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# Why 'unlawful dismissal' doesn't mean 'automatic reinstatement'

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Despite the protection against unfair dismissal afforded to employees in the Labour Relations Act, 1995 (LRA) and the purpose-built framework for resolving employment disputes, many employees, particularly those in senior roles, elect to challenge their dismissals based on a breach of contract, claiming specific performance or damages. These dismissals are commonly characterised as being ‘unlawful’, as opposed to unfair.


Image source: Getty Images

## Unfairness v unlawfulness

There was, for some time, a debate whether employees were entitled to follow this route, or whether they are compelled to use the LRA recourse and remedies to resolve disputes that emanate from dismissals or disciplinary action short of dismissal.

This debate was settled by the Constitutional Court in *Baloyi v Public Protector*, in which the Court confirmed that the LRA did not extinguish contractual remedies where there was a breach of the employment contract or unlawful termination. More than one cause of action flows from the termination of a contract of employment and a litigant can thus choose which cause of action to pursue.

Accordingly, it is generally accepted that employees are entitled to ‘forum shop’ and elect whether to bring a claim for unfairness in terms of the LRA (and approach the CCMA or relevant bargaining council) or to claim unlawfulness and approach the Labour Court in terms of section 77(3) of the Basic Conditions of Employment Act, 1997 (BCEA) for breach of contract.

While this is the settled law, there are still many who have concerns with the disadvantages that flow from this approach. The bench of the Labour Appeal Court (LAC) in the case of *Passenger Rail Agency of South Africa and Others v Ngoye*

*and Others [2024]* (26 March 2024) recently expressed such concern. The case illustrates the risks with an 'unlawful dismissal' claim, particularly when it comes to the prospects of successfully obtaining a contractual remedy.

## Background facts

Prasa terminated the respondents' contracts of employment on the basis that they had 'exceeded the normal five year fixed-term contract extended to all executives'. The respondents lodged an urgent application in the Labour Court in terms of section 77(3) of the BCEA in which they sought to have their dismissals declared unlawful and set aside and claimed reinstatement and back-pay.

The respondents argued that Prasa was not entitled to cancel their contracts of employment.

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The first and second respondents relied on the fact that their written employment contracts were agreements of permanent employment (not fixed term), and that the agreements contained a non-variation clause.

The third respondent, who did not have a written employment contract, relied on the fact that at the time his employment terminated, he had held his position for less than 12 months.

At the Labour Court, Prasa did not challenge any of the facts and allegations made by the respondents and only raised technical defences.

Prasa's defence was that the Labour Court lacked jurisdiction to determine the application because the respondents pleaded unlawfulness as opposed to breach of contract and failed to point to any clause within the contract that Prasa might have breached.

The Labour Court found no merit in Prasa's defence and held that the termination of the respondents' employment contracts was unlawful. It granted the respondents the relief they sought, including costs.

## Findings of the LAC

On appeal, the LAC held that the Labour Court had jurisdiction to adjudicate the dispute, based on *Baloyi*. Although expressing his belief that the approach in *Baloyi* weakens the dispute resolution framework provided for in the LRA and establishes two parallel regimes, which causes incoherency in the law, Waglay JP was bound to follow the precedence set by the Constitutional Court.

As for the failure to allege a breach of any particular clause in the employment contract, the LAC held that this did not make the respondents' claim bad in law. A full and proper reading of the founding affidavit demonstrated that what was alleged was that Prasa terminated their employment contracts contrary to the terms, which amounted to an unlawful termination.

In the absence of any challenge to the facts and allegations set out by the respondents, the Court had to accept them as correct. Accordingly, the LAC was satisfied that Prasa had terminated the respondents' contracts of employment without good or proper cause and there was no dispute that the termination was unlawful.

## Characterisation and remedies

The real issue before the LAC was in relation to the appropriate remedy. In this regard, the Court relied on various authorities which establish that the remedy depends on the way in which the dispute is characterised.

If a matter is brought in terms of the LRA, only the remedies set out in the LRA are competent. By contrast, having disavowed any reliance on the LRA and having succeeded in having the termination of their contracts declared unlawful, only contractual remedies were available to the respondents.

Since the respondents did not prove any damages suffered, they were not entitled to any. This left specific performance (ie. reinstatement).

Unlike a claim for unfair dismissal, where reinstatement is the primary remedy and will only be refused if certain specific conditions set out in section 194 of the LRA are present, in a breach of contract claim, specific performance is not a relief that automatically follows.

The court is required to exercise a judicial discretion on whether it would be appropriate to grant specific performance. This requires the court to consider, among others, the nature of the contract and the consequence of granting the relief.

Although not a hard-and-fast rule, our courts have historically been less inclined to grant specific performance of an employment contract, which is a personal as opposed to a commercial agreement.


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In exercising its discretion in this case, the LAC considered the following:

- The respondents were employees on the upper echelons of a business enterprise and, being on the level of management, had to help with the running of the enterprise. Accordingly, they needed to conduct the business in cooperation and consultation with the owners or those who are authorised to control the affairs of the enterprise and could not perform their functions without any interaction;
- Whether the grant of specific performance may lead to conflict within the workplace;
- The termination of the respondents' employment contracts demonstrated that Prasa is no longer in need of the Respondents' services; and
- Seeking specific performance because of financial prejudice that the employees suffered as a result of losing their income is not grounds for granting this relief.

Ultimately, the LAC held that the Labour Court failed to exercise its discretion to determine whether it was appropriate to grant specific performance and granted the relief simply because Prasa had breached its contract of employment with the respondents.

On closer inspection, the relief granted by the Labour Court was more relief in terms of the LRA, which the Labour Court could not grant.

Having failed to satisfy the LAC that specific performance was warranted, there was no basis upon which to grant this relief. The appeal succeeded and the respondent's application was dismissed.

## Key take-aways

Following terminations, particularly of senior employees, employers may well continue to be faced with claims for unlawful dismissal.

It is important to be aware that this alternative avenue exists for employees and that the Labour Court does have jurisdiction to decide these claims. The attendant risks for an employer may, however, be far less than a claim brought in terms of the LRA.

From an employee perspective, while they may have the election to pursue an unlawful dismissal claim, litigants should take heed of the impediments that exist in obtaining a successful contractual remedy when deciding on the cause of action to be pursued.


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