



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

Second Respondent

COMMISSIONER REZA SLAMANG N.O.

Third Respondent

Heard: In chambers

This ruling is 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 this ruling is deemed to be 10h00 on 5 May 2026.

JUDGMENT – LEAVE TO APPEAL

DE KOCK, AJ

Introduction

- [1] The first respondent, Tsebo Facilities Solutions (Pty) Ltd (“Tsebo”), applies for leave to appeal against the whole of the judgment and order of this Court handed down on 23 March 2026. In that judgment, this Court set aside the arbitration award of Commissioner Reza Slamang, issued on 8 August 2023 under Case No WECT8983-20, and substituted an order directing Tsebo to pay severance pay to each of the individual applicants. The application for leave to appeal is opposed by the applicants.
- [2] The judgment arose from a review under section 145 of the Labour Relations Act 66 of 1995. The commissioner had found that section 41(4) of the Basic Conditions of Employment Act 75 of 1997 (“the BCEA”) applied to disentitle the individual applicants to severance pay on the basis that Tsebo had played an instrumental role in securing their employment with CBRE Excellerate (Pty) Ltd (“CBRE”). This Court found that the commissioner’s conclusion was not rationally connected to the factual findings he had made and set the award aside.

Applicable Legal Test

- [3] Section 17(1)(a) of the Superior Courts Act¹ provides that leave to appeal may only be granted where the judge is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard.
- [4] The wording is deliberate. The legislature moved away from the earlier, more permissive formulation that focused on whether another court may come to a different conclusion. The current test requires that the judge be satisfied that the appeal would have a reasonable prospect of success, a higher threshold than mere arguability.²
- [5] In *Martin and East (Pty) Ltd v National Union of Mineworkers and Others*,³ the Labour Appeal Court underscored the gate-keeping function of the Labour Court. It cautioned that disputes that raise no novel point of law and involve no misinterpretation of existing law should ordinarily end in the Labour Court and not be allowed to reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.

Merits of the Application for Leave to Appeal

General observations

- [6] Tsebo advances seven grounds of appeal. The grounds are: (a) the Court erred in its assessment of the facts and failed to apply the correct review test; (b) the Court erred in finding that the commissioner misconceived the causation inquiry and applied an incorrect legal test; (c) the Court applied an appeal test as opposed to the review test; (d) the Court failed to properly consider the totality of evidence; (e) the Court failed to consider whether the totality of evidence

¹ Act 10 of 2013.

² *Smith v S* (475/10) [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at para 7.

³ *Martin and East (Pty) Ltd v National Union of Mineworkers and Others* (CA23/2012); [2013] ZALAC 35; (2014) 35 ILJ 2399 (LAC).

justified the conclusions reached; (f) the Court erred in applying an incorrect legal test on causation; and (g) the Court erred in substituting its own order. This Court addresses each in turn.

The causation standard (Grounds 1, 2 and 6)

- [7] Tsebo contends that this Court formulated the causation standard under section 41(4) as requiring the employer to have “initiated and driven” the process of securing alternative employment, a standard said to be materially narrower than the test established in *Irvin & Johnson* at paragraph [42]: “through the efforts of his employer.”⁴ Tsebo submits that the departure from *Irvin & Johnson* constitutes an error of law.
- [8] The contention does not withstand scrutiny. This Court’s judgment did not hinge on the verbal formulation of the causation standard. The judgment identified a rational disconnection between the commissioner’s own factual findings and his conclusion. Whatever verbal label is applied to the causation test, whether “through the efforts of” or “initiated and driven”, the analysis is the same: the commissioner’s factual narrative was irreconcilable with the conclusion he reached.
- [9] The undisputed chronology is decisive. De Villiers and Samuels received formal written employment offers from CBRE on 28 February 2020, more than two months before the Alternative Employment Agreement (“AEA”) was signed on 3 May 2020 and before the section 189(3) notice was issued on 1 May 2020. Theunissen responded to a CBRE Notice of Hiring published in March 2020 and was interviewed on 29 April 2020, the same day the AEA was agreed in principle. The employment outcomes preceded the formal arrangement that Tsebo relies upon as constituting its instrumental role. No reformulation of the causation standard alters this factual reality.

⁴ *Irvin & Johnson Ltd v Commission for Conciliation, Mediation and Arbitration* (2006) 27 ILJ 935 (LAC); [2006] 7 BLLR 613 (LAC).

- [10] Tsebo places reliance on *Khanya Cleaning Group (Pty) Ltd v SA Transport and Allied Workers Union and Others*⁵ for the proposition that a less granular approach to chronology should be adopted. The reliance is misplaced. In *Khanya*, the employer's facilitation and the employees' receipt of offers were temporally proximate, the employer arranged a boardroom for interviews, distributed application forms, and collected them during company time. There was no temporal disjuncture between the employer's conduct and the employment outcomes. Here, by contrast, two of the three individual applicants had secured binding employment offers months before the arrangement Tsebo relies upon came into existence. *Khanya* is distinguishable on its facts.
- [11] Tsebo further relies on *Vergenoeg vir Seniors v Stone and Others*⁶ for the proposition that an incoming employer's exercise of independent selection discretion does not break the causal chain. The principle in *Vergenoeg* is not in dispute. But *Vergenoeg* concerned a situation where the outgoing employer's arrangement was antecedent to the employment outcome. Here, the employment outcomes antedated the arrangement. The principle that independent selection does not break the chain presupposes the existence of a chain to break. On the commissioner's own chronology, no such chain existed at the time the offers were made.
- [12] Tsebo further contends that this Court's formulation of the statutory purpose of section 41(2), compensating employees for the extinguishing of accrued service, was incomplete because it failed to account for the incentive rationale recognised in *Irvin & Johnson* at paragraph [46]. This Court accepts that *Irvin & Johnson* recognises both the compensatory and incentive dimensions of section 41. However, the incentive rationale explains why the legislature created the forfeiture in section 41(4); it does not lower the threshold for establishing the causal link. On the undisputed facts, Tsebo's efforts did not cause these

⁵ *Khanya Cleaning Group (Pty) Ltd v SA Transport and Allied Workers Union and Others* (PR32/2023) [2024] ZALCPE 39; (2025) 46 ILJ 363 (LC).

⁶ *Vergenoeg vir Seniors v Stone and Others* (JA 45/08) [2010] ZALAC 35 (4 June 2010).

particular applicants' CBRE employment. The incentive purpose is not advanced by attributing employment outcomes to employer efforts that were not operative in bringing them about.

- [13] There is no reasonable prospect that another court would find that the verbal formulation of the causation standard, rather than the underlying factual analysis, was determinative of the outcome. This judgment does not hold that parallel independent recruitment by an incoming employer invariably defeats the section 41(4) defence; it holds that on these facts, where the employment offers antedated the arrangement, the causal connection was not established.

Review versus appeal (Ground 3)

- [14] Tsebo contends that this Court conducted appellate re-evaluation in breach of the *Sidumo* standard.⁷ Specifically, Tsebo submits that the commissioner expressly addressed CBRE's parallel recruitment at paragraph 55 of the award and nonetheless found an instrumental role, such that the Court's disagreement with that finding constituted impermissible substitution of judgment.
- [15] This ground misconceives the nature of the Court's finding. The judgment did not merely disagree with the weight the commissioner assigned to the evidence. It identified an internal contradiction between the commissioner's factual findings and his conclusion. Where a decision-maker's own factual narrative is irreconcilable with the conclusion drawn from it, the conclusion is not rationally connected to the evidence and falls outside the range of outcomes a reasonable decision-maker could reach. This is a review, not an appeal. It is squarely within the *Sidumo* framework, as elaborated in *Herholdt*.⁸
- [16] The commissioner's acknowledgment of CBRE's parallel recruitment does not cure the irrationality. Acknowledging a fact and properly reckoning with its

⁷ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2008] (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC).

⁸ *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

implications are different things. The commissioner noted the parallel recruitment but drew a conclusion that could not be reconciled with it. That is the hallmark of a finding to which the decision-maker was not reasonably entitled.

Totality of the evidence (Ground 4)

- [17] Tsebo submits that the Court adopted a fragmented approach to the evidence and elevated the timing of employment offers as decisive, ignoring the broader evidentiary matrix, including the sustained bilateral engagement, the in-principle HR understanding, the operating model, and the AEA.
- [18] The submission inverts the analytical sequence. It is not the Court that elevated timing; it is the facts that did so. When the employment outcomes precede the alleged arrangement, no amount of subsequent engagement can retrospectively cause those outcomes. Tsebo's sustained engagement with CBRE, however commendable as an exercise in responsible transition management, was not operative in producing the employment offers that De Villiers, Samuels, and Theunissen had already received or were in the process of receiving through CBRE's independent recruitment.
- [19] As to clause 4.10 of the AEA: this Court's reliance on that provision was not, as Tsebo contends, to establish a contractual enforceability point. The provision was relevant because it confirmed that CBRE retained full discretion over individual appointments. The AEA did not guarantee employment for any named individual. The 27 employees who were retrenched demonstrated that the AEA was not an undertaking to employ all affected staff. Tsebo cannot characterise the AEA as the vehicle through which it "arranged" individual employment when the agreement, on its own terms, created no enforceable right to employment and when a substantial cohort of covered employees was not employed.

- [20] Tsebo submits that the individual applicants engaged in “secretive and opportunistic conduct” by accepting CBRE employment without disclosing it to Tsebo. Even accepting this characterisation, it is irrelevant to the statutory inquiry. Section 41(4) asks whether the employer arranged or caused the alternative employment through its own efforts. The employees’ subjective motivation in accepting independently obtained employment does not transmute that employment into employment arranged by the employer through their own efforts. The section contains no motive-based exception.

The section 41(2) threshold (Ground 5)

- [21] Tsebo contends that this Court's analysis of the section 41(2) threshold at paragraph [30] of the judgment was inadequate and that the language of the termination notices does not establish a dismissal for reasons based on operational requirements. Tsebo submits that the notices, properly read, tether the termination to the employees’ acceptance of alternative employment rather than to the loss of the Sanlam SLA, and that the word “therefore” in the notice is causally determinative.
- [22] This Court addressed the section 41(2) question at paragraph [30] of the judgment. The finding was that Tsebo issued notices of termination on 27 May 2020 and that 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.
- [23] Tsebo’s textual argument does not improve its position. The termination notices themselves referenced the section 189(3) notice, as recorded at paragraph [4] of the judgment. A notice that is issued pursuant to a statutory retrenchment process, references a section 189(3) notice, and terminates employment on the date of the SLA expiry is, on any objective reading, a notice of dismissal for operational requirements. The internal language characterising the reason for termination cannot override the statutory framework within which the notice was

issued. Tsebo conducted a section 189 consultation, issued section 189(3) notices, and terminated employment by notice. Having completed a statutory retrenchment process, it cannot recharacterise the dismissals as something other than retrenchments by selective quotation from its own termination notices.

- [24] There is no reasonable prospect that another court would find this Court's analysis of the section 41(2) threshold to be inadequate or incorrect.

Substitution (Ground 7)

- [25] Tsebo contends that the conditions for substitution under *Herholdt* were not met and that the matter should have been remitted to a different commissioner.

- [26] This Court found that only one outcome was reasonably available on the undisputed facts. Given the temporal sequence, i.e., employment offers antedating the AEA, CBRE's written confirmation of independent appointment, and the 27 employees who were retrenched, no reasonable decision-maker, properly directing himself on the law and the facts, could conclude that Tsebo arranged or caused, through their efforts, the individual applicants' employment with CBRE. Remittal would accordingly have been futile.

- [27] The point is parasitic on the substantive grounds. If the substantive grounds fail, as this Court has found they do, the substitution ground falls with them.

Public interest and compelling reason

- [28] Tsebo submits that approximately 35 further arbitration proceedings involving materially similar facts have been stayed pending the outcome of this matter. It contends that the appeal raises important questions of law warranting determination by the Labour Appeal Court.

- [29] The existence of related proceedings does not, of itself, establish a reasonable prospect of success or a compelling reason for leave to appeal. The stayed proceedings may justify leave in a borderline case, but this matter is not

borderline on the facts. The temporal sequence that is fatal to the commissioner's causation finding is undisputed. The legal principles applicable to section 41(4) are settled in *Irvin & Johnson* and *Vergenoeg*. The dispute is not whether the legal test is correct but whether the commissioner's application of that test to these facts was rational. That is a fact-bound inquiry that does not give rise to a novel legal question of the kind contemplated by section 17(1)(a)(ii) of the Superior Courts Act.

Overall Assessment

[30] Tsebo has failed to demonstrate a realistic, reasonable prospect that another court would arrive at a different conclusion in respect of any of the grounds advanced. The temporal causation problem, employment offers antedating the alleged arrangement, is fatal to each substantive ground, whether the causation standard is formulated as "through the efforts of" or "initiated and driven." The commissioner's finding was not one a reasonable decision-maker could reach on his own factual findings, and this Court's identification of that rational disconnection was a proper exercise of review, not appellate re-evaluation. This is precisely the type of fact-bound review dispute that the Labour Appeal Court in *Martin and East* held should ordinarily end in the Labour Court.

[31] The application discloses no compelling reason for the appeal to be heard. The application for leave to appeal must accordingly be dismissed.

Costs

[32] The applicants do not seek a costs order against Tsebo and no order is made as to costs.

Order

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

1. The application for leave to appeal is dismissed.

2. There is no order as to costs.

C. de Kock

Acting Judge of the Labour Court of South Africa