders for the equipment prior to the complaint from FDA being received. There was no evidence, despite his insistence that the cameras were non-compliant, to counter that of the inventor of the cameras, Dr Weiss, that the complaints of the disgruntled bidder, FDA, were ill-founded and without substance. The Labour Court observed that in the absence of an independent assessment, the appellant '*accepted FDA's say-so on the matter*'. Despite the response of Ethemba having been forwarded to the appellant and his commitment to respond as soon as it was opportune, he never did.

[123] The Labour Court further concluded that the appellant's conduct put in motion a sequence of events resulting in significant and wasteful expenditure to the State. It further found that he was dismissed as a consequence of his conduct as a Divisional Commissioner, and that his inaction, post that position, was correctly taken into account as an aggravating factor.

[124] In the result, the Labour Court found no reason to interfere with the findings of the arbitrator and dismissed the review application, with no order as to costs.

[125] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*,⁶⁰ Waglay JP noted that the review court

'... is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

⁶⁰ [2014] 1 BLLR 20 (LAC) at para 18.

[126] The appellant has had the benefit of an initial enquiry – the expeditious process under regulation 9 of the Discipline Regulations. Despite his misgivings about the process and the presiding officer, both complaints which were found to be without substance, he was afforded an opportunity to present his version to an independent and impartial chairperson. He was found guilty and dismissed. He was then afforded a second opportunity to convince an independent umpire of his innocence. The arbitrator found that his dismissal was procedurally and substantively fair. His application to review the arbitrator's award was his third attempt to revisit the charges against him. The Labour Court rejected his contentions of an irregular procedure employed by the employer in disciplining him pursuant to a hearing under regulation 9. The Labour Court found no basis to interfere with the arbitrator's findings.

[127] It must be stressed that it is neither the function of a review court nor that of an aggrieved litigant to microscopically analyse the evidence at the arbitration in an attempt to demonstrate that the award under review is incorrect and should therefore be set aside. This approach results in a conflation of the approach to the correctness of the award and creates an opportunity for what is otherwise an appeal in the guise of a review.⁶¹ The question central to the enquiry is whether the arbitrator's decision is one that a reasonable decision-maker could reach. Sutherland JA in *Makuleni v Standard Bank of SA (Pty) Ltd and Others*⁶² warned of a review court yielding '*to the seductive power of a lucid argument that the result could be different*'. The court went on to state that:⁶³

'At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.'

[128] Having had the benefit of three different fora pronouncing on the charges against the appellant, this court must consider whether there was any misdirection by the Labour Court in confirming the findings of the arbitrator.

⁶¹ See: *Cox v CCMA and Others* [2001] 2 BLLR 141 (LC).

⁶² *Makuleni v Standard Bank of SA (Pty) Ltd and Others* (2023) 44 ILJ 1005 (LAC) at para 4.

⁶³ *Makuleni* (ibid) at para 4.

Was the finding by the arbitrator so egregious that no reasonable person could reach such an award?⁶⁴

[129] In this court, the appellant persisted in his heads of argument with very much the same arguments presented before the arbitrator, calling for a forensic introspection of the evidence presented. At the forefront of his contentions is that he was no longer the Divisional Commissioner: Forensic Services at the time when the settlement of almost R24,5 million was concluded with Ethemba, and that he was being used as the proverbial scapegoat in light of the fruitless expenditure.

[130] The inescapable conclusion, as alluded to by the arbitrator, is the tendency of the appellant to look to everyone else but himself as being responsible for the loss, which undoubtedly detrimentally affected the image of the State in the eyes of right-thinking citizens. Where inaction by senior officers results in wasteful expenditure, the image of the public service as an entity is tarnished, especially in the minds of the general public servants.

[131] Viewed in its totality, the appellant was the catalyst in refusing to place orders with Ethemba, thereby dishonouring the State's contractual obligations. He initially expressed no signs of resistance to the terms of the contract or to the specifications for the cameras, which his department was instrumental in drafting. For reasons that are not quite apparent, once the letter from FDA was received contending that Ethemba's product was not fit for purpose, the appellant seized the opportunity and was emboldened in his resistance to comply with the terms of the agreement. As a senior ranking officer, his stance from the outset was that of non-compliance with a valid binding contract, even in the face of the looming threat of litigation exposing the State to significant loss.

[132] If, as the appellant claims, he was concerned that the State had entered into an agreement to commit almost R92 million for the purchase of camera equipment which was inferior and ill-suited for their purpose, the appellant's choices were readily apparent. He could have invited the aggrieved bidder,

⁶⁴ *Makuleni* (id fn 64) at para 13.

FDA, to launch its review application under the Promotion of Administrative Justice Act⁶⁵ and allow the courts to determine the veracity of FDA's complaints. No doubt, the SAPS would have been cited as a party and the appellant could have placed his views before the court as a diligent senior public official. As Cameron J, writing for the majority in *Kirland*,⁶⁶ pointed out:

'The Constitution entrenches the right to lawful, reasonable and procedurally fair administrative action. But, in the same breath, it obliges Parliament to "provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal". In doing so, the Constitution foresees that the administration that would answer to it would be imperfect. Those charged with state administration will inevitably on occasion fall short of the high aspiration of just administrative action. When they do, the courts are able to intervene.' (Footnotes omitted.)

[133] The second option available to the appellant, in his capacity as the Divisional Commissioner, was to apply to the court to review the administrative actions of his own department, on the grounds that Ethemba ought not to have been selected as the successful bidder and, more importantly, that its product was not fit for purpose.⁶⁷ Even in his capacity as the Acting National Commissioner, he was alerted to this responsibility following an opinion obtained from the SAPS's Legal Services. He acted with reckless indifference. His inaction was self-evident and its financial consequences alarming to the taxpayer.

[134] I can find no grounds to interfere with the decision of the Labour Court in confirming that the dismissal of the appellant was substantively and procedurally fair. I hasten to add, however, that I disagree with the finding of the arbitrator (confirmed by the Labour Court) that the employer succeeded in proving on a balance of probabilities that the appellant '*intentionally caused non-compliance*' with the terms of the contract. The evidence before the arbitrator did not establish intention. This would have required evidence of a

⁶⁵ Act 3 of 2000.

⁶⁶ *Kirland* (id fn 59) at para 91.

⁶⁷ See: *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC).

pre-conceived plan by the appellant not to honour the State's contractual obligations. This is a high threshold. However, it is not one which is necessary for a guilty finding on count one of the charge against the appellant. The respondent was required to prove that the misconduct 'detrimentally affected the image of the Service' or brought the SAPS 'into disrepute', in that he acted 'intentionally or negligently'. I am satisfied that the evidence broadly reflects that the appellant acted negligently rather than intentionally.⁶⁸ That distinction offers no succour to the appellant, as the respondent succeeded in establishing the essential ingredients of the charge on count one.

[135] There is nothing in the record that demonstrates a reviewable irregularity on the part of the arbitrator which manifests itself in an unreasonable result, where the outcome of the proceedings under review represents a decision that no reasonable decision-maker could reach on the available evidence. For reasons canvassed earlier, I would find the dismissal of the appellant an appropriate sanction.

[136] Equally, the arbitrator's finding that there was no dishonesty on the part of the appellant is of no assistance. The charge sheet clearly articulated the case details he had to meet.⁶⁹ So, the SAPS's labelling of the alleged misconduct is less important. It will generally be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed.⁷⁰

[137] I would accordingly dismiss the appeal, with no order as to costs.

⁶⁸ *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) para 102.

⁶⁹ See: *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2019] ZALAC 57, (2019) 40 ILJ 2477 (LAC) at paras 16-17.

⁷⁰ *EOH Abantu* (ibid).

M R Chetty

Acting Judge of the Labour Appeal Court of South Africa

NKUTHA-NKONTWANA JA

[138] I have had the advantage of reading the two judgments penned by my colleagues Tokota AJA (the first judgment) and Chetty AJA (the second judgment). The first judgment disposes of the appeal on the basis that, to the extent that he is challenging the legality of his dismissal, on the *dictum* in *Steenkamp*,⁷¹ the Labour Court had no jurisdiction in terms of the LRA to entertain the matter. By this edict, he steers clear of deciding the merits of the dispute.

[139] While I agree with the first judgment's finding that the Labour Court has no jurisdiction to entertain an unlawful dismissal claim under the LRA jurisdiction and the order it has reached, I regrettably disagree that the legal point pertaining to the legality of the appellant's dismissal is meritorious. The appellant's cause of action, as articulated in the pleadings, is based on unfair dismissal in terms of the LRA. He further sought an LRA relief in the following terms:

1. THAT the arbitration award issued by the third respondent of the second respondent under case reference number PSSS 210-20/21 dated 16 July 2021 be reviewed and set aside in terms of section 145, alternatively 158(1)(g) of the ...LRA...
2. THAT the award be substituted in terms of section 145(4) of the LRA with an award to the effect that the dismissal of the applicant was both substantively and procedurally unfair and that the applicant be retrospectively reinstated into the employ of the first respondent.'

⁷¹ *Steenkamp* (id fn 20).

[140] In this Court as well, the appellant assails the Labour Court's failure to review and set aside the arbitration award, which he contends was not rationally justifiable. The appellant then contends that, to the extent that the arbitrator found his actions as the Acting National Commissioner led to the breach of contract between the SAPS and Ethemba, he ought to have been disciplined by the President. It is on this point that the first judgment turns. It agrees with the appellant that his dismissal was unlawful and had the following to say regarding the course of action he pursued:

"It seems to me that the referral to the Bargaining Council purporting to be based on unfair dismissal was in fact a referral of unlawful dismissal. It was therefore couched in such a manner that it should not oust the jurisdiction of the Bargaining Council. It is therefore evident to me that the cause of action was based on unlawful dismissal, which is outside the provisions of the Labour Relations Act 66 of 1995 (the LRA)."

[141] It is a well-accepted principle that the cause of action pleaded constrains jurisdiction and remedy.⁷² In *Baloyi v Public Protector and others*,⁷³ the Constitutional Court found that where more than one cause of action flows from the termination of a contract of employment, a litigant could therefore choose which cause of action to pursue. The dispute-resolution procedures in the LRA would only apply if the litigant chose to pursue an unfair dismissal claim. This is what happened in this case; hence, the arbitrator and the Labour Court were confined to determining procedural fairness and substantive fairness of the dismissal.

[142] That the arbitrator referred to the appellant's failure, as the Acting National Commissioner, to intervene when he was made aware of an impending litigation that led to wasteful expenditure as an aggravating factor that justified dismissal does not cure the pleading defect. Nor could it support a finding that the dispute that served before the arbitrator pertained to an unlawful dismissal camouflaged as an unfair dismissal dispute. In the appellant's own version, he

⁷² See: *Gcaba* (id fn 41); *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA); (2009) 30 ILJ 1539 (SCA); *Archer v Public School—Pinelands High School and others* (2020) 41 ILJ 610 (LAC); *Baloyi v Public Protector and others* 2022 (3) SA 321 (CC); (2021) 42 ILJ 961 (CC), *Passenger Rail Agency of SA and others v Ngoye and others* (2024) 45 ILJ 1228 (LAC).

⁷³ *Baloyi v Public Protector and others* (ibid).

was charged with the transgressions that transpired when he was the Divisional Commissioner: Forensic Services.⁷⁴ Moreover, he accepts that he was dismissed for those transgressions, and he duly availed himself of the LRA dispute resolution mechanism to challenge its fairness.

[143] I accept the trite principle that a legal point can be raised for the first time at appeal.⁷⁵ However, in the present case, the appellant's legal point is unmeritorious.

[144] For all these reasons, I agree with the second judgment of my colleague, Chetty AJA, that the unlawful dismissal claim is untenable and stands to be dismissed, and that the appeal be decided on the merits. I also agree with the findings Chetty AJA reached on the merits.

P. Nkutha-Nkontwana

Judge of the Labour Appeal Court of South Africa

⁷⁴ See paragraph 84 of the founding affidavit where the appellant asserts that: *"It was further trite during the disciplinary hearing, as well as the arbitration proceedings, that the allegations against me were raised against me in lieu of 20 the position which I held as the Divisional Commissioner: Forensic Services."*

⁷⁵ See: *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) at para 39, where the following is said: *"The mere fact that a new point of law is raised on appeal is not itself sufficient reason for refusing to consider it. If the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise, where for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved and that "[it] would similarly be unfair to the party if the law point and all its ramifications were not canvassed and investigated at trial."*

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LABOUR APPEAL COURT