THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C472/23

In the matter between:

SOLIDARITY	**First Applicant**
DE VILLIERS, B	**Second Applicant**
SAMUELS, W	**Third Applicant**
THEUNISSEN, E	**Fourth Applicant**

and

TSEBO FACILITIES SOLUTIONS (PTY) LTD	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)	**Second Respondent**
COMMISSIONER REZA SLAMANG	**Third Respondent**

Heard: **29 January 2026**

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 23 March 2026.

Summary: Severance pay — Section 41(4) BCEA — Forfeiture — Causation. Employees retrenched after loss of contract secured employment with incoming service provider (CBRE) before the employer's section 189 process and before conclusion of an Alternative Employment Agreement (AEA) — Commissioner misconceived the section 41(4) inquiry by treating acceptance of alternative employment as dispositive and failing to determine whether employment was obtained *as a result of* the employer's efforts. Findings inconsistent with evidence and with commissioner's own factual conclusions. Award unreasonable and reviewable.

JUDGMENT

DE KOCK, AJ

Introduction

[1] This matter comes before the Labour Court as a review application in terms of section 145 of the Labour Relations Act[1] ("LRA"). The First Applicant, Solidarity, brings the application as the representative trade union on behalf of the Second, Third and Fourth Applicants, being De Villiers B, Samuels W and Theunissen E respectively (collectively referred to as "the applicants"), former employees of the First Respondent, Tsebo Facilities Solutions (Pty) Ltd ("Tsebo"). The applicants seek an order reviewing and setting aside the arbitration award issued by the Third Respondent, Commissioner Reza Slamang ("the commissioner"), under case number WECT8983-20, dated 8 August 2023 ("the award"). In the award, the commissioner found that the applicants had forfeited their entitlement to severance

[1] Act 66 of 1995, as amended.

pay in terms of section 41(4) of the Basic Conditions of Employment Act[2] ("BCEA") on the basis that Tsebo had arranged their alternative employment with Excellerate Facilities Management (Pty) Ltd ("CBRE"). The applicants contend that this finding is reviewable as a gross irregularity within the meaning of section 145(2)(a)(ii) of the LRA.

<u>Background</u>

[2] Tsebo delivered a comprehensive service to Sanlam. The service was delivered in terms of a Service Level Agreement ("SLA") with a staff complement of about 125 employees and was in place for about 20 years. Sanlam, following a tender process, appointed CBRE with effect from 1 June 2020. On or about 28 November 2019 Sanlam issued written notice of the termination of the SLA with Tsebo with the termination date effective 31 May 2020. The "go-live" date was static and was communicated to all Tsebo's employees.

[3] On or about 1 May 2020 Tsebo issued a section 189(3) notice to all affected employees, including the applicants. On or about 27 May 2020 Tsebo issued the affected employees with a notice of termination of employment.

[4] The termination notice issued to the applicants referenced the section 189(3) notice and stated, *inter alia*, "*As you have found alternative employment you are not entitled to severance pay in accordance with the Basic Conditions of Employment Act 75 of 1997. Your employment with us will therefore terminate on 31 May 2020.*"

[5] Following the non-payment of severance pay as per the notice of termination, the applicants referred a section 41 severance pay dispute to the CCMA claiming that they obtained alternative employment on their own accord and that they were therefore entitled to receive severance pay.

[2] Act 75 of 1997.

<u>Arbitration Award</u>

[6] The commissioner, after surveying the evidence and arguments by the parties, concluded that the applicants are not entitled to severance pay as envisaged by section 41(2) of the BCEA as section 41(4) of the BCEA finds application.

[7] The commissioner, relying on *Irvin & Johnson Ltd v CCMA*[3] (*Irvin & Johnson*), notes that the trite opinion of the LAC is that "*the purpose of severance pay in our law is not necessarily to tide the employee over while he is looking for another job. If that was the purpose, an employee who immediately walks into another and sometimes even better paying job after his dismissal would not be entitled to severance pay because he would have no need for it".*

[8] The commissioner refers to the forfeiture clause in section 41(4) and finds that the forfeiture clause will apply where the employer offered the employee alternative employment with that employer or with any other employer and the employee to whom alternative employment has been offered unreasonably refuses to accept the offer. The commissioner finds further that the LAC has held that an employee who accepts a retrenching employer's offer of alternative employment with another employer (an incoming service provider) is not entitled to severance pay. An employee is not entitled to alternative employment as well as to the payment of severance pay. Relying on *Servest Landscaping Turf Maintenance (Pty) Ltd v SA Commercial Catering & Allied Workers Union & Others*[4], the commissioner finds that the requirements of the forfeiture clause are satisfied if retrenched employees are offered suitable alternative employment with a new employer because of the efforts of the retrenching employer. The commissioner, again relying on *Irvin & Johnson*, finds that the LAC opined that the forfeiture clause rewards an employer for offering or securing alternative employment for an employee. Put differently, if an offer of alternative employment is made to the employee, but the offer is not made by his employer or through the efforts of his employer, then they would be

[3] (2006) 27 ILJ 935 (LAC).
[4] (2023) 44 ILJ 380 (LC).

entitled to severance pay, even if they turn it down. The commissioner further finds that, at a minimum, a retrenching employer must be able to demonstrate that it played an instrumental role in securing alternative employment for an employee, with another employer, if it seeks to rely on section 41(4) of the BCEA.

[9] The commissioner finds that it is common cause that the employment of the applicants continued uninterrupted with CBRE. The applicants' version, however, being that they secured alternative employment through their efforts without any contribution and/or intercession by Tsebo. Tsebo, on the other hand, maintains that the forfeiture clause finds application because of its involvement, influence and engagement with CBRE which was intended to secure the transfer and/or appointment by CBRE of the affected employees. The commissioner finds, considering the totality of the evidence in the matter, he is of the view that in both scenarios, the applicants would not be entitled to the payment of severance pay.

[10] The commissioner goes on to find that while he is not inclined to agree that the applicants secured alternative employment on their own and through their efforts without any intervention by Tsebo, he notes that if this were the case then upon acceptance of the offer of employment, they could not maintain that they would continue with their employment with Tsebo. They were all contractually bound to commence employment under the rubric of CBRE and through their testimony they confirmed that from 1 June 2020, they would be employed by CBRE.

[11] The commissioner finds that the applicants maintained that Tsebo had not communicated any intention to retrench any of the staff prior to 1 May 2020 and that, at the time of accepting employment and (in some instances) a lucrative sign-on bonus, it cannot be said that Tsebo had contemplated retrenchment of the applicants or any of its employees. The commissioner, however, notes that it was the applicants' case that Tsebo had communicated the termination of the SLA and from the outset persisted with the view that the prescribed section 197 process should apply.

[12] The commissioner finds that, while the applicants ought to have resigned, he is mindful that they did not. The commissioner, however, finds that their acceptance of the offer of employment is an unequivocal statement of their intent, namely that they intended to no longer be employed by Tsebo but rather from 1 June 2020 their employment would be with CBRE. The commissioner finds that the probabilities favour a finding that the applicants held back on formerly resigning so that they could benefit from any severance pay that they thought would be due and payable to them. Their failure to resign was nothing more than a stratagem from which they should not profit. They would in the circumstances not be entitled to severance pay.

[13] The commissioner finds further that Tsebo played an instrumental role in securing alternative employment for the applicants and indeed its other employees. Tsebo and CBRE were in contact after the news broke that CBRE would be the new service providers and discussions immediately ensured. According to the commissioner, it matters not that Tsebo was seeking to manage its financial risk, albeit Tsebo maintained that its approach was to save jobs; the two are not mutually exclusive nor is it contra to public policy.

[14] The commissioner finds that it is understandable that the discussions were not smooth sailing but that the stop-start affair eventually resulted in an Alternative Employment Agreement ("AEA"). The AEA was not a one-sided initiative and came about through the efforts of Tsebo. To contend that the efforts of Tsebo are too little too late is, in the circumstances of the matter, manifestly unreasonable.

[15] The commissioner finds that the process kicked off once an agreement had been reached. Tsebo immediately served a section 189(3) notice on all affected staff, joint communication was issued, information sharing intensified and the parties mobilised the affected employees towards applying for a vacancy and being interviewed. The filling of vacancies, offers made and accepted, and the appointment of staff by CBRE were tracked. It cannot thus be said that Tsebo was

an inactive spectator, to do so would be devoid of the instrumental role played by Tsebo.

[16] The commissioner concludes that the employees who secured an alternative job were not paid any severance pay because, under the provisions of section 41(4) of the BCEA, they were not entitled thereto. Tsebo cannot be faulted for this. The applicants are therefore not entitled to severance pay as section 41(4) of the BCEA finds application.

Grounds of review

[17] The applicants listed the following summarised grounds of review in the founding affidavit:

17.1 The commissioner misconstrued the evidence in concluding that the applicants were not entitled to severance pay in terms of section 41 of the BCEA.

17.2 The commissioner clearly misconstrued the evidence before him and came to an unreasonable outcome.

17.3 The commissioner made errors of law and an error of fact and committed misconduct in that he ignored relevant evidence, failed to consider material issues and failed to apply his mind.

17.4 The commissioner did not reach a conclusion reached by a reasonable decision maker. The outcome of the award was not rationally and properly connected to the material facts before him.

[18] This Court will address each of these grounds in the evaluation that follows.

Review Test

[19] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,[5] the Court held that "*the reasonableness standard should now suffuse section 145 of the LRA*", and that the threshold test for the reasonableness of an award was: "*... Is the decision reached by the commissioner one that a reasonable decision maker could not reach?...*"[6]. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[7] the Court applied this reasonableness consideration as follows:

> *"In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."*

[20] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

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[5] (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).
[6] Id at para 110.
[7] (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

[21] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[8] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.[9]

[22] In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & Others*[10] *(Gold Fields)* the Labour Appeal Court further explained the reasonableness test in the following terms:

> *"[15] A process-related review suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by taking into accounts facts that are irrelevant, and the like. The emphasis here is on process and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not*

[8] *Fidelity Cash Management Service v Commission for Conciliation Mediation and Arbitration & Others* [2007] ZALAC 12; [2008] 3 BLLR 197 (LAC); (2008) 29 ILJ 964 (LAC) at para 102.
[9] See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC); [2015] 4 BLLR 394 (LAC) at para 12.
[10] (JA 2/2012) [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) (4 November 2013).

a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review."

and

"[20] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries. Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?"

and

> *"[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork"*

[23] The Labour Appeal Court in *Head of the Department of Education v Mofokeng and Others*[11] *(Mofokeng)* provided the following exposition of the review test:

> *"[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue;*

[11] [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC).

the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator, however, must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[24] The court will now proceed to consider the review application against the above principles and the test applicable to review applications.

Evaluation of grounds of review

[25] This case turns on a single question of causation: whether the applicants obtained employment with CBRE because of Tsebo's efforts, or whether that employment came about independently of anything Tsebo did. The decisive question under section 41(4) of the BCEA is whether the employer has arranged alternative employment for the employee. The Labour Appeal Court in *Irvin & Johnson* held that the forfeiture clause is not triggered by the mere fact that an employee obtains or accepts alternative employment. The employer must have taken purposive steps to cause that employment to come about. It must have initiated and driven the process of securing employment for the employee with the incoming employer, such that the employment was obtained as a result of the employer's efforts. In *Vergenoeg vir Seniors v Stone and Others*[12] the Labour Appeal Court confirmed this causation standard and held that it is sufficient if the retrenching employer negotiated with the new employer and, as a result of the employer's efforts, the individual employees were employed. The underlying purpose of section 41(2) is

[12] JA45/08 [2010] ZALAC 35.

to compensate an employee for the extinguishing of accrued service, a statutory entitlement earned through years of continuous employment with that employer and that loss is suffered by the individual applicants irrespective of the fact that their employment continued uninterrupted with CBRE. The seamless transition does not undo the severing of the employment relationship with Tsebo or the extinguishing of the service that section 41(2) compensates. The decisive question is therefore whether the applicants obtained CBRE employment because of Tsebo's efforts, or whether they would have obtained that employment regardless of anything Tsebo did.

[26] The commissioner erred, as a threshold matter, in the identification of the question he was required to answer. Having correctly found that a retrenching employer must demonstrate that it played an instrumental role in securing alternative employment, the commissioner proceeded to treat the dispositive question as whether the applicants accepted employment with CBRE, which was common cause, rather than whether Tsebo's efforts caused that employment to come about. This is a misconception of the nature of the inquiry under section 41(4). An employee who obtains alternative employment through his or her own efforts does not forfeit severance pay merely because the retrenching employer initially also engaged with the incoming service provider to secure a section 197 agreement. Tsebo's attempts over months do not assist them to show that the applicants obtained employment through Tsebo's active engagement with CBRE. The section 197 discussions had no impact on the purpose of section 41 and more specifically section 41(4) of the BCEA.

[27] The commissioner's own findings of fact defeat the causation requirement. The commissioner records in his award that the discussions between Tsebo and CBRE were not smooth sailing and that the stop-start affair eventually resulted in an AEA. Significantly, Tsebo's own answering affidavit concedes at paragraph 11 that the AEA was concluded through its efforts before the retrenchment process commenced. The section 189(3) notice was only issued on 1 May 2020 and received by employees on 6 May 2020. Both events therefore occurred after the

facts that are critical to the individual applicants' CBRE appointments. The AEA itself was reached in principle on 29 April 2020 and formally signed on 3 May 2020. It is common cause that De Villiers and Samuels received formal CBRE employment offers as early as 28 February 2020, more than two months before the AEA was signed and well before any retrenchment process had been initiated. On the commissioner's own findings, CBRE was recruiting those individuals independently from December 2019, without Tsebo's knowledge. In respect of Theunissen, the commissioner records at paragraph 21 of the award that in March 2020 CBRE published a Notice of Hiring People with a closing date of 24 April 2020, and that Tsebo ostensibly did not know about the recruitment drive. It was this independent recruitment drive, of whose existence Tsebo was ignorant, to which Theunissen responded. He applied on 22 April 2020 and was interviewed on 29 April 2020 before the in-principle agreement on the AEA was reached on that same day and before Tsebo's Human Resources Manager had received CBRE's organisational structures that evening. Tsebo cannot have arranged an appointment arising from a recruitment process of whose existence it was unaware. An employer who does not know a recruitment process exists cannot be the cause of an appointment made through it. This is the paradigm case of the *Irvin & Johnson* 'fourth scenario" in which independently-sourced employment cannot trigger forfeiture. This conclusion is confirmed by evidence from CBRE itself. CBRE confirmed in writing that the applicants were appointed independently and without involvement of Tsebo, and that the appointments were based on merit. The commissioner records at paragraph 57 that the process kicked off once an agreement had been reached. That agreement was reached at the earliest on 29 April 2020, the same day as Theunissen's interview, and more than two months after the offers to De Villiers and Samuels. Whatever the process that kicked off after the AEA cannot, as a matter of temporal logic, have caused appointments that preceded or were contemporaneous with it.

[28] There is a further and independently dispositive finding. It is common cause that 27 Tsebo employees deployed on the Sanlam SLA were retrenched notwithstanding their coverage by the same AEA framework. The commissioner

engages with this fact at paragraph 58 of the award, recording that although some of the affected employees did not secure alternative and ongoing employment with CBRE and/or Tsebo, the overwhelming majority did. He does not, however, engage with its causation implications. He characterises the 27 retrenchments as a minority exception and moves on without analysis. The significance of the 27 retrenchments is fatal to the causation case and equally fatal to Tsebo's characterisation of the AEA as constituting an undertaking by CBRE that the applicants will be appointed (answering affidavit, paragraph 22.2). If the AEA constituted an undertaking to appoint the named employees, it was an undertaking that failed for 27 of them. The AEA's own terms explain why. Clause 4.10 expressly provided that the placement provisions did not constitute a stipulation for the benefit of employees and that employees could not accept or enforce any obligations arising from those provisions. An arrangement that by its own express terms creates no rights for and confers no enforceable obligations towards the affected employees cannot simultaneously constitute the arrangement of those employees' alternative employment for purposes of section 41(4). CBRE retained full discretion to assess each candidate's cultural compatibility, and it exercised that discretion adversely in 27 cases. The outcome remained CBRE's decision, not Tsebo's. An employer who submits names to a competitive and discretionary process that it does not control has not arranged employment for anyone who emerges from it. The commissioner's failure to engage meaningfully with the causation implications of the 27 retrenchments, and his uncritical acceptance of the undertaking characterisation without testing it against the AEA's express terms, constitutes a failure to apply his mind to material evidence before him.

[29] The commissioner's conclusion that Tsebo played an instrumental role in securing the applicants' CBRE employment is not rationally connected to his own preceding findings. He records that discussions commenced after the news broke that CBRE would be the incoming service provider, and that those discussions were a stop-start affair. He records that the process kicked off once an agreement had been reached. If the process only kicked off after the AEA was formally signed on 3 May 2020, no conduct of Tsebo prior to that date could constitute the instrumental role

the commissioner attributes to it. Yet the individual applicants' applications and interviews all pre-dated the AEA. This conclusion is irreconcilable with the factual narrative in this case. Applying the standard in *Gold Fields* and *Mofokeng*, this constitutes a failure to apply the mind to material facts such that the outcome is unreasonable.

[30] Two further arguments advanced in the answering affidavit require brief attention. The first is the contention that it was not a foregone conclusion that the applicants would have been retrenched if the AEA had not been concluded (answering affidavit, paragraph 14). This argument does not assist the causation inquiry. Section 41(4) does not ask whether the applicants would certainly have been retrenched. It asks whether the employer arranged the alternative employment. The forfeiture operates where the employer caused the employment outcome. The contingency of the retrenchment is irrelevant to that inquiry. The second is the contention that by concluding employment contracts with CBRE before the retrenchment process commenced, the applicants were contractually obligated to join CBRE on 1 June 2020, making the termination of their Tsebo employment one that occurred at their own instance rather than at the instance of Tsebo (answering affidavit, paragraph 21.5 to 21.6). This argument is legally unsound. It is common cause that Tsebo issued notices of termination on 27 May 2020. The applicants were retrenched by Tsebo in terms of those notices. The fact that they had separately accepted CBRE offers does not convert Tsebo's retrenchment into a termination at the instance of the employees. Section 41(2) was triggered by the retrenchment. The forfeiture under section 41(4) then required Tsebo to have arranged the alternative employment. It did not. As to the commissioner's own secondary route that the individual applicants held back from formally resigning in order to profit from severance pay and that their failure to resign was nothing more than a stratagem, this reasoning is not merely unsound on the facts; it is unsound in law. Section 41(4) contains no motive-based exception to the entitlement to severance pay. The provision operates on a single criterion: whether the employer arranged the alternative employment. An employee's reason for not resigning, and any inference drawn therefrom, find no place in that inquiry. The commissioner's

secondary route accordingly imposes a forfeiture on a basis that finds no warrant in the BCEA and introduces into section 41(4) a requirement that the legislature did not enact. To the extent the commissioner's secondary reasoning purports to stand independently of the causation analysis, it cannot do so. It is *ultra vires* the provision on which it purports to rely.

[31] Having regard to the totality of the evidence, i.e., the pre-AEA chronology, the 27 retrenchments, the absence of evidence that Tsebo arranged any interview or offer for the individual applicants, and the commissioner's own finding that discussions were a stop-start affair that only kicked off after the AEA was concluded, the conclusion that Tsebo played an instrumental role in securing the individual applicants' CBRE employment is not one that a reasonable decision-maker could have reached. The award stands to be reviewed and set aside. Substitution is appropriate: the record is complete, the material facts are common cause, and only one outcome is possible on the evidence. Remittal would serve no purpose.

<u>Conclusion</u>

[32] For the reasons set out above, the award is reviewed and set aside, and an order is made as set out below.

<u>Costs</u>

[33] This Court considered the provisions of section 162 of the LRA and finds that it will not be in the interests of law and fairness to make any order as to costs. Tsebo, who obtained a favourable award, was required to oppose the review application brought on behalf of the applicants. There is no reason why it should be ordered to pay the costs of the application under those circumstances.

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

<u>Order</u>

1. The arbitration award issued by the Third Respondent under case number WECT 8983-20, dated 8 August 2023, is reviewed and set aside.

2. The following is substituted as the finding of this Court:

   2.1 The Second Applicant (De Villiers B) is entitled to severance pay in the amount of R274,521.93.

   2.2 The Third Applicant (Samuels W) is entitled to severance pay in the amount of R81,235.82.

   2.3 The Fourth Applicant (Theunissen E) is entitled to severance pay in the amount of R21,312.18.

3. The amounts referred to in 2.1 to 2.3 above attract interest at the relevant, prescribed legal rate of interests as from the date that severance pay became due and payable, i.e., as from 1 June 2020.

4. No order is made as to costs.

[redacted]

C. de Kock

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: I Stockenström (Solidarity)

For the First Respondent: T du Preez

Instructed by: Van der Spuy & Partners