

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

___ 30 October 2026
Signature Date

THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C21/2025

In the matter between:

INGA SAMANTHA DYANTI **Plaintiff**

and

NORTON ROSE FULBRIGHT SOUTH AFRICA INC **Defendant**

Delivered: 30 October 2026

Summary (Special pleas – unfair discrimination dispute not conciliated – court lacking jurisdiction – referral struck off the roll)

JUDGMENT

LAGRANGE, J

Introduction

LABOUR COURT

[1] The plaintiff, Ms I Dyantyi ('Dyantyi'), is an attorney formerly employed in the defendant law firm's commercial property department. She has instituted action against the firm. She seeks compensation and damages from Norton Rose Fulbright South Africa Inc (now Deneys) under section 50(2) of the Employment Equity Act 55 of 1998 ('the EEA'). Her claim, as set out in her amended statement of claim, is founded on alleged unfair discrimination in the form of racial harassment as contemplated in section 6(3) read with section 10 of the EEA.

[2] In response to the amended statement of claim, the firm delivered a statement of response raising two special pleas concerning the jurisdiction of this court. The primary special plea is that the discrimination dispute was never referred to conciliation, nor conciliated by the Commission for Conciliation, Mediation and Arbitration, the CCMA, as required by section 10 of the EEA, and that this court consequently lacks jurisdiction to adjudicate it. The alternative special plea asserts that if the dispute was conciliated, the referral to this court took place after the expiry of the statutory ninety-day period prescribed by section 10(7) of the EEA read with section 136(1)(b) of the Labour Relations Act 66 of 1995, the LRA, without an application for condonation, thereby depriving the court of jurisdiction.

[3] The parties agreed to separate the determination of the special pleas from the main action. The special pleas were argued before me on 29 April 2026.

Chronology of events

[4] The factual background and chronology of events giving rise to the determination of the special pleas are largely common cause, appearing from the pleadings and the annexures placed before the court.

[5] Dyantyi, an admitted attorney of approximately five years standing, alleges that from June 2023 onwards she was subjected to persistent workplace victimization, bullying, and racial harassment by a director of the firm. Without purporting to make any findings on the facts, it would appear from the pleadings that it was the director's re-allocation of her duties to work on a *pro bono* matter, leading her to complain about his conduct, which sparked off the chain

LABOUR COURT

of events. The director found her behaviour unacceptable and asked her to apologise, which she refused to. Thereafter Dyantyi lodged her formal grievance against the director complaining of his '*bullying, intimidation and abuse of power'.* In her view things deteriorated, as she described in an annexure attached to her CCMA dispute referral. The firm's alleged failure to resolve the situation, siding with the director in question and suspending her made the working relationship intolerable, causing her to resign with effect from 31 July 2024. She claimed that the termination of her service amounted to a constructive dismissal.

[6] On 13 August 2024, Dyantyi referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration in Cape Town. Under item 3 of the referral form (Form 7.11), where the referring party is required to identify the nature of the dispute, Dyantyi marked the box designated for dismissal and specifically indicated that it concerned a constructive dismissal under section 191 of the Labour Relations Act 66 of 1995. She did not mark the box specifically provided for an unfair discrimination dispute under section 10 of the Employment Equity Act 55 of 1998. Under item 5, Dyantyi inserted 31 July 2024 as the date on which the dispute arose, which coincided with the effective date of her resignation.

[7] Under item 11, '*Discrimination Matter*' the question posed on Form 7.11 states: *'If it is a discrimination dispute, have you attempted to resolve the dispute?'* An applicant must say what steps they took to resolve the dispute and, if none, to provide reasons for not taking such steps. Dyantyi answered affirmatively that she had taken steps to resolve the dispute and referred to an annexure, which she had attached to the referral form for the details.

[8] The annexure attached to the referral form was a narrative statement bearing the heading '*Constructive dismissal - facts of the dispute'.* In it she alleged she had lodged a grievance against the director for *'bullying, victimisation and abuse of power'.* She emphasised the director's alleged history of mistreating young women, particularly those who are black. She claimed the management of the firm was more concerned about the reputational damage to the firm than in aiding her. She alleged that the directors and HR department of the firm

LABOUR COURT

embarked on a '*dishonest and shameful campaign'* to discredit her and to protect the director in question by embarking on a biased investigation which she appears to allege exonerated the director of any racism. However, she was denied a copy of the report. She claims that when the firm became aware of her intention to resign on account of her mistreatment, she was placed on suspension pending an investigation, which lasted more than a month and was never concluded. She interpreted this as an attempt to intimidate and silence her and to sully her reputation.

[9] Dyantyi concluded that she suffered '*deep pain and distress'* at the hands of the firm all because she had '*dared to speak up in the face of racist mistreatment'.* She said that she left the firm because of the abuse she had been subjected to by the directors and Human Resource department. The firm's alleged vilification of her and failure to protect her made her continued employment intolerable.

[10] The conciliation proceedings convened on 11 September 2024 at the CCMA. The conciliation failed to resolve the dispute, and the presiding commissioner issued a certificate of outcome certifying that the dispute between the parties and describing the dispute as constructive dismissal under section 186(1) of the Labour Relations Act ('the LRA'), declared it was unresolved. Although it is relatively unimportant, the commissioner did not indicate on the certificate which forum should adjudicate the dispute.

[11] Following the inconclusive conciliation, on 3 October 2024, Dyantyi submitted a request for arbitration of her constructive dismissal dispute, using Form LRA 7.13.

[12] In addition to her referral of her unfair dismissal dispute to arbitration, on 3 February 2025, Dyantyi launched trial proceedings in this court under case number C21/2025. Dyantyi set out the legal basis of her claim in her original statement of case in the following terms:

> *'6. STATEMENT OF LEGAL ISSUES FROM THE FACTS*
>
> *6.1 the Applicant's claim is premised on the provisions of section 6 [3] read with section 10 [6] [a] of the Employment Equity Act 55 of 1998, as amended [' EEA']*

LABOUR COURT

6.2 The relevant provisions of section 6 [3] of the EEA provide as follows:

> *"Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection [1]".*

6.3. Accordingly, the Applicant alleges unfair discrimination in the form of harassment related to a listed ground of race against the Respondent.

6.4 The provisions of section 10 [6] [a] of the EEA provide the following:

> *"The dispute remains unresolved after conciliation -*
>
> *[a) any party to the dispute may refer it to the Labour Court for adjudication;*

6.5 At the very outset of the legal issues, it must be emphasized and clarified that the Applicant's unfair discrimination claim in the main is that she suffered racial harassment due to the Respondent's conduct in handling the Grievance, and the Respondent's subsequent conduct thereafter, until the applicant left the Respondent's employee on 31 July 2024.'

(*sic – emphasis added)*

[13] She sought compensation comprising a solatium and loss of income amounting to approximately R 5,7 million.

[14] An exception was raised by Norton Rose that the statement of claim was vague and embarrassing and lacked averments necessary to sustain a cause of action. The gist of the complaint was that Dyantyi had not laid a basis for holding the firm vicariously liable for the alleged harassment. She then amended her statement of case, in which she pleaded that the firm's liability arose by virtue of section 60 of the EEA, which makes provision, under certain circumstances, for an employer to be held liable for the discriminatory conduct of an employee.

[15] Incidentally, Dyantyi pleaded at paragraph 5.41 of the amended statement of claim that the CCMA had not yet scheduled her constructive dismissal dispute for arbitration due to an institutional backlog, and under those circumstances she opted to refer this matter to this court for adjudication.

[16] The firm filed its statement of response incorporating two special pleas in limine. The first special plea was that this court lacked authority to decide the discrimination dispute because it had never been referred to conciliation nor conciliated by the CCMA as required by section 10 of the Employment Equity

LABOUR COURT

Act. In the alternative, the second plea was that, even if the discrimination dispute had been conciliated, it had been referred to this court outside the statutory 90-day time limit without an accompanying application for condonation, depriving the court of jurisdiction.

[17] Dyantyi delivered a replication asserting that she had referred both an unfair constructive dismissal '*and a discrimination matter by completing or marking section 11 of the referral form.'* She referred also to the statement of facts annexed to her referral form in which she mentions the grievance she had lodged against '*bullying, victimisation and abuse of power'* by the director in question and that the firm had failed to protect her, vilified her, alienated her, tainting her reputation and making her continued employment intolerable. She pleaded that it was plain from the referral form that she had referred an unfair discrimination dispute, which unfair discrimination also resulted in her constructive dismissal.

[18] In relation to the firm's contention that her referral to this Court was also late, she argued that the 90-day period in s 191 (11)(a) of the LRA did not apply to a discrimination claim under the EEA.

[19] At a pretrial conference, the parties agreed that the special pleas would be separated from the main action and determined in limine.

[20] Further, on 10 April 2026, the parties concluded and signed a joint practice note regulating the determination of the special pleas. In that joint practice note, the parties recorded their agreement that neither party would call witnesses, that the special pleas would be argued solely with reference to what the pleadings state, and that the documents annexed to the pleadings were admitted being what they purported to be.

[21] The firm delivered its heads of argument on the special pleas on 16 April 2026. Dyantyi delivered her heads of argument on 23 April 2026. The special pleas subsequently served before this court for hearing and determination on 29 April 2026.

[22] Shortly before the hearing, in late April 2026, Dyantyi delivered her application for condonation in respect of the late referral to this court.

LABOUR COURT

The evidentiary material relevant to the special pleas

[23] When the special pleas were argued at the hearing, Dyantyi's attorney suggested that whether the discrimination dispute was conciliated ought properly to be determined by hearing oral evidence from those who attended the conciliation proceedings. However, on 10 April 2026, the parties had concluded a formal joint practice note regulating the determination of the special pleas. Paragraph 2 thereof records that:

> *'The parties have agreed that neither party will call witnesses and that the special pleas will be argued with reference to what the pleadings say and that the documents annexed to the pleadings are what they purport to be.'*

[24] It is trite law that a pretrial agreement constitutes a binding contract that circumscribes the issues and confines both the parties and the court, as authoritatively affirmed recently by the Labour Appeal Court in *Telkom SA SOC Ltd v Van Staden and others*[1] In *Fuel Retailers Association of SA v Motor Industry Bargaining Council* [2], the Labour Court stated the following in relation to an agreement between parties on the method of determining facts:

> *'[15] A pre-trial agreement is binding on the parties (Shoredits Construction (Pty) Ltd v Pienaar NO and others [1995] 4 BLLR 32 (LAC) and Checkers Shoprite (Pty) Ltd v Busane1 (1996) 17 ILJ (LAC)). It cannot be retracted unless there are proper, recognised grounds for doing so. Moreover, where the pre-trial agreement permits the ascertainment of certain facts in a particular manner, which it is agreed will form the basis of a court's judgment, the findings cannot be attacked, in this case, except on the basis of fraud. MIBCO does not allege fraud in this matter, merely that the results of KPMG's audit are unreliable. I am not permitted to reopen a factual issue which the parties have resolved.'*

(emphasis added)

---

[1] (2021) 42 *ILJ* 869 (LAC) at paragraphs 16 to 24. See also *Filta Matix (Pty) Ltd v Freudenberg and others* 1998 (1) SA 606 (SCA) at 613H-614D.

[2] [2001] 6 BLLR 605 (LC).

LABOUR COURT

[25] The grounds for resiling from an agreement of this nature are the same grounds on which a party may resile from any other contract, such as fraud, misrepresentation, or duress. No application to resile from the agreement recorded in the joint practice note has been made, nor are contractual vitiating factors present. The practice note, which was signed by both parties, embodied a clear agreement setting parameters on what they could rely on in arguing the special pleas. In the absence of an amendment to that agreement or an application to resile from it, this court must respect the parameters agreed on.

Merits of the special pleas

[26] In argument, Dyantyi suggested that the firm attracted the burden of proof by raising the jurisdictional objection. However, as held in *Malherbe v Britstown Municipality*[3], the overall legal onus of proving a court's jurisdiction to adjudicate a matter rests on Dyantyi as *dominus litis*. The firm's plea amounts to a denial of the jurisdictional facts upon which Dyantyi relies. Prior conciliation is an indispensable statutory jurisdictional fact under section 10 of the EEA, and the burden of showing compliance rests squarely on Dyantyi.

First Special Plea

[27] Section 10(2) of the EEA allows a party to an unfair discrimination dispute to refer it in writing to the CCMA, while section 10(5) requires the CCMA to try to resolve it through conciliation. Only where the dispute is still unresolved following conciliation does a party acquire the statutory right under section 10(6)(a) to refer it to this court for adjudication. The Constitutional Court in *National Union of Metalworkers of SA v Intervalve (Pty) Ltd*[4] held that conciliation is an indispensable statutory precondition to jurisdiction. Likewise, the Labour Appeal Court in *National Union of Metalworkers of South Africa obo Members v SAA Technical SOC Ltd*[5] similarly reiterated the universal requirement that all matters must pass through conciliation.

[3] 1949 (1) SA 281 (C) at pages 287 to 288

[4] 2015) 36 *ILJ* 363 (CC) at paragraphs 32 and 40

[5] [2024] 12 BLLR 1259 (LAC) at paragraph 22

LABOUR COURT

[28] In *September and others v CMI Business Enterprise CC*[6], the Constitutional Court laid down that the referral form and certificate of outcome constitute prima facie evidence of the nature of the dispute conciliated, but where the true dispute is alleged to be different, parties may adduce evidence to establish that fact. As pointed out above, in this instance, because the parties agreed to confine the evidence that could be relied on to the pleadings and documentation, that is the only evidence the court can consider.

[29] An examination of the CCMA referral form, Form LRA 7.11, and the certificate of outcome dated 11 September 2024 reveals that under item 3, Dyantyi marked the box for dismissal and identified the category as constructive dismissal under section 191 of the LRA, omitting to tick the box specifically provided for unfair discrimination under section 10 of the EEA. Under item 5, she recorded 31 July 2024, her resignation date, as the date the dispute arose. Under item 11, she circled affirmatively in response to whether she tried to resolve the dispute internally. She attached a document titled '*Constructive dismissal facts of the dispute*', in which she concluded (at paragraph 3.2) that the employer made her continued employment intolerable, leaving her no choice but to resign. The certificate of outcome issued on 11 September 2024 expressly describes the unresolved dispute as constructive dismissal under section 186(1) of the LRA.

[30] Dyantyi submits that circling affirmative under item 11 and recounting allegations of bullying and victimization shows an intention to refer an unfair discrimination dispute under section 6(3) of the EEA. That contention ignores section 10(1) of the EEA, which provides that a dispute under section 10 excludes a dispute about an unfair dismissal. The legislature created two distinct and separate statutory causes of action. In a constructive dismissal referral, averments of bullying or racial abuse are pleaded to show the factual foundation that continued employment had become intolerable under section 186(1)(e) of the LRA. They do not transform an unfair dismissal referral into an independent claim under Chapter II of the EEA.

[6] (2018) 39 *ILJ* 987 (CC) at paragraph 52

LABOUR COURT

[31] While the Constitutional Court in *September* cautioned against formalistic reliance on administrative forms and held that the crucial inquiry is whether the true dispute became plain during conciliation, the facts in September were entirely different. The applicants in that matter, were employed as general mechanical workers on mining projects across Africa. During their employment, they were subjected to systemic, egregious racial discrimination, verbal degradation (including severe racial slurs), physical assaults, and appalling living conditions while their white colleagues were accommodated in fully equipped guest houses. They resigned sending a message to the employer that they could no longer tolerate the abusive and racially discriminatory conditions.

[32] As unrepresented laypersons unfamiliar with legal terminology such as '*constructive dismissal*', the applicants completed CCMA referral form 7.11 themselves, ticking the box for '*unfair discrimination section 10 of the Employment Equity Act*', requested that the employer '*stop discriminating us*', and left Part B (applicable to dismissal disputes) uncompleted or cancelled. There was evidence that the conciliating commissioner extensively canvassed the issue of whether their dispute was really about a constructive dismissal, but when he issued the outcome certificate left the description of the dispute as one of *'unfair discrimination'* unchanged. They filed a statement of claim in the Labour Court under sections 187(1)(f) and 191 of the Labour Relations Act 66 of 1995 (LRA), claiming an automatically unfair constructive dismissal. Default judgment was handed down in their favour and the employer applied to rescind the judgment on the basis that the automatically unfair dismissal dispute had not been conciliated. The issue ended up before the LAC which rescinded the default judgment for that reason. The Constitutional Court upheld their appeal. In doing so, a critical factor in finding that the issue of constructive dismissal was actively canvassed in the conciliation was the uncontroverted evidence of the applicants (in their answering affidavit in the rescission application) to this effect, which the employer did not dispute in its replying affidavit. Accordingly,

LABOUR COURT

the applicant's version of what was conciliated had to be accepted by the court[7].

[33] On 13 September 2011, the applicants resigned by sending a text message to Mr Cronje, saying that they could no longer tolerate the abusive and racially discriminatory working conditions.

[34] As unrepresented laypersons unfamiliar with legal terminology such as *'constructive dismissal'*, the applicants completed CCMA referral form 7.11 on 19 September 2011. They ticked the box for 'unfair discrimination section 10 of the Employment Equity Act', asked that the employer 'stop discriminating us', and left Part B (applicable to dismissal disputes) uncompleted/cancelled.

[35] In this instance, no evidence whatsoever was placed before this court to establish that a standalone unfair discrimination dispute under the EEA was ever raised, discussed, or conciliated at the CCMA, quite apart from the *prima facie* evidence of the dispute described in the referral form and certificate of outcome remains. Moreover, the legal ability of a qualified attorney of five years' experience cannot be equated with the legal competency of the applicants in *September's* case. Even if Dyantyi was not a labour law specialist, identifying the appropriate statutory claim and pleading the correct cause of action, ought not to have been beyond her abilities to research.

[36] This matter has parallels with the case of *Tlou v University of Zululand* [8]. In *Tlou*, an employee referred an unfair discrimination dispute under section 10 of the EEA, but she later referred an automatically unfair dismissal claim under the LRA to this court. Following *September,* this court held, absent evidence showing that the dismissal dispute was conciliated, that this court lacked jurisdiction, *viz*:

> *'[22] Section 10(1) of the EEA provides that a dispute in terms of s 10 excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of chapter VIII of the LRA.*

[7] *September* at paragraph 77.

[8] (2018) 39 *ILJ* 1841 (LC)

LABOUR COURT

[23] The dispute the applicant referred in terms of s 10 of the EEA does not constitute an unfair dismissal dispute. This is so not only because it is specifically excluded in the EEA, but also because the disputes are materially different and provided for in separate legislation. An automatically unfair dismissal dispute is not merely a different label for the dispute the applicant referred for conciliation.

[24] The applicant did not refer any unfair dismissal dispute for conciliation.

[25] In view of September it is not only the referral form and certificate of outcome that are to be considered. I have to consider whether, at the conciliation, an automatically unfair dismissal dispute was identified as a dispute between the parties and whether it was conciliated.

[26] The applicant made no attempt to place any evidence before this court to show that her automatically unfair dismissal dispute in terms of s 187(1)(e) of the LRA was conciliated. The respondent's version is that the applicant's claim for automatically unfair dismissal was not canvassed at all during the conciliation proceedings.

[27] The respondent's version is supported by another fact, namely that the applicant's case is that she was dismissed on 10 March 2017 and that is also the date on the referral form she indicated as the date the dispute arose. The applicant referred her dispute to the CCMA on 26 May 2017, well within the six-month period provided for in s 10(2) of the EEA, but outside the 30-day period required by s 191(1) of the LRA.

[28] On the certificate of outcome issued on 26 June 2017, the presiding commissioner indicated that condonation was not applicable. This is indicative of the fact that an unfair dismissal dispute was not canvassed at conciliation, as such dispute was referred late and condonation had to be applied for and be granted, before a certificate of outcome could have been issued. Had it been discussed, the commissioner would have and should have drawn the applicant's attention to the fact that an application for condonation was required.

[29] The applicant did not apply for condonation for the late filing of her unfair dismissal dispute and absent an application for condonation and same being granted, the CCMA would not have been in a position to issue a certificate of outcome in respect of such dispute.

[30] In argument before court Mr Molea, for the applicant, conceded that the applicant's claim in terms of s 187(1)(e) of the LRA was not conciliated.

LABOUR COURT

> *[31] On the facts before me, I am not satisfied that the applicant's unfair dismissal dispute was conciliated at all hence this court lacks jurisdiction to adjudicate the applicant's automatically unfair dismissal dispute.'*

[37] Comparatively, in this matter the dispute Dyantyi referred to conciliation was an unfair constructive dismissal case under section 186 of the LRA. The case she referred to court subsequently was an unfair discrimination claim concerning alleged unfair discrimination up to the time of her resignation. In the CCMA referral she identified the date of her termination as the date the dispute arose. In her statement of case, she set out a litany of alleged acts of unfair discrimination beginning in June 2023 more than a year before the date of her termination on 31 July 2024.

[38] Dyantyi herself conceded in her amended statement of claim that she only opted to approach this court because of the delay in enrolling her constructive dismissal dispute by the CCMA. This supports an inference that the unfair discrimination claim referred to court was an attempt to pursue a different course of litigation, rather than reflecting a dispute she had always intended to pursue as a separate claim once the conciliation had failed to settle it.

[39] The firm's counsel, *Mr G Leslie SC,* made the point that the institution of an unfair discrimination claim under the EEA, with a potentially uncapped claim for compensation, presents an employer participating in conciliation with vastly different legal and financial considerations from a claim for compensation for an unfair dismissal which is limited to twelve months' remuneration. Conciliation cannot achieve its statutory purpose if an employer is deprived of the opportunity to conciliate the actual claim later instituted in court.

[40] On the evidence which the parties agreed could be considered in determining the special pleas, the unavoidable conclusion is that the unfair discrimination dispute referred to this court had not been contemplated as a distinct dispute referred simultaneously for conciliation together with the unfair constructive dismissal claim. Accordingly, it was not subject to a conciliation process, and the Labour Court lacks jurisdiction to entertain it, so the first special plea must be upheld.

LABOUR COURT

[41] The firm had raised the second special plea relating to the failure to apply for condonation for the late referral, strictly in the alternative. It falls away in light of the special plea being upheld. In any event, if the first plea had not been upheld, in view of a belated condonation application being filed, that would have ceased to be an issue as it would be replaced by the need to decide the condonation application.

[42] The firm sought costs including the employment of two counsel. Although the referral was jurisdictionally defective, there is a genuine dispute between the parties about whether unfair discrimination based on race occurred. It is appropriate, considering principles of law and fairness, that each party bear their own costs.

Order:

1. The firm first special plea in limine is upheld.
2. The referral is struck off the roll for lack of jurisdiction.
3. There is no order as to costs

_____

R Lagrange

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: --- Mr T Buthelezi of TS Buthelezi Inc

For the Respondent: --- Mr G Leslie SC, assisted by Mr S Khoza
Instructed by: --- Deneys

LABOUR COURT