REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-022546

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

3 June 2026 [redacted]

DATE SIGNATURE

In the matter between:

AMUKELANI MILDAH NKUNA Applicant

and

ESKOM ROTEK INDUSTRIES SOC LTD Respondent

JUDGMENT

DJ Smit, AJ

Introduction

[1] Does a state-owned company have the power to override a finding in an internal disciplinary proceeding overturning the dismissal of its employee?

[2] The applicant (*Ms Nkuna*) seeks specific performance of her employment contract with the respondent (*Rotek*). Rotek is a state-owned company related to

Eskom Holdings SOC Ltd (*Eskom*). Rotek decided not to comply with the finding of an appeal chairperson which in turn overturned the decision of a disciplinary hearing dismissing Ms Nkuna.

[3] Ms Nkuna seeks a declarator on motion that her employment contract with Rotek remains extant; an order for payment of her contractual remuneration; and an order allowing her to resume her duties at Rotek.

[4] This application raises questions regarding the interface between enforcement of employment contracts and the statutory labour law regime which is based (insofar as it overlaps with this matter) on statutory standards regarding the fairness of dismissals. These questions were not dealt with in the parties' heads of argument. For this reason, I directed the parties to file supplementary heads of argument after the hearing, which they have done.[1] I am indebted to both counsel for helpful submissions.

Background facts

[5] Ms Nkuna was employed by Eskom from 2008 to 2018 and by Transnet Freight Rail SOC Ltd from 2018 to 2022.

[6] In December 2022, Rotek offer her a position as senior manager with effect from 1 January 2022. She accepted the offer.

[7] On 16 December 2022, Rotek sought to withdraw the offer. The withdrawal was based upon Ms Nkuna's previous employment by Eskom, during which she was

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[1] The directive reads as follows:
"Counsel is required to submit supplementary written submissions on the following issues:
1. The jurisdiction of the High Court to make the orders requested by the applicant in light of the remedies available under the Labour Relations Act.
2. Whether there is a suitable analogy for the disciplinary process as a matter of contract, for instance in the law governing consensual arbitrations or references to third-party referees and – if so – the implications thereof.
3. Whether a decision by the appeal chairperson in terms of the employer's Disciplinary Code is "binding" on the employer on a proper interpretation of the employment contract in this case; or whether the employer has a contractual power to reconsider the outcome of the disciplinary process (and if so, the source of the power to reconsider).
4. The court's discretion to order specific performance of an employment contract and the factors evident from the evidence before the court to be taken into account in exercising such discretion.
5. Whether there is sufficient evidence before the court to make an order sounding in money as part of an order of specific performance of the employment contract."

allegedly flagged for resigning to avoid a disciplinary hearing into alleged misconduct involving procurement irregularities during 2014 and 2015 at Duvha Power Station.

[8] After representations by Ms Nkuna, Rotek seemingly retracted the withdrawal and required her to report for duty on 27 January 2023. On 30 January 2023, however, Rotek placed her on precautionary suspension.

[9] Rotek convened a disciplinary hearing and on 26 October 2023 Ms Nkuna was found guilty. The chairperson of the disciplinary hearing recommended her dismissal.

[10] Ms Nkuna appealed to an appeal chairperson, as she was entitled to do under Rotek's Disciplinary Code and Procedure (*Code*). On 8 January 2024, the appeal chairperson set aside the ruling on her guilt and the recommendation that she be dismissed. The appeal chairperson ordered that: "*The effect of the outcome of the appeal is that [Ms Nkuna] has never been dismissed as the finding, and therefore also the sanction, has been set aside on appeal.*"

[11] The appeal outcome was based upon an excessively long delay in disciplining Ms Nkuna and the merits were not dealt with.

[12] On 9 January 2024, Rotek indicated to Ms Nkuna that the appeal outcome is reviewable and unfair to Rotek; and that it would "*review or amend*" the appeal outcome and retain the summary dismissal. It gave Ms Nkuna an opportunity to make representations on those issues.

[13] Ms Nkuna disputed Rotek's right to disregard the appeal outcome, but Rotek notified her on 18 January 2024 that it had elected to retain the sanction of summary dismissal.

Discussion

[14] Ms Nkuna brings her case to the High Court, on motion and in contract.

[15] Rotek takes issue with this, arguing that there are disputes of fact regarding whether Ms Nkuna committed dismissible misconduct; whether the appeal

outcome is binding on Rotek; and whether Ms Nkuna has shown that she has suffered "*damages*".

[16] Rotek also argues that the disciplinary chairperson dismissed Ms Nkuna; and although that was set aside by the appeal outcome, the notification on 18 January 2024 served as a "*second dismissal*". Because the dispute is concerned with dismissal, so it is argued, the exclusive jurisdiction of the Labour Court regarding unfair dismissals is engaged and the High Court does not have jurisdiction.

[17] Rotek is mistaken in each of these submissions. In what follows I explain why.

[18] Ms Nkuna has pleaded her case in contract. Her case is, in short, that:

a. Her acceptance of Rotek's offer created an employment contract.

b. The employment contract incorporates the Code. The Code is a contractual dispute resolution mechanism.

c. The Code states that the decision of the appeal chairperson shall be "*final*".

d. "*Final*" should be interpreted as "*binding*" on the employer and therefore Rotek had no right – located in the employment contract or otherwise – to deviate from the appeal outcome. (This is where she and Rotek part ways.)

e. Thus, Rotek's notification to her that it had elected to retain the sanction of dismissal (imposed by the chairperson of the disciplinary hearing but set aside on appeal) constituted anticipatory breach of contract in that Rotek indicated that it would not honour the employment contract.

f. Ms Nkuna therefore claimed the amount of remuneration stipulated in her employment contract from 15 November 2023 (the date of the "first dismissal").

[19] In my view, there is no relevant dispute of fact in this matter. Ms Nkuna's case is not based on an assertion that she has not committed misconduct at Eskom (although she denies it); it is based on an assertion that Rotek was not entitled to second-guess the appeal outcome based upon its own views of the merits of her dismissal. The only relevant dispute is whether the appeal outcome was

contractually binding on Rotek. This is an issue of law, based upon the interpretation of the employment contract.

The High Court's jurisdiction to enforce employment contracts

[20] Historically, the law of contract governed the employment relationship. Over the years, and particularly after section 23 of the Constitution enshrined the right to fair labour practices, many statutory protections were added, including – most prominently, and most relevant to the current dispute – the right not to be unfairly dismissed.[2]

[21] Although in practice the statutory protections tend to overshadow the contractual bedrock of the employment relationship, it has never disappeared. There can be no suggestion that the constitutional dispensation deprived employees of the common-law right to enforce the terms of a contract of employment.[3] Employees have an election whether to enforce their statutory right not to be unfairly dismissed or their common-law right to specific performance of a contract.[4]

[22] The Labour Relations Act, 66 of 1995 did not destroy causes of action based on contract, over which the High Court retains jurisdiction. Jurisdiction is determined on the basis of the pleadings; not the substantive merits of the case.[5]

[23] Thus, Ms Nkuna was entitled to bring an application based on the assertion that Rotek breached their employment contract in the High Court.

The terms of the employment contract and whether Rotek breached it

[24] The parties were agreed that the employment contract incorporated the Code and that it provided that the decision of the appeal chairperson shall be *"final"*. The question against that background is whether the decision is binding on the

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[2] Section 185 of the Labour Relations Act, 66 of 1995.
[3] *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) paras 15-16.
[4] *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) paras 13-18 and 26. See also *Lewarne v Fochem International (Pty) Ltd* [2019] ZASCA 114 (18 September 2019) paras 6-10.
[5] *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) paras 73-75. While the Labour Appeal Court in *Passenger Rail Agency of South Africa v Ngoye* 2025 (2) SA 556 (LAC) esp. para 25 found these conclusions less appealing than the minority position set out in *Wolfaardt* (*supra*), it accepted that it was bound by the Constitutional Court's judgment in *Baloyi v Public Protector* 2022 (3) SA 321 (CC), which affirmed the conventional approach that employees have a choice between pursuing a purely contractual claim and an unfairness claim.

employer so that the employer may not second-guess it, in the absence of another contractual provision creating such a power.

[25] On a proper interpretation of the Code, the decision of the appeal chairperson is binding on the employer (and the employee). The employer (Rotek) has no right to second-guess it and to use self-help to disregard it. Such self-help constitutes a breach of the employment contract. The only option for an employer in the position of Rotek is to seek a review of the decision of the appeal chairperson, if a review lies against it (which is an issue not necessary to explore here).

[26] These conclusions follow from a textual, contextual and purposive interpretation of the employment contract.[6]

[27] If one attends to the text first, the word "*final*" connotes that the decision of the appeal chairperson is the end of the disciplinary process. There is no recourse to another mechanism for decision on the employer's disciplinary action. Internal appeals have been exhausted. Rotek's attempt to interpose another mechanism through which it could subvert the appeal chairperson's finding has no basis in the text of the employment contract. The absence of a procedure for setting aside the appeal chairperson's finding means that it is binding.

[28] Attending to purpose next, it seems strange and counterintuitive for an employer to create an elaborate disciplinary mechanism but then to tacitly retain a right to disregard it, should it be discontent with its outcome. The purpose of the disciplinary mechanism is to yield a final outcome through bodies with some institutional independence to ensure their credibility. The tacit retention of a discretion to disregard the outcome of the elaborate process would result in an employment contract skewed entirely in favour of the employer: heads the employer wins, tails, the employee loses.[7]

[29] Finally, the context: It would have been known to the drafters of Rotek's disciplinary code that the normal position in South African labour law is that,

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[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 endorsed by the Constitutional Court in *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* 2020 (2) SA 325 (CC) para 41.

[7] The Labour Appeal Court reached the same conclusion in *National Electronic Media Institute of SA v Buthelezi* [2004] ZALAC 7 (9 July 2004) para 12.

absent a different provision in an employer's code or a collective bargaining agreement, an employer cannot overrule the decision of a disciplinary mechanism created by such code.[8]

[30] The decision in *Chatrooghoon*[9] is particularly salient. In that matter, the Labour Appeal Court remarked regarding the collective bargaining agreement governing employees of the South African Revenue Service that:

> *"The wording of the collective agreement does not only make it abundantly clear that the chairperson's pronouncement on penalty is a final sanction, but, in my view, it also leaves no room for interpretation in favour of the parties having intended to provide in the collective agreement a term granting a right to SARS to substitute a sanction imposed by its chairperson for its own. Whilst it is trite that the duty of trust and confidence on the part of an employee is a term implied by law in an employment contract, I do not think that such implied term extends to include the right of an employer to substitute its own sanction for that of the chairperson, particularly in a situation such as the present where the parties in a collective agreement elected expressly to confer on the disciplinary chairperson the sole power to impose the final sanction."*[10]

[31] Thus, the Code contemplated the decision of the appeal chairperson to bind both Rotek and Ms Nkuna. Rotek's attempt to reverse that decision disregards the express terms of the employment contract and thus breaches it. In addition to this breach, Rotek also indicated that Ms Nkuna remains dismissed and should not come to work. This is a form of anticipatory breach of contract which is often called repudiation in South African law. In addition, Rotek did not allow Ms Nkuna to return to work and has not paid her a salary. These are all breaches of contract.

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[8] See *County Fair Foods (Pty) Limited v Commissioner for Conciliation Mediation and Arbitration* [2002] ZALAC 31 (11 December 2002) para 21; *South African Revenue Services v Commission for Conciliation Mediation and Arbitration* [2013] ZALAC 26 (17 October 2013) paras 24-30;
[9] *South African Revenue Services v Commission for Conciliation Mediation and Arbitration* [2013] ZALAC 26 (17 October 2013) (*Chatrooghoon*); SARS v CCMA (Kruger) [2015] ZALAC 62 (8 December 2015) paras 41-42 and 48.
[10] *Chatrooghoon* para 28.

[32] Rotek attempted to escape these conclusions by arguing that its notification that it would not implement the appeal outcome is a "*second dismissal*", thereby implying that it (lawfully) terminated the employment contract and that Ms Nkuna can only contest the fairness of the termination. The logical extension of this argument is that Ms Nkuna has no contractual claim (because the contract has been lawfully terminated); only a statutory claim for unfair dismissal.

[33] These submissions fail because Ms Nkuna's "*second dismissal*" did not constitute a termination of her employment contract, applying its terms, but a breach (and repudiation) of those contractual terms – for the reasons I set out above.[11] Ms Nkuna therefore does not have to rely on the statutory protections created by the Labour Relations Act, because her "*second dismissal*" failed at a more basic level, i.e. the level of contract.

Ms Nkuna's election and remedy

[34] It is trite that the anticipatory breach (i.e. repudiation) of a contract avails the innocent party of an election to cancel or enforce the contract.[12]

[35] In this case, Ms Nkuna has chosen to enforce the contract and to claim specific performance. An employee may claim his or her remuneration from an employer based upon specific performance.[13]

[36] The grant of an order for specific performance is an exercise of a discretion, which must be exercised judicially upon all the relevant facts of the case.[14] Although it may in certain circumstances be inadvisable to make an order for specific performance in the context of an employment relationship in which the trust relationship has irretrievably broken down,[15] the matter remains one of judicial discretion.[16]

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[11] *National Electronic Media Institute of SA v Buthelezi* [2004] ZALAC 7 (9 July 2004) para 12.
[12] *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) esp. at 653E-H.
[13] *National Electronic Media Institute of SA v Buthelezi* [2004] ZALAC 7 (9 July 2004) para 9; *Lewarne v Fochem International (Pty) Ltd* [2019] ZASCA 114 (18 September 2019) paras 8-10.
[14] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781H-782A.
[15] Compare *Schierhout v Minister of Justice* 1926 AD 99 at 107.
[16] *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T) at 155H-158E.

[37] Perhaps because it did not appreciate Ms Nkuna's cause of action, Rotek did not adduce, or attempt to adduce, any evidence that bears on the exercise of the discretion to grant specific performance (or not). Instead, Rotek relied on the judgment of the Labour Appeal Court in *Ngoye*[17] In that matter, the Labour Appeal Court found that it would not exercise its discretion in favour of the employees there concerned, because they were "*on the upper echelons of a business enterprise*" and "*these employees on the level of management need to involve themselves in helping with the running of the enterprise, they need to conduct the business in cooperation and consultation with the owners or those who are authorised to control the affairs of the enterprise*".[18] Given this close interaction, specific performance was not appropriate.

[38] Rotek's difficulty in this case is that it has not presented evidence on Ms Nkuna's role in its business. There was no evidence that she is someone in "*the upper echelons*" who run the enterprise. There was also no evidence of her interaction with the top management of Rotek in her post.

[39] What weighs strongly in favour of specific performance is the unconscionable self-help of which Rotek attempted to avail itself by unilaterally countermanding the appeal chairperson's decision. In those circumstances, there seems to be no equitable reason to exercise the discretion in Rotek's favour.

[40] This leaves the issue of Ms Nkuna's claim for remuneration, from the time when she was first dismissed and Rotek first failed to pay her (15 November 2023) to the present; and her claim for an order that she paid contractual remuneration for as long as she remains employed. Rotek's case was Ms Nkuna failed to prove her past damages and that she had mitigated her loss, and also failed to prove a right for "*prospective loss*".

[41] These submissions misconceive Ms Nkuna's claim. She claims specific performance of her employment contract (in the form of a liquidated amount with reference to her employment contract); not damages for breach of contract.

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[17] *Passenger Rail Agency of SA v Ngoye* 2025 (2) SA 556 (LAC) paras 46-51.
[18] Id para 51.

Insofar as she claims future remuneration, it is likewise for an order of specific performance of Rotek's obligation to pay her remuneration.

[42] Rotek has not placed the amounts that Ms Nkuna was due to earn as remuneration in dispute.

[43] Accordingly, I intend to make an order in terms of the draft order handed up at the hearing by Ms Nkuna's counsel and which refined the relief sought in certain common-sense ways. I have introduced further common-sense changes. Rotek raised no specific opposition to the draft order handed up at the hearing.

[44] In regard to the costs of counsel, counsel for Ms Nkuna asked for an order on scale C while counsel for Rotek requested an order on scale B. In my view, the matter was of average complexity. Costs follow the event and scale B applies.

Order

[45] I make the following order:

a. It is declared that the employment contract concluded between the applicant and the respondent on 5 December 2022 remains extant.

b. The respondent is ordered to pay the applicant remuneration from 15 November 2023 to the date of judgement calculated at R1 882 419.00 per annum minus statutory and contractually-specified deductions.

c. The respondent is ordered to pay the applicant's future remuneration as and when it falls due, for a long as she remains employed by the respondent.

d. The respondent is ordered to allow the applicant to resume her duties specified in the employment contract.

e. The respondent is ordered to pay interest on the amounts aforementioned at the prescribed rate *a tempore morae*.

f. The respondent is ordered to pay the costs of this application including the costs of counsel on Scale B.

DJ SMIT
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 5 March 2026
Date of judgment: 3 June 2026

For the Applicant:	HM Viljoen instructed by Ramsay Webber Inc.
For the Respondent:	N Mahlangu instructed by Motsoeneng Bill Attorneys Inc.