



- (1) Reportable: Yes
(2) Of interest to other Judges: Yes

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: 2026-059416

In the matter between:

**PUBLIC SERVANTS' ASSOCIATION OF
SOUTH AFRICA obo LUTENDO MALUSHA**

Applicant

And

DEPARTMENT OF MILITARY VETERANS

First Respondent

**ACTING DIRECTOR-GENERAL OF THE
DEPARTMENT OF MILITARY VETERANS**

Second Respondent

Heard: 20 March 2026

Delivered: 30 March 2026

JUDGMENT

HARVEY J

Introduction

- [1] The applicant employee, represented by her trade union, was employed as a Senior State Accountant by the first respondent Department in 2017. On 11 March 2026 she received a letter signed by the second respondent summarily terminating her contract of employment.
- [2] Contending that the termination was in breach of the employment contract, she approached this court for urgent relief in the form of specific performance. The application is brought in terms of section 77(3) read with section 77A(e) of the Basic Conditions of Employment Act.¹
- [3] The Department opposed the application. It raised a point of jurisdiction, disputed urgency, and denied that the termination was in breach of contract.
- [4] The matter was heard virtually (on Teams) on 20 March 2026, as the Johannesburg Labour Court is presently undergoing renovation.
- [5] On 27 March 2026 the Court handed down the following Order:
- “[1] The application is heard as one of urgency.*
- [2] The termination of Ms Malusha’s employment by the First Respondent on 11 March 2026 is in breach of her contract of employment.*
- [3] The First Respondent is directed to restore Ms Malusha to her position in terms of the contract of employment with effect from 11 March 2026.*
- [4] There is no order as to costs.”*
- [6] These are the reasons for the Order.

Background facts

- [7] The letter terminating the employee’s services is headed “Termination of your services with the Department of Military Veterans (employer) on account of breach of duty, cooperate (*sic*) and failure to perform work.” It states that she refused to complete her performance agreements, does not recognise her supervisor, and refuses to perform her duties or responsibilities. It records that the acting Director General sought to intervene in May 2025 and in January and

¹ Section 77(3) of the BCEA confers jurisdiction on this court to hear and to determine any matter concerning a contract of employment, while section 77A(e) empowers it, in such a matter, to make a determination that it considers reasonable, including an order for specific performance.

March 2026, but without success. The letter concludes that, for these reasons, the employer “has decided to terminate your employment contract and/or services with immediate effect on receipt of this letter”.

- [8] After receiving the letter, the employee left the workplace. She returned the following day, 12 March 2026, to speak to a shop steward to lodge an appeal, but was informed that she was trespassing and that the SAPS would be called.
- [9] The trade union launched this application on her behalf on 13 March 2026, relying expressly on section 77(3) of the BCEA (read with section 77A(e)). The applicant does not rely on a cause of action under the LRA, nor does it seek any remedy provided for in the LRA.

Jurisdiction

- [10] The respondents contend that this Court lacks jurisdiction to entertain the application on the basis that the dispute, properly construed, concerns an unfair dismissal which must be referred to the bargaining council. In support of this submission, reliance is placed on the decision of the Labour Appeal Court in *Passenger Rail Agency of South Africa v Ngoye*.²
- [11] That submission cannot be sustained. It is now well-established that the existence of the dispute-resolution mechanisms created by the LRA does not extinguish an employee’s right to pursue a claim arising in contract. In *Baloyi v Public Protector and Others*³ the Constitutional Court affirmed that the character of a claim is determined by the pleadings, and that contractual causes of action arising from employment may be pursued independently of the LRA framework.⁴
- [12] In *Ngoye*, the Labour Appeal Court followed *Baloyi* and proceeded on the basis that employees are entitled to frame their claims in contract rather than under the LRA. While Waglay JP (as he then was) expressed concern about the proliferation of causes of action arising from dismissals and the potential for

² *Passenger Rail Agency of South Africa and Others v Ngoye and Others* (JA78/21) [2024] ZALAC 18; (2024) 45 ILJ 1228 (LAC); [2024] 7 BLLR 706 (LAC); 2025 (2) SA 556 (LAC) (26 March 2024)

³ *Baloyi v Public Protector and Others* (CCT03/20) [2020] ZACC 27; 2021 (2) BCLR 101 (CC); [2021] 4 BLLR 325 (CC); (2021) 42 ILJ 961 (CC); 2022 (3) SA 321 (CC) (4 December 2020)

⁴ *Baloyi* (note 3 above) at paras 38-48.

incoherence in the law,⁵ he accepted that the Court was bound by *Baloyi*. *Ngoye* is therefore not authority for the proposition that dismissal-related contractual claims constitute an impermissible circumvention of the LRA.

[13] What *Ngoye* does emphasise is that the remedy of specific performance in employment matters is not automatic. The Court cautioned that the LRA provides a carefully calibrated system for resolving dismissal disputes, and that where a contractual claim is pursued, the grant of specific performance remains subject to the Court's discretion.⁶ In *Ngoye*, that discretion was exercised against granting reinstatement.

[14] In the present matter, the applicant has elected to pursue a claim for breach of contract. This Court is required to determine that claim as pleaded. The respondents' challenge to jurisdiction is rejected.

Urgency

[15] The applicant in the founding affidavit submits that the matter is urgent because the contract is binding and the employer's violation thereof is *void ab initio*. In argument it was further contended that specific performance as a remedy loses its efficacy if not granted urgently and that the present harm to the employee – which encompasses loss of livelihood and reputational damage - is irreparable if left to proceedings brought in the ordinary course.

[16] The respondents contend that the application is not urgent because loss of income does not justify urgent intervention, and because the employee has adequate available remedies including an appeal or an unfair dismissal referral.

[17] The primary consideration in determining whether a matter should be heard as one of urgency is whether substantial redress may be obtained in the normal course.⁷ The Court will also consider whether, in the interests of justice, other factors may preclude an urgent hearing (such as culpable delay in approaching

⁵ *Ngoye* (note 2 above) at paras 25-28.

⁶ See also the discussion in *Mahonono v National Heritage Council and another* (2022) 43 ILJ 2335 (LC) at paras 37-41.

⁷ *O'Connor v Lexis Nexis (Pty) Ltd* (P18/24) [2024] ZALCPE 11; (2024) 45 ILJ 1287 at [28]. See also *Maphalle v National Heritage Council & Others* (2023) 44 ILJ 579 (LC) at [18]; *Vumatel (Pty) Ltd v Majra & Others* (2018) 39 ILJ 2771 (LC) at [8]; *Association of Mineworkers & Construction Union & Others v Northam Platinum Ltd & Another* (2016) 37 ILJ 2840 (LC) at [21]; *East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others* [2012] JOL 28244 (GSJ) at [6].

the court, procedural prejudice to the respondent, or prejudice to the administration of justice).

[18] The question concerning whether the applicant may obtain substantial redress at a hearing in due course must be answered with reference to the claim before the court, being one for specific performance.

[19] In *Mahonono v National Heritage Council and another*⁸ Lagrange J dealt with urgency in the context of claim for specific performance where there was an alleged breach of contract and held as follows:

'...Of course it also must not be forgotten that an order of specific performance for a material breach of contract is a remedy available to a party to a contract, who is not obliged to simply sue for damages. When applied to an unlawful termination of employment, it requires the restoration of the actual employment relationship to what it was prior to the breach. The value of this remedy is naturally diluted if it is not sought as a matter of urgency. The timely availability of an order of specific performance as a remedy cannot be equated, except superficially, to an order of reinstatement under the LRA, which must be given effect to if the prerequisites of s 193(2) are met, even years after the dismissal.'

[20] The employee's contract was terminated with immediate effect, based on allegations which carry reputational consequences, and with a resultant loss of livelihood. The applicant acted with expedition, launching this application within two days of the termination. In these circumstances, I am satisfied that the applicant will not obtain substantial redress in due course, and that the matter should be heard on an urgent basis.

Was there a breach of contract?

[21] The applicant contends that the summary termination of her contract of employment was in breach of its terms. The respondents deny that the contractual provision relied upon finds application.

[22] The provision in question is contained in a collective agreement known as Resolution 1 of 2003 ("the Agreement"), concluded under the auspices of the

⁸ *Mahonono v National Heritage Council and another* (note 6 above) at [24] as well as *Ngubeni v National Youth Development Agency and another* (2014) 35 ILJ 1356 (LC) and *Letsholonyane v Minister of Human Settlements and Another* (J616/23) [2023] ZALCJHB 147; [2023] 8 BLLR 796 (LC); (2023) 44 ILJ 1740 (LC).

Public Sector Coordinating Bargaining Council. In terms of section 23 of the LRA, the Agreement forms part of the employee's contract of employment.

[23] The Agreement prescribes procedures to be followed in cases of alleged misconduct before sanctions, including dismissal, may be imposed. These include the convening of a formal hearing on notice to the employee, the opportunity to be represented and heard, the right to make submissions in mitigation prior to sanction, and a right of appeal.

[24] The applicant contends that the employer terminated the employee's employment on account of allegations of misconduct without following any of those procedures, without affording her an opportunity to respond to the allegations, and without a right of appeal.

[25] The respondents deny this. They assert that the termination was effected for reasons of "performance and incompatibility", whereas the Agreement regulates disciplinary action for misconduct.

[26] That submission cannot be sustained. The termination letter itself attributes the termination to the employee's conduct, in particular her refusal to complete performance agreements, refusal to recognise a supervisor, and refusal to perform duties or responsibilities. Those are allegations of misconduct, whatever label the respondents now seek to attach to them. In those circumstances, I am persuaded that the procedures prescribed by the Agreement applied.

[27] It is undisputed that these procedures were not followed. I am accordingly satisfied that the termination was effected in breach of the terms of the employee's contract of employment.

Is an order of specific performance appropriate in this case?

[28] Where a party establishes a breach of contract, specific performance (in this case, an order restoring the employment contract/relationship) is an available remedy. The grant of such relief, however, does not follow as a matter of course. It remains a matter for the Court's discretion, to be exercised judicially

and with due regard to all the relevant circumstances.⁹ As the Labour Appeal Court emphasised in *Passenger Rail Agency of South Africa v Ngoye*,¹⁰ even where a dismissal is impugned as a breach of contract, specific performance in the form of reinstatement is not automatic.

[29] The discretion is informed by considerations of fairness, practicality, and justice between the parties. Specific performance will ordinarily be granted unless there are sound reasons for refusing it, such as where its enforcement would be inequitable, impracticable, or would give rise to consequences that are unconscionable in the circumstances. In the employment context, courts are cautious to ensure that the remedy does not compel the continuation of a relationship that has become untenable or incapable of performance, but equally they will not permit an employer to disregard binding contractual constraints on termination.¹¹

[30] In exercising that discretion, regard must be had to the nature of the contractual right asserted, the consequences of compelling continued performance, and whether the employment relationship remains capable of continuation. Where the breach consists in the failure to comply with a prescribed pre-termination process, the contractual limitation on the employer's power to terminate is directed at regulating how and when that power may be exercised. If the contract is terminated in disregard of that limitation, the appropriate remedy may, in a proper case, be to restore the parties to the position they occupied before the breach, so that the agreed process may take its course.¹²

[31] In the present matter, the breach is fundamental: the employer terminated the relationship summarily without any regard to the prescribed process mandated by the Agreement. The application was brought with expedition, at a stage where the employment relationship has not yet irretrievably broken down. There is no suggestion on the papers that continued employment pending

⁹ *Mahonono* (note 8 above) at 37-38; *National Union of Textile Workers v Stag Packings (Pty) Ltd & another* (1982) 3 ILJ 285 (T)

¹⁰ Note 2 above.

¹¹ See *National Union of Textile Workers v Stag Packings (Pty) Ltd & another* (note 9 above) with reference to *Haynes v King Williamstown Municipality* 1951 (2) SA 371 (A) at 378 and 379.

¹² See *Mahonono* (note 8 above) at [39] – [41] and the authorities cited there; *Letsholonyane v Minister of Human Settlements and Another* (note 8 above).

compliance with the agreed procedures would be impracticable or untenable, or that the employer would be unable to follow the mandated procedures going forward.

[32] The relief sought is directed at restoring the contract, and the parties may then proceed in accordance with the contractual terms. Having regard to the time-sensitive nature of the right asserted, the inadequacy of delayed remedies, and the absence of countervailing considerations, I am satisfied that this is an appropriate case in which to exercise the Court's discretion in favour of specific performance. The Order is framed in terms that give effect to the substance of the relief sought, namely the restoration of the employment relationship, expressed in contractual terms consistent with the cause of action before the Court.

Costs

[33] This Court in *Mahonono* and *Letsholonyane* awarded costs against the employer in comparable circumstances. However, in the exercise of my discretion in accordance with the requirements of law and fairness, I consider that, although the applicant was compelled to approach the Court to enforce her contractual rights, my order restores an ongoing employment relationship between the parties. In those circumstances, a costs order may undermine rather than support the continuation of that relationship. The interests of fairness are therefore best served by making no order as to costs.

Conclusion

[34] It is for the above reasons that the Order reproduced in paragraph [5] of this Judgment was issued on 27 March 2026.

SJ Harvey

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Mphahlele, Union official

For the Respondents: Mr Sibanyoni instructed by the State Attorney, Pretoria