THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 78/21

In the matter between:

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA	**First Appellant**
LEONARD RAMATLAKANE	**Second Appellant**
THINA VUYO MPYE	**Third Appellant**
DINKWANYANE MOHUBA	**Fourth Appellant**
SMANGA SETHENE	**Fifth Appellant**
XOLILE GEORGE	**Sixth Appellant**
NOSIZWE NONKWE-MACAMO	**Seventh Appellant**
MATODZI MUKHUBA	**Eighth Appellant**
THEMBA ZULU	**Ninth Appellant**
MS THANDEKA MABIJA	**Tenth Appellant**

and

ONICA MARTHA NGOYE	**First Respondent**
NKOSINATHI ALLEN KHENA	**Second Respondent**
TIRO HOLELE	**Third Respondent**

Heard: **23 May 2023**

Delivered: **26 March 2024**

Coram: **Waglay JP, Musi JA *et* Gqamana AJA**

JUDGMENT

WAGLAY, JP

[1] It has become commonplace, mostly for white-collar employees, to challenge their dismissals or disciplinary action initiated by their employers on the basis of unlawfulness and/or breach of contract, rather than to dispute the fairness of the employer's action.

[2] This matter is yet another example of this. Here, the employees allege that their dismissals were unlawful and refrain from disputing its fairness.

[3] Since the enactment of the Labour Relations Act[1] (LRA), there has been an ongoing debate about whether employees are compelled to utilise the LRA's recourse and remedies to resolve disputes that emanate from dismissals, or disciplinary action short of dismissal that could be classified as an unfair labour practice (ULP).[2] If there was such a compulsion this would divest employees of the right to refer such disputes on the basis of unlawfulness and/or breach of contract, instead, the employee would be required to utilise the dispute resolution procedures provided for in the LRA.

[4] The LRA seeks to resolve unfair dismissal and ULP disputes in an effective manner. Section 191 provides clear and concise directions on the procedure to be followed. Significantly, it is the CCMA and the Bargaining Councils (hereafter collectively referred to as the CCMA) that are afforded jurisdiction in the first instance to deal with such disputes.

[5] The Labour Court acquires its jurisdiction from section 157(1), which authorises it to deal with matters emanating from the LRA, except where the LRA provides otherwise.[3] One such instance is where jurisdiction is assigned to the CCMA. Furthermore, the Labour Court is afforded jurisdiction in terms of section 77(1) read with section 77(3) of the Basic Conditions of Employment Act[4] (BCEA). The last-mentioned sections authorise the Labour Court to hear and determine

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[1] Act 66 of 1995, as amended.
[2] See K Newaj, "*The Use of Contractual Recourse in Dismissal Disputes: Settling The Dilemma*" (2022) 43 ILJ 2189; D du Toit, "*Oil on Troubled Waters? The Slippery Interface Between the Contract of Employment and Statutory Labour Law*" (2008) 125 SALJ 95; and T Ngcukaitobi, "*Sidestepping the Commission for Conciliation, Mediation & Arbitration: Unfair Dismissal Disputes in the High Court*" (2004) 25 ILJ 1.
[3] Section 157(1) states that "*subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court*".
[4] Act 75 of 1997.

any matter concerning a contract of employment, irrespective of whether a basic condition of employment constitutes a term of the contract.[5]

[6] Against this backdrop, perhaps one should commence by setting out the principles that have been established by the judiciary regarding the jurisdiction of courts to address disputes of the character referred to above and which are present in the current matter.

[7] There have been a number of Supreme Court of Appeal (SCA) decisions, where it has been expressly stated that the dispute resolution procedure provided for in the LRA does not defeat an employee's right to rely on common law recourse. *Fedlife Assurance Ltd v Wolfaardt*[6] (*Fedlife*), *Makhanya v University of Zululand*[7] (*Makhanya*) and *SA Maritime Safety Authority v McKenzie*[8] (*SA Maritime Safety Authority*) are three such judgments. The common thread highlighted in these judgments is that the courts will have jurisdiction to hear a dismissal dispute as long as the employee pleads the claim as one relating to unlawfulness or breach of contract, and not to unfairness. The emphasis is therefore on the form that the claim takes.

[8] The majority in *Fedlife* stated:

> 'Whether a particular dispute falls within the terms of s 191 depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the 'fairness' of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about.'[9]

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[5] Section 77(1) Of the BCEA states that "*subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act*".
[6] 2002 (1) SA 49 (SCA).
[7] [2009] 8 BLLR 721 (SCA).
[8] 2010 3 SA 601 (SCA).
[9] *Fedlife* at para 27.

[9] Similarly in *Makhanya,* the SCA stated that the pleadings of a case were definitive:

> '...the claim that is before a court is a matter of fact. When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.'[10]

[10] The SCA further held that the right not to be unfairly dismissed or not to be subjected to an unfair labour practice, termed "LRA rights" were not the only rights that an employee was entitled to. While the CCMA had exclusive jurisdiction to enforce "LRA rights" this was not the case with other rights, such as contractual rights.[11]

[11] In *SA Maritime Safety Authority*, the court explained that the question to be engaged with was not whether the court had jurisdiction over another claim which arose from the same set of facts but rather whether the court had jurisdiction over the pleaded claim.[12]

[12] Notwithstanding the above, the minority judgment in *Fedlife* is far more persuasive. The minority judgment has as its point of departure the Constitution, which solidifies that there is only one system of law, the nature and ambit of which is determined by the Constitution itself. Significantly, the Constitution provides for the right to fair labour practices, within which the right not to be unfairly dismissed is pinned down. Therefore, determining whether the dismissal of the employee, following upon the unlawful repudiation of the employment contract, was a dispute about the fairness of a dismissal, required

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[10] *Makhanya* at para 71.
[11] Ibid at paras 11, 13 and 18.
[12] *SA Maritime Safety Authority* para 7.

an evaluation of whether the LRA comprehensively dealt with the constitutional right to fair labour practices.[13]

[13] The minority in *Fedlife* answered this question in the affirmative considering that the defendant fell within the LRA definition of an employee, that the termination of the employment was easily classifiable as a dismissal for the purposes of the LRA, and the fact that the LRA provisions that regulate dismissals are wide-ranging and comprehensive in nature. Therefore, despite the respondent's classification of the dispute as an unlawful termination, it was difficult for the minority court to conceive "*how an unlawful dismissal would not also be an unfair dismissal*". Consequentially, the minority judgment held that it must be found it to be an unfair dismissal that fell squarely within the ambit of section 191 of the LRA.[14]

[14] These findings would equally find application in respect of unfair labour practice disputes, such as suspensions, which are similarly encompassed within the constitutional right to fair labour practices, and which are expansively governed by the LRA.

[15] Following upon *Fedlife* there have been a number of Constitutional Court (CC) decisions that are relevant. These are *Chirwa v Transnet and Others*[15] (*Chirwa*), *Gcaba v Minister of Safety and Security*[16] (*Gcaba*), *Steenkamp and others v Edcon Limited*[17] (*Edcon*), *Zungu v Premier of the Province of KwaZulu-Natal and others*[18] (*Zungu*) and *Baloyi v Public Protector*[19] (*Baloyi*).

[16] Both *Chirwa* and *Gcaba* rejected the rights of public servants to refer disputes stemming from a dismissal or an alleged ULP as a violation of their right to fair administrative action. *Chirwa* emphasised the suitability of utilising the dispute resolution framework provided for in the LRA in employment-related disputes over the use of non-purpose-built processes and forums. The LRA was

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[13] *Fedlife* (minority) at paras 4, 5 and 11.
[14] Ibid at paras 6 - 10.
[15] [2007] ZACC 23; [2008] 2 BLLR 97 (CC).
[16] [2009] ZACC 26; [2009] 12 BLLR 1145 (CC).
[17] [2016] ZACC 1; 2016 (3) BCLR 311 (CC).
[18] [2018] 4 BLLR 323 (CC).
[19] [2021] 4 BLLR 325 (CC).

described as providing "*a one-stop shop for all labour-related disputes*", such that employees should pursue claims through the mechanisms established by the LRA and not through alternative causes of action.[20] Equally important were the pronouncements that the substance of a dispute must prevail over its form. It was explained that if form rather than substance were allowed to dominate, "astute litigants" would formulate their claims very carefully to avoid reliance on fairness in order to bypass the dispute resolution machinery created by the LRA.[21]

[17] *Gcaba* endorsed the primacy of the use of the dispute resolution mechanisms provided for in the LRA, by explaining that:

> 'Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system... If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, *a dual system of law* could fester in cases of dismissal of employees.'[22]

[18] While these two cases ostensibly championed the predominance of the dispute resolution procedures provided for in section 191 of the LRA, *Gcaba* caused confusion by finding that the legal basis of the claim must be determined on its pleadings. These pronouncements have come to be relied upon by both the High Court and the Labour Court to assume jurisdiction in disputes stemming from dismissal referred as contractual disputes.[23] The confusion caused by *Gcaba* is apparent, as certain cases have utilised *Gcaba* to find that it had no jurisdiction to entertain unlawful/contractual disputes,[24] while others used it to confirm jurisdiction.[25]

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[20] *Chirwa* at paras 41 and 54.
[21] Ibid at para 95.
[22] *Gcaba* para 56.
[23] See for example *SA Maritime Safety Authority* at para 7 and *Xako v Nelson Mandela Bay Municipality* [2015] 12 BLLR 1276 (LC) at para 6.
[24] See for example *Zungu* at para 17 and *Baloyi* at para 8 where the CC explained that the High Court relying on *Gcaba* found that it did not have jurisdiction to adjudicate the dispute.
[25] See for example *Archer v Public School — Pinelands and others* (2020) 41 ILJ 610 (LAC) at para 24 and *Baloyi* at para 33.

[19] The CC in *Edcon* suggested that employees are not precluded from pursuing claims emanating from dismissals in a manner other than that provided for in the LRA. It stated, "*where the law permits forum-shopping, a litigant cannot be denied relief just because it is engaging in forum-shopping*".[26] However, it rejected the applicants' pursuance of their claim as an invalid dismissal rather than an unfair dismissal, as what gave rise to the claim of invalidity was non-compliance with the LRA. The claim was rejected on the basis that the LRA does not contemplate unlawful dismissals, coupled with the fact that the remedy sought was a common law remedy. Zondo J highlighted that a litigant must seek an LRA remedy for an LRA infringement.[27] Essentially, if a dispute is pleaded as being non-compliant with the dismissal or ULP procedures set out in the LRA, it will have to be referred in terms of section 191. However, if non-compliance with the LRA is not relied on, an employee can pursue a contractual claim if a contractual remedy is sought.

[20] The Labour Appeal Court (LAC) in *Zungu v Premier, Province of KwaZulu-Natal and Another*[28] gave priority to the substance of the dispute. An important point made by the LAC was that its jurisdiction had to be determined by assessing what character the dispute manifested.[29] It was stated that:

> 'In a judicial system where jurisdiction over causes of action is divided among several fora, it is no surprise that the imposition of what is, for policy reasons, an artificial ring-fencing of types of disputes, will from time to time result in a rubbing-up against the edges. However, where a clear characterisation is possible, it is not sensible to force a different characterisation to facilitate forum shopping.'[30]

Despite the employee making no reference in the pleadings to a dismissal or unfairness, both the Labour Court and the LAC came to the conclusion that they lacked jurisdiction to adjudicate the matter. Both courts found that the issue in dispute was a dismissal, which needed to be arbitrated by the CCMA in line with section 191 of the LRA. The CC agreed. The effect of the judgment led to

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[26] *Edcon* at para 125.
[27] Ibid at paras 129-136.
[28] [2017] ZALAC 26; (2017) 38 ILJ 1644 (LAC) (*Zungu (LAC)*).
[29] Ibid at para 18.
[30] Ibid at para 20.

the rejection by the Labour Court of claims lodged by dismissed employees who "*tried to dress up unfair dismissal*" as a contractual claim, instead of dealing with it in line with the section 191 procedure.[31]

[21] There are important principles that arise from the CC, though it cannot be said that a consistent approach was followed. On the one hand, precedence was given to the dispute resolution structures set up in the LRA and courts were called upon to assess the substance of the claim (character manifested). On the other hand, reliance was required to be placed on the pleadings, and other causes of action were allowed to be pursued. Therefore, a clear approach was not postulated, resulting in divergence as reflected in the findings and outcomes. However, *Baloyi* has provided some clarity.

[22] In *Baloyi,* the CC had to determine whether an employee could institute a contractual claim to challenge a dispute stemming from her dismissal. Here, the employee was ostensibly dismissed for poor performance during her probationary period.[32] She claimed that her termination was unlawful as it constituted a breach of her employment contract and amounted to the exercise of public power that breached the principle of legality.[33]

[23] The High Court dismissed the claim for lack of jurisdiction as it was persuaded that the nature of the dispute constituted "*a labour dispute envisaged by the LRA*".[34] This decision was overturned by the CC. It found that more than one cause of action flows from the termination of a contract of employment, a litigant could therefore choose which cause of action to pursue.[35] It is only where a litigant chose to pursue an unfair dismissal claim, that the dispute resolution procedures in the LRA would apply. The same could not be said where the litigant chose to pursue the dispute as a contractual claim, as contractual rights existed independently of LRA rights, as confirmed in *Makhanya*.[36] *Gcaba* was

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[31] J Grogan, "*Rubber stamped Last word on the High Court's jurisdiction in employment disputes?*" (2021) August (Part 4) *Employment Law Journal* 3.
[32] *Baloyi* at para 4.
[33] Ibid at para 5.
[34] Ibid at para 5.
[35] Ibid at para 38.
[36] *Baloyi* at paras 40, 41 and 46.

used as authority for the assertion that jurisdiction must be based on the pleadings and not on the substantive merits.[37]

[24] The CC highlighted that the LRA did not extinguish contractual remedies where there was a breach of the employment contract or unlawful termination. Therefore, the High Court had jurisdiction as the plaintiff asserted her claim as a breach of contract without relying on a violation of the LRA.[38] It was emphasised that, while she may have had a claim of unfair dismissal, she was entitled not to pursue such a claim and rather to pursue an alternate cause of action, which is what she elected to do.[39]

[25] While I find the minority judgment in *Fedlife* more appealing, I must accept that *Baloyi* is the existing authority on the matter, which I am bound by, and which I will duly follow. However, I feel compelled to express my concerns with the disadvantages that flow from such an approach.

[26] While neither of the CC decisions preceding *Baloyi* expressly ruled out the right to utilise contractual recourse, there were findings that directed the courts to respect the "*purpose-built employment framework*" in order to prevent a dual system of law. *Baloyi* overrides this principle and gives the courts unreserved jurisdiction over such disputes. This undoubtedly weakens the dispute resolution framework set up in the LRA, as litigants are now easily able to jettison the LRA rights afforded to them in favour of having their dispute adjudicated as a contractual claim or one based on unlawfulness. This despite the fact that the dispute would never have arisen if it were not for the dismissal or the ULP.

[27] It is now nearly 25 years since the LAC raised concerns about the challenges being experienced in the dispute resolution system applicable to labour and employment matters. The point made was that uncertainty was created by courts having "*different jurisdictions and powers in relation to virtually the same dispute.*"[40] The right to use different causes of action to challenge disputes

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[37] Ibid at para 33.
[38] Ibid at paras 48 and 50.
[39] Ibid at para 49.
[40] *Langeveldt v Vryburg Transitional Local Council and Others* (2001) 22 ILJ 1116 at para 64.

arising from dismissals is now given impetus by the CC. This unequivocally permits the "*establishment of two parallel regimes of employment law – one based on statute and one on common law*", which causes incoherency in the law.[41]

[28] While there are provisions in the legislation, notably section 77(3), that endow the Labour Court with authority to adjudicate contractual claims. In my view, these provisions must be interpreted by having regard to the objectives sought to be achieved by the labour law dispensation as a whole. I do not believe that the intention of the legislature in enacting section 77(3) was to give the Labour Court jurisdiction over disputes that arise from dismissals and ULPs which should, in the first instance, be categorised as unfair dismissal disputes or unfair labour practice disputes and dealt with by the CCMA. In dealing with employment disputes, our first point of reference should be the constitutional right to fair labour practices, which is given effect in the LRA.

[29] The motive for litigants choosing to follow an alternate route to that which is set out in the LRA is seemingly to be awarded a quicker remedy than that which is available in terms of the LRA. However, it appears that litigants are not aware of the requirements that must be met to qualify for a contractual remedy such as specific performance or damages. This is potentially the reason for the proliferation in the use of contractual recourse. In this regard, I refer to what was said by this Court more than five years ago in *Toyota SA Motors (Pty) Limited v Nzuza and others*[42]:

> '...it appears to have become fashionable for dismissed employees to come to the Labour Court in terms of the BCEA and claim breach of contract seeking either specific performance or damages. I do not know the reason that has given rise to this, but the risk associated with claims made in terms of the BCEA, as in this matter before this Court, is enormous. Firstly, unlike in the LRA the claimant must prove an unlawful breach and not unfairness for the termination of the employment; next in terms of the LRA reinstatement is generally compulsory where a dismissal is found to be substantively unfair,

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[41] D du Toit "*Oil on Troubled Waters?*".
[42] (2020) 41 ILJ 908 (LAC).

specific performance consequent upon a breach is not, and generally it is a discretionary relief.[43]

[30] Now that the use of contractual recourse is unhindered, litigants must take heed of the impediments that exist in obtaining a successful contractual remedy when deciding on the cause of action to be pursued. The difficulty in securing a contractual remedy is exactly what the purpose-built framework set out in the LRA seeks to counter. The rights and procedures that flow from the LRA seek to provide an efficient and effective method of resolving disputes emanating from employment, including accessible remedies. Therefore, employees should think carefully about the prospects of success before deciding to lodge contractual disputes or challenge the lawfulness of dismissals or other disciplinary action. While the Labour Court, on an application of *Baloyi,* has jurisdiction to deal with unlawful dismissals and other alleged unlawful employer conduct, this does not translate into a successful outcome for litigants insofar as getting their jobs back.

[31] In the present matter the facts relating to the dispute are that on 29 January and 1 February 2021, the Appellants summarily terminated the Respondent's contracts of employment stating that the Respondents had "*exceeded the normal five year fixed-term contract extended to all executives*". The Respondents lodged an urgent application seeking a declarator that their contracts of employment are extant; that the termination of their contracts be declared unlawful and be set aside; that they be reinstated with immediate effect and retrospectively to the date of their dismissal and that they be paid their salaries and benefits from the date on which their contracts were terminated.

[32] If reliance is to be placed on substance rather than form, the applicants (Respondents in this appeal) were effectively seeking to have their dismissal declared unlawful and as relief, they sought an order of specific performance to restore the *status quo ante.* The Respondents sought the declarator and the consequent relief expressly in terms of section 77 (3) of the BCEA.

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[43] Ibid at para 10.

[33] According to the Respondents, the First Appellant (Appellant) was not entitled to cancel their contracts of employment as it did and as such, the cancellation of their contracts of employment was unlawful, invalid and of no force and effect.

Background

[34] The Respondents have been in the Appellant's employ variously from 2007 to 2014. The first Respondent held the position of Group Executive: Legal Risk and Compliance since 22 August 2014. The Second Respondent has been in the Appellant's employ since 1 December 2012 as Chief Operating Officer. The positions held by the First and Second Respondents are executive positions within the Appellant's employment structure. The Third Respondent commenced his employment with the Appellant on 1 June 2007 and has since held various executive positions. On 31 July 2020, he was offered the post of General Manager: Strategy, which he accepted. This is also a very senior management position.

[35] There are written contracts of employment between the Appellant and the First and Second Respondents. There is no written contract between the Appellant and the Third Respondent.

[36] The Appellant, by letters dated 29 January 2021 and 2 February 2021, terminated the Respondents' employment. The letters gave the reason for the termination as the expiry of a five-year period. The letters of termination stated that since the Respondents held executive positions in the Appellant's employ, their employment was limited to a period of five years and since the five-year period had lapsed, they could no longer remain in the Appellant's employ. In a press release issued by the Appellant in respect of the termination of the Respondents' contracts of employment, it added that the Respondents: *"capitalised on the instability at the Board level culminating in their extended unlawful stay at [the Appellant]"*.

[37] The Respondents' challenge to the termination of their contracts of employment on the grounds of unlawfulness is grounded on their denial that their employment contracts with the Appellant were for a fixed term of five years. The written contracts of employment between the Appellant and the First and the

Second Respondents evince an agreement of permanent employment not limited in terms of time. The written contracts further include a non-variation clause which provides *inter alia*: "*Neither party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein*".

[38] In the case of the third Respondent, the position he held at the time that his employment was terminated was a position he held for less than 12 months.

[39] Rather curiously, the Appellant failed to challenge any of the facts and allegations made by the Respondents. It only saw fit to raise technical defences.

[40] The Appellant's defence was that the Labour Court lacked jurisdiction to determine the application because the Respondents' "*pleaded case is one of unlawfulness as opposed to breach of contract*" adding that the Respondents did not allege any breach of contract and failed to point to any clause within the contract that the Appellant might have breached.

[41] The Labour Court correctly found no merits in the points raised by the Appellant and found that the termination of the Respondents' employment contracts was unlawful. In terms of relief, the Labour Court granted the Respondents the prayers they sought in their notice of motion, including costs.

[42] In the absence of any challenge to the facts and allegations set out and made by the Respondents, the Court must accept them as correct. It is clear from those facts and allegations that the Appellant did in fact terminate the Respondents' contracts of employment without good or proper cause. The grounds for the termination of the contracts as communicated to the Respondents are without merit and as such, there can be no dispute that the termination was unlawful. The Appellant's argument that the Respondents failed to allege a breach of any particular clause does not make their claim bad in law. A full and proper reading of the founding affidavit (though inelegantly drafted) demonstrates that they were employed by the Appellant and that the Appellant terminated their employment contract and did so contrary to the terms of that contract which termination amounts to an unlawful termination.

[43] In respect of the present matter, I find that the Labour Court had jurisdiction to adjudicate the dispute, based on the precedence set by *Baloyi* by which this Court is bound.

[44] The issue however is what happens once the contract is found to have been unlawfully terminated. As has been stated earlier and particularly in the matter of *Edcon*, where the Constitutional Court held that if a matter is brought in terms of the LRA, only the remedies set out in the LRA are competent. If a claim is made in terms of contract, only contractual remedies are competent.

[45] Since the Respondents had disavowed any reliance on the LRA and having succeeded in having the termination of their contract declared unlawful, the only relief to which they would be entitled is specific performance or damages. In the absence of proving the damages that they have suffered, they are not entitled to any. In any event, the only relief the Respondents seek is specific performance. A party claiming specific performance is pursuing its claim on the basis that a contract exists and it trying to enforce the obligations undertaken by the other party in terms of the agreement. In claiming specific performance, the wronged party has elected not to treat the other party's failure to perform as a repudiatory action justifying cancellation but to hold the other party to its obligations under the contract. To simplify it further, where one has a commercial contract or more particularly a transactional contract and one party resiles from the contract the other party can enforce the contract's continuation and the Court seized with the matter must exercise its discretion whether to compel the parties to the contract to perform in terms thereof or to order the party in breach to pay damages.

[46] In the circumstances where a contract is terminated for a breach *albeit* consequent on unlawful conduct by the breaching party, specific performance is not a relief that automatically follows: it is a discretionary relief. A court must look at the facts and circumstances of the breach and determine if it is appropriate to grant specific performance, that is, to compel the parties to continue the relationship in terms of their agreement even though one of the parties, on the face of it, no longer wants to continue with the contract. This is opposite to the relief a dismissed employee who seeks reinstatement in terms

of the LRA for unfair termination of her/his employment is entitled to. For specific performance, the court will exercise a judicial discretion on whether it is appropriate to grant specific performance whereas in a claim of unfair dismissal, the Commissioner or the Labour Court will only refuse reinstatement if certain specific conditions set out as in section 194 of the LRA are present.

[47] In determining the appropriateness of granting specific performance, a Court must also look at the nature of the contract and the consequence of granting the relief of ordering the restoration of the status quo *ante*. Since we have been warned to consider termination based on unlawfulness and unfairness differently and to strictly apply the rules peculiar to the basis of the claim, as stated earlier, a claim of unlawful dismissal based on contract cannot automatically result in the grant of specific performance but determined after the court exercises its judicial discretion on whether it should be granted.

[48] The issue of specific Performance in an employment context, therefore, is fraught with difficulties. Although specific performance was generally refused in an employment context in *Haynes v King Williams Town Municipality*[44] it was said:

> 'the discretion which a court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.'

[49] Similarly, the court in *National Union of Textile Workers and others v Stag Packaging (Pty) Ltd and another*[45] noted that *"[t]he Appellate Division did not in Haynes' case, when laying down the approach to the granting of orders for specific performance, exclude the case of an ordinary servant".*

[50] In *Nationwide Airlines (Pty) Ltd v Roediger and another,*[46] the court considered the operation of the remedy of specific performance within the context of employment contracts and held that:

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[44] 1951 (2) SA 371 (A) at 378G.
[45] [1982] 4 All SA 566 (T) at 573.
[46] 2008 (1) SA 293 (W) at para 17.

> 'Where it concerns a contract of employment it has been held that a court will in the exercise of its discretion not normally grant specific performance, However, the tendency to regard this rule as one cast in stone, that is, that specific performance of an employment contract would never be granted, was shown not to be a hard-and-fast rule.'

[51] The reason why employment contracts were considered differently when it came to the relief of specific performance is precisely because an employment contract is not a commercial or transactional contract, it is a personal contract. In my view, when we are dealing with employees on the upper echelons of a business enterprise one must not lose sight of the fact that 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. In this instance, although there has been an unlawful termination of the contract, I cannot exercise a discretion in favour of granting specific performance without being satisfied that in their continued employment there will be no interaction between the Respondents and those who control the affairs of the Appellant to determine the continued operation of the enterprise, or whether the grant of specific performance may lead to conflict within the workplace. Added is the fact that the termination of the employment contracts demonstrates that the Appellant is no longer in need of the Respondents' services. These factors must be taken into account in determining specific performance for an unlawful termination but may play no role where the dismissal is found to be unfair. Finally seeking specific performance because of financial prejudice that employees suffer as a result of losing their income is not grounds for granting of this relief.

[52] If the party seeks urgent and immediate relief, as the Respondents do, thus foregoing any claim for damages then it must accept, as the Respondents must, the risk of not being granted any relief.

[53] In this matter, the Labour Court clearly failed to exercise its discretion and granted the relief which at first glance looks like specific performance although,

on a closer look, it becomes apparent that it is more relief in terms of the LRA, which the Labour Court could not grant.

[54] For present purposes, I will accept that the relief granted by the Labour Court was that of specific performance, this relief granted was misconceived and the application should have been dismissed by the Labour Court. The Labour Court misdirected itself in failing to exercise its discretion to determine whether it was appropriate to grant specific performance and granted the relief simply because the Appellant had breached its contract of employment with the Respondents. It erred in the circumstances. For the reasons stated above and the fact that the respondents have failed to satisfy this Court that specific performance is warranted, there is no basis upon which specific performance should be granted in this matter.

[55] In the result, the appeal must succeed. Costs must follow the result.

[56] I make the following order:

Order

1. The appeal succeeds with costs;

2. The order of the Labour Court is set aside and replaced with the following order:

"The application is dismissed with costs".

WAGLAY JP

Musi JA and Gqamana AJA concur.

APPEARANCES:

FOR THE APPELLANTS:	Adv. T. Manchu with Adv. F. Karachi Instructed by: De Swardt Myambo Hlahla Attorneys
FOR THE RESPONDENTS:	Adv. Makola SC, Adv. K. Thabakgale, Adv. S. Mhlongo and Adv. N. Qwaba Instructed by: Haffeggee Roksam Savage Attorneys