

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case number:

In the matter between:

MUYIWA GBENGA-OLUWATOYE

Applicant

and

RECKITT BENCKISER SOUTH AFRICA (PTY) LTD

First Respondent

NADEEM BAIG *N.O.*

Second Respondent

---

**AFFIDAVIT OPPOSING APPLICATION FOR LEAVE TO APPEAL**

---

I, the undersigned,

FRANCOIS FRENCH

do hereby make oath and say that:

- 1 I am an adult male businessman employed by the first respondent as its Regional Legal Counsel for Africa at the first respondent's principal place of business at Number 8, Jet Park Road, Elandsfontein, Johannesburg.

- 2 I am duly authorised to oppose this application on behalf of both the first and second respondent (hereafter “the respondents”). In this regard I annex hereto a previous resolution passed by the first respondent’s board of directors marked **AA1** and which was intended to grant me authority to act on behalf of the first respondent in respect of any claims and legal proceedings launched by the Applicant in respect of his employment and termination thereof including any ancillary matters which arise therefrom. In addition and as a cautionary measure, I secured a further resolution which was passed by the board of directors of the first respondent as at the date of deposing to this affidavit, being 10 March 2016 which again confirms my authority to act on behalf of the first respondent in respect of legal proceedings pertaining to his employment and termination thereof and in this application. The further resolution is annexed hereto marked **AA2** and a confirmatory affidavit by the second respondent marked **AA3**.
- 3 Unless the contrary is stated or indicated by the context, the facts deposed to herein are within my personal knowledge and are to the best of my knowledge and belief true and correct. Where I make submissions of a legal nature, I do so on the advice of the respondents’ legal representatives.

## **INTRODUCTION**

- 4 The parties have been embroiled in extensive litigation subsequent to the termination of the applicant's employment with the first respondent. Initially the applicant brought an urgent application in the Labour Court declaring the termination of his employment contract "*to be a breach of clause 10.1*" of that contract and declaring the mutual separation agreement signed by him to be "*invalid ab initio and of no force and effect*". In consequence hereof the applicant requested that his termination of employment be set aside and that the first respondent be ordered to reinstate him with immediate effect.
- 5 The applicant's case before the Labour Court was based, not on the provisions of the Labour Relations Act, 66 of 1995 ("the LRA"), but on a common law breach of his employment contract (clause 10.1). It was the applicant's case that his employment contract, on a proper construction thereof, expressly catered for a pre-dismissal hearing; in the alternative the applicant contended for an implied term to this effect. The denial of this contractual right, so contended the applicant, constituted a repudiation of his contract of employment which he elected to reject – holding the first respondent to the terms of the contract and seeking an order for reinstatement pursuant thereto.
- 6 There is no dispute that on the same day as the termination of the applicant's employment, the applicant and the first respondent entered into a mutual separation agreement, the terms whereof provided

(amongst others) that the applicant accepts the termination of his employment and waives his right “*to approach any Relevant Authority, including the CCMA and/or the Labour Court or any other Court for any relief ... emanating from his Employment and/or his resignation and/or this Agreement*”. The applicant contended before the Labour Court that he was coerced into signing the separation agreement, alternatively that the agreement was in contravention of section 5(4) of the LRA.

- 7 In the Labour Court Mr Justice Molahlehi held that in terms of the common law an employer is entitled to terminate the employment contract on the basis of its view that an employee (the applicant in this instance) is guilty of misconduct. Whilst this ought to have been the end of the matter, Mr Justice Molahlehi in any event held in relation to the separation agreement that the applicant failed to make out a case that he was coerced to sign it and did not provide any other evidence that would warrant declaring the agreement invalid. The judgment is annexure “B” to the founding affidavit.
- 8 The applicant sought leave to appeal against the Labour Court decision directly to this Honourable Court. On 7 August 2014 the application was dismissed. Leave to appeal to the Labour Appeal Court having been granted, the appeal was dismissed with costs on 3 February 2016 on the basis that:

- 8.1 The Labour Court correctly refused to declare the separation agreement invalid *ab initio* and of no force and effect on the grounds of duress;
  - 8.2 The Labour Court correctly refused to set the separation agreement aside on the basis that the limitation to obtain further redress from the CCMA and the court was neither unlawful nor contrary to public policy;
  - 8.3 The applicant had accordingly waived his right to approach the CCMA or any court to seek relief against the respondent; and
  - 8.4 In the premise it was unnecessary to determine whether the applicant had a contractual right to a hearing prior to the termination of his employment (given that the terms of the separation agreement overtook any such contractual entitlement).
- 9 The applicant has not sought leave to appeal to the Supreme Court of Appeal (“the SCA”), but instead again seeks leave to appeal directly to this Honourable Court.
- 10 The merits of the submissions made in the founding affidavit aside, there are a number of difficulties with the application:

- 10.1 The applicant does not depose to the founding affidavit nor files a confirmatory affidavit in relation thereto. This renders the factual allegations made in the founding affidavit hearsay. The deponent's statement that they fall within his personal knowledge are, save in relation to the conduct of the litigation, simply without foundation.
- 10.2 The deponent has failed to annex to his application for leave to appeal to the application papers that were served before the Labour Court and that constituted a major portion of the appeal record in the Labour Appeal Court. As such there is no factual basis put up upon which this Court can determine the application for leave to appeal.
- 11 As far as the basis for the application for leave to appeal is concerned, it would appear that it is premised on a consideration of two issues (that the applicant contends is of a constitutional nature alternatively is of general public importance):
- 11.1 The first issue is whether a term implied by law (to the effect that a pre-dismissal hearing constitutes a procedural prerequisite to any termination by the employer of a contract of employment) can be read into all contracts of employment. If this were so, the applicant contends, the first respondent was in breach of the provision and the applicant ought to be entitled to an order of

specific performance in consequence of the first respondent's breach (resulting in the order for reinstatement sought by the applicant).

11.2 The second is whether the separation agreement was lawful given that it restricts the applicant's access to justice and flouts the protection which the applicant contends is afforded employees under sections 4 and 5 of the Labour Relations Act, 66 of 1995 ("the LRA").

12 In this Court the applicant must show that he has reasonable prospects of succeeding on both scores in order for him to obtain leave to appeal; reasonable prospects on only one of the aforesaid will not suffice as the applicant's case will then nevertheless fall on the other. Differently put, the applicant must show the following:

12.1 The applicant has a reasonable prospect of demonstrating that the Labour Appeal Court was wrong in relation to its finding relating to the validity and lawfulness of the separation agreement. Insofar as the applicant's case before this Court is premised on the finding that any agreement voluntarily concluded in terms whereof a party waives his/her right to approach the CCMA or any court to seek relief is invalid, the applicant's appeal correctly raises a constitutional issue. Insofar as the applicant's case is simply that he was placed under

duress when concluding the separation agreement, this is an issue of fact and does not raise any constitutional issue. It would appear that the applicant has cast his case before this Court in narrower terms than the appeal before the Labour Appeal Court, in that the applicant no longer seems to rely on a case for duress when concluding the separation agreement. Be that as it may, this issue will nonetheless be dealt with herein, lest the application be read to incorporate an appeal in respect of this issue. These issues are dealt with below under the main heading “Validity of the Separation Agreement” and the two sub-headings “Constitutional Invalidity” and “Duress”.

- 12.2 The applicant has a reasonable prospect of demonstrating (a) that the Labour Court was wrong in relation to its finding that there was no term in the applicant’s contract of employment requiring the first respondent to conduct a pre-dismissal hearing before terminating the applicant’s employment; and (b) that the first respondent breached this term of the contract for failure to conduct any such pre-dismissal hearing. The first of these issues raises a constitutional issue; the second does not. Irrespective hereof, insofar as this Court deals with the first issue it would also be ceased with the second issue. The application before this Court, however, appears only to focus on whether a right to a pre-dismissal hearing is a term implied by law and

seemingly ignores the second issue. It remains a prerequisite for a finding that the first respondent breached the contract (as a matter of fact) that no pre-dismissal hearing was held (and the applicant must show that it has reasonable prospects of demonstrating this). It also appears that in relation to this ground of appeal that the applicant has cast his case before this Court in narrower terms than the appeal before the Labour Appeal Court, in that the applicant no longer seems to contend for an express term (but only a term implied by law). Again, *ex abundanti cautela*, the importation of an express term will also be dealt with. These issues are dealt with under the main heading “The Pre-Dismissal Hearing” and the three sub-headings “An Express Term of the Contract”, “An Implied Term of the Contract” and “Breach of Contract”.

## **VALIDITY OF THE SEPARATION AGREEMENT**

### **Constitutional Invalidity**

- 13 As is the case with a number of the grounds of appeal, the applicant seems to pursue his appeal based on the invalidity of the separation agreement on narrower grounds than that which served before the Labour Appeal Court. The applicant before this Court contends that the

waiver contained in the separation agreement is invalid because it is in breach of sections 4 and 5 of the LRA (and by dint thereof flouts the applicant's rights under section 23 of the Constitution). Before the Labour Appeal Court the applicant's case was wider, incorporating the contention that separation agreement is invalid also by dint of section 34 of the Constitution. For the sake of caution, both grounds are addressed herein.

- 14 As far as section 34 of the Constitution is concerned, the Labour Appeal Court held with reference to *Barkhuizen v Napier*<sup>1</sup> that a contractual limitation on seeking redress is permissible when it is reasonable to limit such right because, in general, parties should comply with contractual obligations that have been freely and voluntarily undertaken (thus giving effect to the central constitutional values of freedom and dignity). The Labour Appeal Court with reference to *Barkhuizen* pointed out that self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. It follows, concluded the Labour Appeal Court, that the extent to which the contract was freely and voluntarily concluded is a vital factor as it will determine the extent to which the values of freedom and dignity were adhered to. Having considered the applicant and the first respondent's relative positions as contracting parties, including their bargaining power

---

<sup>1</sup> 2007 (5) SA 323 (CC) at para 48

and understanding of the contract, the Labour Appeal Court held that there was nothing to indicate that the agreement was not concluded with understanding (nor that it was concluded involuntarily) and that, as such, it was neither unlawful nor contrary to public policy. In this regard an inherent and important difference between the present matter and the *Barkhuizen* case is that in *Barkhuizen* the court considered the exclusion or limitation of legal recourse as a matter of principle in respect of “*any future injury or wrong*”. This is different to the present scenario where the applicant, with knowledge of his rights, elected to waive those rights.

- 15 A further consideration is the fact that this Court was previously prepared to assume, without finding, that a party could consent to being removed to a country in order to face a criminal charge where his life is in jeopardy.<sup>2</sup> In any event, even if it were held that certain rights are inalienable and can never be waived, the right to legal recourse is not one such an inalienable right. An inalienable right would be limited to rights to human dignity, life and the right not to be discriminated against.<sup>3</sup>

---

<sup>2</sup> *Mohamed and another v President of the RSA and others* 2001 (3) SA 893 (CC) at paras 61 et seq.

<sup>3</sup> See in this regard De Waal et al., *The Bill of Rights Handbook* 4<sup>th</sup> Ed at 42 – 43

- 16 The applicant has not shown that the applicant's waiver (absent a finding of duress) is constitutionally assailable. Such a finding would, of course, have the effect that there could never be a valid an enforceable waiver of a right to proceed with litigation. Such a finding would not only dramatically alter the common law, but there is no public policy that militates for such a position. To the contrary, inherent in the finding of the Constitutional Court in the *Mohamed* matter is a finding that there can be a waiver of a right to legal recourse.
- 17 Insofar as the applicant relies on sections 4 and 5 of the LRA to contend that the waiver is unenforceable (and in breach of the constitutional right entrenched in section 23), such reliance is misplaced. Firstly, the applicant's claim in the Labour Court (for the setting aside of his dismissal) was premised upon the terms of his contract of employment. The applicant's claim was neither in the Labour Court nor in the Labour Appeal Court, and is not now, based on the protections afforded to employees under the LRA. To the contrary, the applicant has expressly disavowed reliance on any of the remedies or relief afforded to him by the LRA. As such the applicant cannot rely on the provisions of the LRA (or the constitutional right entrenched in section 23 of the Constitution for that matter) for the invalidity of the separation agreement.
- 18 Secondly, the aforesaid aside, section 4 of the LRA provides for employees' rights to freedom of association. It does not contain any

reference to an employee's right to pursue any claims against his/her employer relating to unfair dismissal. Section 5 of the LRA protects the rights of employees and prospective employees against discrimination. Accordingly, whilst there is a prohibition against the limitation of the rights in sections 4 and 5 contained in section 5(4), this is restricted only to rights entrenched in sections 4 and 5 of the LRA. Section 5(4) reads:

*“A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act.”*

- 19 The separation agreement regulated the applicant's exit from the first respondent's employment. It provided that the agreement was in full and final settlement of any dispute between the applicant and the first respondent. The separation agreement in no way infringed on any rights contained in sections 4 and 5 of the LRA. As such the limitation contained in section 5(4) of the LRA does not find application in this instance.
- 20 The applicant contends that section 5(2)(b) of the LRA prohibits the conclusion of the separation agreement. For the sake of clarity I quote the full provisions of sections 5(1) and 5(2)(b):

*“(1) No person may discriminate against an employee for exercising any right conferred by this Act.*

*(2) Without limiting the general protection conferred by sub-section*

*(1), no person may do, or threaten to do, any of the following –*

*(a) ...*

*(b) prevent an employee or person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or*

*(c) ...”*

21 The act of prevention that is prohibited here is a future act of prevention. The applicant was in no way prohibited from seeking to enforce his remedies under the LRA prior to the termination of his employment. Once the applicant's employment with the first respondent was terminated, the applicant was free to refer an unfair dismissal dispute (or any other claim available to him under the LRA) to the CCMA (or the Labour Court insofar as it has jurisdiction). The separation agreement was entered into by the applicant voluntarily and with knowledge of the consequences thereof. More than this, it was entered into at the instance of the applicant who sought to regulate his exit from the first

respondent in a particular manner. As such, the separation agreement is in breach of section 5(4) of the LRA.

### **Duress**

22 Whilst the applicant no longer appears to pursue a claim for duress, and seems content in advancing only a legal argument in relation to the constitutional invalidity of the separation agreement, I nonetheless briefly deal with the issue of duress (in the event that my understanding of the narrower basis of the applicant's appeal is not correct). At the outset it must be indicated (as was highlighted by the Labour Appeal Court), there is a dispute of fact regarding this issue. The applicant contends in his founding affidavit that he was coerced into signing the separation agreement given the impact the immediate termination of his employment had on his financial position, his housing and benefits, his child's schooling and his status in South Africa.<sup>4</sup> By contrast the respondents have indicated that the separation agreement arose in consequence of the applicant seeking a reprieve from the consequences of the termination of his contract of employment.<sup>5</sup> Suffice

---

<sup>4</sup> These allegations are made in the FA at paras 6.36 – 6.42 and was summarized in this way by the Labour Appeal Court in para 18 of its judgment.

<sup>5</sup> The respondents' version in this regard is outlined above under the heading "*The breach of contract*" and accordingly is not repeated here.

to point out that the versions presented by the applicant and the respondents are diametrically opposed, and as pointed out by the Labour Appeal Court this can only be resolved with reference to the principle as set out in *Plascon Evans Paints v Van Riebeeck Paints*.<sup>6</sup>

23 This aside, the applicant has not denied the discussions of 3 March 2015 detailed in the respondents' answering affidavit in his replying affidavit. Once the respondents' version of the events of 3 March 2014 are accepted, there is no basis for a case of duress. As indicated above, throughout the entire conversation of 3 March 2014 the applicant's language, tone and responses were not that of an aggrieved employee, nor of a person acting under duress. He offered no resistance to the allegations and even bargained for the terms on which he ultimately waived his rights. This is crisply demonstrated by the fact that the original separation agreement was rejected by the applicant, resulting in an amended agreement.<sup>7</sup>

24 This has the inevitable consequence that the version put up by the respondents must be accepted and that there was no duress or coercion in concluding the separation agreement. The applicant has furnished no

---

<sup>6</sup> 1984 (3) SA 623 (A) at 634 to 635

<sup>7</sup> The amendment to the separation agreement, inserted at the applicant's instance, was reflected in annex "FF10" to the application papers before the Labour Court.

basis in this application for leave to appeal to demonstrate why this conclusion reached by the Labour Appeal Court was flawed.

## **THE PRE-DISMISSAL HEARING**

25 It is settled law that a contract of employment may contain an express or tacit provision incorporating the rules of natural justice.<sup>8</sup> Based on this approach, in *Denel (Edms) Bpk v Vorster*,<sup>9</sup> the SCA upheld the employee's claim for contractual damages where the employer had breached a disciplinary code, which formed part of the employee's contract of employment. Whilst the applicant appears in his application for leave to appeal to have abandoned any reliance on an express term (contending only for a term implied by law), both are considered below insofar as I might be mistaken in my understanding of the applicant's case.

### **An Express Term of the Contract**

---

<sup>8</sup> *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid Afrika en Andere* 1976 (2) SA 1 (A) at [21] & [31]; and *Lamprecht and Another v McNeillie* 1994 (3) SA 665 (AD) at 668 – 669

<sup>9</sup> 2004 (4) SA 481 (SCA)

- 26 There is no dispute between the parties that the applicant and the first respondent concluded a contract of employment on 16 June 2013 and that a copy thereof is annexed to the founding affidavit marked "D".<sup>10</sup> There are two pertinent provisions therein referenced by the applicant in support for his contention for an express term catering for a pre-dismissal hearing. The first is clause 10 and the second is clause 15.
- 27 Clause 10 of the employment contract provides that:

*"10.1. The Company may terminate your employment under this Agreement with immediate effect if at any time you:*

*10.1.1. refuse or without reasonable cause fail or willfully neglect to attend properly to our duties or fail to obey any lawful direction of any person in a position of authority over you; or*

*10.1.2. commit any serious or persistent breach of any of your obligations to the Company ...; or*

---

<sup>10</sup> In the papers before the Labour Court the agreement was annexed marked A to the founding affidavit.

10.1.3. are **guilty** of gross misconduct, mismanagement or neglect in the performance of any duty owed by you to the Company; or

10.1.4. *become bankrupt or apply for any receiving order ...;*

10.1.5. commit or give to the Company reasonable grounds for believing that you have committed any act of dishonesty or fraud or such other conduct which is likely to bring you or the Company or any Group Company into disrepute;  
or

10.1.6. *are charged with a criminal offence...*

10.2 *In such circumstances, the Company shall not be obliged to make any further payments to you except such salary as may have accrued at the date of termination and in respect of any accrued but untaken holiday. You shall have no claim against the Company by reason of such termination and the notice period, Garden Leave and any compensation for loss of office will not apply.*

10.3 ...”

28 The applicant's case in the Labour Court was that the word 'guilty' in clause 10.1.3 of the contract of employment denotes a requirement that he be afforded a disciplinary hearing before his services could be terminated. The Labour Court did not agree with the applicant's interpretation. Molahlehi J referred to Black's Law Dictionary that defines the word as "*the fact or state of having committed a wrong*" and as "*responsible for a civil wrong, such as part of breach of contract > guilty of fraudulent misrepresentation*". The learned Judge also referred to the Oxford English Dictionary that defines the word to mean "*that has incurred the guilt; deserving punishment - ... that has offended or being at fault*". The Labour Court concluded that it is clear from this that the word refers to a fact or an outcome and not a process as contended for by the applicant.<sup>11</sup> The finding is sound and unassailable and the respondents align themselves with it.

29 The only possible basis upon which the applicant could contend for a different meaning for the word "guilty", would be with reference to a context or a factual matrix which suggests that the word was not used in its ordinary sense. In this regard, there has in recent years been a significant shift in the approach to the interpretation of contracts. The trend away from the strict application of the "golden rule" in *Coopers &*

---

<sup>11</sup> Judgment of the Labour Court, annex B, paras 19 and 20, vol 4, p 278

*Lybrand*<sup>12</sup> was evident in decisions such as *Van der Westhuizen v Arnold*<sup>13</sup>, *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd*<sup>14</sup> and *KPMG v Securefin Ltd*<sup>15</sup>. This gradual trend culminated in the decision handed down by the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.<sup>16</sup>

30 In that matter the SCA referred to a decision in the court a quo to the effect that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. The SCA pointed out<sup>17</sup> that, while this summary of the approach to interpretation was buttressed by authority, it suffered from an internal tension insofar as it did not indicate what was meant by the 'ordinary meaning' of words. There was no clarity as to whether this ought to be influenced by context, or why, once ascertained, the ordinary meaning of the words would necessarily coincide with the 'true' intention of the draftsman (absent context). The SCA concluded that<sup>18</sup> “*whatever the nature of the document, consideration must be given to the language used in the light*

---

<sup>12</sup> *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A)

<sup>13</sup> 2002 (6) SA 453 (SCA) at para 23

<sup>14</sup> 2008 (6) SA 654 (SCA) at para 7

<sup>15</sup> 2009 (4) SA 399 (SCA) at para 39

<sup>16</sup> 2012 (4) SA 593 (SCA)

<sup>17</sup> at para 17

<sup>18</sup> at paras 18 and 19

*of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.”* The approach that ought to be adopted is a unitary one – that is an approach that has regard to all the aforesaid considerations – and not one that is a tiered approach and that disregards the contextual and purposive considerations should a seemingly satisfactory answer be obtained from a consideration of the language alone.

31 The applicant, applying the principles aforesaid, sets out no objective facts that would contribute to the construction contended for by him.<sup>19</sup> To the contrary, a consideration of the context in which the word is used in the clause suggests that it only be given its ordinary grammatical meaning (as was done by the Labour Court) because

31.1 The introduction to the clause records the right of the employer to terminate the agreement “with immediate effect”; and

31.2 There is no other sub-clause to clause 10.1 that intimates a pre-dismissal hearing.

---

<sup>19</sup> A consideration of the facts leading up to the conclusion of the contract of employment in paragraph 6 of the founding affidavit in the application before the Labour Court shed no further light on the meaning of the word “guilty” in clause 10.1.3.

32 Clause 10.1.5 of the employment contract contains no reference to the word guilty. Accordingly that clause, on the applicant's reasoning, would entitle the first respondent to terminate the applicant's employment in the event that the applicant gave the first respondent '*reasonable grounds for believing*' that he had committed an act of dishonesty or fraud, or conduct which could bring the first respondent into disrepute. The applicant's letter of termination states that his employment was terminated in accordance with clause 10.1 of his employment contract. It does not state that his employment was terminated in terms of clause 10.1.3 of the contract. As such, there in any event is no basis for contending that the applicant was specifically dismissed in terms of clause 10.1.3 and in consequence thereof is entitled to a pre-dismissal hearing. The facts of the applicant's dismissal support as much a termination under clause 10.1.5 as clause 10.1.3.

33 Clause 15 provides that:

*"For the purpose of investigating any allegation of misconduct the Company may suspend you on full salary and benefits for such period as is necessary for a proper investigation to be made. If you have a grievance relating to any matter arising from your suspension and/or your employment or ultimately wish to appeal against any disciplinary decision against you, you should follow the procedures outlined in local policies and practices."*

- 34 The first sentence of the clause does no more than record that a person may be suspended pending a proper investigation. The reference to “a *proper investigation*” cannot be construed to be a reference to a disciplinary hearing. Nor can the mere fact that a person might be suspended before disciplinary steps are taken infer that a disciplinary hearing will precede such disciplinary steps. The second sentence of the clause deals with no more than a grievance arising from a suspension or an appeal against a disciplinary decision. Again the provision of grievance procedures or an appeal process can in no way be construed to imply a contractual provision for a disciplinary hearing. The fact that in advancing a grievance or an appeal “*procedures outlined in local policies and practices*” should be followed is also of no import.
- 35 Insofar as the applicant sought to place reliance on the decision in *Ngubeni v National Youth Development Agency & Another*<sup>20</sup>, such reliance is misplaced. The Labour Court correctly distinguished the applicant’s case from the facts relevant to the *Ngubeni* judgment. The distinguishing feature was not simply that Ngubeni’s employer had invited him to a pre-dismissal hearing. It was also relevant that clause 10.1 of Ngubeni’s contract of employment provided specifically and expressly for a pre-dismissal hearing:

---

<sup>20</sup> Now reported in (2014) 35 ILJ 1356 (LC)

*“10.1. Misconduct*

*The employment of the employee may be terminated at any time, either summarily or on notice by the Agency **after a fair disciplinary procedure establishes that the employee is guilty** of any misconduct or the Employee has committed a breach of a material obligation under this agreement ...”*

- 36 Neither clause 10.1.3 nor clause 15 imports the provisions of the disciplinary procedure in such a way into the contract of employment. Accordingly, there is no basis on the ordinary wording of these clauses that a contractual obligation on the first respondent to conduct a pre-dismissal hearing can be inferred.

### **An Implied Term of the Contract**

- 37 The applicant contends that:
- 37.1 The South African law recognises an implied term in all contracts of employment to the effect that employees are entitled to a pre-dismissal hearing; alternatively
- 37.2 This Court should in terms of section 39(2) of the Constitution develop the common law to make provision therefor.

38 Firstly, as will be shown below, the South African law has not recognised such an implied term. To the contrary, it is clear from the decisions emanating from the SCA and the Labour Court that the courts have consistently held that there is no room for such an implied term. It will be shown herein that the applicant has sought to obfuscate the clear authority emerging from the SCA in this regard. Secondly, the reasoning of the SCA on this topic aside, there is no room for developing the common law in the way suggested by the applicant.

39 The question whether, and if so under what circumstances, the law recognises that an employee is entitled to enforce a common law contractual right to a pre-dismissal hearing, has been considered by the SCA on several occasions. Indeed, the applicant itself claims that the SCA has delivered conflicting decisions on the very issue. In this regard the Applicant claims that the SCA has handed down two judgments in support of the alleged implied term<sup>21</sup> and two judgments stating the exact opposite.<sup>22</sup>

40 It is this alleged anomaly that the applicant relies on for his contention that the issue constitutes an arguable point of law, deserving of the

---

<sup>21</sup> *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA); and *Boxer Superstores Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA)

<sup>22</sup> *Transman (Pty) Ltd v Dick and Another* 2009 (4) SA 22 (SCA) and *SAMSA v McKenzie* 2010 (3) SA 601 (SCA).

Constitutional Court's consideration. Closer consideration of the four judgments reveal, however, that they are not in conflict as alleged by the applicant. Moreover, Wallis AJA specifically addressed the alleged conflict between the above judgments in the *McKenzie* judgment, which contains a lengthy exposition of the development of the South African law in this regard.

41 Whilst the SCA appeared (in *Gumbi* and *Boxer Superstores*) to recognise a common law contractual right to a pre-dismissal hearing, it did not (in fact) do so for the following reasons:

41.1 In *Gumbi* it was not necessary for the SCA to consider whether an implied term exists in all contracts of employment because the claim by the employee was dismissed on the basis that she did not demonstrate any procedural unfairness. As such any remarks made by the SCA in relation to the existence of an implied term in contracts of employment granting employees a right to a pre-dismissal hearing was made *obiter*.

41.2 This aside, as was carefully illustrated by Wallis AJA in *McKenzie*, there was no intention on the part of the SCA in *Gumbi* to lay down new law, but only to reiterate the position as it existed in the case law as at that point in time. Wallis AJA points out, with reference to the law as it existed at that time, that no implied term in contracts of employment entitling employees to a

pre-dismissal hearing was recognised in South African law as at that time.

41.3 In *Boxer Superstores* the SCA was called upon to consider whether the High Court had jurisdiction to entertain a dispute framed in contract where the characterisation thereof in substance rendered it a claim that ought to have been pursued in terms of the LRA. The SCA rejected this argument. The issue as to whether an implied term ought to be read into all contracts of employment entitling the employee to a pre-dismissal hearing was however not in issue before the SCA. As such the court's remarks there were similarly *obiter*. The reference therein to *Gumbi* simply takes the matter no further.

42 In the *Transman* case, the majority (per Jafta JA – who handed down the decision of the SCA in the *Gumbi* case) held as follows in relation to the employee's contractual right to a pre-dismissal hearing (at paragraphs 28 – 30):

*“[28] Counsel for the employee argued that the employee was entitled to a second hearing before the board terminated his employment. He submitted that this entitlement arose from an implied term of the employment agreement. As mentioned earlier the parties to an employment contract may set a standard of procedural fairness applicable to their employment relationship*

*by incorporating principles of natural justice into their agreement.*

*Such incorporation may either be express or tacit.*

*[29] Where – as in the present matter – the incorporation is claimed to have been tacit, the test ordinarily applicable to a determination of a tacit term applies...*

*[30] In the present case the duty was on the employee not only to plead a contractual claim but also to prove facts from which the contended tacit term could be inferred. This the employee has failed to do and as a result there is no factual basis for importing into the employment agreement the term that he was entitled to a hearing before the board terminated his employment...* [I have added the emphasis.]

- 43 It is trite that the phrase “*tacit*” and “*implied*” may often be used interchangeably. This much was referenced by the SCA in *McKenzie*. It is apparent that the SCA, when referring to “*an implied term*” in *Transman* used it interchangeably with the phrase “*tacit term*”. The SCA intended to indicate thereby, not a term implied by law, but rather a tacit term incorporated into the contract of employment by conduct. Having regard to the references made in *Transman* to *Gumbi*, both being decisions by Jaffa JA, the only logical inference is that the SCA in its

decision handed down in *Gumbi* intended to refer to a tacit term when making reference to an implied term. That this is so is further indicated by the reference in paragraph 4 of *Gumbi* to the *Lamprecht* decision.

- 44 The minority decision in *Transman* (per Hunt AJA and Mpati P), agreeing with the order made by Jafta JA, clarified this requirement as follows:

*[36] There are two features of the situation in which an employee challenges disciplinary proceedings and/or dismissal on a contractual basis as opposed to the “unfair labour practice” with which the Labour Relations Act 66 of 1995, and proceedings in the Labour Tribunals are concerned. The first is that, having based his claim on contract, it is incumbent on the employee to prove the terms of the contract on which he relies and the breach which entitled him to relief. The second is that the relief that he seeks must be relief in terms of the common law of contract.*

*[37] There is no evidence in the founding papers which establishes the terms of the applicant’s contract of employment with Transman...*

*[38] In this situation, the simple question may be asked of the applicant: ‘In what respects did the disciplinary hearing constitute*

*a breach of Transman's contractual obligations to you?' The question could certainly not be answered by reference to anything in the applicant's papers. It is not enough for him to contend for a general implied term that he would be afforded a fair hearing because what constituted a fair hearing in this particular situation would plainly depend on the contractual provisions as whole. It follows that the applicant cannot establish his case as a breach of contract without taking the primary, elementary step of proving the contract on which he relies. As was decided in *Lamprecht*, the applicant's case must fail at its threshold for want of proper proof is his contract. (I added the emphasis).*

- 45 In any event, as indicated by Wallis AJA in *McKenzie*, the reference in *Transman* to the to the obiter decision in *Gumbi* takes the law no further – even if the decision in *Gumbi* were read to refer to a term implied by law properly so-called (as opposed to a tacit term). As such, prior to *McKenzie*, there simply was no SCA authority supporting the introduction into South African law of an implied term in all contracts of employment entitling an employee to a pre-dismissal hearing. In *McKenzie* Wallis AJA, identifying that the court was dealing with an implied term properly so-called (as opposed to a tacit term), indicated that this enquiry commences by examining the statutory provision in

order to determine whether it was intended that its provisions should be incorporated in contracts of that class.

46 In the context of that case, (as in the present matter), the crux of the enquiry was whether the legislature, in enacting the provisions relating to dismissal in the LRA (having its origin in a fundamental right to fair labour practice under the Constitution), intended not only to prohibit unfair dismissals and provide statutory remedies for when they do occur, but also intended to incorporate into all contracts of employment a term that they could not be terminated unfairly.

47 The court considered that the arrangements in the sections of the LRA, which deal with dismissal, constitute a legislative scheme, which gives effect to the employee's right not to be unfairly dismissed. None of the sections dealing with dismissal provide for any contractual implications. This is in stark contrast with the provisions of section 23(3) of the LRA which provide that:

*“Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.”*

48 Another example of the incorporation of statutory provisions into a contract of employment is to be found in section 4 of the Basic Conditions of Employment Act. *McKenzie* could not rely on any express

wording in the LRA for the incorporation of the right to a pre-dismissal hearing. Therefore, as in the present matter, it was argued that the incorporation had to be implied from the terms of the relevant provisions of the LRA, *read in the light of the Constitution*.

- 49 Turning to foreign law, the court referred with approval to the judgment of Brennan CJ in *Byrne v Australian Airlines Ltd* 185 CLR 410, a case that concerned precisely the same question as the one in *McKenzie* (and the present one). In rejecting the contractual claim, Brennan CJ said at para 11 at 421:

*“In a system of industrial regulation where some, but not all, of the incidents of an employment relationship are determined by award, it is plainly unnecessary that the contract of employment should provide for those matters already covered by the award. The contract may provide additional benefits, but cannot derogate from the terms and conditions imposed by the award and, as we have said, the award operates with statutory force to secure those terms and conditions. Neither from the point of view of the employer nor the employee is there any need to convert those statutory rights and obligations to contractual rights and obligations. There is, therefore, an insuperable obstacle in the way of the applicants’ second argument that the terms of an*

*award such as cl 11(a) are implied terms of the contract of employment.”*

50 The same conclusion was reached in the United Kingdom in *Johnson v Unisys Ltd* [2001] 2 All ER 801 (HL) when confronted with the same problem. Dissatisfied with the compensation awarded to him by an employment tribunal, the employee pursued a claim for damages, contending that apart from the statutory regime and pursuant to the implied contractual term of trust and confidence attaching to all contracts of employment it was not open to his employer to dismiss him in an unfair manner. In essence, the claim failed because, recognising such an implied term in the contract of employment would be inconsistent with, and render redundant the statutory scheme insofar as it regulates dismissals. Lord Nicholls of Birkenhead put it in thus:

*“But there is an insuperable obstacle: the intervention of Parliament in the unfair dismissal legislation. Having heard full argument on the point, I am persuaded that a common law right embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the benefit*

*of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not the ordinary courts of law.”*

51 At [33] Wallis AJA concurs with the above reasoning and adds that there is a further bar in South Africa:

*“...that the legislation in question has been enacted in order to give effect to a constitutionally protected right and therefore the courts must be astute not to allow the legislative expression of the constitutional right to be circumvented by way of the side-wind of an implied term in contracts of employment.*

52 In considering whether it is necessary to develop the common law to provide for an the implied term contended for by McKenzie, the Court considered the judgment In *Mohlaka v Minister of Finance (2009) 30 ILJ 622 (LC)* where Pillay J stated that when applying a provision of the Bill of Rights, a court is called upon to apply or develop the common law *“if necessary”*, and only *“to the extent that legislation does not give effect to that right”*.

53 The SCA concluded that where employees are protected by the LRA, section 8(3) of the Constitution does not warrant or require constitutionally protected labour rights to be imported into contracts of

employment by way of an implied term. The LRA specifically gives effect to the constitutional right to fair labour practices, including the right not to be unfairly dismissed. The SCA accordingly held that there was no basis for developing the common law of employment to include a right to a pre-dismissal hearing.

54 It follows that the position in the South African law is clear. The applicant has not challenged the correctness of the legal position as expounded above, much less motivated why this Court ought to be called upon to vary the position as set out above.

55 It is submitted that the applicant must demonstrate, with reference to the same considerations against which constitutional challenges to contractual terms are considered, that the law requires the introduction of such an implied term. In short the applicant must show that public policy requires the imposition of the implied term.<sup>23</sup> Not only has the applicant failed to motivate with reference to public policy considerations why this Court ought to develop the common law so as to introduce an implied term into all contracts of employment entitling the employee to a pre-dismissal hearing, but a consideration of the consequences of such an approach readily indicates why the SCA and courts in other jurisdictions have been reluctant to do so.

---

<sup>23</sup> See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paragraphs 27 – 29

56 The first implication of the imposition of such a term into all contracts of employment is that it restricts parties' right to freely contract. In *Barkhuizen v Napier*<sup>24</sup> the Constitutional Court explained the principle as follows:

*“The first question involves the weighing-up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted,<sup>40</sup> gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common-law principles of contract.”*

---

<sup>24</sup> At para 57

57 There is no principle of public policy that motivates the restriction of parties' right to contract in the fashion suggested by the applicant, particularly where legislation caters for the rights sought to be imposed contractually by the applicant. In fact, as indicated in *McKenzie*, if such an implied term were imported there would be no need for the statutory framework of the LRA. Evidently public policy does not require that contractual protection be afforded in circumstances where legislation adequately does so.

58 Not only are there no public policy considerations that support the imposition of an implied term as propounded by the applicant, nor has the applicant suggested any, but a further consideration that militates against such an approach is the ambit of such an implied term and the ultimate consequence thereof:

58.1 Assuming that the content of the right is the same as that developed under the labour jurisprudence, the parties would effectively have an election regarding the forum in which they wish to pursue their right and would not be restricted by the limitations placed on a claim under the LRA. A question that arises is what purpose is then served by the specialist tribunals created for this purpose under the LRA should a party be capable of bringing precisely the same claim in the High Court?

The approach, on the face of it, undermines the framework set up in the LRA for the resolution of such disputes.

58.2 A further issue is the ambit of the claim arising out of such a dual system. The LRA limits a claim for procedural unfairness to 12 months. There is, however, no such limitation to claims pursued under the common law. Not only might the damages exceed 12 months, but an individual might seek reinstatement in consequence of a procedurally unfair dismissal – an avenue that does not avail an employee under the LRA. In other words, in this matter, the applicant would not have been entitled to seek reinstatement in consequence of a procedurally unfair dismissal. Such an approach would clearly undermine the framework for claims set up in the LRA.

58.3 Moreover, once a right to a pre-dismissal hearing is an implied term in a contract of employment, there is no reason why every other right arising out of the right to fair labour practices (as legislated under the LRA) ought not also to be implied in every contract of employment. These include all manner of rights to substantive and procedural fairness. Taken to its logical conclusion such an approach effectively caters for a dual system – the one regulated by legislation and other regulated by the common law. The rights accruing to the parties under each

would be identical. The only difference would be the forum in which the rights are pursued (being either those specifically created under the LRA or those that regulate ordinary common law contractual claims) and the ambit of any claim for damages arising from it (being either the limited monetary claims available under the LRA or the wider claim for damages available under the common law). This might well render the framework and processes created under the LRA largely defunct.

59 In short, there is no conceivable public policy consideration that suggests that the common law ought to be developed to cater for an implied term in all contracts of employment entitling employees to a pre-dismissal hearing. This accords with the SCA's decision in *McKenzie* to the effect that there was no basis for developing the common law of employment to include a right to a pre-dismissal hearing.

### **Breach of Contract**

60 In the event that it is held that there was a term that obligated the first respondent to hold a pre-dismissal hearing before terminating the applicant's contract of employment, the issue is whether the provisions of the term were breached. Whilst the applicant has not traversed this topic in any great detail in his founding affidavit before this Court, it is a matter of substantial importance as without demonstrating such a

breach, the applicant has no reasonable prospects that this Court would come to a different finding to the Labour Court and the Labour Appeal Court.

61 Whether or not the implied (or express) term contended for by the applicant was breached depends, of course, on the content of the contractual obligation. In his founding affidavit in his application before the Labour Court the applicant seemingly contends for no more than “a *right to a fair hearing*” prior to termination of the contract of employment.<sup>25</sup> The applicant contends that the term was breached in the following circumstances:

61.1 While on suspension, the applicant was called into a meeting on 3 March 2014 where, on arrival, he was issued with a letter of termination of his employment.

61.2 The letter allegedly falsely claimed that the applicant had been invited to make representations as to why the first respondent should not conclude that the applicant had committed the misconduct recorded in the letter and, in consequence thereof, terminate his contract of employment.

---

<sup>25</sup> FA para 5.10

61.3 The applicant emphasises that at no point was he requested to make representations.

62 When these bald allegations were made in the application before the Labour Court, they were disputed with reference to the following detailed allegations:

62.1 On 21 February 2014, the applicant was suspended when it emerged that he had made a material misrepresentation to the first respondent, prior to his employment and during the course of negotiating the terms of his employment.

62.2 Prior to the applicant's suspension he was engaged in a telephone conference with the following persons: Alan Thompson (the Senior Vice President Regional Director Africa), the second respondent (who is the Area Human Resources Director, who was the applicant's direct superior) and myself. The applicant and I were seated together in the applicant's office in Johannesburg, Thompson was on a business trip in the UK and the second respondent was based in Dubai.<sup>26</sup> I again confirm (as I had done in the Labour Court application) that the following was discussed with the applicant at this meeting:

---

<sup>26</sup> Answering Affidavit in the Labour Court para 22 & 23.

- 62.2.1 It had come to the first respondent's attention in the days prior to the telephone discussion that the applicant had misrepresented to the first respondent that he was employed with Unilever, as opposed to being employed by Standard Chartered Bank at the time of his negotiations and ultimately his employment with the first respondent. Aligned to this, the applicant misrepresented to the first respondent that he would forfeit 5000 Unilever shares held by him, and this formed the basis of a remuneration package discussed between the parties.
- 62.2.2 The upshot of the discussion held on 21 February 2014 was that the applicant admitted that he misrepresented his employment history at the time that he was engaged by the first respondent. He also admitted that he ought not to have been compensated for the 5000 shares. He justified his conduct by suggesting that he was in a "*transitional phase*".
- 62.2.3 As representatives of the first respondent myself, the second respondent and Thompson indicated that we wished to investigate the matter further and to this end

the applicant was handed a letter of suspension by myself at the end of the telephone conference.<sup>27</sup>

63 The significance of the misrepresentation that the applicant was employed by Unilever as opposed to being by Standard Chartered Bank is that the negotiations between the applicant and the first respondent during mid-2013 were based on the premise that the first respondent would need to entice the applicant away from its trade rival Unilever. In this regard, the applicant misled the first respondent to believe that by 'leaving Unilever' he would forfeit shares and share options to the value of 40 000 USD. The applicant's misrepresentation caused the first respondent to compensate the applicant for his 'loss' by way of a 40 000 USD sign- on bonus (a loss that was not in fact suffered by the applicant).

64 On 3 March 2014 the applicant was requested to attend at the offices of the first respondent at Elandsfontein (Johannesburg). Between 14h00 and 17h45 on that day, several separate telephonic conversations were held between the applicant (who was seated in my presence in Johannesburg), myself and the second respondent (who was situated in Dubai):

---

<sup>27</sup> A copy of the notice of suspension is Annex "FF4" to the Labour Court application.

- 64.1 The second respondent put it to the applicant that he had concealed from the first respondent that he had in fact been working at Standard Chartered Bank at the time of their negotiations. The applicant responded in the affirmative and apologised.
- 64.2 The second respondent put to the applicant the grounds of complaint against the applicant, inclusive of the 40 000 USD that had been paid ostensibly on the strength of the applicant's loss of shares and share options whereas, in truth, the applicant was no longer employed by Unilever at such time. The applicant did not try to challenge these allegations and responded in the affirmative. Instead the applicant initially sought to justify his conduct on the basis that he did not want to discredit himself as a candidate for the position with the first respondent. Ultimately the applicant conceded that his integrity must be called into question, distanced himself from any justification for his conduct, recognised that the relationship of trust was breached and pleaded for an opportunity to rebuild the trust.
- 65 The conversation was terminated to give both parties an opportunity to consider the way forward. During the course of the second conversation, which took place approximately 20 minutes later, the following occurred:

- 65.1 The applicant was advised that, given the concessions he made regarding the misrepresentation at the inception of his employment, as well as the fact that the relationship of trust had broken down, the first respondent has decided to terminate his contract of employment. The applicant indicated that he accepted the decision and did not seek to motivate for his retention of his services with the first respondent.
- 65.2 Instead the applicant pleaded for a reprieve in relation to the consequences of his termination. Ultimately he made proposals regarding the retention of certain benefits that impact on his family and sought an extended period of time for the repayment of the 40 000 USD.
- 65.3 The second telephone conference of 3 March 2014 was concluded with the applicant being advised that he would be presented with a termination letter and the second respondent indicating that he wished to discuss the applicant's proposed terms of exit with his colleagues and that he would advise the applicant of the outcome in a further conversation.
- 66 During the intervening period prior to the third telephone discussion, I handed the applicant his letter of termination. Thereafter the second respondent advised me that the first respondent was amenable to the reprieve sought by the applicant and requested me to prepare a

separation agreement recording the terms of such a “soft exit”. The document prepared by me is the document that was annexed to the applicant’s founding affidavit in his Labour Court application marked Annex “D”. As the Applicant has failed to annex the Application to the Labour Court to his founding affidavit in this application, we accordingly annex a copy of the Annex D marked “**Annex AA4**”.

67 Significantly the applicant refused to sign annex “D”. Instead he bargained for a further extension of the date for the repayment of the 40 000 USD (from 31 January 2015 until 31 March 2015). An agreement was reached regarding the extended date for the repayment of the 40 000 USD and the agreement was amended in manuscript and signed by the applicant. The amended separation agreement was annexed marked “FF10” to the answering affidavit before the Labour Court and which forms part of “**Annex AA5**” respectively annexed hereto.

68 The versions presented by the applicant and the respondents are diametrically opposed. As such the principle as set out in *Plascon Evans Paints v Van Riebeeck Paints*<sup>28</sup> ought to apply and the version respondents ought to be accepted. Moreover, the applicant did not deny the discussions in his replying affidavit; he could not as a transcribed record of all the discussions were appended to the

---

<sup>28</sup> 1984 (3) SA 623 (A) at 634 to 635

answering affidavit marked “FF5”, “FF6”, “FF7”, “FF8” and “FF9”. The applicant contended that the recordings ought to be excluded from the record as he was not advised thereof and as such these constituted (so he contended) so-called “entrapment”. This, of course, misses the point. There were several witnesses present during each of those discussions and they have confirmed the content of the discussions. Moreover I kept extensive manuscript contemporaneous notes during all the discussions. These were also made available in the Labour Court application and they confirm the contents of the transcript of the discussions.

69 Once the respondents’ version of the events of 21 February 2014 and 3 March 2014 are accepted, there is no basis for the suggestion that the applicant was refused “*a right to a fair hearing*” prior to termination of the contract of employment. Both at the time of his suspension and on 3 March 2014 the applicant was presented with the allegations of misrepresentation and breach of trust arising from this. The applicant on no occasion disputed this and ultimately did not seek to justify his conduct. He also did not seek to dispute the decision to terminate his contract of employment, seeking only to bargain for better exit conditions than those communicated to him in his letter of termination. In consequence hereof there can be no question that the applicant was granted a right to be heard prior to the decision to terminate his contract

of employment. As such, there can be no question of any breach of contract.

## **RESPONSE AD SERIATIM**

70 Ad paragraphs 1.1 and 1.2

70.1 I deny that the deponent is authorised to depose to the founding affidavit and to launch the application for leave to appeal on behalf of the applicant. The deponent is obliged, at the very least, to have disclosed his power of attorney to pursue another (third) application for leave to appeal.

70.2 I deny that the facts contained in the founding affidavit fall within the personal knowledge of the deponent. To the contrary, all the of the critical facts pertaining to the applicant's employment and the termination of his employment do not fall within the personal knowledge of the deponent. The deponent has critically failed to annex a confirmatory affidavit by the applicant. The deponent has also failed to make available the record before the Labour Court. As such this application is critically flawed.

70.3 I also deny that the facts contained in the founding affidavit are necessarily true and correct. I refer in this regard to what I have said elsewhere in this affidavit and in my affidavits filed before

the Labour Court. In this regard I annex hereto my answering and supplementary affidavits and the supplementary affidavit of Sheila Louw in the Labour Court together with the annexes thereto and request that it be incorporated herein and is annexed hereto marked as “**Annex AA5, AA6 and AA7**” respectively.

71 Ad paragraphs 1.3 to 1.11

The allegations herein are noted.

72 Ad paragraphs 1.12 and 1.14

72.1 I deny that the applicant's employment was terminated unilaterally or that he was simply issued with a letter entitled 'termination of employment' on 3 March 2014 or that there was no pre-dismissal hearing.

72.2 I refer in this regard to what I have said by way of summary in this affidavit and what is alleged in greater detail in my answering affidavit before the Labour Court. The conversations held on 21 February 2014 and 3 March 2014 indicate the extent to which the first respondent engaged with the applicant prior to terminating his employment. Moreover, the ultimate decision was made once the applicant had conceded that he committed a misconduct and breached the relationship of trust.

72.3 Save as aforesaid, the allegations herein are denied.

73 Ad paragraph 1.15

73.1 I admit that the applicant's employment was terminated in terms of clause 10.1 of his contract of employment.

73.2 I deny that the applicant was unwillingly coerced into signing the mutual separation agreement or that he was threatened in any way. To the contrary, as I intimated above, the applicant requested that the terms of his exit be negotiated so as to 'soften' them. Moreover, once presented with a draft settlement agreement, the applicant negotiated and amended the terms thereof. The amended settlement agreement reflecting the applicant's requested changes is annexed to my answering affidavit before the Labour Court marked "FF10" as well as Annex E in the applicant's founding affidavit in this application.

73.3 I have already indicated that, throughout the entire conversation of 3 March 2014, the applicant's language, tone and responses were not that of an aggrieved employee, nor of a person acting under duress.

73.4 Save as aforesaid, I deny the allegations herein.

74 Ad paragraphs 1.16 and 1.17

The allegations herein are noted.

75 Ad paragraphs 1.18 to 1.25

75.1 I admit that the applicant brought an application for urgent relief before the Labour Court seeking the relief set out in the notice of motion annexed hereto.

75.2 I admit that the relief sought by the applicant, in part, was for a claim for specific performance pursuant to an alleged repudiation of the employment agreement and that his claim was founded in common law principles of a breach of contract. I deny that the first respondent unilaterally terminated the applicant's employment or that there was any repudiation of the contract of employment. I refer in this regard to what I have said elsewhere herein regarding the alleged breach of the contract of employment.

75.3 I admit that the applicant disavowed any reliance on the provisions of the LRA.

75.4 I admit that the applicant contended that his contract of employment provided for a pre-dismissal hearing. I deny that the contract of employment contains any such provision. I refer to what I have said above in this regard – both in relation to an express or an implied term to this effect.

75.5 Save as aforesaid, I deny the allegations herein.

76 Ad paragraph 1.26

76.1 I admit that the applicant's case was that no reliance could be placed on the separation agreement. The applicant contended that this was so for a variety of reasons that I have canvassed elsewhere herein. I deny that the separation agreement was unlawful or invalid and refer to what I have already said in this regard.

76.2 Save as aforesaid, the allegations herein are denied.

77 Ad paragraph 1.27

I admit the allegations herein.

78 Ad paragraph 1.28

I note the proposed structure of this affidavit.

79 Ad paragraphs 2.1 to 2.4

79.1 I admit that the application before this Court raises constitutional issues and points of law that will be of general public importance.

79.2 I deny that the application has any reasonable prospects of success for the reasons I have indicated above.

79.3 More than this, the applicant has failed to show that he has reasonable prospects of success because, the law aside, the applicant has failed to place any facts before this Court as will assist him in demonstrating such prospects. I have already indicated that this affidavit is deposed to by the applicant's legal representative who has no knowledge of the facts, without appending any confirmatory affidavit by the applicant and without any reference to the previous affidavits filed in this matter.

79.4 Save as aforesaid and as alleged elsewhere in this affidavit, the allegations herein are denied.

80 Ad paragraphs 3.1 to 3.3

I admit the allegations herein.

81 Ad paragraph 3.4

81.1 I admit that the applicant was suspended on 21 February 2014. The circumstances surrounding his suspension have been dealt with elsewhere in this affidavit as well as in my affidavits filed in the Labour Court and appended hereto.

81.2 Save as aforesaid, I deny the allegations herein.

82 Ad paragraph 3.5

82.1 I admit that the first respondent terminated the applicant's employment on 3 March 2014. The circumstances surrounding the termination of the applicant's employment have been dealt with elsewhere in this affidavit and in my affidavits filed in the Labour Court and appended hereto.

82.2 I specifically deny that the applicant was not afforded a hearing or that his employment was summarily terminated.

82.3 Save as aforesaid, I deny the allegations herein.

83 Ad paragraphs 3.6 and 3.7

83.1 I admit that the first respondent and the applicant concluded a lawful and valid mutual separation agreement on 3 March 2014. The agreement is annexed to the founding affidavit marked "E". Insofar as the terms of that agreement are correctly set out in these paragraphs, they are admitted. The circumstances surrounding the conclusion of the separation agreement have been dealt with elsewhere in this affidavit and in my affidavits filed in the Labour Court and appended hereto.

83.2 I specifically deny that the applicant was coerced or forced against his free will to sign the agreement. To the contrary, as I have indicated, the agreement had its origins in a request by the applicant. Subsequent to the production of a first draft of the

agreement, the applicant bargained for a better deal and the agreement was amended to accommodate the applicant's requests. In the circumstances there can be no question of duress or coercion.

83.3 Save as aforesaid, the allegations herein are denied.

84 Ad paragraphs 3.8 and 3.9

84.1 I have dealt with the provisions of clause 10.1 fully above.

84.2 Save as aforesaid, the allegations herein are admitted.

85 Ad paragraphs 3.10 to 3.12

85.1 I admit the description of the applicant's case before the Labour Court.

85.2 I deny that there is any merit in this case put up before the Labour Court for the reasons I have alluded to elsewhere herein and in my affidavits filed in the Labour Court.

85.3 Save as aforesaid, I deny the allegations herein.

86 Ad paragraphs 3.13 and 3.14

86.1 I admit that it was the applicant's case that he did not have the requisite pre-dismissal hearing which he contends was catered for in his contract of employment.

86.2 I deny that the applicant's contract contained any such provision or that the applicant was denied a pre-dismissal hearing. I refer in this regard to what I have already said on both scores elsewhere in this affidavit as well as in my affidavits filed in the Labour Court.

86.3 Save as aforesaid, the allegations herein are denied.

87 Ad paragraphs 3.15 and 3.16

87.1 I admit that the applicant contended that the first respondent breached the contract of employment and requested specific performance thereof in the urgent application launched in the Labour Court.

87.2 I deny that there is any merit in the alleged breach. I have already dealt with this and do not intend to repeat it again. I simply refer to what I have said elsewhere herein and in my affidavits filed in the Labour Court.

87.3 Save as aforesaid, the allegations herein are denied.

88 Ad paragraph 3.17

88.1 I note that the deponent refers to the “attached application”. No application was attached to the application for leave to appeal before this Court.

88.2 For the reasons I have stated, this application is critically flawed for this reasons alone.

89 Ad paragraphs 3.18 to 3.20

The allegations herein are noted.

90 Ad paragraphs 4.1 to 4.11

90.1 The Labour Court judgment is a matter of record. A copy is annexed to the founding affidavit marked “B”.

90.2 Insofar as the applicant correctly quotes from the judgment, this is admitted.

90.3 I deny the appropriateness of certain arbitrary remarks in relation to aspects of the judgment. Suffice to point out that none of these paragraphs indicate on what basis the findings of the Labour Court were flawed. Nor do any of these paragraphs disclose why the applicant has reasonable prospects that this Court will come to a different finding.

90.4 I refer to what I have said above regarding the correctness and appropriateness of the Labour Court judgment. It was also supported by the decision of the Labour Appeal Court.

91 Ad paragraph 5.1

The allegations herein are admitted.

92 Ad paragraph 5.2

I deny that the approach of the Labour Appeal Court was erroneous. I have already shown why the decision by the Labour Appeal Court was correct.

93 Ad paragraph 5.3

93.1 I admit that one of the applicant's complaint was that he was not afforded a pre-dismissal hearing.

93.2 I deny that the issue around duress was a "by the way aspect". The Labour Appeal Court correctly held that if the validity of the separation agreement was upheld, that this was the end of the applicant's case in relation to the breach of his employment contract.

93.3 As I have indicated above, the applicant must succeed both in demonstrating a breach of his contract of employment and the

invalidity of the separation agreement before he has shown that he has reasonable prospects of succeeding on appeal. I have already indicated why he should fail on both scores.

93.4 Save as aforesaid, the allegations herein are denied.

94 Ad paragraphs 5.4 to 5.6

94.1 I deny that the applicant's case was not founded primarily on duress. Be that as it may, both the issue of duress and the issue of public policy was considered by the Labour Appeal Court.

94.2 I have also dealt with both. In addition I have indicated why the applicant's reliance on the provisions of section 5(4) of the LRA is without merit.

94.3 Save as aforesaid, I deny the allegations herein.

95 Ad paragraph 5.7

The Labour Appeal Court dealt with the issue whether or not a waiver such as was contained in the separation agreement renders that agreement unlawful and invalid.

96 Ad paragraphs 5.8 to 5.13

96.1 I deny that the decision in *Barkhuizen* was erroneously applied. I refer to what I have said in this regard above.

96.2 It is correct that the facts in *Barkhuizen* were different to the facts in this matter – not only in the respect identified by the applicant, but also because the limitation in the *Barkhuizen* matter is one agreed to prior to any claim arising. The principles set out in *Barkhuizen* pertaining to the limitation of a constitutional right, this notwithstanding, are yet applicable to this matter.

96.3 I deny that, in applying the legal principles in *Barkhuizen*, the Labour Appeal Court overlooked the differences in the facts of the two matters. I refer to what I have said above in this regard.

96.4 Save as aforesaid, the allegations herein are denied.

97 Ad paragraph 5.14

97.1 I deny that the Labour Appeal Court erred by not dealing with the question whether the applicant had a contractual right to a pre-dismissal hearing. As indicated above, the applicant needs to succeed in demonstrating (a) that he has a contractual right to a pre-dismissal hearing, (b) that the right was breached and (c) that he did not waive his right to seek redress at the CCMA or any court of law before he has any prospects of succeeding with an appeal. All that the Labour Court did was indicate why he fell

on one of these to motivate why his appeal ought to be dismissed.

97.2 I repeat in this regard what I have set out elsewhere in this affidavit regarding the applicant's prospects of succeeding with an appeal to this Honourable Court.

97.3 Save as aforesaid, the allegations herein are denied.

98 Ad paragraph 6.1

The allegations herein are noted.

99 Ad paragraphs 6.2 to 6.6

99.1 I deny that the issue the applicant seeks to address is a matter of common law or the development of the common law.

99.2 The applicant contends for a term incorporated in his contract of employment. Whether or not such a term is present depends on whether it is an express term, a term tacitly imported or a term implied in the agreement by law. The term is thus not incorporated "in terms of the common law", as much as it is incorporated by dint of it being either an express, tacit or an implied term. Which it is, depends on the facts of each particular case and whether the test for establishing such a term has been met. It is not understood that it is the applicant's case that the

test for the incorporation of either an express, a tacit or an implied term has changed. As such, the right to a pre-dismissal hearing is not “sourced” in common law.

99.3 Insofar as the applicant contends for a term implied by law, I have already indicated why it is inappropriate in the present circumstances for such a term to be implied. I refer in this regard to what I said elsewhere in this affidavit.

99.4 Save as aforesaid, I deny the allegations herein.

100 Ad paragraphs 6.7 to 6.10

100.1 I have already dealt with the various decisions emanating from the SCA above.

100.2 I deny that the decisions are conflicting. This was clarified in the *McKenzie* judgment.

100.3 The decisions of the SCA aside, I have set out above why a term such as contended for by the applicant ought in any event not to be implied in every contract of employment.

100.4 Accordingly, I deny that the applicant raises an “arguable point of law”. There is no room for an approach that differs from the reasons set out in the *McKenzie* judgment by the SCA.

100.5 Save as aforesaid, the allegations herein are denied.

101 Ad paragraphs 6.11 to 6.16

101.1 I have already dealt with the constitutionality and validity of the waiver contained in the separation agreement. I repeat what I have set out above in this regard.

101.2 I specifically deny that sections 4 and 5 of the LRA find application in this matter.

101.3 Save as aforesaid, I in any event deny the remaining allegations herein.

102 Ad paragraph 6.17

I admit the allegations herein.

103 Ad paragraph 6.18

103.1 I admit that the applicant is prevent from challenging his termination in consequence of the finding of the Labour Court and the Labour Appeal Court.

103.2 I deny that this gives rise to an arguable point of law. Waivers, such as the one contained in the separation agreement, are the order of the day in all types of litigation. The absurd

consequences of that contended for by the applicant is that there never can be a compromise of any litigation.

103.3 Save as aforesaid, the allegations herein are denied.

104 Ad paragraph 7.1

104.1 The allegations herein are noted.

104.2 It is only in the interest of justice to entertain the appeal when the applicant is able to demonstrate that he has reasonable prospects that this Court will come to a different finding.

105 Ad paragraph 7.2

105.1 I deny that it is in the interest of justice to grant the leave to appeal.

105.2 The mere presence of fundamental issues does not render it in the interest of justice to grant an application for leave to appeal. In this matter the applicant has poor prospects of success for the reasons I have already outlined above, and as such it is not in the interest of justice to grant any leave to appeal herein.

105.3 Save as aforesaid, the allegations herein are denied.

106 Ad paragraph 7.3

106.1 I deny that there is any need for this Court to determine the issue whether the right to a pre-dismissal hearing ought to be implied by law in all contracts of employment. The issue has been fully and adequately dealt with by the SCA.

106.2 Moreover, even if there were a need for this Court to do so, which is denied, this is not the right case in which to do so given that the appeal ought to fail on the facts in any event. In this regard I point out that no breach of a pre-dismissal hearing contractual requirement has been demonstrated on the facts. To the contrary, I refer to what I have set out above and which indicates that such a hearing was in fact held.

106.3 Save as aforesaid, the allegations herein are denied.

107 Ad paragraphs 7.4 to 7.7

107.1 I deny that there are conflicting decisions emanating from the SCA as suggested by the applicant and refer to what I have said above in this regard.

107.2 Save as aforesaid, the allegations herein are denied.

108 Ad paragraphs 7.8 to 7.12

108.1 I deny the allegations herein.

108.2 I refer to what I have said repeatedly regarding the validity and lawfulness of the separation agreement (and in particular the waiver encapsulated therein).

109 Ad paragraphs 7.13 and 7.14

The allegations herein are admitted.

110 Ad paragraph 8.1

I deny that it is in the interests of justice to grant the leave to appeal for any of the reasons set out by the applicant. I refer to what I have said in this regard elsewhere in this affidavit.

111 Ad paragraph 8.2

I deny that the applicant raises important arguable points of general public importance. I refer to what I have said in this regard elsewhere in this affidavit.

## **CONCLUSION**

112 The respondents request that the application for leave to appeal be dismissed with costs.

---

DEPONENT

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_ 2016 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

---

COMMISSIONER OF OATHS