



- (1) Reportable: No
- (2) Of interest to other Judges: Yes/No
- (3) Revised

Signature

01 September 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. J875/22

In the matter between:

NICOLAAS FRANCOIS JONKER LOURENS

Applicant

and

SUNRANCH SOLAR (PTY) LTD

Respondent

Heard: 27 August 2026

Delivered: 1 September 2026 (By uploading on CaseLines and/or circulation to the parties' legal representatives by email)

Employee claimed payment of outstanding salary, accrued leave pay and a project-based performance bonus, and sought an order declaring a contractual buyout clause void *ab initio* - Employer relied on the buyout clause to set off an agreed debt of R90 000.00 against salary and leave pay and instituted a counterclaim for the balance - Employee failed to establish that the clause contravened s 34 of the BCEA, the Conventional Penalties Act 15 of 1962, or public policy - Buyout clause held valid and enforceable - Employer entitled to effect set-off in terms of the parties' written agreement

Claim for performance bonus dismissed for failure to plead and prove compliance with contractual preconditions, including prior agreement on project-specific targets,

outcomes and bonus percentage - Application dismissed - Counterclaim upheld for balance remaining after set-off - Costs followed the result.

JUDGMENT

MAKHURA, J

- [1] The applicant seeks an order for payment of his outstanding May 2022 salary, accumulated leave days as of 31 May 2022, and project-based performance bonus. He also seeks a declaratory order that clause 23.5 of his employment contract, as amended, be declared void ab initio, and the costs of the application.
- [2] The respondent acknowledges that it did not pay the applicant's salary for May 2022 or his accrued leave pay. It contends, however, that these amounts were neither due nor payable, as it was entitled, in terms of clause 23.5 of the employment contract, to set them off against an alleged indebtedness of R90 000.00 owed by the applicant. The respondent further disputes that there is any basis for declaring clause 23.5 invalid and has, in turn, instituted a counterapplication for payment of R90 000.00 pursuant to that clause. The respondent has abandoned its separate claim for damages in the amount of R3 109.64 arising from the alleged destruction of a drone
- [3] On 19 April 2021, the parties concluded a written employment contract in terms of which the applicant was appointed as a Project Engineer with effect from 1 July 2021. The contract provided for a gross monthly salary of R45 000.00, together with contributions to the Workmen's Compensation Fund and the Unemployment Insurance Fund. It is common cause that the applicant's salary was paid on the 28th day of each month.

- [4] Clause 4 of the employment contract obliged the respondent to provide the applicant with on-the-job training and opportunities to enhance his skills through attendance of designated courses and practical exposure at Thobile Engineering as part of the respondent's solar projects. The clause further required the applicant to identify any specific training needs that would improve his ability to perform his duties, which training, subject to the respondent's approval, would be paid for by the respondent.
- [5] Clause 23 governs the termination of employment. In terms of clause 23.1, either party may terminate the contract by giving one calendar month's written notice, provided that such notice is delivered no later than the last day of a month, with the termination taking effect at the end of the ensuing month. Further, that:
- 'Any Notice of Termination submitted by the Employee within 12 months from the commencement of this Contract ... will be subject to the Buy-Out Clause in 23.5.'
- [6] Clause 23.5 provides:
- 'Should the Employee wish to terminate this contract within 12 months from the commencement of this Contract (the date of the last Party to this Contract) [he] will be required to Buy Out of this Contract by providing to the Company an amount of R90 000.00. The Employee agrees that the Company may offset the Buy Out amount from salaries and other amounts owed to the Employee unless otherwise agreed between the Parties.'
- [7] The parties subsequently agreed to amend clause 23.5 by extending its duration from 12 months to 36 months. As a result, the buyout clause remained operative for a period of 36 months from the commencement date of the employment contract.
- [8] On 29 April 2022, the applicant tendered his resignation, giving one calendar month's notice. His employment consequently terminated on 31 May 2022, 11 months from the commencement of the contract.

- [9] As at 30 April 2022, the applicant's total monthly remuneration package amounted to R54 177.12, comprising a basic salary of R45 000.00, a vehicle allowance of R9 000.00, and a UIF benefit of R177.12. The applicant maintains that this amount was due and payable to him on 28 May 2022, being the date of payment of his salary on the basis that he had rendered his services. He further contends that the respondent has failed or refused to make payment thereof and accordingly seeks recovery of that amount in these proceedings. In addition, the applicant claims payment in respect of 14 accrued annual leave days, which is calculated by both parties at R35 009.45. He contends that the respondent refused to make payment on the basis that he is allegedly indebted to it in terms of what he characterises as an unlawful and unenforceable buyout clause.
- [10] The respondent disputes liability for the applicant's claims relating to his May 2022 salary and accrued leave pay. It relies on clause 23.5 of the employment contract, under which it alleges the applicant became indebted to it in the amount of R90 000.00. The respondent contends that it was entitled to set off this debt against the applicant's remuneration and therefore retained the sum of R54 177.12 due for May 2022 plus the R35 009.45 accrued leave pay. It has also lodged a counterclaim for the balance allegedly remaining owing after such set-off.
- [11] The applicant further seeks an order declaring clause 23.5 of the employment contract void *ab initio* and consequently unenforceable. He advances three grounds in support of that relief. It is convenient to determine that issue before considering the applicant's claims for payment of his remuneration and accrued leave pay, as the respondent's entitlement to withhold those amounts by way of set-off is dependent upon the validity and enforceability of the clause.
- [12] First, the applicant contends that clause 23.5 contravenes section 34(1) of the Basic Conditions of Employment Act¹ (BCEA). Section 34(1) provides that:

¹ Act 75 of 1997.

‘(1) An employer may not make any deduction from an employee's remuneration unless –

(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or

(b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.’ (Own emphasis)

[13] The applicant expressly agreed that, in the event of his resignation within 36 months of commencing employment, the respondent would be entitled to recover the buyout amount of R90 000.00 and to set off that indebtedness against amounts owing to him. He has not pleaded any factual or legal basis upon which this express written agreement is said to contravene section 34(1)(a) of the BCEA, which permits the conduct of the parties in this case. In the absence of any challenge to the validity of the consent embodied in clause 23.5, the respondent's conduct in deducting or setting off the applicant's remuneration against the debt allegedly owed by him does not offend the provisions of the BCEA.

[14] The applicant's second ground is that clause 23.5 constitutes a penalty clause that is unenforceable because it allegedly contravenes the provisions of the Conventional Penalties Act² (CP Act). The existence and terms of the agreement are common cause. It is equally undisputed that the applicant resigned within the period contemplated in clause 23.5, thereby triggering the operation of the clause. Furthermore, the respondent does not seek to justify its claim on the basis that it suffered damages, nor does it advance a damages claim in its counterclaim. The parties are ad idem that clause 23.5 is a penalty stipulation. In my view, that characterisation is correct.

[15] However, it does not follow, as the applicant appears to assume, that the clause is unenforceable. The very purpose of the CP Act is not to prohibit penalty stipulations but to regulate and recognise them. A creditor is entitled to claim a

² Act 15 of 1962.

contractual penalty upon breach, subject to the court's statutory power to reduce the penalty where it is out of proportion to the prejudice suffered. The CP Act therefore assumes the validity and enforceability of penalty clauses and provides a mechanism for judicial intervention only where the circumstances justify a reduction.

- [16] The applicant's reliance on the CP Act is accordingly misplaced. He does not seek a reduction of the penalty in terms of section 3 of the Act, nor does he place any evidence before the Court concerning the prejudice suffered by the respondent or the extent to which the stipulated amount is disproportionate thereto. Instead, from the scant allegations in his affidavit, he assumes that the clause is unenforceable because it constitutes a penalty. That contention is contrary to the scheme of the Act. The mere fact that clause 23.5 is a penalty provision does not render it invalid or unenforceable. As was observed by the full bench in *Braddson Mc Cleland (Pty) Ltd t/a Network Associates v Le Roux*³ (*Le Roux*):

'[8] The purpose of a penalty clause is to enable the penalty creditor to claim the penalty without the need to prove that he has suffered damage, or what the extent of his damage is, particularly in circumstances where proof of the extent of damage may be difficult. It is intended to deter the penalty debtor from breaching the contract and is said to operate, *in terrorem*. A penalty stipulation arising from a contractual obligation is sanctioned by the Act and is enforceable in law. Once it is established that the penalty debtor has breached the undertaking, the penalty creditor is entitled to the full amount thereof, unless it is reduced by a court, in terms of s 3 of the Conventional Penalties Act.'

- [17] As stated above, the difficulty with the applicant's case is that he does not plead, with any degree of particularity, the respects in which clause 23.5 contravenes the CP Act. On this basis alone, this ground must fail. Insofar as he seeks to rely on section 3 of the CP Act, *Le Roux* held:

³ [2024] ZAECMKHC 49 (7 May 2024).

[9] The section confers on the court an equitable jurisdiction, not merely in the form of a discretion, but in the form of a power coupled with a duty. Thus, the penalty debtor bears the onus of proving, not only that the penalty is disproportionate to the prejudice suffered by the penalty creditor, but the extent to which it is disproportionate. Where the penalty debtor has established a prima facie case in respect of these requirements there is a burden upon the penalty creditor to rebut the case made. This would be particularly important where the creditor relies on prejudice other than financial prejudice. If, at the conclusion of the evidence, the court is left in doubt as to whether or not the penalty is out of proportion to the prejudice, then the penalty falls to be enforced as agreed.⁹ Section 3 of the Act enjoins the court considering the prejudice to the penalty creditor to have regard not only to his proprietary interests, but to every other rightful interest that would be affected by the act or omission in question.'

[18] The founding affidavit is devoid of any factual allegations that would enable this Court to embark upon the enquiry contemplated in section 3 of the CP Act. The Court cannot speculate as to the nature or extent of the respondent's investment in the applicant, if any, nor can it assume what benefits the applicant may have derived from the agreement relative to the duration of his employment. The onus rested on the applicant to place sufficient facts before the Court to permit an assessment of whether the stipulated penalty was disproportionate to the prejudice suffered by the respondent. Having failed to do so, the applicant has not laid a proper foundation for relief under section 3. The reliance on the CP Act is therefore without merit.

[19] The applicant's third ground of attack is that clause 23.5 is *contra bonos mores* and consequently unenforceable because it was included in the contract solely to prejudice him. This challenge fares no better. In *Barkhuizen v Napier*⁴, the Constitutional Court held that:

'What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of

⁴ 2007 (5) SA 323 (CC).

Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms.⁵

[20] The Court continued:

‘Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled “is the general sense of justice of the community, the boni mores, manifested in public opinion.”’⁶

[21] The critical issue therefore is whether the applicant was induced or compelled to conclude the employment contract on terms that unjustifiably infringed his constitutional rights, particularly his rights to dignity and equality, such that considerations of fairness, justice and reasonableness require the Court to decline enforcement of clause 23.5 on public policy grounds.

[22] The difficulty for the applicant, as it was the case with the other grounds, is that his founding affidavit contains no factual allegations capable of sustaining such an enquiry. He does not allege any inequality of bargaining power, coercion, undue influence, exploitation, or any other circumstance demonstrating that the agreement was concluded in a manner inconsistent with constitutional values.

⁵ Ibid at paras 29 - 30.

⁶ Ibid at para 73.

Nor does he identify the specific constitutional rights allegedly infringed by the clause or explain how its enforcement would be contrary to public policy.

[23] Accordingly, the applicant's challenge to the validity of clause 23.5 cannot succeed. The applicant has failed to establish that the clause is void *ab initio* or otherwise unenforceable. It follows that clause 23.5 remained valid and binding on the parties, and that the respondent was entitled to invoke and enforce it.

[24] In terms of the clause, the respondent was entitled to set off the applicant's indebtedness in the amount of R90 000.00 against the amounts otherwise due to him. Those amounts comprise the applicant's May 2022 remuneration of R54 177.12 and accrued leave pay of R35 009.45, totalling R89 186.57. The respondent was accordingly entitled to set off that amount in partial satisfaction of the R90 000.00 debt.

[25] For substantially the same reasons, and on the basis advanced in the counterapplication, the respondent's counterapplication must succeed. The applicant became liable to the respondent in the amount of R90 000.00 in terms of clause 23.5. After setting off the sum of R89 186.57 against that indebtedness, a balance of R813.43 remained owing to the respondent. The respondent is therefore entitled to judgment in that amount.

[26] The applicant's remaining claim concerns an alleged entitlement to a project-based performance bonus. He pleads this claim as follows:

'The Respondent has also failed to pay the Applicant a project-based performance bonus as per clause 3.4 of the employment despite the Applicant successfully completing the projects and achieving the project specific targets and outcomes as negotiated between the parties.'

[27] The total bonus due and payable, according to the applicant, is R67 500.00. Clause 3.4 of the employment contract provides that:

'A project based performance bonus of up to a maximum of 25% of the monthly gross remuneration will be payable on completion of each project, where the

employee has successfully achieved the project specific targets and outcomes negotiated between [him] and [the respondent] and set forth in writing prior to the start of each project.'

- [28] The respondent denies that the applicant is entitled to the project-based performance bonus. It contends that the applicant failed to satisfy the prerequisites set out in clause 3.4, in that he did not negotiate and agree upon the specific targets and outcomes of any project before undertaking it.
- [29] There is merit in this contention. The applicant has not pleaded compliance with the requirements of clause 3.4. In particular, he does not allege that the parties negotiated and agreed upon the project-specific targets, outcomes, or the percentage bonus payable in respect of any project undertaken by him.
- [30] The applicant's claim appears to be founded on the erroneous premise that clause 3.4 confers an automatic entitlement to a performance bonus of 25% upon completion of a project. The clause does no such thing. Rather, it contemplates a variable performance bonus, both the payment and quantum of which are dependent upon the prior negotiation and agreement of project-specific targets and outcomes. The clause further envisages agreement between the parties regarding the percentage bonus payable in respect of a particular project.
- [31] In the absence of any allegation, let alone evidence, that these preconditions were fulfilled, the applicant has failed to establish a contractual entitlement to the performance bonus claimed. The claim is therefore devoid of any merits and falls to be dismissed.
- [32] This matter concerns the enforcement of contractual rights and obligations and does not arise under the Labour Relations Act⁷. In contractual disputes, the general principle is that costs follow the result, subject of course to the Court's discretion. Having considered the matter, I find no basis for departing from that principle.

⁷ Act 66 of 1995, as amended.

[33] Although the respondent sought a costs order on the attorney and client scale, no exceptional circumstances or facts were advanced to justify the granting of such a punitive costs order. Accordingly, the applicant's application falls to be dismissed with costs, and the respondent's counterapplication is granted with costs. The costs are on a party and party scale.

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

Order

1. The applicant's application is dismissed.
2. The respondent's counterapplication succeeds.
3. The applicant is ordered to pay the respondent R813.43 within 10 days of this judgment.
4. The costs of the application and counterapplication are to be paid by the applicant on a party and party scale.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms M. van Jaarsveld
c/o De Beer Makoele Inc.

For the Respondent: Mr P.H. Kirstein

Instructed by:

Dreyer and Dreyer Attorneys

LABOUR COURT