(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: A2025-132542

In the matter between:

**PROSPER MAPHOSA & OTHERS** **Appellants**

and

**NEW MODEL PRIVATE COLLEGE** **First Respondent**

**COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION** **Second Respondent**

**GLORIA NCALA *N.O.*** **Third Respondent**

**Heard**: **7 May 2026**

**Delivered**: **28 May 2026**

**Coram: Van Niekerk JA, Djaje AJA *et* Masipa AJA**

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**JUDGMENT**

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**VAN NIEKERK, JA**

Introduction

[1] This is an appeal, with the leave of the Labour Court, against a judgment delivered on 3 March 2025, in which the Court dismissed an application to review and set aside an arbitration award issued by the third respondent (the commissioner). In her award, the commissioner found that the appellants had been unfairly suspended by the first respondent and awarded each of them compensation equivalent to 12 months' remuneration.

[2] Although the application for leave to appeal was opposed, the first respondent had not filed any opposing papers in the appeal proceedings, nor did the first respondent file any power of attorney, heads of argument or practice note as required by the Rules. The first respondent did not appear at the hearing of the appeal. This was despite the notice of set down of the hearing having been communicated to the first respondent's attorneys of record on 2 February 2026, and an acknowledgment of receipt of the notice on the same date, and confirmation that the link to the virtual hearing had been communicated to the first respondent's attorney. The hearing thus proceeded on an unopposed basis.

Factual background

[3] The appellants were employed by the first respondent as educators. The educators had worked for the first respondent for a number of years under fixed-term contracts that had been consistently renewed, in some instances for periods of nine or ten years. In 2020, the respondent and each of the appellants entered into a 12-month fixed-term contract for the calendar year.

[4] On 15 December 2020, the first respondent addressed letters to each of the appellants, advising them that their contracts would terminate on 31 December 2020 and that they were free to apply for appointment for the 2021 academic year, provided they did so in writing before that date. All the applicants applied for appointment in 2021 but received no response.

[5] In late December 2020, the principal of the junior school, Ms Mhlanga, sent WhatsApp messages to staff, including the appellants, advising that the school would open on 13 January 2021 and requesting that they collect payslips and letters on 30 December 2020. On the same date, the first respondent addressed letters to the appellants stating:

> 'On the 2nd December 2020, you participated in an unlawful and/or unprotected strike, and you did so without notifying the School to enable the School to make necessary arrangements to ensure that learners, staff, parents and visitors were not compromised in view of the Covid-19 health risk…
>
> Please note that your action constitute misconduct as defined in paragraph 3.13 of your contract of employment, entitling the School to institute disciplinary action against you.
>
> Kindly be advised that the School is taking legal advice on the matter and reserves its right to institute disciplinary action against you.

[6] The appellants denied participating in any strike. On January 4, 2021, the appellants were paid for December 2021 (the first respondent paid salaries on the 4th of the following month) and issued payslips showing that the 'next pay day' was February 4, 2021.

[7] On 10 January 2021, Mr. Mafu, the principal of the high school, sent a WhatsApp message to six heads of department about a meeting scheduled for the next day. The meeting was postponed and never took place. On 13 January 2021, the school reopened without the appellants being reengaged.

[8] On date, the appellants referred a dispute to the Commission for Conciliation, Mediation and Arbitration. The dispute, as described in the referral form, concerns an alleged unfair suspension that arose on 31 December 2020.

[9] The arbitrator's award confirms that the dispute to be determined is whether the first respondent unfairly suspended the appellants, and if so, to determine an appropriate remedy. The appellant's case was that on 29 December 2020, they

had been issued with letters notifying them of disciplinary proceedings, that they had not been permitted to return to work nor had they been paid since that date (but for the payment of salaries for December 2020), and that their continued suspension was unfair. The first respondent's case was that the appellants had not been suspended but that their fixed-term contracts had expired on 31 December 2020.

[10] The arbitrator came to the following conclusion:

> ’63. I had two destructive versions before me, the applicants testified that they were still employees of the respondent and were unfairly suspended. Whilst it is the respondent’s contentions that the applicants were never suspended but their contracts came to an end thus, they were no longer employees of the respondent…
>
> 74. In this case the’ rolling over’ of the contract for a period of nine, in some cases 10 years, had also established a reasonable expectation that the contracts will be renewed and the reapplying for the positions was merely an exercise to confirm staff complement for the following year. Furthermore, the school still required educators and had funds to pay the educated as proven by the fact that new recruits were found to fill the applicants positions and funds are available to pay the new teachers. The insured, the work was available for the educators, and it had been established that the applicants were capable to do the work as proven by the fact that their contract continued for years.
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> 75. In light of the above I find that the applicants are still employees of the respondent. The evidence they submitted supported their version of events and they were credible witnesses. It is therefore my view that they discharge the onus of proving their relationship with the respondent.
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> 76. Having accepted the applicants version comma I find the suspension was without just cause. Procedure was not followed. Having taken the applicants version as probable, I find that the respondent's action was unjust in that no explanation was given to the applicants to be at home for

> over six months now and as to why the services were being suspended for such a long time. Based on the evidence before me I find that the respondent's conduct amounts to unfair labour practice.'

The commissioner issued an award ordering the respondent to pay those appellants who had submitted their payslips an amount equal to their annual remuneration and ordered the remaining applicants to submit their payslips for the determination of the amount of compensation. On 13 July 2021, the commissioner issued a variation award that recorded the additional appellants' names and the amounts payable to them.

[11] The first respondent filed an application to review and set aside the arbitration award. In its judgment, the Labour Court noted that had the commissioner presided over an unfair dismissal dispute, she may well have found that the appellants had a reasonable expectation that their fixed-term contracts would be renewed and that the respondent's failure to renew the contracts constituted a 'dismissal' for the purposes of section 186 (1) of the LRA. The Court concluded:

> '[31] However, the commissioner did not preside over an unfair dismissal dispute arising from a dismissal in terms of section 186(1)(b), but rather over an unfair suspension dispute, which was premised on a contract of employment actually being in existence on the date of the educators' suspension. In my view, the fact that the LRA, in effect, deems the failure to renew a fixed term contract where a reasonable expectation of renewal exists as a 'dismissal', does not mean that – in law- the failure to renew a fixed term contract in such circumstances per se gives rise to the actual existence of such a contract (capable of being suspended).
>
> [32] In my view, the commissioner thus committed a material error of law in finding that, because the educators had a reasonable expectation of renewal of their fixed-term contracts, they were still 'employees of the School' and thus capable of being suspended.'

[12] The appellants seek leave to appeal on the basis that the Labour Court proceedings be declared a nullity on the basis that the respondent's legal representatives were not authorised to represent it at the hearing of the review application; alternatively, that the Labour Court erred in failing to adjudicate the unfair suspension dispute and failed to have regard to the provisions of section 198 of the LRA (in particular, section 198A(3)(b) and 198B (5) to establish whether at the time of their suspension, the appellants were deemed permanent employees of the respondent. Put another way, the appellants submit that, *ex lege*, they were deemed to be permanent employees of the respondent, employed for an indefinite period after the lapse of three months of employment under their fixed-term contracts. Although the notice of appeal suggests that this Court should find that the appellants had been unfairly dismissed and that they should be reinstated, at the hearing of the appeal, counsel submitted that the commissioner's award should stand, i.e., that the appellants were unfairly suspended and that they should be paid compensation in terms of the award.

[13] The appellants seek to admit further evidence on appeal. Specifically, they seek to admit evidence regarding the status of the firm of attorneys that represented the respondents at the time the review was argued. The review application was argued on 3 September 2024. Judgment was delivered on 3 March 2025. On 28 March 2025, while engaged in the filing of process relevant to an application for leave to appeal, the appellants discovered that the attorneys representing the respondent in the review application had 'closed their doors' with effect from 6 January 2024. This contention is confirmed by correspondence from the Legal Practice Council, which confirms that Koena Herbert Mpshe was admitted as an attorney of the High Court on 8 August 2017 and converted to an advocate without a trust account on 3 April 2024.

[14] The LPC further confirmed that the firm Mpshe Koena Attorneys Inc closed on 6 January 2024. The correspondence between the appellant's attorney and the LPC forms the basis of the application to admit further evidence on appeal. The

threshold to be applied when an appellant seeks to lead further evidence on appeal is well-established.[1]

[15] An appellant seeking to have further evidence admitted on appeal must establish that there is a sufficiently reasonable explanation why the new evidence was not led in the court a *quo*, there should be a *prima facie* likelihood of the truth of the new evidence, and the evidence should be materially relevant to the outcome of the case. In the present instance, the evidence of Mpshe Koena's closure came to light only after the appellants' new attorneys of record attempted service of process post the delivery of the judgment under appeal. The attorneys obtained evidence regarding the closure of Koena Mpshe from the LPC, the custodian of records concerning the status of legal practitioners. Finally, the appellants submit that the evidence of representation by an unauthorized legal representative rendered the review proceedings a nullity.

[16] The notice of motion in the review application, which was filed on 17 August 2021 by Koena Mpheshe Attorneys. The answering affidavit was filed on 5 May 2022, the replying affidavit on 18 May 2022. All processes were thus filed during the period in which Koena Mpheshe Attorneys existed. The review application was opposed. The judgment indicates that the respondent was represented by Adv M Mafu, instructed by Koena Mphese Attorneys.

[17] When pressed during the appeal hearing, counsel for the appellants conceded that the evidence sought to be introduced did not establish more than that the firm of attorneys on record at the time the review application was argued had closed its doors. This is an insufficient basis to conclude that the appellants were represented at the hearing without the necessary authority; in particular, the appellants have failed to establish that Adv Mafu was not properly briefed to argue the review. It does not necessarily follow from Koena Mpshe's cessation of practice in January 2024 that the review proceedings are a nullity. The evidence

[1] *S v De Jager* 1965 (2) SA 612 (S); *Moor and Another v Tongaat-Hulett Pension Fund and Others* 2019 (3) SA 456 (SCA) at paras 35 and 36; *Rail Commuters Action Group & Others v Transnet Limited t/a Metrorail and Others* 2005 (2) SA 359 (CC).

proffered by the appellant is not such, as stated by the Constitutional Court in *Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others*[2] that if adduced '*would be practically conclusive, for if not, it would leave the issue in doubt, and the matter would still lack finality*'. There is thus no merit in the application to adduce further evidence on appeal.

[18] Turning then to the merits of the appeal, it is not in dispute that on 31 December 2020, the appellant's 12-month fixed-term contracts expired by effluxion of time. The commissioner's award was based on her reading of *King Sabata Dalindyebo Municipality v Commission for Conciliation, Mediation and Arbitration and Others*.[3] That judgment dealt with section 186(1)(b)(i) of the LRA and defined a 'dismissal' as a failure by an employer to renew a fixed-term contract in the face of a reasonable expectation of renewal on the same or similar terms, or a renewal of a contract in those circumstances on less favourable terms. In essence, the commissioner found that the appellants had established a reasonable expectation of renewal of their contracts and concluded that they had thereby established their continued employment relationship with the first respondent. On this basis, the commissioner found that the appellants had been suspended and that, in the absence of a cogent reason for the suspension, it was unfair.

[19] The Labour Court cannot be faulted for finding, on the material and submissions before it, that the commissioner had committed an error in law by conflating the inquiry into the existence of a dismissal (a necessary point of departure in any claim of unfair dismissal) with an inquiry into the existence of an employment relationship for the purposes of determining the fairness of any suspension from employment. Put another way, the Labour Court, on the evidence before it, assessed the matter through the prism of the fixed-term contract concluded for the calendar year 2020 and concluded that the commissioner had erred because the award conflated the definition of a 'dismissal' (which includes a failure to

[2] 2005 (2) SA 359 (CC) at para 41.
[3] (2005) 26 *ILJ* 474 (LC).

renew a fixed-term contract in the face of a reasonable expectation of renewal) with the actual existence of such a contract. For this reason, the Labour Court held that the commissioner's award should be set aside and substituted with an order that the first respondent had not unfairly suspended the appellants.

[20] In its ruling on the application for leave to appeal, the Labour Court noted that the thrust of the application was a submission that by operation of section 198B (5), read with section 198B (3), the appellants were deemed, at all material times, to be employed indefinitely. On this basis, the Court granted leave to appeal, noting that the point raised in the application involves a question of law.

[21] As the Labour Court noted, the appellants' reliance on section 198B was not foreshadowed by the referral to conciliation and arbitration, nor was a case made out for its application on review. The thrust of the appellants' submissions on appeal is that, by virtue of section 198B (5), the appellants' contracts were deemed in law to be of indefinite duration, and that, at the time of their suspension, their employment with the first respondent was continuous. It follows that the termination, by effluxion of time, of the fixed-term contracts they had concluded for the calendar year 2020 was not a bar to their claim that they had been unfairly suspended from their employment.

[22] Section 198B provides as follows:

> '198B. Fixed-term contracts with employees earning below earnings threshold.
>
> (1) For the purpose of this section, a 'fixed-term contract' means a contract of employment that terminates on—
>
> (a) the occurrence of a specified event;
>
> (b) the completion of a specified task or project; or
>
> (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).
>
> (2) This section does not apply to—
>
> (a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act;

(b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless—

(i) the employer conducts more than one business; or

(ii) the business was formed by the division or dissolution for any reason of an existing business; and

(c) an employee employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.

(3) An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if—

(a) the nature of the work for which the employee is employed is of a limited or definite duration; or

(b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.

(4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee—

(a) is replacing another employee who is temporarily absent from work;

(b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;

(c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;

(d) is employed to work exclusively on a specific project that has a limited or defined duration;

(e) is a non-citizen who has been granted a work permit for a defined period;

(f) is employed to perform seasonal work;

(g) is employed for the purpose of an official public works scheme or similar public job creation scheme;

(h) is employed in a position which is funded by an external source for a limited period; or

(i) has reached the normal or agreed retirement age applicable in the employer's business.

(5) Employment in terms of a fixed-term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration (own emphasis).

(6) An offer to employ an employee on a fixed-term contract or to renew or extend a fixed-term contract, must—

(a) be in writing; and

(b) state the reasons contemplated in subsection (3)(a) or (b).

(7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.

(8) (a) An employee employed in terms of a fixed-term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment…'

[22] On 1 March 2021, the earnings threshold referred to in section 198 was R211 596.30. It is common cause, from the terms of the main award and the variation issued by the commissioner, that the appellants' earnings were below that threshold. It was also common cause that the appellants had been engaged on fixed-term contracts for a protracted period, each concluded for a year at a time. There was no evidence adduced at the arbitration hearing to establish any justifiable reason for employing the appellants on fixed-term contracts limited to a period of 12 months at a time.

[23] In *Assign Services (Pty) Ltd v National Union of Metalworkers of SA and Others (Casual Workers Advice Office as Amicus Curiae)*,[4] the Constitutional Court held that, in relation to the application of section 198A of the LRA and the triangular relationship between the temporary employment service, the client, and the

[4] (2018) 39 *ILJ* 1911 (CC).

employee, the deeming provision in that section provides that placed employees are fully integrated into the workplace after a three-month period, and that the contractual relationship between the client and the placed employee does not arise from a negotiated agreement or the client's normal recruitment processes. Rather, the employee automatically becomes employed on the same terms and conditions as similar employees, with the same employment benefits, the same prospects of internal growth, and the same job security. The same principle applies in respect of the deeming provision contained in section 198B(5).

[24] There is nothing on record to suggest that section 198B was not applicable to the appellants, or that, in terms of section 198B(5), their fixed-term employment contracts were concluded or renewed in circumstances where they were employed by the first respondent for a period of longer than the permissible three months for any justifiable reason reflected by section 198B (3).

[25] It follows that, by December 2020, even if one were to account only for the last fixed-term contract on which the appellants were engaged, the appellants were deemed to be employed by the first respondent on an indefinite basis and automatically became so employed. The first respondent’s defence to the claim of unfair suspension, namely the alleged expiry of their fixed-term contracts on 31 December 2020, had no basis in law. It also follows that the Labour Court’s finding that the appellants’ employment contracts were not in existence at the time the first respondent purported to suspend them cannot stand. Although the commissioner’s reasoning can be called into question, her conclusion that the appellants had in fact been suspended and that their suspensions were unfair must stand. Regarding the remedy granted, nothing was pleaded before the Labour Court to suggest that the remedy of compensation was so unreasonable that interference was warranted. There is similarly nothing before us to suggest otherwise.

[26] In these circumstances, the Labour Court's order stands to be set aside and replaced with an order dismissing the application to review and set aside the commissioner's award.

Order

1. The appeal is upheld.

2. The order of the Labour Court is set aside and substituted by the following:

   *'The application to review and set aside the respondent's award is dismissed.'*

3. There is no order as to costs.

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A van Niekerk

Judge of the Labour Appeal Court of South Africa

Djaje AJA and Masipa AJA concur.

APPEARANCES:

For the Appellants : Adv H Legoabe

Instructed by: Ditabe and Wagner Attorneys

For the First Respondent : No appearance