

SOUTH AFRICA / JUDGMENT

Mnisi and Others v South African Broadcasting Corporation SOCS Limited and Others (JS 126/2019) [2023] ZALCJHB 178; [2023] 9 BLLR 950 (LC); (2023) 44 ILJ 1977 (LC) (9 June 2023)

[2023] ZALCJHB 178

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 126/2019

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Not Reportable
Case No: JS 126/2019

In the matter between:

NICHOLAS
MNISI AND 56 OTHERS
Applicant
and
SOUTH
AFRICAN BROADCASTING CORPORATION SOCS LIMITED
First
Respondent
SABC
MEDICAL AID SCHEME
Second
Respondent
TOKISO
DISPUTE SETTLEMENT (PTY) LTD
Third
Respondent

Heard:

23 March 2023

Delivered: 9 June 2023
(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 9 June 2023.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicants were dismissed by the respondent (the SABC) in April 2016 after having been found guilty of gross misconduct in the form of fraud and dishonesty. They are part of a group of about 113 employees dismissed by the SABC for defrauding the SABC medical aid scheme in collusion with health care providers. The medical aid scheme is a closed scheme, administered by Medscheme. The SABC contributes 60% of the monthly premium; members of the scheme contribute the balance.
- [2] It is not in dispute that the SABC received a report that there was a criminal syndicate operating amongst its employees that recruited employees, members of the medical scheme, to submit fraudulent medical aid claims. The proceeds of the fraudulent claims were shared by the member, the relevant service providers and the syndicate. A forensic investigation concluded that some 200 employees had defrauded the medical scheme. The form of the fraud involved claims from service providers for medical services or medication not actually provided, with the proceeds of payments from the medical scheme shared on the basis that I have indicated. Disciplinary proceedings were instituted against a total of 134 employees. The SABC decided that it was not reasonably practicable in these circumstances to conduct individual disciplinary hearings. Instead, the SABC engaged an external service provider, Tokiso, to conduct the disciplinary proceedings before 10 chairpersons appointed by Tokiso for this purpose.
- [3] Each of the affected employees received a charge sheet, together with documentary evidence to support the allegations of misconduct. These documents included an affidavit in respect of each employee setting out the basis upon which it was alleged that the employee was guilty of the allegations of misconduct. The employees were afforded the opportunity to respond to these allegations in writing, with all of the documentation then handed to the chairperson concerned. Not all of the affected employees submitted written responses. At the end of the process, the chairpersons found that 113 employees had committed misconduct, and 11 had not. The 113 employees were given the opportunity to make submissions in respect of sanction, and the SABC to make submissions in respect of those factors it considered relevant in aggravation of sanction. The SABC then considered the findings made by the chairpersons, the mitigating and aggravating factors, and the recommendations by the disciplinary chairpersons. The SABC dismissed all of the

employees who had been found guilty of misconduct, including the applicants in the present proceedings. In letters dated 1 April 2016, signed by the SABC's group executive human resources, the group Chief Executive Officer and the chief operations officer, the applicants were dismissed from the SABC's employ.

- [4] A number of the applicants referred disputes to the CCMA contending that their dismissals were unfair. For reasons that are not entirely apparent, these proceedings were abandoned and the present proceedings initiated, formulated as claims of breach of contract.
- [5] The parties have agreed to have their dispute adjudicated by way of a stated case. In essence, the applicants allege that the respondent breached their contracts of employment when it terminated those contracts, specifically by failing to hold oral hearings prior to their dismissal for misconduct, by unlawfully obtaining private and confidential medical information in breach of their right to privacy and dignity, and on account of what they alleged to be the lack of authority on the part of the respondent's board to terminate their contracts.
- [6] The respondent has raised various defences against the applicants' claims. First, the respondent contends that the terms of the contract on which the applicants rely (in the form of the disciplinary code and procedure) does not contemplate that the procedure for which the applicants contend is mandatory. In other words, the respondent contends that there has been no breach of the employment contract. Further, the respondent contends that the information accessed by the person appointed to investigate the fraud that led to the applicants' dismissal was not medical information. Finally, the respondent contends that its head of human capital, who signed the letters of termination of employment, was empowered to do so.
- [7] Prior to recording the terms of the stated case, the pleadings should be scrutinised if only to ascertain the basis of the applicants' claim. The applicants invoke the jurisdiction of the court under section 77(3) of the Basic Conditions of Employment Act, which confers concurrent jurisdiction on this court, with the civil courts, in respect of disputes that concern a contract of employment.
- [8] The applicants plead, among other things, that the failure by the respondent to comply with its disciplinary code and procedure, being incorporated into their contracts of employment, constituted a breach of those contracts and that the termination of the contracts was consequently unlawful, invalid and void ab initio. In regard to the alleged disclosure of confidential information, the applicants plead that the breach of the applicants' right to privacy and dignity had the consequence that the termination of the applicants' contracts of employment was unlawful, invalid and void ab initio. Finally, the applicants plead that the termination was unlawful because members of the board who signed the letters of termination

had no authority to do so.

[9] The stated case reads as follows:

STATEMENT OF FACTS

PART A: ALLEGED BREACH OF EMPLOYMENT CONTRACTS

1. The applicants are as listed in Annexure “A” to the Statement of Case.
2. Of the above applicants, the applicants listed in Annexure “B” hereto were at the material time relevant to the dispute, members of BEMAWU. A copy is annexed hereto and marked “B”.
3. The list of those applicants who were members of the Communication Workers Union (“CWU”) and members of MWASA is contained in Annexure “B1” annexed hereto.
4. The list of those applicants who filed mitigating submissions is contained in Annexure “B2” annexed hereto. Some of the applicants required or submitted mitigating submissions in May 2015 when the decision to dismiss them was already taken in April 2015.
5. Of the Applicants above, the Applicants listed in Annexure “C” are deceased. The executors of their estates have not applied to be a party to these proceedings. A copy is annexed hereto and marked “C”.
6. The Applicants were employed by the First Respondent (“the SABC”) in various capacities prior to the termination of their employment contracts on 01 April 2016.
7. A bundle containing the list of some of the applicants’ contracts of employment and letters of employment is attached and listed under additional document schedule appended hereto as Annexure “U”. The employment contracts bear the same terms and conditions for all applicants except for salaries.
8. All the Applicants, as well as all other employees of the SABC, were members of the SABC Medical Aid Scheme, a closed medical scheme which is administered by Medscheme.
9. The SABC contributed 60% of the monthly premiums for all employees, including the applicants, whilst the applicants contributed 40% of the monthly premiums.
10. The SABC Disciplinary Code and Procedure which applies to the dispute came into effect on or about August 2002 (the “Code”). A copy is annexed hereto and marked “D”.
11. In terms of clause 1.5, the Disciplinary Code forms part of an employee’s terms and conditions of employment and applies to all employees, including the Applicants.
12. On or about September 2014, the SABC’s Internal Audit completed an investigation and issued a report which implicated approximately 211 employees as having colluded with a number of health services providers to defraud the SABC Medical Aid Scheme.

13. On 27 March 2015, the SABC held a consultative meeting with the employees' representative unions, including BEMAWU and CWU, at which it informed the representatives about the outcome of the investigation into the medical aid scheme fraud claims and its intention to institute disciplinary action against those employees who had been implicated.
14. On 18 June 2015, the SABC's Group Executive Human Resources, Mr Jabulani Mabaso, addressed a memorandum to the SABC's Group CEO and COO in terms of which he communicated challenges associated with disciplining the implicated employees, including the applicants. A copy is annexed hereto and marked "E". The contents of the memo are by reference incorporated herein and will be referred to in detail where relevant by the parties in their written legal

submissions.

15. The SABC's Group Executive Human Resources recommended that the following procedure be adopted for the disciplinary hearings of the implicated employees, including the Applicants. The proposed procedure, the full details of which appear in the memorandum and which by reference are incorporated herein, entailed the following:-

15.1 "each employee will be provided with a letter detailing the allegations of misconduct against him/her, the reason why the SABC believes that he/she is guilty of the alleged misconduct, supported by the documents relevant to the employee;

15.2 the above letter will include an invitation for the employee to submit written representations, which must include evidence that they may have, that controverts the evidence furnished by the SABC and why they should not be found to have committed the misconduct and should not be sanctioned;

15.3 a designated "chairperson" will then consider the allegations and evidence provided by the SABC and the representations

and counter-evidence submitted by the employee and make a determination on whether or not the employee is guilty;

15.4 if the employee is found to be guilty, the employee will be provided with another letter setting out the aggravating factors and the proposed sanction and he/she will be invited to submit mitigating factors and propose what an appropriate sanction should be; and

15.5 the designated chairperson will determine the appropriate sanction which will then be communicated to the employee."

16. The memorandum and proposed process were approved by the SABC Group CE and COO on 19 June 2015.

17. On 18 June 2015, the SABC's General Manager: Group Employee Relations, Mandiwe Nkosi, addressed a letter to the two unions representing employees at the SABC (BEMAWU and CWU) in which she informed them of the SABC's intention to adopt the disciplinary process as set out in paragraph 13 above and invited the unions to respond thereto by 22 June 2015. A copy is annexed hereto and marked "F".
18. On 19 June 2015, BEMAWU circulated an email to its members informing them of the proposed procedure and that it would obtain legal advice in respect thereof. A copy is annexed hereto and marked "G".
19. On 24 June 2015, BEMAWU requested to be furnished with the internal audit report on which the allegations of misconduct were based. A copy is annexed hereto and marked "H".
20. On 25 June 2015, the SABC declined to provide BEMAWU with the report for reasons as set out in the letter. A copy is annexed hereto and marked "I".
21. On 17 September 2015, the SABC issued letters dated 15 and/or 16 September 2015 detailing various allegations of misconduct against each employee and the supporting evidence, including an affidavit deposed to Michael Malete, the investigator, and invited the employees, including the applicants, to submit written responses and supporting evidence by 25 September 2015. A copy of the documents in respect of Mr Lwazi Gobodo is annexed hereto and marked "J".
22. On 22 September 2015, BEMAWU wrote an email to the SABC in which it rejected the disciplinary procedure adopted by the SABC. A copy is annexed hereto and marked "K".
23. On 23 September 2015, BEMAWU's attorneys wrote to the SABC challenging the disciplinary procedure that it had adopted and threatening an urgent application to interdict the SABC if it did not suspend it. A copy is annexed hereto and marked "L".
24. On 28 September 2015, the SABC replied to BEMAWU's attorneys' letter of 23 September 2015, setting out its view that the process was fair and legitimate and that it would not be suspended. A copy is annexed hereto and marked "M".
25. On 08 October 2015, the SABC informed BEMAWU that it would not extend the deadline for employees to respond to the allegations of misconduct to 01 December 2015 as demanded by BEMAWU. A copy is annexed hereto and marked "N".
26. On 19 October 2015, the SABC extended the deadline to respond to the allegation of misconduct for employees, including the Applicants, to 30 October 2015; and explicitly advised that no further extension would be granted. A copy is annexed hereto and marked "O".
27. On 09 November 2015, BEMAWU lodged an urgent application in the Labour Court to interdict the SABC from proceeding with the disciplinary proceedings against the implicated employees, including the Applicants.

28. The SABC opposed the application and filed affidavits. The application was first heard on or about 09 December 2015.
29. On 14 January 2016, the late Steenkamp J delivered a judgment striking the application from the roll for lack of urgency, but also expressed his views with regard to the procedure adopted by the SABC. A copy of the judgment is annexed hereto and marked "P".
30. The Applicants listed in Annexure "Q" hereto duly submitted their representations.
31. The remainder of the Applicants did not submit their representations.
32. Following consideration of all information submitted to the Tokiso Chairpersons, and on 28 January 2016, the Applicants were found guilty of the allegations of misconduct.
33. The Applicants listed in annexure "R" submitted their mitigating factors. The remaining applicants did not do so.
34. In terms of letters dated 01 April 2016, signed by the SABC's Group Executive Human Resources and the Group Chief Executive Officer and the Chief Operations Officer, the Applicants were dismissed from the SABC's employment.
35. The Applicants who are members of BEMAWU referred an alleged unfair dismissal dispute to the SABC for conciliation. In November 2018, BEMAWU withdrew the alleged unfair dismissal dispute from the CCMA.
36. On 16 October 2019 the Group Executive: Human Resources of the SABC wrote a letter to the CCMA, MWASA and BEMAWU in which he advised that the SABC decided not to accept Tokiso's recommended sanctions, a copy of the letter is attached marked "S".

LEGAL ISSUES FOR DETERMINATION IN RESPECT OF PART A

37. Based on the above facts as supported by the annexures, the Court is required to decide the following legal issues:

37.1 Whether on a proper interpretation of the SABC Disciplinary Code and Procedure of August 2002, the SABC was obliged to follow the procedure recommended clauses 4.5 to 4.7 of the Disciplinary Code;

37.2 Whether the actual procedure followed by the SABC nonetheless resulted in a breach of the Applicants' employment contracts, more specifically, the right to a hearing as recommended by clause 1.4 of the Disciplinary Code;

37.3 If the SABC committed a material breach of the applicants' employment contracts, whether such breach rendered the termination of the employment contracts for that reason alone unlawful and invalid;

37.4 If the termination of the employment contracts of the Applicants was unlawful and invalid for the reason contemplated in the preceding paragraph, whether the Applicants are entitled to specific performance as a remedy; and

37.5 If the Applicants are entitled to specific performance, the Court must determine the date from which the order is to operate, having regard to the fact that the Applicants have not challenged the findings made by the chairpersons of their disciplinary hearings that they committed misconduct as alleged by the SABC, which misconduct constitutes a breach of their employment contracts.

PART B: ALLEGED BREACH OF THE CONSTITUTION AND NATIONAL HEALTH ACT

38. On or about September 2014, the SABC's Internal Audit completed an investigation and issued a report which implicated approximately 211 employees as having colluded with a number of health services providers to defraud the SABC Medical Aid Scheme.
39. In conducting the above investigation, the SABC obtained copies of the medical aid claims submitted by health care service providers to Medscheme.
40. The SABC alleges that was not provided with the medical files of the Applicants, including prescriptions.
41. The Applicants did not consent to Medscheme or medical practitioners providing the SABC with their medical aid claims.
42. The SABC alleges that the medical aid claims submitted by health service providers on behalf of the Applicants are fraudulent.
43. The Applicants allege that the evidence used to dismiss them was obtained unlawfully and must have been excluded.

LEGAL ISSUES FOR DETERMINATION IN RESPECT OF PART B

44. The Court is required to decide the following legal issues-

44.1 Whether the medical aid claims obtained by the SABC contain confidential medical information as contemplated by sections 14 and 15 of the National Health Act of 61 of 2003.

44.2 If the medical aid claims constitute confidential medical information as contemplated by sections 14 and 15 of the National Health Act, whether the SABC obtained such information unlawfully;

44.3 If the SABC obtained the medical information unlawfully, and the information was confidential medical information as contemplated by sections 14 and 15 of the National Health Act and the Constitution, whether such information could nonetheless be used by the SABC during the disciplinary process of the Applicants, having regard to the principles of law applicable to such evidence and the manner in which it was obtained;

44.4 If the SABC was not entitled to obtain and use the applicants' medical aid claims, whether reliance on information contained in such claims rendered the termination of the applicants' employment contracts for that reason alone unlawful;

44.5 Whether the SABC, in obtaining the applicants' medical aid claims, breached sections 14 and 35 of the Constitution;

44.6 If the termination of the employment contracts of the applicants was unlawful and invalid, whether the applicants are entitled to specific performance as a remedy; and

44.7 If the applicants are entitled to specific performance, the Court must determine the date from which the order is to operate, having regard to the fact that the Applicants have not challenged the findings made by the chairpersons of their disciplinary hearings that they committed misconduct as alleged by the SABC, which misconduct constitutes a breach of their employment contracts.

PART C: THE BOARD HAD NO AUTHORITY TO DISMISS THE APPLICANTS

45. On 1 April 2016 the SABC considered the findings of guilt and dismissed each of the applicants with written reasons.

46. The sanction is signed by:

46.1 Jabulani Mabaso, the Group Executive: Human Capital Services;

46.2 James Aguma, Chief Financial Officer;

46.3 Hlaudi Motsoeneng, Chief Operations Officer ("Motsoeneng"); and

46.4 Jimi Matthews, Acting Group Chief Executive Officer.

47. Section 13(10) of the Broadcasting Act 4 of 1999 states that "members of the Board, which must include the chairperson or the deputy chairperson, will constitute a quorum at any meeting of the Board". The Board cannot take any binding decisions unless it is quorate.

48. Messrs Mabaso, Aguma, Motsoeneng and Matthews signed the sanction in respect of each applicant.

49. Furthermore, in respect of Motsoeneng:

49.1 The Public Protector report titled When Governance and Ethics Fail published in 2014 recommended that Motsoeneng be suspended pending a disciplinary inquiry.

49.2 In *Democratic Alliance v SABC Ltd and Others* 2015 (1) SA 551(WCC), Schippers J granted an order directing the SABC to institute disciplinary proceedings against Motsoeneng. It was further ordered that pending the finalisation of the disciplinary proceedings, which had to be completed within 60 calendar days after they had been instated, Motsoeneng shall be suspended from the position of COO of the SABC, on full pay.

49.3 In an application for leave to appeal, heard on 23 April 2015, Shippers J granted leave to appeal against his aforementioned order. However, she also found that her orders pertaining to the suspension and the institution of disciplinary proceedings shall operate and be executed pending the outcome of the appeal to the SCA.

49.4 On the date on which Motsoeneng signed the applicants' dismissal letters, he ought to have been suspended pending the outcome of his disciplinary enquiry.

49.5 In the review application in *Democratic Alliance v SABs Soc Limited and Others* (Case No: 12497/2014) (27 November 2015), Davis J ruled that the decision taken by the Minister of Communications to approve the recommendation made by the SABC and its Board to appoint Motsoeneng as its Chief Operating Officer be reviewed and set aside. The SCA dismissed Motsoeneng's appeal against this order.

49.6 In *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC) and Others; Democratic Alliance v Motsoeneng and Others*

[2017] 1 All SA 530 (WCC) (12 December 2016, Rogers and Le Grange JJ held as follows:

"[42] So the state of play at the end of 2015 was that there was a pending application for leave to appeal against the SCA's dismissal of the Part A appeal, a pending application to appeal Davis J's setting aside of Motsoeneng's appointment as COO, and a disciplinary decision clearing Motsoeneng on the attenuated charges. It appears that following the disciplinary decision, Motsoeneng resumed his duties as COO, the effect of Davis J's decision having been suspended by the applications for leave to appeal.

The DC application and the Part B appeal proceedings

[43] The correctness of the SCA's view of the legal effect of the Public Protector's factual findings and remedial action would have been to the forefront of the proposed appeal by the SABC, the Minister and Motsoeneng to the Constitutional Court. Those same issues were to be considered in the *Nkandla* case, in which the Constitutional Court heard argument on 9 February 2016 and delivered judgment on 31 March 2016.[9] Even before the *Nkandla* hearing the would-be appellants in the SABC case withdrew their applications for leave to appeal, a fact formally recorded by the Constitutional Court on 3 February 2016. This meant that Schippers J's order on the Part A relief could no longer be questioned.

[44] The applications for leave to appeal to the Constitutional Court were presumably withdrawn because the appellants no longer regarded the Part A order as having practical effect. With the granting of Davis J's order the need to suspend Motsoeneng as COO fell away, subject to any appeal against Davis J's judgment. And if the disciplinary proceedings before Mr Edeling constituted compliance with the Public Protector's remedial action, the basis for suspension had in any event lapsed.

[45] As to the pending applications for leave to appeal against Davis J's judgment, Davis J dismissed them on 23 May 2016. The SCA dismissed petitions on 14 September 2016. The would-be appellants did not take it further. So 14 September 2016 was the date by which it was finally determined that Motsoeneng's appointment on 8 July 2014 as COO was invalid and set aside."

50. None of the judgements referred to herein in relation to the lawfulness of the appointment of Mr Motsoneng as Chief Operations officer included any declarator that all actions and decisions by Mr Motsoeneng were invalid, nor had such declarator been sought by any of the applicants in any of the applications.

LEGAL ISSUES FOR DETERMINATION IN RESPECT OF PART C

51. The Court is required to decide the following legal issues-

51.1 Whether, as alleged by the applicants', Messrs Mabaso, Aguma, Motsoneneg and Matthews were acting as the SABC Board when imposing a sanction of dismissal on the applicants, if so, if the Board was quorate and/or authority to terminate the applicants' employment contracts?

51.2 Whether or not Messrs Mabaso, Aguma, Motsoneneg and Matthews were entitled to deviate from the sanctions recommended by the appointed Chairperson from Tokiso Dispute Settlement (Pty) Ltd.

51.3 Whether the imposition of the sanctions by Messrs Mabaso, Aguma, Motsoeneng and Matthews was therefore in breach of the SABC Disciplinary Code or its own adopted procedure in terms of the memorandum dated 15 June 2015.

[10] The applicants' claims in Parts A, B and C can be reduced to the respective assertions that the SABC's termination of their contracts of employment was unlawful, invalid and void ab initio because the SABC did not hold oral disciplinary hearings prior to that termination; the SABC unlawfully obtained confidential medical

information in breach of the applicants' right to privacy and dignity; and because members of the SABC board did not have authority to terminate the contracts.

[11] I deal first with Part A of the applicants' claim. This requires, as the stated case indicates, a determination of whether the SABC was obliged to follow the procedure in clauses 4.5 to 4.7 of the disciplinary code, whether the actual procedure adopted by the SABC constituted a breach of contract and whether any such breach rendered the termination of the contracts unlawful and invalid, and if so, whether the applicants are entitled to the remedy of specific performance.

[12] Clause 1.5 of the disciplinary code provides that the disciplinary procedure and code of conduct form part of employees' contracts of employment. The preceding clause, 1.4, reads as follows:

Discipline will be maintained through a system of verbal and formal written warnings, hearings and inquiries that will be conducted in such a way so as to ensure that discipline is exercised fairly in accordance with the rules of natural justice.

[13] 4.6 describes the constitution of a disciplinary panel, which must be seen to be independent and objective as possible. For misconduct sufficiently serious to warrant a disciplinary measure exceeding a warning, a formal disciplinary hearing must be held. Clause 4.8 reads as follows:

The following procedure is recommended for the conducting of a disciplinary hearing.

[14] What these provisions of the code establish is that when dismissal is a possible outcome, a formal disciplinary hearing must be held, presided over by a panel chaired by a line or other manager, and that group labour relations may, at the invitation of the line manager, decide on the composition of the panel. The procedure recommended involves the hearing at which the employee is entitled to be present and at which witnesses give oral evidence and are subject to cross-examination.

[15] It is not in dispute that the process followed by the SABC participant the applicants did not assume the form of the procedure contemplated by clause 4.8 of the code, at least in that the applicants were not present at the hearings, oral evidence was not lead and there was no cross-examination. As I have indicated, Tokiso appointed independent chairpersons, put the allegations of misconduct to the applicant concerned supported by affidavits and documents, and afforded the applicant an opportunity to respond to the allegations. The chairpersons thereafter reached independent and impartial conclusions with regard to the guilt or otherwise of the employee.

[16] Of some significance is the wording in paragraph 4.8, which is clearly cast in the language of recommendation for the conduct of a disciplinary hearing. Properly interpreted, the wording of the clause, properly understood in its context and in the larger structure of the disciplinary code as a whole, confers a discretion as to how a disciplinary hearing is to be. Put another way, the use of the words 'is recommended' self-evidently means that the SABC is not obliged to follow the procedure set out in clause 4.8.

[17] The facts of the present case illustrate why the default procedure set out in clause 4.8 may not be workable in every instance. To hold 134 individual hearings, with the forensic investigator having to testify at each one of them, each with a different chairperson and likely a different initiator, is operationally impossible. Equally, the language of clause 4.8 is that even in cases where the recommended procedure is not followed, whatever procedure is followed must comply with the rules of natural justice. In a labour context, the content of the rules of justice are best ascertained by reference to the procedure contained in item 4 of the code of good practice: dismissal annexed to the LRA. Item 4, in line with ILO Convention 182 contemplates that an employee accused of misconduct would be allowed an opportunity to state a case in response to the allegations brought against him or her, a reasonable time to prepare that response and in particular, that this engagement need not assume the form of a

formal inquiry.

[18] On the pleaded facts, the employment of the applicants was terminated on 1 April

2016. The breach on which they rely is a breach that they claim arose on that date, when they were dismissed without the SABC having followed the procedure established by its discipline code. In view of my finding in relation to the proper meaning to be accorded to clauses 4.5 to 4.7 of the disciplinary code and in particular, my conclusion that the procedure contained in those clauses is not mandatory but the subject of a recommendation, it follows that SABC did not commit any material breach of the applicant's employment contracts by employing the procedure that it did. As I have indicated, the procedure that was adopted meets the test of the rules of natural justice reflected in paragraph 1.4 of the disciplinary procedure.

[19] Turning next to claim B, it will be recalled that the applicants contend that the termination of their contracts of employment is unlawful for the reason that information that was used as a basis to dismiss them was unlawfully obtained. It is not in dispute that the forensic investigator, during the course of his investigation, interviewed the employees involved, collated data in the form of service providers invoices, statements of account and the like, which were provided by Medscheme, the medical scheme administrators. It is also not in dispute that the investigator did not access any medical records or information held by any of the service providers relating to any alleged medical treatment that they may have received. The basis of the allegations of misconduct brought against employees was that the claims submitted to Medscheme were fraudulent, and that the medical services described herein were never provided. That being so, I failed to appreciate how it can be said that medical information came to be held by the investigator, acting on behalf of the SABC. In short, the information that was accessed concerned claims from service providers, and not medical records kept by the health practitioners concerned which at all times, remained confidential. In these circumstances, I fail to appreciate how it can be said that the SABC breached the employment contracts of the applicants by obtaining information regarding fraudulent claims made against the medical scheme.

[20] Claim C it will be recalled, concerns the issue of authority to dismiss the applicants. It is not in dispute that the termination letters were signed by the SABC's group executive: human resources, the group Chief Executive Officer and the chief operations officer. The applicants pleaded cases that the termination was unlawful because the SABC's board had no authority to sign the letters of termination. Put another way, the complaint is that the termination letters were not issued by a quorate board, which the applicants submit renders the conduct of the signatories to the letter unlawful and their dismissals invalid.

[21] It is not seriously in dispute that in terms of the SABC's delegation of authority, the chairperson of the disciplinary hearing makes recommendations to the next level authority for approval. In the present instance, the SABC's group executive: human capital services had the requisite authority in relation to the termination of the applicant's individual

employment contracts and in accordance with this authority, he signed and issued the termination letters. The fact that the letters were co-signed by two additional executives prior the head of human capital of the powers vested in him. Further, a letter of dismissal does not constitute a resolution of the SABC board. The signing of a dismissal letter is an internal action pursuant to the finalization of a disciplinary hearing. There is thus no merit in the applicant's contention that the signatories to the letters of termination of employment were acting at the time as the SABC board or that the termination of their appointment was invalid on account of any absence of any necessary authority.

- [22] The failure by the applicants to establish any breach of contract by the SABC aside, there is a conceptual difficulty that underlies their claim. In essence, the applicants contend that the SABC breached their contracts of employment by terminating the contracts in the circumstances that relate to claims A, B and C respectively, that the termination was thus unlawful and invalid and that they are entitled to specific performance as a remedy. The misconception is that the breach of a contract necessarily gives rise to invalidity or the voidness of the contract. As the LAC remarked in *Pilanesberg Platinum Mines (Pty) Ltd v Ramabulana* (2019) 40 ILJ 2723 (LAC), the only relief open to a party claiming breach of contract is either specific performance or damages. Claim A is in essence a claim of breach of contract, in the form of an alleged failure to comply with the SABC disciplinary code. The statement of claim makes no mention of any acceptance of any repudiation of the employment contracts, or any election to seek performance of the contract or to cancel the contract and claim damages. The same applies to claims B and C. On the assumption that the remedy sought by the applicants is one of specific performance (this would appear to be the case by reference to paragraph 37.4 of the stated case and the claim for reinstatement), it is well-established that specific performance is a discretionary remedy. As Froneman J remarked in *Steenkamp & others v Edcon Ltd and another* (2016) 37 ILJ 564 (CC), while there is absolute prohibition against granting specific performance to wrongfully dismissed employees, 'Whether specific performance is in fact to be granted depends on practical considerations and lies in the court's discretion'.
- [23] The only possible purpose of an order of specific performance would be to compel the SABC to convene disciplinary enquiries in respect of each of the applicants, this time strictly in accordance with its disciplinary code. There are at least two reasons why specific performance is not appropriate in the present circumstances. First, the applicants do not deny the misconduct with which they were charged. It should be recalled that they were accused of engaging in fraudulent and dishonest conduct. It is no answer to say that a disciplinary hearing conducted strictly in terms of the code will determine the veracity of these allegations. The applicants have already been subjected to an enquiry, in which the allegations of misconduct made against them have been sustained. Here is no challenge to those findings. Further, the applicants have delayed the prosecution of this litigation inordinately. It is more than seven years since the applicants' termination of employment. The applicants referred an unfair dismissal dispute to conciliation, and then to arbitration. After a number of postponements of those proceedings, they were abandoned and the

present proceedings instituted.

[24] In summary: the SABC did not breach the applicants' employment contracts by adopting the procedure that it did prior to the termination of their employment, or by accessing the documents that it did in the course of investigating claims of fraud, nor was the termination invalid or void for lack of authority. Even if the SABC breached the employment contracts, all of the relevant facts and circumstances militate against an award of specific performance.

[25] Finally, the requirements of the law and fairness are best satisfied by each party bearing its own costs.

I make the following order:

1. The applicants' claims are dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv X Mofokeng

Instructed by: Mabuza Attorneys

For the respondent: Mr P Maserumule, Maserumule Attorneys

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mnisi-and-others-v-south-unknown-topic-alcjhb-2023>

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