THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J569/22

In the matter between:

NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	**First Applicant**
L HONTOTI	**Second Applicant**
JULIA MAHLANGU	**Third Applicant**
TSHEMBANI VALOYI	**Fourth Applicant**
CRYSTAL ADAMS	**Fifth Applicant**
TEBOGO MSABALA	**Sixth Applicant**

and

UNIVERSITY OF SOUTH AFRICA	**First Respondent**
VICE CHANCELLOR OF THE UNIVERSITY OF SOUTH AFRICA	**Second Respondent**

Heard: **26 May 2022**

Delivered: **This judgment with reasons was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 June 2022.**

Summary: Urgent application – section 77(3) of the BCEA – breach of contract – contractual terms sought to be vindicated must be plainly pleaded. Where the employer availed itself to its contractual right to terminate the contract of employment, a breach of contract claim by the employees is not justiciable under section 77(3) of the BCEA.
Unlawful dismissal – section 158(1)(a)(iv) of the LRA – the Labour Court has no jurisdiction to declare the dismissal of employees unlawful.
Interim reinstatement pending final determination of CCMA dispute – reinstatement is intrinsically final and cannot be granted on interim basis.

JUDGMENT

NKUTHA-NKONTWANA, J

[1] On 26 May 2022 this Court heard, as a matter of urgency, an application by the applicants. They were seeking an order declaring the dismissal of the second to sixth applicants (applicant employees), the members of the first applicant (NEHAWU) invalid and of no effect and force; interdicting the respondents from terminating the applicant employees contracts of employment without compliance with the Employee Disciplinary (Disciplinary Code) read with recognition agreement; and, alternatively, the reinstatement of the applicant employees pending the finalisation of the suspensions or finalisation of the disciplinary enquiry or pending a referral of the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) arising from the summary termination of their contracts of employment.

[2] The application was opposed by the respondents who in turn took two points *in limine*; firstly, urgency and secondly, the jurisdiction of this Court. I made an order dismissing the application and these are the reasons for the order.

Pertinent facts

[3] NEHAWU has a collective bargaining relationship with the first respondent, the University of South Africa (UNISA). The applicant employees were its shop stewards at UNISA.

[4] On 19 April 2022, the applicant employees were served with notices of suspension. In those notices, the second respondent (Prof Lenkabula) accused the applicant employees of acting contrary to the Code of Ethics and Conduct (Ethics Code) and Disciplinary Code in relation to alleged various acts of misconduct which, *inter alia,* included organising and participating in an illegal and unprotected strike from 15 March to 26 March 2022, disrupting graduations of 15 March 2022 until 26 March 2022, violating the integrity of the academic programme which resulted in bringing the name of UNISA into disrepute, and violating the High Court order obtained against NEHAWU on 15 March 2022, despite being properly served.

[5] The applicant employees were given up until 22 April 2022 to provide reasons why their contracts of employment should not be terminated summarily. On 6 May 2022, the applicant employees were served with notices of summary termination of their contracts of employment.

Urgency

[6] On 18 May 2022, the applicants launched this application on an extremely urgent basis. The respondents impugned the truncated time periods they were afforded to oppose this application. The respondents were served with complete set of papers on 19 May 2022 and were still expected to serve and file their answering affidavit on 20 May 2022. That was so, despite the applicants having given themselves about 10 days from the date of the applicant employees' dismissal to launch this application. When challenged, the applicants contended that they had no easy access to legal representatives. This reason is flimsy because NEHAWU is not a novice trade union.

[7] The applicants, in addition, contended that they would not be afforded substantial redress at a hearing in due course, quintessentially because the conduct of the respondents was patently unlawful; they would suffer financial hardship, though tersely pleaded; and that they would suffer irreparable harm if they were to refer the dispute to the CCMA.

[8] It will be, clear later in this judgment the applicants case is deliberately pleaded in an inexplicit manner in order to circumvent the impugn on urgency and, in turn, jurisdiction. In *Association of Mineworkers and Construction Union and others v Northam Platinum Ltd and another*[1], referred to by the respondents, Snyman AJ lamented the developing proclivity for litigants to challenge dismissals as being unlawful on an urgent basis and as such unlawfulness being the basis for urgency. He pertinently stated that:

> '[5] But, and as a result of the judgment in *SABC*, an unforeseen, and I am quite sure unintended, consequence has arisen. The judgment has been taken to now establish some sort of licence for litigants to approach the Labour Court on an urgent basis challenging dismissals as being unlawful. There seems to be a general view that the fact that the dismissal may be considered to be unlawful, and is challenged on that basis, is in itself a basis of urgency. It needs to be made clear that such an approach would be wrong. In fact, this was recognised by Lagrange J himself in *SABC*, where the learned judge said: 'The mere fact that the applicants have been dismissed in breach of their contracts of employment might not in and of itself warrant urgent relief. What makes the application urgent is related to a number of factors…'
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> [6] Whilst it may be so that a dismissal could in particular circumstances, and where the LRA is not relied upon, be considered to be unlawful and consequently invalid because of a specific provision in a contract of employment which has been breached, this cannot per se serve to jump the queue of all other dismissed employees relying on the provisions of the LRA waiting for their turn in Court. This kind of situation is merely another cause of action upon which the termination of a contract of employment can be challenged in the Labour Court. But other than that it holds no particular magic.' (Emphasis added)

[1] (2016) 37 ILJ 2840 (LC) *(Northam)* at paras 5 – 6.

[9] Tellingly, in the present case, other than a broad reference to section 77(3) of the Basic Conditions of Employment Act[2] (BCEA), there is no iota of evidence to support the applicants' contractual claim. I deal with this issue in detail when I address the second point *in limine*.

[10] It is also trite that financial hardship is not a sufficient ground to establish urgency.[3] The only exception to this general principle is when there are exceptional circumstances that would justify the granting of urgent relief.[4] In *University of the Western Cape Academic Staff Union and others v University of the Western Cape,*[5] Mlambo J, as he then was, pertinently stated that:

> 'With regard to the notion of irreparable harm it needs to be mentioned that loss of income as a result of dismissal is the inevitable consequence and as such provides no good ground for the granting of urgent interim relief. Special circumstances must be advanced to persuade a court to oblige. Loss of accommodation has been found to be a special feature accepted by the courts in order to grant urgent interim relief. … In considering the issue of irreparable harm the court will also consider the adequacy or not of any alternative remedy that may be available.' (Emphasis added)

[11] In the present case, the applicant employees' financial hardship is pithily pleaded. Moreover, contrary to the applicants' contention, the applicant employees, like all other dismissed employees, have an ample alternative remedy in terms of the Labour Relations Act[6] (LRA).

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[2] Act 75 of 1997, as amended.
[3] See: *De Beer v The Minister of Safety and Security/Police and Another* [2013] 10 BLLR 953 (LAC) (*De Beer*) at para 32; *Malatji v University of the North* [2003] ZALC 32 (LC) (22 April 2003); and *Nasionale Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO en andere* (1990) 11 ILJ 971 (T).
[4] Supra n 1 at para 37.
[5] (1999) 20 ILJ 1300 (LC) (*UWC)* at para 17.
[6] Act 66 of 1995, as amended.

[12] It follows that the applicants failed to make a case for the urgent intervention of this Court. Ordinarily, this would have been the end of the matter and the application be struck off the roll for lack of urgency. Nonetheless, I also considered the second point *in limine* for expediency and finality.

Jurisdiction in terms of section 77(3) of the BCEA

[13] The respondents impugned the jurisdiction of this Court to deal with the matter. They contended that the applicants were bound by their pleaded case which essentially called to question the fairness of the conduct of the respondents. To the extent that applicants sought to invoked section 77(3) of the BCEA, it was contended that they failed to clearly demonstrate that the Disciplinary Code on which they relied forms part of the applicant employees' contracts of employment. To buttress this contention, the respondents referred to the decision of the Constitutional Court in *Gcaba v Minister for Safety and Security and Others,*[7] were it was pertinently observed that:

> '[74] The specific term "jurisdiction", which has resulted in some controversy, has been defined as the "power or competence of a Court to hear and determine an issue between parties"…
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> [75] Jurisdiction is determined on the basis of the pleadings… and not the substantive merits of the case. … In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court…' (Emphasis added)

[7] 2010 (1) SA 238 (CC) (*Gcaba*) at para 74-75; see also *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) at para 155.

[14] It is clear *ex facie* the pleadings that the applicants case is mainly based on fairness while sparsely interposed by unadorned reference to section 77(3) of the BCEA. When challenged, the applicants averred that they impugn the validity of the dismissal of the applicant employees, which they contended was a nullity. This averment obviously gave credence to the respondents' contention that the applicants contractual claim was stillborn.

[15] Besides, the applicants' nullity impugn is flawed. In *Steenkamp and Others v Edcon Limited*[8], the Constitutional Court, in the majority judgment penned by Zondo J, as he then was, rejected the notion of invalid dismissals. The apex Court unequivocally opined that:

> '[105] The LRA created special rights and obligations that did not exist at common law. One right is every employee's right not to be unfairly dismissed which is provided for in section 185. The LRA also created principles applicable to such rights, special processes and fora for the enforcement of those rights. The requirement for the referral of dismissal disputes to conciliation is one of the processes created by the LRA. The CCMA, bargaining councils and the Labour Court are some of the fora. The principles, processes, procedures and fora were specially created for the enforcement of the special rights and obligations created in the LRA. Indeed, the LRA even provides for special remedies for the enforcement of those rights and obligations. The special remedies include interdicts, reinstatement and the award of compensation in appropriate cases. These special rights, obligations, principles, processes, procedures, fora and remedies constitute a special LRA dispensation.
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> [106] Section 189A falls within Chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. Its heading is: UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE. Under the heading appears an indication of which sections fall under the chapter. The sections are reflected as "ss 185-197B". The chapter starts off with section 185. Section 185 reads:
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> "Every *employee* has the right not to be —

[8] (2016) 37 ILJ 564 (CC) (*Steenkamp*) at paras 105-109 (footnotes omitted).

(a) unfairly dismissed; and

(b) subjected to unfair labour practice."

Conspicuous by its absence here is a paragraph (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in section 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for a right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal as a consequence of a dismissal effected in breach of a provision of the LRA.

[107] This indication is reinforced when one has regard to the definition of "dismissal" in section 186(1). It starts with what would ordinarily be understood as a dismissal, namely, a termination of employment with or without notice. That encompasses the ordinary situation of the employer giving notice under the contract of employment and a summary dismissal. But then in five further paragraphs it extends the concept of dismissal far beyond its ordinary meaning. Once again the absence of any reference to an unlawful dismissal is telling. It suggests that, if a dismissed employee wishes to raise the unlawfulness of their dismissal, they must categorise it as unfair if they are to obtain relief under the LRA.

[108] Another indication that the LRA does not contemplate an invalid dismissal is this. In section 187 the LRA created a new category of dismissals. It called them "automatically unfair dismissals". This is a special category of dismissals. What makes this category of dismissals special is that the dismissals in this category are all based on reasons that we, as society, regard as especially egregious. They include cases where an employee is dismissed for his or her race, gender, sex, ethnic origin, religion, marital status, political opinion, membership of a trade union, participation in a protected strike, exercise of rights provided for in the LRA and other such arbitrary reasons.

Another factor that makes this category of dismissals special is that for those cases where an employee's dismissal has been found to be automatically unfair, the LRA provides the Labour Court with power to order the employer to pay double the maximum compensation that the Labour Court would have had the power to order if the dismissal had not been found to be automatically unfair but was found to simply lack a fair reason or was found to have been effected without compliance with a fair procedure.

[109] Most, if not all, of the reasons for dismissal that render a dismissal automatically unfair as contemplated in section 187 are reasons that would ordinarily render a dismissal unlawful and invalid. If the Legislature had intended that under the LRA there would be a category of invalid dismissals, it would have been the automatically unfair dismissals. The Legislature must have deliberately decided that the LRA would not provide for invalid dismissals but rather for automatically unfair dismissals instead. Put differently, the Legislature deliberately provided in the LRA for unfair dismissals and automatically unfair dismissals to be outlawed and to attract a remedy but did not make any provision for unlawful or invalid dismissals...' (Emphasis added)

[16] It follows that since the applicants failed to present evidence to support their contractual claim, reliance on *Solidarity and Others v South African Broadcasting Corporation*[9](*SABC*) did not assist their case either as that decision is obviously distinguishable.

[17] Yet, even if I benevolently accept that the Disciplinary Code is part of the applicant employees' contracts of employment, there is another impediment that faced the applicants. The contracts of employment they sought to vindicate had already been terminated. Unfortunately, as mentioned above, this proclivity of litigations inundates this Court's urgent roll every week, despite this Court's denunciation in various decisions.

[9] 2016 (6) SA 73 (LC); (2016) 37 ILJ 2888 (LC); [2017] 1 BLLR 60 (LC).

[18] Recently, in *Noxolo Matoti v Komatsu Mining Corp and one other*[10] this Court referred with approval to the decision of this Court, per Moshoana J, in *SAMWU v Tswaing Local Municipality and three others*[11], where confronted with the similar set of circumstances, he aptly observed that:

> '[10] In my view where a contract of employment is terminated or cancelled, whether lawfully or unlawfully, fairly or unfairly, the jurisdiction of this Court under section 77(3) cannot be invoked. In this regard, I am fortified by the language employed by the legislature. The word '*concerning'* is used as a preposition in a present continuous tense. If the legislature had in mind a matter involving a terminated contract, it could have used a verb like 'concerned'. The dictionary meaning of the word '*concerning'* is '*regarding; touching; in reference or in relation to; or about*'. Therefore, in my view, at the time the Labour Court hears and determines a matter, the contract must be still extant. My view obtains further substance and fortification from the phrase *"irrespective of whether any basic condition of employment constitutes a term of that contract*." Clearly a contractual dispute arises on the basis of the terms of an existing contract. Where a contract has been terminated or cancelled, its terms are no longer binding on the parties. In short a cancelled contract is incapable of being enforced unless the right to cancel is placed in dispute…
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> [13] … It has long been held that jurisdiction is determined by starting on the allegations made in the affidavits. On the applicant's own admission, the contract was terminated…
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> [14] Further, when regard is had to prayer 2 the applicant seeks an order declaring the termination that has factually happened to be unlawful. Section 77A(e) remedies fortifies the point that the

[10] (*Komatsu*), marked reportable but unreported. Case number: J569/22. Delivered: 27 May 2022.
[11] (*Tswaing*), marked reportable but unreported. Case number: J1230/20. Delivered: 17 November 2020 at paras 10 onwards. See also: *Zungu v Premier of the Province of Kwazulu-Natal and others* [2017] 9 BLLR 949 (LAC) at para 18.

contemplated contract is one that is extant. An award for specific performance presupposes an existing contract. Specific performance is performance of that on which the contractants agreed. Hence a claim for specific performance is based on the contract and not on a breach of it ...

[21] A breach of contract traditionally occurs when there is malperformance. Malperformance in the strict sense of the word is breach by a contractant of a promise to perform, which is contained in the contract. Specific performance is a remedy for breach of contract. Where an aggrieved contractant is faced with a breach, such a party may elect to uphold the contract and sue for specific performance or cancel the agreement and sue for damages."

[19] The court further stated:

'[24] Contractually, the Municipality is entitled to terminate by simply giving one-week notice. If that is done, there can be no speak of breach and/or repudiation which will entitle the applicant to some contractual remedies. At its discretion the Municipality may terminate without notice and or may hold a disciplinary hearing. In *Nyathi v Special Investigating Unit*, this Court per Basson J stated the following:

'[37] In principle therefore, an employer has the right contractually to terminate the contract. Whether the termination will also be fair is entirely a different question and not relevant in these proceedings. Where a contract is terminated unlawfully it will usually also constitute an unfair termination. The reverse is, however not always true.'

[20] In the end, Moshoana J, concluded that, since the termination was authorised by the terms of the agreement, it cannot amount to breach or repudiation. That being the case, he further opined that the matter, as pleaded, was not justiciable under section 77(3) of the BCEA. I totally agree with the sentiments expressed by my learned brother in the above decision.

[21] Turning to the present case, equally, to the extent that the applicants sought to vindicate a contractual right *post facto* the termination of the applicant employees' contracts of employment, the matter is not justiciable under section 77(3) of the BCEA.

Constitutional right to fair labour practice

[22] The applicants further contended, adamantly, that they sought to vindicate their constitutional right to fair labour practice. As such, this Court is properly robed with the jurisdiction to entertain the matter. I deem it unnecessary to be arrested by this point because it is well accepted that direct reliance on the Constitution of the Republic of South Africa, 1996, (the Constitution) is impermissible in light of the subsidiarity principle as correctly submitted by counsel for the respondents. Subsidiarity principle dictates that, '*where legislation has been enacted to give effect to a constitutional right, a litigant must either rely upon that legislation or challenge its constitutionality. It cannot bypass legislation and rely directly upon the right*'[12], unless the '*factual situation is complex and the legal position uncertain*'[13]. In the present case, the converse is true as the facts are crisp and predicable.

[23] The applicants' direct reliance on the Constitution rather than on the provisions of the LRA pertaining to unfair labour practice and/or unfair dismissal undermined the principle of subsidiarity.[14]

Jurisdiction in terms of section158(1)(a)(iv) of the LRA

[24] The applicants further claimed that this Court has jurisdiction to entertain their matter in terms of section 158(1), particularly 158(1)(a)(iv) of the LRA. To fortify this contention, their counsel referred to this Court's decision in *Chubisi v South African*

[12] See*: Electoral Commission of South Africa v Democratic Alliance and Others* 2021 (5) SA 476 (SCA) at para 31*; My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at paras 160- 161 (per Khampepe J) and paras 44-66 (per Cameron J).
[13] Ibid; see also: *H v Fetal Assessment* Centre 2015 (2) SA 193 (CC) (*Fetal Assessment Centre*) at para 11 -12.
[14] See: *My Vote Counts NPC v Speaker of the National Assembly* (Id fn 12 *supra)* at paras 44-74.

Broadcasting Corporation (SOC) Ltd and Others[15] per Tlhotlhalemaje J, where it was stated that:

'The applicant asserts that she rejects the unlawfulness related to the non-recognition of her contract of employment. Inasmuch as I appreciate that the contractual claim under the provisions of section 77 of the BCEA was belatedly made in the replying affidavit, it is my view that given the nature of her overall claim, this Court under the provisions of section 158 of the LRA, nonetheless still has jurisdiction to consider whether a declaratory order should be granted, and this is so in that her claim as pleaded, cannot be said to be a dispute that is quintessentially based on the right to fair labour practices, or an unfair dismissal, nor can she categorize the alleged unlawfulness as unfairness.'

[25] I struggle to understand how *Chubisi* finds application in the present instance as the applicants mainly impugned the unfairness of the conduct of the respondents. There was not even an attempt in the applicants' replying affidavit to disavow reliance on the fairness or otherwise of the decision to terminate the applicant employees' contracts of employment, as superficial as it may be in these instances.

[26] Nonetheless, to the extent that my learned brother, Tlhotlhalemaje J, seems to suggest that this Court has jurisdiction in terms of section 158(1)(a)(iv) of the LRA to declare the dismissal of employees unlawful, I beg to differ. In *Steenkamp*[16]*,* the Constitutional Court patently expounded the intention of the drafters of the LRA and opined that they deliberately proscribed unfair dismissals and automatically unfair dismissals and provided consequential remedies. On the contrary, they did not make any provision for unlawful or invalid dismissals.

[27] The present instance is comparable because the relief sought by the applicants is, in effect, consequent upon the invalidity of the dismissal of the applicant employees due to non-compliance with the internal procedures in terms of the Disciplinary Code. To my mind, it does not avail the dismissed employees to circumvent the dictum in *Steenkamp* by invoking section 158(1)(a)(iv) and seek

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[15] (2021) 42 ILJ 395 (LC) (*Chubisi*) at para 34.
[16] *Supra* n 9 at para 109.

a declaration of a right that is not countenanced in the LRA. It stands to reason, therefore, that the premise espoused in *Chubisi* that the Labour Court retained jurisdiction to pronounce on the lawfulness of dismissals in terms of the LRA post *Steenkamp* is patently mistaken and cannot be followed.

[28] My views in this regard are buttressed by the findings by my learned brother, Moshoana J, in *Singhala v Ernst & Young Inc & another,*[17] and pertinently the following concluding remarks:

> 'Therefore, in my judgment, I conclude that there is no room for unlawful dismissal claims even under the rubric of s 157(2) of the LRA. Similarly, an employee should not be allowed to tuck what effectively is an automatically unfair dismissal under the wing of 'arising from employment and from labour relations'. Accordingly, I part ways with my brother insofar as he may be suggesting at para 48 of the SABC 8 judgment that s 157(2) creates room to challenge so-called unlawful dismissals in this court. To my mind the Labour Court, being a creature of the LRA, lacks jurisdiction to entertain claims of unlawful dismissals. An employee like the applicant before me must pursue the remedies as per the LRA. This disavowal business should not be encouraged by this court. As pointed out above it should be resisted as it brings to the fore a state of lawlessness.'[18] (Emphasis added)

Interim order of reinstatement

[29] The applicants sought, in the alternative, an interim order of reinstatement. In *De Beer v The Minister of Safety and Security Services/ Police and Another,*[19] the Labour Appeal Court (LAC), confronted with similar circumstances, opined that:

> '…because of the nature of reinstatement, it shall not be readily possible to grant, 'interim reinstatement' without deciding crucial issues pertaining to the dismissal and reinstatement, finally, albeit indirectly. What is apparent from the cases referred to is that, within the context of deciding whether the court

[17] (2019) 40 ILJ 1083 (LC) (*Singhala*) at paras 16-29.
[18] Ibid at para 29.
[19] *Supra* fn 3 at para 27.

could grant 'interim reinstatement', the true nature of the remedy of reinstatement was not expressly considered, or commented upon and, in particular, there appears to have been no consideration whether, reinstatement, due to its inherent nature, can be made interim. It is significant that in terms of s193(1) of the Act it is only if and when the Labour Court, or the arbitrator appointed in terms of the Act, finds that a dismissal is unfair, that reinstatement may be ordered. Reinstatement ordinarily means that the period between the dismissal and the resumption of service is regarded as never having been broken. In *Kroukam v SA Airlink (Pty) Ltd,* Davis JA explained the nature of this remedy as follows: 'If an order of reinstatement is made, then the contract is restored and any amount due would necessarily be part of the employee's entitlement.'(Amounts due would include back pay). Again without deciding the issue, in my view there is a finality inherent in the remedy of reinstatement that would make it difficult to adapt or refashion that remedy to serve as true interim relief.' (Emphasis added)

[30] The LAC stated further that:

'[38] It is apparent from an analysis of the facts that the crucial and central issue in the matter was indeed about the termination of the appellant's employment and the fairness thereof, despite the appellant's averments to the contrary. His employment was terminated in July 2010 and not on 30 September 2010. This is clear from the letters of the second respondent to that effect which I have referred to above. In order for the appellant to be 'reinstated forthwith to his full salary, benefits and emoluments', as he claims, he would have to be reinstated in his employment. The court would, as a matter of necessity, have to decide on the fairness of the termination of his employment. The appellant cannot be reinstated in his employment, unless the court finds that his dismissal was substantively unfair.

[39] In the circumstances, the court a quo ought to have found that it had no jurisdiction to effectively adjudicate the termination of the appellant's

employment with SAPS in the circumstances where there has been no compliance with the jurisdictional requirements provided for in s191 and s 24 of the Act.' (Emphasis added)

[31] Likewise, in the present case, the high-water mark of the applicants' case, as pleaded, is the unfair dismissal of the applicant employees. This reality cannot be wished away by any amount of disavowal.

[32] Given the fact that reinstatement is intrinsically final, it cannot be granted on interim basis. The LAC made it clear in *De Beer* that the Labour Court is debarred from pronouncing on the fairness of the dismissal when there has been no compliance with the jurisdictional requirements provided for in section 191 of the LRA.

Conclusion

[33] In all the circumstances, I upheld the second point *in limine* of lack of jurisdiction and accordingly dismissed the application.

Costs

[34] Turning to the issue of costs, I was not persuaded to award costs against the applicants as their claim was not exclusively contractual.

[35] It is for these reasons that the order of 26 May 2022 was made in the following terms:

Order

1. The application is dismissed.

2. There is no order as costs.

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa

Appearances:

For the applicants:	Advocate T Ngcukayitobi SC with advocate Nikke Stein
Instructed:	Webber Wentzel Attorneys
For the first respondent:	Advocate W Mokhari SC with advocate M Majozi
Instructed by:	Finck Attorneys