

SOUTH AFRICA / JUDGMENT

Feliti v South African Broadcasting Corporation SOC Ltd (JS942/17)

[2023] ZALCJHB 97 (27 January 2023)

[2023] ZALCJHB 97

COURT

Labour Court Johannesburg

BEFORE

M T M Phehane

CASE / FILE NUMBER

JS942/17

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS942/17

In the matter between:

WITNESS DINGAAN
FELITI
Applicant
and
SOUTH AFRICAN
BROADCASTING CORPORATION
SOC LTD
Respondent

Heard:

18
November 2022

Delivered:

27 January 2023 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 27 January 2023.)

JUDGMENT

PHEHANE, J

Introduction

[1] The applicant launched proceedings in this Court in terms of the provisions of section 77 (3) of the Basic Conditions of Employment

Act[1] (BCEA) claiming breach of a fixed-term contract of employment by the respondent. At the time of the termination of the applicant's contract, he was employed in the position of General Manager: Human Resources on a fixed-term contract that commenced on 1 June 2014 and was due to end on 30 September 2018 (fixed-term contract). The applicant alleges that on 19 April 2016, the respondent terminated the fixed-term contract with effect from 31 August 2018, without adhering to the respondent's disciplinary code and procedure and prior to the agreed date of termination, as such, the termination is unlawful. In essence, the applicant's case is premised on the premature termination of his fixed-term contract of employment by the respondent.[2] The matter is opposed by the respondent, in summary, on the basis that no breach had occurred and consequently, the applicant is not entitled to the relief he seeks.

[2] Initially, as contained in the statement of claim, the applicant instituted four claims arising from the allegations of breach of the fixed-term contract by the respondent:

2.1 Claim 1: shortfall in the amount of R150 175.18 relating to the payment of the applicant's salary until 30 September 2018, the date when the fixed-term contract of employment was due to terminate.

2.2 Claim 2: a shortfall in the payment of benefits and salary increases that were due to the applicant in the total amount of R 174 349.05.

2.3 Claim 3: damages in relation to the non-payment of the applicant's annual bonuses in the amount of R207 698.42.

2.4 Claim 4: damages in relation to the payment of the applicant's accrued leave in the amount of R412 410.09.

2.5 Claim 5: damages suffered by the applicant in relation to not qualifying for a post-retirement benefit in the amount of R36 762 760.98.

[3] Claims 1 and 2 are conceded by the respondent, although the total amount of R359 939.87 in respect of these claims has, to date, not been paid by the respondent.[3] The applicant contends that he is not aware of the reason for the respondent's failure to pay this amount, given its concession. He accordingly asked this Court for an order that interest be paid by the respondent on the aforesaid amount at the prescribed rate of interest from the date of issue of summons (28 May 2018), as well as the costs. Mr. Mosime for the respondent stated that the reason the said amount has not been paid is due to the applicant seeking the

payment of interest and costs in relation to claims 1 and 2. Therefore, the respondent seeks that this Court makes a determination on the payment of such interest and costs.

- [4] Claim 3 has been abandoned.[4] The remaining claims that this Court is to determine are claims 4 and 5.[5] The parties have agreed to separate the merits and the quantum.[6] This judgment deals with the merits only.
- [5] The parties agreed to this matter being disposed of in accordance with the filing of agreed facts as set out in a stated case in terms of the provisions of rule 11 (3) of the Rules for the Conduct of the Proceedings in the Labour Court,[7] read with rule 33
- (4) and 33 (6) of the Uniform Rules of Court.[8] The pleadings are marked as Bundle A. The parties concluded a pre-trial minute which was delivered to this Court on 30 March 2021 (Bundle B). In addition, the parties have collated a common bundle of documents (Bundle C). [9]
- [6] The issue that this Court is to decide is firstly, whether or not the respondent breached the applicant's fixed-term contract; secondly, whether or not the applicant suffered damages as a result of the respondent's breach of contract; thirdly, whether or not the applicant is entitled to the alleged damages sought under claims 4 and 5; and fourthly, whether the respondent is to pay interest and costs in relation to claims 1 and 2.

Stated case

Agreed

facts

[7] The agreed facts[10] are inter alia, as follows:

7.1 The employment history of the applicant at the respondent is as follows:

7.1.1 Employed as Training Consultant – 1 February 1998;

7.1.2 Promoted to Human Resource Manager: Group Services – 1 November 2006;

7.1.3 Promoted to General Manager: Human Resources – 1 September 2010 in terms of a fixed-term contract due to terminate on 31 August 2015;

7.1.4 Transferred from the Commercial Enterprises Division to the News and Current Affairs Division with effect from 1 February 2011 during the duration of the aforesaid fixed-term contract;

7.1.5 Concluded a second fixed-term contract of employment and was employed as General Manager: Human Resources with effect from 1 June 2014 and due to terminate on 30 September 2018.

7.2 It was compulsory for the applicant to be a member of the Pension Fund, Group Life Assurance Scheme and Medical Scheme.

7.3 The applicant's conditions of employment were subject to the respondent's Personnel Regulations Policy (PRP).

7.4 Only employees of the respondent or retirees could be members of the Medical Scheme.

7.5 The respondent paid a subsidy of 60% of the Medical Scheme contributions of all employees and retirees, provided that a retiree is appointed prior to 1 June 2002, has 10 years of uninterrupted service with the respondent and has reached the age of 50 years.

7.6 During the period of the second fixed-term contract, the respondent served a letter on the applicant dated 19 April 2016.

7.7 The respondent paid the applicant an amount, which according to the respondent, is equal to the remuneration that the applicant would have earned for the remainder of the period of the fixed-term contract of employment, calculated up to 31 August 2018.

7.8 The applicant was entitled to 35 calendar days' annual leave.

7.9 The respondent informed the applicant that, with effect from 1 May 2016, the applicant will be responsible for his own pension fund and medical aid arrangements.

7.10 The respondent made a short payment to the applicant for up to August 2018.

7.11 The respondent is indebted to the applicant in the pre-tax amount of R160 687.44 for September 2018.

7.12 The applicant is entitled to salary increments implemented by the respondent for the financial years 2016/2017 and 2018/2019 in the amount of R199 252.43.

7.13 In the premises, the respondent is indebted to the applicant in the amount of R359 939.87 in relation to claims 1 and 2.

Disputed

facts

[8] The applicant contends that his services were terminated by the respondent on 19 April 2016 by way of written notice and that this

termination constitutes a breach of contract. Further, that general damages flow naturally from the breach.[11]

[9] The respondent denies that it terminated the applicant's contract of employment. It contends that the applicant was placed on permanent special leave and that the applicant was paid all legal emoluments that he was entitled to from April 2016 until the fixed-term contract terminated on 30 September 2018. In the premises, the respondent denies that it breached the applicant's fixed-term contract and accordingly, denies that the applicant is entitled to any damages.[12]

Argument

[10] As stated above, the applicant's claims are for damages as a result of the respondent's breach of his fixed-term contract. The applicant contends that the respondent breached the contract of employment by terminating it without just cause and without a justifiable reason prior to the end date. According to the applicant, the respondent's conduct in words and conduct amounted to a repudiation of the contract, which was accepted by the applicant by not returning to work on 22 April 2016 and by handing in his tools of trade, as was required of him.[13]

Claim 4

[11] As a result of the breach, the applicant contends that he was not paid his leave entitlement of 35 days per annum. He contends that he is entitled to payment for the leave days in the period following the unlawful termination of his fixed-term contract until 30 September 2018, as the respondent has acknowledged, (as I understand the contention, by way of its prior concession regarding

the payment of medical aid benefits and salary increases) that the applicant is entitled to all other benefits he would have received

during that period.

Claim 5

[12] The applicant was born on 15 December 1967. He turned 50 years on 16 December 2017. The applicant commenced his employment with the respondent on 1 February 1998 and remained in the respondent's employ until the premature termination of his fixed-term contract on 22 April 2016,[14] at which date, he had not yet reached the age of 50. As his fixed-term contract was due to end on 30 September 2018, the applicant contends that as a result of the breach, he could not qualify for the post-retirement medical scheme benefit, as he had not reached the age of 50 years at the termination of his fixed-term contract. He would have been 50 years old had the fixed-term contract run its full course. The applicant had thus satisfied only two of the three requirements to qualify for the post-retirement benefit:

(a) he had served more than 10 years of interrupted service with the respondent, and (b) he had been appointed prior to 1 June

2002. The applicant did not meet the third requirement, i.e. the attainment of the age of 50 years, as the respondent had prematurely terminated his employment contract before he reached the age of 50. The applicant further contends that he was also prevented by the respondent from applying for early retirement once he had reached the age of 50 years, which would have been within the period of the fixed-term contract of employment.[15]

- [13] As a direct result of the breach of the fixed-term contract, the applicant could not qualify for post-retirement medical aid benefits. The amount of money that the applicant would have received in the form of the 60% contribution to the medical aid, for the remainder of his life quantifies the damages suffered by the applicant. The quantification will be the subject of the dispute relating to quantum.
- [14] In respect of claim 4, the respondent contends that the applicant was placed on special leave and in terms of clause 27 of its personnel regulations, paid leave days do not accrue in favour of an employee who is on any kind of leave.[16]
- [15] In respect of claim 5, the respondent contends that the applicant would have qualified for a 60% post-retirement medical aid contribution from the respondent had the following conditions prevailed:
- 15.1 if the fixed term contract terminated by effluxion of time and the applicant had reached the age of 50 years;
- 15.2 the applicant had applied for an early retirement benefit from the Pension Fund; and
- 15.3 the respondent approved the early retirement request in which case, the Pension Fund would have processed the claim accordingly.[17]
- [16] The respondent contends that being on permanent special leave, the applicant would have remained a member of the Pension Fund until he reached the age of 50 and would have then applied to the respondent for early retirement, and if approved by the respondent, he would have qualified for the post-retirement medical aid contributions. The applicant withdrew his pension funds in 2016 when he was 49 years old contrary to the provisions of clause 6.2 of the rules of the Pension Fund. In other words, he exited the Pension Fund before attaining the age of 50 years and this, against the advice that he had received from the respondent to defer his pension until retirement and apply for early retirement. In the circumstances, the respondent denies that there is a causal link between the alleged breach and the loss of his post-retirement benefit. Put differently, the applicant not qualifying for the post-retirement benefit was the result of his own decision to withdraw from the Pension Fund before reaching the age of 50 or not deferring his pension until retirement and applying for early retirement.

Analysis

- [17] In order to succeed with a claim for damages for breach of contract, the applicant must allege and prove the following:
- 17.1 The existence of the contract;
- 17.2 Breach of the contract by the respondent;
- 17.3 That the applicant has suffered patrimonial loss;

17.4 That there is a causal link between the breach and the loss; and

17.5 The loss is not too remote from the breach.

Existence of contract

[18] It is common cause that the applicant commenced employment with the respondent in February 1998. It is also common cause that the

fixed-term contract, which is the subject matter of this dispute, was due to terminate on 30 September 2018.[18] In the circumstances, the applicant has proved the existence of the fixed-term contract to which this dispute relates.

Did the respondent breach the contract?

[19] It is trite that parties to a contract are bound to respect their agreement and to perform all the obligations that it imposes upon them. Contracts provide legal certainty regarding each party's rights and obligations. Commonly referred to as the doctrine of pacta sunt servanda, parties are to honour contracts entered into freely and voluntarily. In *Barkhuizen v Napier*, [19] the Constitutional Court stated that this doctrine is universally recognized and reinforced by our Courts; it is a profoundly moral principle.[20] With this doctrine in mind, if either party, by an act or omission and without lawful excuse, fails in any way to honour a contractual obligation, a breach is committed.

[20] The applicant contends that, in its letter of 19 April 2016, the respondent repudiated the fixed-term contract.[21] It is trite that repudiation of a contract is a form of breach of contract. It is necessary to examine what our Courts have held regarding repudiation as a form of breach of contract and what it entails.

[21] In *SA Forestry Co Ltd v York Timber Ltd*, [22] the Supreme Court of Appeal (SCA) stated as follows:

'Repudiation occurs where one party, without lawful grounds, indicates to the other party, by word or conduct, a deliberate and unequivocal

intention that all or some of the obligations arising from the contract will not be performed in accordance with its true tenor (see eg *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2000] ZASCA 82; 2001 (2) SA 284 (SCA) at 294H-I; *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* (supra) at 684-685B). It is clear, I think, that in particular circumstances conduct of a contracting party can constitute both a breach of contract in the form of malperformance and a repudiation. A fair example of this is to be found in the present case. York's conduct amounted to breach in the form of failure to comply with his obligations in terms of clause 3.2 and 4.4. However, at the same time it also amounted to a repudiation in that York conveyed the clear indication to Safcol of its intention not to comply with those obligations in the future either. In these circumstances, the contracts were in my view duly terminated when Safcol accepted York's repudiation in its letter of 10 November 1998.' (Emphasis added).

[22] In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*, [23] (*Datacolor*), the SCA per Nienaber JA aptly stated as follows at paragraph [1]:

‘Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, “accepting” and thus completing the breach. So, for example, Winn LJ remarked in *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 at 731F–732A:

“Where A and B are parties to an executory contract, if A intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat the contract as thereby repudiated, he is deemed, according to the language of many decided cases, to ‘accept the repudiation’ and is thereupon entitled (a) to sue for damages in respect of any earlier breach committed by A and for damages in respect of the repudiation, (b) to refrain from himself performing the contract any further.”

Both the analogy and the language of offer and acceptance, a legacy from England, have on occasion been deprecated by this Court. The better view is that repudiation is a breach in itself (*Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 653B–G per Jansen JA); that the “intention” does not in truth have to be either deliberate or subjective (*Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 845A–846G per Rabie JA) but is simply descriptive of conduct heralding non- or malperformance on the part of the repudiator; and that the so-called “acceptance”, although a convenient catchword, does not “complete” the breach but is simply the exercise by the aggrieved party of his right to terminate the agreement (*Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 953E–H per Jansen JA).’

[23] From the afore-going, the two acts comprising repudiation as identified by the SCA are first, the unequivocal conduct of the defaulting party displaying an intention to no longer be bound by the contract and second, the conduct of the innocent party displaying a clear election to cancel the contract. The SCA illustrated that repudiation is determined objectively, the emphasis being on the innocent’s party’s perception of the conduct of the defaulting party. The Court determining repudiation needs to assess what a reasonable person in the position of the innocent party perceived of the defaulter’s conduct regarding his or its decision to no longer be bound by the terms of the contract.[24] The SCA held as follows at paragraphs [17] and [18]:

‘[17] As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.

- [18] The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is “a serious matter” (cf *Ross T Smyth & Co Ltd v T D Bailey, Son & Co*
- [1940] 3 All ER 60 (HL) at 72B; *Metalmill (Pty) Ltd v AECI Explosives and Chemicals Ltd* (supra) at 685B–C), requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed.’
- [24] And as follows in paragraph [28]:
- ‘The innocent party to a breach of contract justifying cancellation exercises his right to cancel it (a) by words or conduct manifesting a clear election to do so (b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise of the election to rescind. In particular, the innocent party need not identify the breach or the grounds on which he relies for cancellation. It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after, the time.’
- [25] The respondent contends that the applicant’s statement of claim does not specify repudiation as a form of breach of contract by the respondent and this Court should accordingly ignore this “new case”. [25] Further, that the applicant has failed to plead facts regarding the respondent’s letter of 6 May 2016. In the circumstances, the respondent requests this Court to reject this “new case”.
- [26] It is trite that pleadings need to set out the *facta probanda* and not the *facta probantia*. Thus, in my view, it would have been unnecessary to set out the evidence in granular detail in the pleadings in respect of the letter of 6 May 2016. This letter forms part of the common bundle of documents and no challenge is raised by the respondent to the correctness of its content.
- [27] It is so, that in his heads of argument, the applicant states in specific terms, that the respondent repudiated the fixed-term contract. Mr. Gerber for the applicant submitted on the basis of *Datacolor*, that the respondent’s conduct in its letters of 19 April 2016 and 6 May 2016 amounts to a continuous repudiation. The applicant states that by his conduct of not returning to work, handing in his tools of trade, and taking over the contributions of his pension fund and medical aid, at the instance of the respondent, he accepted the respondent’s repudiation. [26]
- [28] In my view, the respondent raises a technical challenge by submitting that the applicant raises a new case.
- [29] Our Courts have cautioned against being over-technical regarding pleadings. [27] In *Liquid Telecommunication (Pty) Ltd v Carmichael-Brown* [28] (*Liquid Telecommunication*), this Court per van Niekerk J, strongly warned against technical point taking in the Labour Court

and remarked that it has never been encouraged. These decisions concerned exceptions to pleadings. In my view, this applies in casu, albeit that no exception is raised and the complaint is that a “new case” is raised in the applicant’s heads of argument. I disagree that a new case is raised by the applicant. The statement of claim sets out in clear terms the case the respondent is to meet. It sets out in detail, the background to the dispute, the receipt of the letter of 19 April 2016 which letter, the applicant alleges the respondent unlawfully and prematurely terminated his fixed-term contract. The applicant avers in his statement of claim, that the respondent breached the fixed-term contract by unlawfully terminating it without adhering to its disciplinary code and procedure, alternatively, it unlawfully terminated the contract prior to the termination date.[29] In the stated case, the applicant contends that the respondent breached the contract by unlawfully terminating it without just cause and prematurely. In similar terms in *Liquid Telecommunication*, the applicant (in the main dispute) instituted a claim for breach of contract party and had alleged in her statement of claim, breach of contract premised on an allegation of the premature termination of her fixed-term contract. Van Niekerk J, in determining the exception (and dismissing it), stated as follows at paragraph [19]:

‘It is clear from the pleading that the respondent relies on a repudiation of the contract in order to claim damages. All that is required to assert is a repudiation of the fundamental term of the contract (ie conduct which exhibits an objectively deliberate and unequivocal intention not to be bound any longer by the contract), an election to terminate the contract and a communication of that election. The remedies open to an aggrieved party in the circumstances include restitution, damages or specific performance.’

[30] In view of the afore-going, in casu, it is clear from the facts of this case, that the applicant relies on repudiation as a form of breach.

[31] In *RFS Administrators (Pty) Ltd v Samons and others*, [30] (RFS Administrators) Moshoana J gives a helpful reminder of various types of instances of breach of contract when he states as follows:

‘[38] In law, there are about six instances where a contract may be regarded as having been terminated. Those are; (a) where one party is in breach of contract entitling the other party to cancel the agreement (repudiation); (b) where one party is entitled to rescind by reason of the other party’s misrepresentation, undue influence or duress (rescission); (c) where a contract is void by reason of mistake, non est factum – that is not my doing; or Statute; (d) where the parties agree to bring the contract to an end (mutual discharge); (e) where the contract provides for termination in the event of force majeure (force majeure); and (f) where some unforeseen event prevents the parties from performing the contract (frustration).

[39] On the facts of this case, it is clear that the employees must have repudiated their alleged employment contracts or there was a mutual termination thereof.’

[32] To illustrate the point further, in *Datacolor*, the SCA stated that the innocent party may rely on an adequate ground for cancellation at a later stage, such ground having existed at the time of cancellation.[31] The learned authors in *Christie's Law of Contract in South Africa*, state that repudiation may present itself in a variety of ways, such as anticipatory breach, where a party informs the other that it will not carry out its obligations in terms of the contract.[32]

[33] On the issue of not providing work to the applicant, the respondent contends that an employer is under no duty to provide work to an employee. The fundamental problem that this stance raises, in the context of the issues that prevailed when the letter of 19 April 2019 was served on the applicant while an unfair labour dispute was pending, is that it undermines the doctrine of *pacta sunt servanda* and the constitutional values of dignity, equality and freedom upon which agreements are premised in a democratic society. It simply

cannot be, that in a democratic society founded on these values, an employer at its own whim, can “wake up” on a particular

day and inform an employee that he will no longer be provided with work, without any explanation and he will be paid out his remuneration and benefits for the remaining term of his fixed-term contract. Even worse, it is suggested at the whim of the employer (as the respondent alleges), that the employee is on ‘permanent’ special leave (an oxymoron given that the duration of the contract is definite), in circumstances where the employee has not requested or applied for such leave and the reason for such leave is unexplained. This conduct smacks of both repudiation and termination of the employment contract without just cause. Such conduct goes against the aforesaid constitutional values. The employee's dignity is impaired; he is no longer free to work and this, for a period of approximately two and a half years; the employer flexes its muscles and demeans the value of equality because the employee has no choice but to accept the repudiation and cancel the contract.

[34] It is necessary to consider the content of the respondent's letter dated 19 April 2016.[33] The furnishing of this letter to the applicant must be placed in context. The statement of claim sets out allegations pertaining to a lengthy historical background of the labour relations disputes that ensued between the parties.[34] The respondent dismisses these allegations as irrelevant and places them in dispute.[35] The applicant alleges that on 19 April 2016, an unfair labour practice dispute relating to his grievance was conciliated at the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner issued a certificate of non-resolution of the dispute and on the same date, the applicant received the letter of 19 April 2016.[36]

[35] It reads:

‘Dear Mr. Feliti

RE: CONTRACT OF EMPLOYMENT – SABC / DINGAAN FELITI

1. The above matter as reference.
2. As you are aware, you are employed by the SABC on a fixed-term contract basis and your fixed term contract of employment with the SABC will expire by effluxion of time on 31 August 2018.
3. You are hereby advised that the SABC will not be renewing or extending your fixed term contract of employment upon termination thereof on 31 August 2018 (Expiry Date).
4. Please note that the SABC has, in terms of his own prerogative, decided to waive its rights to the provision of services and/or rendition of work by you for the remainder of the contract period. Accordingly, with effect from Friday, 22 April 2016, you are not required to report for duty and will provide services to the SABC and the SABC will be under no obligation to and will therefore not provide or assign any work or services to you.
5. The SABC will, in relation to the remainder of the contract period, pay you the remuneration is provided for you in your fixed term contract of employment, payable as a once of lump sum. This includes payment in view of accrued annual leave, if any. All payments will be subject to the tax laws of the Republic of South Africa.
6. The SABC will deduct and/or set off from the amount due to you, the value of any outstanding loans and debts that are repayable and/or due to the SABC.
7. You will be required to hand over all SABC property and assets back to the SABC on or before 22 April 2016 at 15:00, to the Human Resources Manager: Group Services. This includes the access card, laptop computer and 3G card, as well as your forwarding address and medical aid card/s.
8. Due to the SABC having opted to discharge its full payment obligations to you upfront, you will, with effect from 1 May 2016, be responsible for your own pension fund and medical aid arrangements.
9. Please note that the provisions relating to confidentiality in terms of your fixed term contract of employment are and remain applicable. We request that you comply therewith, which includes keeping this letter and the terms contained herein confidential.
10. We would like to take this opportunity to wish everything of the best in your future endeavours.

Please do not hesitate to contact us in this regard.

Yours faithfully

(signed)

JIMI MATTHEWS

GROUP CHIEF EXECUTIVE OFFICER (ACTING)'

[36] In reply, in a letter dated 3 May 2016,[37] the applicant's attorney of record informed the respondent that the termination of the applicant's contract as recorded in this letter of 19 April 2016 is unlawful and demanded that the applicant be reinstated within 7 days, failing which, the applicant would institute a civil claim against the respondent for the unlawful termination of his contract of employment and would seek legal costs in this regard.

[37] In response, in a letter dated 6 May 2016,[38] the respondent denied unlawfully terminating the applicant's contract and denied that the applicant would suffer any financial loss, as all monies that would have been payable to the applicant would have been paid over to him and therefore, he would not be prejudiced. The respondent further stated that it would not comply with the applicant's demand to reinstate him. This letter reads as follows:

'Dear Sir

RE SABC // D FELITI

The above matter and your letter dated 03 May 2016 refer.

We have noted the contents of your email and wish to advise as set out below.

At this stage we do not intend to deal with each and every allegation therein contained and this should not be construed as an admission of the correctness thereof.

We take note of the fact that you do not set out the basis, grounds and facts to support the allegations that your client's contract of employment was unlawfully terminated.

We further note that you do not specify which financial losses the client will suffer.

As far as the SABC is concerned your client will be paid all the monies that he would have been entitled to be paid had his employment contract continued and terminated by effluxion of time.

Consequently, the SABC vehemently denies the allegations at your client's contract of employment was unlawfully terminated and that your client will suffer financial losses.

The SABC's stance is that by paying all the monies that would have been payable to your client had his employment contract ran its full course, it would have complied with the contractual obligation and your client is not prejudiced.

In the premises the SABC is unable to comply with your client's demand.

All of the SABC's rights remain reserved.

Kind Regards

ANDRE WEBER

GENERAL MANAGER: GROUP EMPLOYEE RELATIONS (ACTING)'

(Emphasis added).

- [38] In my view, in the letter of 19 April 2016, the respondent unequivocally informed the applicant that it no longer intends to continue with the employment contract. The respondent informs the applicant that it will not be assigning any work to him and he is thus not required to render any services; that he will be paid his remuneration for the remaining period of his employment contract in a lump sum and this includes payment in lieu of accrued leave if any. The applicant is required to hand in his 'tools of trade'. The respondent's letter of 6 May 2016 confirms the intention of its letter dated 19 April 2016.
- [39] An interesting and belated contention of the respondent is its denial that it terminated the applicant's contract in its letter of 19 April 2016. It contends that the applicant was placed on special leave. Three problems arise with this contention. The first is that this defence is not pleaded and it arose for the first time in the respondent's heads of argument. The second, is nowhere in the letter of 19 April 2016, does the respondent inform the applicant that he is placed on special leave. The letter is clear, it demands that the applicant return all property belonging to the respondent, informs him that he is "on his own" insofar as pension and medical aid contributions are concerned and "bids him farewell" in wishing him all the best with his future endeavours. In paragraph 5 of this letter, the respondent informs the applicant that it will pay him his remuneration for the remainder of his fixed-term contract as a once-off lump sum, including payment in lieu of accrued annual leave if any.
- [40] Considering, for a moment, the provisions of the respondent's policy relating to special leave as contained in its Personnel Regulations which read as follows:[39]

'27. SPECIAL LEAVE

Special leave, on conditions determined by the Group Chief Executive, may be granted to an employee in the following circumstances:

- (a) To sit for an approved prescribed examination.
- (b) Should a medical practitioner require an employee to be isolated or quarantined because a member of his family has a contagious or infectious disease.
- (c) For such other purposes as the Group Chief Executive may approve.'

- [41] The third problem with the contention that the letter of 19 April 2016 did not terminate the applicant's contract is the respondent's

admission in its statement of response to the contrary.[40] This admission is confirmed in the pre-trial minute, where the parties record that it is common cause that this letter terminated the fixed-term contract. The parties record as follows:

'On 19 April 2016 the Applicant received a letter from the Respondent informing the Applicant that the Respondent was terminating the Applicant's fixed term contract of employment with immediate effect...'[41] (Emphasis added).

- [42] It is trite that parties are bound by their pleadings. It is also trite that the Court is entitled to rely on the statements of the parties as contained in the pre-trial minute.[42] I accordingly accept that the letter of 19 April 2019 terminated the fixed-term contract with immediate effect.
- [43] Nothing was placed before this Court to show that the applicant was placed on special leave (and for what reason) in terms of the provisions of the respondent's policy as quoted above. I am not persuaded that the applicant was placed on special leave.
- [44] The tone of the letter of 19 April 2019 is final in terminating the employment relationship. It also informs the applicant in paragraph 6 that it will deduct and/or set off from the amount due to the applicant, any outstanding loans or debts.[43] Contrary to the statement by the respondent in paragraph 20.2 of its heads of argument that there is nothing in the employment contract that stipulates that the employee is obliged to repay outstanding debts to the respondent when such employee only "leaves employment", clause 20.2 (ironically) of the employment contract under the termination clause, states that "[a]ll money owing to the SABC by the General Manager shall become immediately due and payable to the SABC upon termination of the

General Manager's employment for any reason whatsoever". This is echoed in clause 25.3 of the employment contract where provision is made that the applicant agrees that in the event that his employment is terminated for any reason whatsoever, that the SABC may deduct all amounts owing to it from any amounts due to the applicant on the termination date.[44] In the circumstances, there can be no doubt that the applicant is bid farewell in this letter and is told that any debts or loans owing to the respondent will be deducted or set off from his lump sum payment. The tone of the letter is also final as the applicant is informed with effect from 1 May 2016, he is responsible for his own pension fund and medical aid arrangements. He is also wished, at the end of the letter, everything of the best in his future endeavours. A firm goodbye wave.

- [45] In the circumstances, I find that the letter of 19 April 2016 terminated the applicant's fixed-term contract. The respondent's conduct of its intention to repudiate the contract is deliberate and unequivocal. This is repeated in its letter of 6 May 2016. The conduct of the applicant, by not returning to work, handing in the tools of trade and taking over the payment of his medical aid and pension fund contributions, constitutes his acceptance of the repudiation and the cancellation of the fixed-term contract.
- [46] In the letter of 6 May 2016 to the applicant's attorney, the respondent does not deny that the applicant's contract has been terminated, but denies that it has been unlawfully terminated. Neither does the respondent state that the applicant is placed on special leave. The respondent also states as follows in this letter that the applicant "will be paid all the monies that he would have been entitled to be paid had his employment contract continued and terminated by effluxion of time". In my view, with this sentence and the use of the word "had", the respondent made it clear to the applicant that the contract had been terminated

and would not run its full course. This is repeated in the sentence that follows when the respondent goes on to state that by paying the applicant all his monies “that would have been payable had his employment contract ran its full course”, there is no prejudice to the applicant. There is no doubt, that the respondent terminated the applicant’s contract before it ran its full course. In other words, the contract did not terminate by the effluxion of time.

- [47] Further, the respondent states in this letter, it is unable to comply with the applicant’s demand. The demand that was made by the applicant is that his contract of employment, (which had been terminated), be reinstated within 7 days of his letter of 3 May 2016, failing which, he will institute civil action against the respondent. The respondent does not state that the contract is still in existence and that the applicant is on special leave.
- [48] In view of the afore-going, I find that the type of breach in casu constitutes repudiation of the fixed-term contract. In the words of the SCA in *Datacolor*, a reasonable person having regard to the content of the letter of 19 April 2016 as well as the letter of 6 May 2016, would interpret such letters as a repudiation of the contract of employment by the respondent.
- [49] I am therefore persuaded that the applicant has proved breach of the fixed-term contract by the respondent.
- [50] The contract was terminated prematurely, before its end date. Paying the applicant for the remainder of the term of his contract does not mean the respondent is absolved from breach. Had the respondent not paid the applicant his remuneration and benefits for the remaining term of the contract, no doubt, the applicant would have sought this relief. It is trite that where a fixed-term contract is terminated prematurely, the remedies available to the aggrieved party are reinstatement or the full payment of benefits for the remaining period of the contract.[45] The respondent was alive to this. When the applicant demanded reinstatement, he was promptly informed that he would be paid in full for the remaining period of his contract and therefore, reinstatement was not possible.
- [51] What ensued, was this referral by the applicant, in terms of which he sought (apart from claims 4 and 5), under claims 1 and 2, the short payment of his remuneration and benefits, as the letter of 19 April 2019 (the termination letter), recorded that the contract would expire on 31 August 2018. It is common cause that the termination date of the fixed-term contract was 30 September 2018. The respondent has conceded that it short-paid the applicant in the amount claimed by the applicant, as set above.
- [52] I also find that the contract was terminated by the respondent without adhering to its disciplinary policy and procedures to which the parties were contractually bound and without just cause. Therefore, such termination is unlawful. I disagree with the respondent’s contention that the applicant’s claim in this regard is a claim for unfair dismissal. The applicant has approached this Court in terms of the BCEA claiming that his contract was terminated unlawfully and in non-compliance with the disciplinary policy and procedures of the respondent which form part of the terms and conditions of his employment (see: clause 25.2 of the fixed-term contract at C38). The respondent’s contention of permanent

special leave falls flat on its face in the light of the submission that at best, the applicant's claim is for unfair dismissal.

Has the applicant proved a causal link between the breach and damages he alleges he suffered (factual causation) and is the loss he suffered not too remote (legal causation)?

Factual causation - the first part of the enquiry

[53] In *International Shipping Co (Pty) Ltd v Bentley*,^[46] the Court explained the practical enquiry as follows:

'The enquiry as to factual causation is generally conducted by applying the so-called "but for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued.'

[54] In *Minister of Safety and Security v Van Duivenboden*,^[47] the SCA stated that:

'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise of metaphysics'.

[55] Therefore, all that the applicant needs to show is a probability that he would not have suffered the damages, had the contract been properly performed, to succeed in establishing factual causation, unless the respondent can discharge the onus that there is no such probability. This, the applicant has proven in respect of claims 4 and 5 as set out below.

Legal causation - the second part of the enquiry

[56] The second leg of the enquiry has been described as follows:^[48]

'... whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy play a part. This is sometimes called "legal causation".'

[57] The plaintiff is not entitled to all the damages suffered. However, the plaintiff is entitled to be put in the position it would have been in if the defendant executed its mandate properly. As a general rule, a line needs to be drawn to ensure that the defendant should not be caused due hardship. The line is drawn with regard to broad principles of causation and remoteness.^[49]

- [58] In short, the applicant must prove that the damages flow naturally from the breach. I find that the applicant has proved this, as set out below.
- [59] The fixed-term contract states that the applicant is entitled to 35 days of paid annual leave in each 12-month cycle.[50] The applicant contends that the breach by the respondent prevented him from working and therefore, from accumulating leave days. The applicant contends that he is entitled to the leave days he would have received for the period after the unlawful termination of his employment contract until the date that it was due to terminate. Further, that the respondent has admitted and paid other benefits except for the leave provision.[51]
- [60] The respondent contends that the applicant could not accumulate leave days as he was on special leave, and therefore there was no breach. I have already dealt with this contention by the respondent and in the premises, it is rejected. It is so, that the respondent has admitted to and has paid the applicant his other benefits.
- [61] But for the breach, the applicant would have accumulated annual leave. I accordingly find that the applicant has proved that there is a causal link between the breach and his damages relating to claim 4. The applicant has proved that had the contract been properly performed, he would have been entitled to 35 days' annual leave in the remaining period of the fixed-term contract. The damages are thus not too remote from the breach.
- [62] It is common cause that only employees of the respondent or retirees could be members of the respondent's medical scheme. It is also common cause that the respondent paid a subsidy of 60% of the medical scheme contributions of all employees and retirees, provided that a retiree is appointed prior to 1 June 2002, has 10 years of uninterrupted service with the respondent and has reached the age of 50.[52]
- [63] The respondent's Pension Fund rules define "normal retirement age" in respect of a Group Executive member or a General Management member who is appointed for a fixed period in terms of a contract, as 60 years of age. Clause 6 of the Pension Fund rules deals with retirement benefits.[53]
- [64] The applicant contends that, due to the respondent's breach, he was denied his retirement benefit at the end of his fixed-term contract. He would have qualified for a 60% contribution from the respondent towards his medical aid from 1 October 2018. He could not qualify for the post-retirement medical scheme benefit, as he had not reached the age of 50 years at the time of the unlawful termination of his employment. He would have attained the age of 50 years had his fixed-term contract run its full course.
- [65] The respondent agrees that in October 2018, when the applicant's fixed-term contract would have terminated by the effluxion of time, the applicant would have qualified for its 60% contribution towards his medical aid. However, in order to qualify for the benefit, the applicant must retire within the respondent's Pension Fund. The respondent explains that what this means practically, is that the applicant should have deferred his pension until

reaching the age of 50 and then retire within the Fund. Instead, the applicant elected not to defer his pension but withdrew from the Pension Fund and cashed out his pension benefits before reaching the age of 60 and consequently automatically forfeited the 60% medical aid contribution. In the circumstances, the respondent contends that no amount is owed to the applicant in terms of claim 5.[54]

- [66] The respondent's stance that the applicant ought to have stayed within the Pension Fund and deferred his pension and applied for early retirement is premised on its fanciful contention that the applicant was placed on special leave.[55] I have dealt with this above and have rejected this contention.
- [67] The applicant contends that he was unable to defer his pension and apply for early retirement because his contract was unlawfully and prematurely terminated before he attained the age of 50 years.
- [68] The applicant withdrew from the fund on 29 June 2016, at the age of 49. At this point in time, his contract had been terminated by the respondent and he was informed (in the letter of 19 April 2016), that with effect from 1 May 2016, he is responsible for his own pension fund and medical aid arrangements and as stated above, the letter bids him farewell at its conclusion. In my view, if the applicant had remained within the Fund, he would still not be eligible to apply to the respondent for early retirement as such application in terms of clause 6.3[56] of the respondent's Pension Fund rules, had to be approved by the Board of directors of the respondent. On the facts, the applicant was no longer an employee of the respondent. Therefore, the basis upon which he would have to apply to the respondent's Board of directors is nonsensical.
- [69] In view of the afore-going, I find that the applicant has proved a causal link between the breach and his damages in relation to claim 5 and the damages are not too remote from the breach. But for the breach, the applicant would have qualified for the post-retirement medical aid benefit had the fixed-term contract terminated with the effluxion of time on 30 September 2018. The respondent's breach was a direct cause of his loss of the 60% contribution the applicant would have qualified for. The applicant withdrawing from the Pension Fund took place after the termination of the fixed-term contract. As a result of the breach, the applicant was

prevented by the respondent from qualifying for the benefit or applying for early retirement, as he was no longer an employee and

was not a retiree. His loss is not too remote from the breach.

Interest and costs in relation to claims 1 and 2

Interest

[70] As stated above, the respondent conceded that the amount claimed by the applicant in respect of the two claims 1 and 2 is due and owing. Therefore, the respondent is liable for the payment of these two claims. What is in dispute is whether interest is due and payable on the amount claimed.

[71] Section 75 of the BCEA states as follows:

‘An employer must pay interest on any amount due and payable in terms of this Act or the National Minimum Wage Act, 2018, at the rate of interest prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 to any person to whom a payment should have been made.’

[72] Therefore, all monies that are payable, due and owing in terms of the provisions of the BCEA[57] or the National Minimum Wage Act[58] would attract interest if payment is not made timeously.

[73] Section 2A of the Prescribed Rate of Interest Act[59] (PRIA) states that:

‘2A Interest on liquidated debts –

(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.

(2)(a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.

(b) ...

...

(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.’

[74] With reference to section 2A of PRIA, the Court in *Adel Builders (Pty) Ltd v Thompson*[60] (Adel Builders) held that:

‘...the scope and purposes of the section in question, which is to alleviate the hardship suffered by a plaintiff who, through no fault of his, has to wait a substantial period of time to establish his claim and in the end is paid in depreciated currency.’

[75] In the *Adel Builders*, the plaintiff conceded liability to certain parts of the defendant’s counterclaim but the matter only came to trial some three years thereafter. On the question relating to the payment of interest on the conceded amount, the Court held as follows:

'I can find no reason why the plaintiff could not on its own initiative take steps to assess that part of the defendant's damages for which liability was conceded and to either make an offer of payment or a payment into Court. Mr Buchanan argued that in terms of section 2A(5) of the Act a court of law or an arbitrator or an arbitration tribunal has a discretion to fix the rate at which interest shall accrue and the date upon which interest shall run. I agree with Mr Buchanan that such discretion overrides the provisions of section 2A(2) of the Act...

As to the date from which interest shall run, I am of the view that since the parties agreed that as at February 1992 the defendant's damages stood at R330 000,00, interest should run from 1 February 1992.'^[61]

[76] From the afore-going therefore, interest becomes due and payable on monies owing or on damages suffered. Where parties agree on the amount of damages, the amount is no longer unliquidated and interest on the agreed amount is payable from the date of the agreement or the date of the demand, whichever is later.^[62] Further, where the respondent has conceded to the claim under litigation, the duty is on the respondent to mitigate the amount of interest by either paying the conceded amount to the applicant or as security to the Court. The concession does not stop the accrual of interest on the amount due, unless the parties agree otherwise, which is not the case in casu.

[77] Given the respondent's concessions in respect of claims 1 and 2 that there is a shortfall owed to the applicant in the total amount of R359 939.87, I am of the view that the respondent should pay interest on this amount from the date of such concession when it in effect, agreed that the said amount was due and payable to the applicant i.e. 1 July 2022.^[63]

Costs

[78] As stated above, the applicant seeks this Court to order the respondent to pay the interest on the total amount in respect of claim 1 and 2 and the costs. The respondent contends that its concession does not constitute a judgment debt and therefore, interest in terms of the PRIA is not payable. Further, that it has not agreed to pay interest arising out of this concession. As far as costs are concerned, the respondent submits that the mere fact that it has conceded to claims 1 and 2 does not justify a finding of costs in favour of the applicant, as the general rule in this Court is that costs do not follow the result.^[64]

[79] It is so, that the general approach in this Court is that costs do not follow the result. This was endorsed by the Constitutional Court in various matters,^[65] where it held that costs should not be a deterrent to litigants that wish to enforce their Constitutional rights and therefore, costs in this Court should be determined in accordance with the law and fairness. The question that then arises, is what happens when this Court determines matters that are not technically 'labour related' or which do not have a constitutional element to the claim? In those circumstances then, can costs follow the result?

[80] The Labour Appeal Court in the matter of *Skinner and Others v Nampak Products Ltd and Others*^[66] held as follows:

‘As this matter is principally a contractual claim in terms of s 77(3) of the BCEA, the ordinary rule that costs should follow the result applies.’

[81] Further in RFS Administrators,[67] this Court held that:

‘[83] This is a civil matter and not a labour matter. Accordingly, the principle of costs not following the results does not find application. This Court disagrees with a submission by Mosam SC that the principle in *Zungu v Premier of the Province of KwaZulu-Natal and Others* applies in casu. RFS invoked the provisions of section 77 (3) of the BCEA since the dispute involves or concerns an employment contract. In terms of this section, the Labour Court has concurrent jurisdiction with the civil Courts. Thus, it can be said that the Labour Court in hearing this matter, exercises its civil jurisdiction as opposed to the LRA jurisdiction. In order to demonstrate the point, the parties before me could have comfortably debated this matter in the High Court. Now that they are in the Labour Court, this Court is not hearing a “labour matter” but a civil matter...

[85] It must be indisputable that in the above quoted; reference is made to the Labour Court as a specialist labour disputes resolution body. Involved herein is a contractual dispute as opposed to a labour dispute. This Court must assume that the rule of no automatic cost orders does not find application in contractual disputes. What obtains is the ordinary rule of costs following the results. This rule is grounded on the principle that a successful party must not be deprived of its success costs. It is a principle that is constitutionally defensible...’

[82] This Court is determining a contractual dispute in terms of section 77 of the BCEA. In the circumstances, it is exercising its civil jurisdiction and not adjudicating a specialised labour dispute. Therefore, the rule that costs follow the results is appropriate.

[83] Section 162(1)(b) and (2) of the Labour Relations Act[68] states as follows in relation to an order as to the payment of costs:

‘(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account –

(a) ...

(b) the conduct of the parties –

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before this Court.’

[84] The conduct of the respondent in refusing to pay the interest is a factor that I take into consideration with regard to defending this matter before the court. No good justification is provided for not paying the interest. The respondent admits the payment is a “shortfall” and

therefore, in my view, it ought to have simply paid it. Its failure to mitigate the amount of interest payable is of its own doing. The respondent has been obstinate in refusing to pay the interest. The payment of the interest could have curtailed the issues before this Court. In the circumstances, I exercise my discretion to issue an order that the respondent should pay the costs. Further, as this is a contractual dispute, I see no reason why the applicant should be out of pocket.

[85] In the circumstances, the order is as follows:

Order

1. The respondent's termination of the applicant's fixed-term contract of employment is unlawful and constitutes a breach of contract.
2. The respondent is liable to the applicant for the damages suffered by the applicant as a result of the breach of his fixed-term contract of employment.
3. The respondent is to pay the applicant the conceded amount of R359 939.87 in respect of claims 1 and 2, together with interest on the said amount at the prescribed rate of interest from 1 July 2022 until the date of payment.
4. The respondent is to pay the applicant's costs of suit to date.
5. The action is postponed sine die for the determination of the quantum in respect of claim 4 and 5.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: H Gerber SC Instructed by: Welman and Bloem INC. For the Respondent: Adv K Mosime Instructed by: Maserumule Attorneys

- [1] Act 75 of 1997.
- [2] See: applicant heads of argument, at para 1.5 to 1.7.
- [3] Applicant's heads of argument at para 1.2. See also: respondent's heads of argument at para 8.
- [4] See: stated case, para 3.13. See also: respondent's heads of argument at para 8.2.
- [5] See: respondent's heads of argument at para 9.
- [6] See: stated case, para 3.14.
- [7] As promulgated by G1665 in GG 17495 of 14 October 1996.
- [8] See: Court Order dated 16 September 2022.

- [9] The page references to the bundles begin with the prefix of the bundle followed by the page number for example C188.
- [10] Stated case, para 3 and its sub paras.
- [11] Stated case, paras 4.1 to 4.3.
- [12] Stated case, paras 4.4 to 4.6.
- [13] See: applicant's heads of argument, at paras 5.3, 6 and its sub-paragraphs.
- [14] Para 4 of the letter dated 19 April 2016 informs the applicant that he is not required to report for duty or to render services to the respondent with effect from 22 April 2016. See: C188.
- [15] See: applicant's heads of argument at paras 1.11 to 1.13.
- [16] Stated case, paras 5.1.1. and 8.2.
- [17] Stated case, para 5.2 and its sub-paragraphs.
- [18] The fixed-term contract appears at C18 to 41. Clause 1.2.10 of the fixed-term contract at C20, states that the end date is 30 September 2018.
- [19] 2007 (7) BCLR 691 (CC).
- [20] At para [87].
- [21] Applicant's heads of argument at para 6.5 and its sub-paragraphs.
- [22]
- [2004] 4 All SA 168 (SCA) at para [38].
- [23]
- [2000] ZASCA 82; 2001 (2) SA 284 (SCA) at para [1]. See: applicant's heads of argument at para 6.2.
- [24] Datacolor, at para [16].
- [25] See: respondent's heads of argument, at paras 13 to 16.
- [26] Applicant's heads of argument at para 6.10.
- [27] See: Joubert v Impala Platinum LTD 1988 (1) SA 463 (BH) held at 471D-H; Outsurance Insurance Company Limited v Lupondwana (case no 2021/10241 in the High Court of South Africa delivered 16 November 2021) at para 6.
- [28]
- (2018) 39 ILJ 1779 (LC) at para [23].
- [29] Statement of claim, paras 56 to 58, at A45 to 46. See also: pre-trial minute, at paras 4.35 to 4.37, which is a repeat of the

aforesaid paragraphs in the statement of claim.

[30] Unreported judgment under case no JS641/17 delivered on 30 August 2022.

[31] See paragraph 24 above of this judgment and para [28] of the judgment in Datacolor.

[32] RH Christie, GB Bradfield, “Christie’s Law of Contract in South Africa”, 7 ed, 2016, at p 610.

[33] C188 to 189.

[34] See: statement of claim at paras 21 to 55.

[35] See: statement of response at para 3.

[36] There is no dispute that the said conciliation was held on 19 April 2016 and that a certificate of outcome was issued by the CCMA. The certificate of outcome appears at C187.

[37] C 191 to 192.

[38] C 193 to 194.

[39] C44 to 62, in particular, C 59 at clause 27 thereof.

[40] In para 3 of the statement of response at A59, the respondent admits that the letter of 19 April 2016 terminated contract.

[41] See: para 3.10 of the pre-trial minute.

[42] South African Breweries v Louw (2018) 39 ILJ 189 (LAC).

[43] C35.

[44] C39.

[45] See: Masetlha v President of the Republic of South Africa and another 2008 (1) SA 566 (CC).

[46] 1990 (1) SA 680 (A) at 700 F-G.

[47] 2002 (6) SA 431 (SCA) at para [25].

[48] Fn 46 supra at 700I.

[49] See: Sandlundlu (Pty) Ltd v Shepstone & Wylie Inc.

[2011] 3 All SA 183 (SCA).

[50] Clause 15.1.1, C27.

[51] Stated case, paras 4.9 and 8.1.

[52] See: stated case, paras 3.4 and 3.5.

[53] C278.

[54] See: statement of response at para 17 at A61 and the letter by the respondent's attorneys to the applicant's attorneys

dated 1 July 2022, at C200 to 205, in particular, paragraph 8.2 at C204.

[55] Stated case at para 5.2.2.

[56] C 277 to 278.

[57] See in this regard: Telkom SA SOC Ltd v Mashaba (2019) 40 ILJ 629 (LC).

[58] Act 9 of 2018.

[59] Act 55 of 1975.

[60]

[1998] 2 ALL SA 534 (SE) at p 21.

[61] Ibid at pp. 22 - 23.

[62] See: Christie's The Law of Contract, p 657.

[63] The respondent admits liability in its letter dated 1 July 2022 at C200.

[64] Stated case, para 9.4.

[65] See: Member of the Executive Council for Finance, KwaZulu-Natal and another v Dorkin NO and Another

(2008) 29 ILJ 1707 (LAC) and Zungu v Premier of the Province of KwaZulu-Natal and Others [2018] 4 BLLR 323 (CC).

[66]

(2021) 42 ILJ 838 (LAC) at para [47].

[67] Supra at fn 30.

[68] Act 66 of 1995, as amended.

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