

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

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DATE 05 January 2023 SIGNATURE

**CASE NUMBER: 6055/2021**

In the matter between:

MACGREGOR KUFA **PLAINTIFF**

and

NATIONAL RESEARCH FOUNDATION **FIRST DEFENDANT**

DR MOLAPO QOBHELA **SECOND DEFENDANT**

MR BISHEN SINGH **THIRD DEFENDANT**

DR DOORSAMY PILLAY **FOURTH DEFENDANT**

DR NOEL SAMUEL ROCKY SKEEF **FIFTH DEFENDANT**

DR NOMPUMELELO OBOKOH **SIXTH DEFENDANT**

PROF LOYISO NONGAXA **SEVENTH DEFENDANT**

MR JACOB MAHLANGU **EIGHTH DEFENDANT**

DR BEVERLY DAMONSE **NINTH DEFENDANT**

**REASONS FOR ORDER OF 11 APRIL 2022**

**TLHAPI J**

[1] These reasons pertain to a requested for them as a result of an order granted

on 11 April 2022 in the exception to the plaintiffs particulars of claim, which read:

“1. The Defendants’ Exceptions are upheld with costs;

2. The costs in question shall:

2.1 Be paid by the plaintiff on the scale as between party and party;

2.2 Include the costs of two counsel; and

2.3 Include the costs occasioned by the Plaintiff’s Rule 28(1) Notice of 6

November 2021, the Defendants’ Rule 28(3) Objection of 10

November 2021 and postponement of this matter when it was

previously set down for 16 November 2021.

3. The Particulars of Claim are set aside.

4. 4.1 The Plaintiff is granted leave to deliver amended Particulars of

Claim having regard to this order, within 15 days of the date of this

order.

4.2 Should the Plaintiff fail to do so, then the Plaintiff’s action will be

automatically regarded as dismissed with costs on the scale as

between party and party, including the costs of two counsel.

[2] This order was preceded by one granted by agreement between the parties

on 15 November 2021 which read:

“By agreement between the parties and in light of the Plaintiff’s Rule 28(1)

Notice dated 8 November 2021 and the Defendants’ Rule 28(3) ) objection

dated 10 November 2021, it is ordered as follows with regard to the

Defendants’ exceptions that were enrolled for hearing on the opposed roll of

15 November 2021;

1. It is recorded that the Plaintiff is entitled (if so advised) to bring application

in accordance with Rule 28(4) within 10 days of the Defendants’ Rule

28(3) Objection, and that if the Plaintiff should do so, then the Rule 28(4)

application and the remaining Exceptions should best be heard together,

with the consequence that the remaining exceptions cannot be heard in

the week of 15 to 19 November 2021.

2. In the premises the remaining exceptions are postponed *sine die* for later

hearing (together with the Plaintiff’s Rule 28(4) application, should such

an application be timeously brought).

3. The costs of the postponement are reserved.”

The purpose of the agreement was to give the plaintiff an opportunity to bring an

application to amend the particulars of claim in terms of Rule 28(4) which application,

in terms of the above order, the plaintiff agreed to bring within 10 days of the

Defendant’s Rule 28(3) objection. The plaintiff failed to bring the said application

within the 10 days so allowed and the period expired on 24 November 2021.

[3] Prior to the order of 15 November 2021 the defendants had already filed and

served its Index to the Exception Application and the Heads of Argument for the

hearing on 15 November 2021. An application for the exception to be placed on this

opposed roll was made by the defendants’ on 2 February 2022 and a set down for

the hearing of the exception 11 April 2022 was served by email and receipt was

acknowledged on 7 February 2022 by the plaintiff’s attorneys. There can therefore

be no excuse or mistaken belief that the exception would not be heard on 11 April

2022.

[4] On CaseLines the Amended Particulars of Claim and proof of service were

filed on 6 April 2022. The proof of service by email is dated 9 January 2022. The

Plaintiff filed an application on 9 April 2022 for an order condoning the late service

and or filing of the amended particulars of claim in terms of Rule 28(5) read with Rule

27 of the Rules of Court; Condoning and extending the time frames of the Rule 28(1)

Notice to Amend the particulars of claim served on the first to the ninth respondent

on 21 December 2021; that the amended particulars of claim be deemed to be filed

in terms of Rule 28(5) and (7) and costs if opposed. The Plaintiff’s Heads of Argument

were loaded on CaseLines on 10 April 2022, a day before the hearing and were seen

by me on the morning of the hearing.

[5] Both counsel Mr Mullins for the excipient and Mr Mahasha for the plaintiff had

discussions prior to the hearing. The Mr Mullins contended that the Rules under

which the application for condonation was brought in particular Rule 27 does not

apply to a failure to file amended pages, that failure to do so, the amendments would

fall away. Furthermore, except for exception six, relating to the 10% of the pension,

the proposed amendment does address that it seeks to withdraw the plea relating

thereto, even though he contended, the withdrawal did not remedy the excipiability

in that regard. Otherwise, it was contended that the remainder of the exceptions

were good, that it was better for the exceptions to be upheld if the court agreed, that

the plaintiff consider the exceptions and seek to amend.

Another issue addressed by Mr Mullins was the possibility of the matter being

postponed having regard to state the papers, the heads for the plaintiff being filed

late, the duration that would be required to argue the matter if proceeded with, which

would exceed five hours which in terms of the practice manual the matter would

have to be allocated to the third court motion, that if I was amenable to the matter

being postponed, which the excipients did not agree with, the excipients would ask

for wasted costs, which costs would include costs of two counsel. Mr Mahasha was

not in agreement regarding the issue on costs he contended that since there was a

main matter still to be adjudicated upon, the excipients were not losing anything and

that the costs be reserved.

[6] I took the view that before me were the exceptions which remained extant and

having appraised myself of the heads of argument, which were the only ones filed, the

exceptions were good, and indicated that I would uphold the exceptions and a

draft order was presented. The only objection raised by Mr Mahasha was again the

issue of costs of two counsel and that these be reserved. Both parties have engaged

more than one counsel, the plaintiff in preparation of the pleadings expect for this

application for condonation and the defendant has always had two counsel throughout

also with regard to the exception before me and I regarded the issues as complex,

hence my allowing costs as requested.

[7] In giving a brief outline of the matter it is such that the plaintiff is suing the

defendants after his dismissal for exposing alleged corrupt activities of the defendants.

He seeks to set aside a decision taken by the First Defendant to use a forensic report

and that of the Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth Defendants to

dismiss him from the employment of the First Defendant. Summons were accordingly

issued on 5 February 2021 against the defendants, and the following was prayed for:

a) A declaratory order that the Plaintiff’s dismissal by the First Defendant was

unlawful and the contract deemed to be extant;

b) In respect of Claim on breach of employment contract, payment of

R17 000 000 (seventeen million rands);

c) With ten percent of the claim being paid from the pension interest of the

Second, Third, Fourth, Fifth, Eighth and Nine Defendant jointly and

severally each paying the other to be absolved;

d) Interest on the amount at the rate of 15.5 percent per annum;

e) Costs of suit on an attorney and client scale against the second to the

ninth defendants personally inclusive of the employment of three counsel;

f) Alternatively, costs against all the Defendants jointly and severally on an

attorney and client scale each paying for the other to be absolved inclusive

of costs of employment of three counsel;

[8] The plaintiff alleged his dismissal was unfair and that this court had jurisdiction

to hear the matter. The dismissal constituted a material breach of his contract of

employment and he claimed damages being the loss of emoluments up to retirement

age for the alleged “wrongful and intentional” dismissal. He relied on the Common

Law; on the Basic Conditions of Employment Act 57 of 1997 in terms of section 77(3)

read with 77A(e) thereof; on section 157(2) of the Labour Relations Act 66 of 1965(as

amended), Furthermore, the summons was issued in the public interest in terms of

section 38 of the Constitution Act 108 of 1996.

[9] In light of the order granted on 11 April 2022 it is necessary to mention the

exceptions. The defendants excepted to the Plaintiff’s Particulars of claim as lacking

averments necessary to sustain an action, that some allegations were vexatious,

irrelevant and scandalous and that some allegations had no bearing to the actual claim

or claims as briefly stated below. Not all exceptions have been quoted:

“1. The First Exception- Incoherence: That the 91-paragraph particulars of claim

are replete with irrelevant, scandalous and vexatious allegations, so as to fail

to make out an action, Examples were outlined in 1.3.1 -1.3.16.

1.3.1 In paragraphs 14 -19 the second, third, fourth, and eighth defendants (para

14) or the second, third, fourth, sixth, seventh and eighth defendants (para

18) are alleged to have misappropriated funds “either individually or

collectively” without laying a foundation for the allegations;

1.3.2 …….;

1.3.3 Allegations about ghost workers. An “elaborate fraudulent scheme, sexual

impropriety or delinquency that have no bearing on the actual claims or

claims as seen in paragraph 21; 30,3 41, 61 and 62 of the particulars of

claim;

1.3.4 ……..

1.3.5 ………;

1.3.6 Allegations about the first defendant’s board’s tenure “marked by decay

and financial ruin (para 25);

1.3.7 …….;

1.3.8 Allegations about the ‘unlawfulness of [the] actions’ of the first defendant

and that they ‘keep evading legal consequences and fly under the radar of

corruption’ (para 28);

1.3.9 ……..;

1.3.10 ……..;

1.3.11 Paragraph 31 contains the allegation that an unspecified factor ‘is one of

the reasons why the employment contract of the second defendant could

not be renewed;

1.3.12 ………;

*1.3.13 ………;*

1.3.14 *(a) a number of paragraphs contain gratuitous remarks which cannot be*

pleaded and do not belong in pleadings;

(b) three examples are (a) paragraph 40.9 (‘was hell bent and had an

inkling’), (b) paragraph 40.10 (‘[u]ndeterred by the onslaughts of

victimisation’), and (c) paragraph 40.16(‘that’s when the night to (*sic)* the

long knives transpired’);

1.3.15 (a) the particulars of claim are replete with footnotes, sourcing authority

for one purpose or another.

(b) footnotes have no part in particulars of claim and cannot be pleaded

to.

(c) the inclusion of the footnotes renders these particulars of claim

incoherent.

1.3.16 There is an allegation in paragraph 68 to the effect that the ‘plaintiff will

in due course be bringing a review application to set aside the Deloitte

Report which is nonsensical

2. The Second Exception – A Claim for contractual damages is inconsistent with

a challenging of the dismissal allegedly giving rise to the contractual damages:

2.1 It is apparent from prayers (a) and (b) of the particulars of claim that the

plaintiff claims both reinstatement (‘that the….. contract [is] deemed extant’)

and payment of damages consequent upon dismissal.

2.2 see also, to the same effect, paragraphs 78 and 81 (the dismissal must be

set aside) and 82 (the plaintiff must be paid damages for what he would

allegedly have earned up to retirement age, had he not been dismissed) of

the particulars of claim.

2.3 claiming damages for breach of contract on the basis of the consequences

of that breach (loss of employment) is inconsistent with at the same time,

and in the same document, claiming the setting-aside of that breach, which

setting aside if granted, obviate the alleged contractual damages.

2.4…..the claim for the alleged breach of contract of employment is

inconsistent with (and in effect contradicted by) the claim for

reinstatement, and by virtue of this contradiction the allegations in the

particulars of claim consequently do not sustain an action against any of

the defendants.

3. The Third Exception – Parallel Proceedings in the Labour Court:

3.1 It is apparent from paragraph 4 of the particulars of claim, read together

with Annexure “M2” thereto, that at the same time as the plaintiff is

pursuing this action in the High Court seeking the setting aside of his

dismissal (and payment of damages based on the consequences of that

dismissal), he is seeking reinstatement in the Labour Court.

3.2 See in this regard annexure ‘M2’to the particulars of claim and the

allegation in paragraph 4 of the particulars of claim that the plaintiff is

challenging such [allegedly] automatically unfair dismissal at the

Labour Court under the statutory framework in question.

3.2 A claim for contractual damages pursuant to dismissal in inconsistent

with a challenging of that dismissal under the statutory framework in

question.

3.3………

3.4………

3.5……..

4. The Fourth Exception – Contractual Damages are limited in Common Law:

4.1 …….the plaintiff’s claims are couched in the particulars of claim as

being common law contractual claims for contractual damages for

alleged breach of contract in the form of an alleged unlawful dismissal.

4.2 The plaintiff’s contract of employment:

4.2.1 is not on the face of it a fixed term contract (no allegation to that

effect is made in the particulars of claim.

4.2.2 On a proper construction of the allegations contained in the

particulars of claim, read with section 37 and 38 of the Basic

Conditions of Employment Act 75 of 1997, is a monthly contract

terminable at the instance of either party on a month’s notice;

and

4.2.3 Does not, on the face of it, entitle the plaintiff to continued

employment until retirement, without the possibility of termination

by notice.

4.3 A common law claim for contractual damages for alleged unlawful

dismissal is limited to the amount the plaintiff would have earned

were it not for the alleged breach.

4.4………

4.5………

4.6………

4.7……

5. The Fifth Exception – The particulars of claim do not make out a case for

contractual breach:

5.1…………

5.2 The grounds on which the plaintiff was dismissed are outlined in

paragraph 40.21 of the particulars of claim (insolence, verbal abuse,

making false allegations against a fellow employee, bringing of the

name of the first defendant into disrepute).

5.3 ………..

5.4 ……….

5.5 The allegations in paragraphs 45 to 56 of the particulars of claim

do not go far enough to establish that the plaintiff’s dismissal

constituted a breach of his contractual rights.

5.6…………

5.7………

6. The Sixth Exception – No basis for the plaintiff’s predilection for payment

out of the second, third, fourth, fifth, eighth and ninth defendant’s pension

funds:

6.1 The sixth exception:

6.1.1. Relates to the component of the plaintiff’s claim against the

second, third, fourth, fifth, eighth and ninth defendants.

Personally, in terms of 10% thereof 10% is claimed from their

pension interests, as per paragraph 84 read together with prayer

(c) of the particulars of claim; and

6.1.2…….

6.2………………

6.3. The particulars of claim lack averment necessary to sustain this

distinct component of the claim

6.4 More particularity, but without thereby derogating from the generality

of what was stated in paragraph 6.3 above:

6.4.1. The particulars of claim do not make out any basis on which

the plaintiff would be entitled to payment out of the second,

third, fourth, fifth, eighth and ninth defendant’ pension

interests (as opposed to any other source) in the event the

plaintiff is entitled to any payment whatsoever from them;

6.4.2. The particulars of claim lack averments that would be

necessary to overcome the provisions of section 37A of the

Pensions Funds Act 24 of 1956 in terms of which ‘no benefit

provided for in the rules of a registered fund….or right to such

benefit …shall, be capable of being reduced, transferred or

otherwise ceded…all be liable to be attached or subjected to

any form of execution under a judgment or order’.

6.5…………..

6.6……………

7. The Seventh Exception – No case is made out for the Personal Liability of

the second to ninth defendants:

7.1……….

7.2………..

7.3. As appears from paragraphs 40.1 and 42 to 44 of the particulars of

claim, the plaintiff’s contract of employment was with the first

defendant.

7.4. The plaintiff fails to make averments that would render the second

to ninth defendants personally liable to the plaintiff for an alleged

breach of the plaintiff’s contract of employment with the First

Defendant.

7.5. More particularly, but without thereby derogating from the

generality of the aforegoing:

7.5.1. The plaintiff does not allege that any of the second to ninth

defendants were party to his employment contract, and in

the premises does not, and cannot allege that any of them

breached contractual obligations to him.

7.5.2. The plaintiff does not allege grounds on which any of the

second to ninth defendants owed him a duty of care in

relation either to his employment, or to the termination

thereof.

7.5.3. Although the plaintiff alleges certain conduct on the part

of the second (paragraph 86.1), third, fifth and eighth

(paragraph 86.2), sixth and seventh (paragraph 86.3)

and ninth (paragraph 86.4) defendants:

(a) the plaintiff does not even allege conduct on the part

of fourth defendant; and

(b) the allegations which the plaintiff makes with regard

to the second, third, fifth, sixth, seventh, eighth and

ninth defendant do not lay a basis for personal liability

on the part of such defendants

7.6……….

7.5……………..”

[10] It is common course that the plaintiff on 8 November 2021 by notice in terms of

Rule 28(1) informed the defendants of the intention to amend the particulars of claim.

The defendant objected by the filing of a notice of objection in terms of Rule 28(3) on

10 November 2021. The parties agreed and consented to an order being made

allowing the plaintiff within 10 days of the objection so filed to launch an application to

amend his particulars of claim in terms of Rule 28(4). Applicable in the circumstance

are Rules 28(1). 28(2), 28 (3) and 28 (4). The plaintiff failed to comply with his

undertaking to bring such application which period expired on 24 November 2021. The

failure to bring such application and the failure to file the amendments sought rendered

the exceptions extant. The plaintiff was served with a set down for the hearing of the

exception on 7 February 2022, service was acknowledged and the plaintiff did nothing.

[11] The plaintiff proceeded to effect its amendments and ignored that in terms of

Rule 28 (4) an application had to be launched since the proposed amendments were

objected to. The application in terms of Rule 28(4) would have allowed the parties to

engage the legal principles governing applications for amendment as summarised in

Commercial Union Assurance Co Ltd v Waymark NO[[1]](#footnote-1) and would have also addressed

some of the issues in exception.

[12] The plaintiff brought an application for condonation in terms of Rule 28 (5) read

with Rule 27. Counsel for the defendant correctly pointed out that reference to these

Rules were not applicable to the application before the court which was solely for the

determination of the exceptions which remained extant after the plaintiff failed to

comply with the deadline to bring an application in terms of Rule 28(4) by the 24

November 2021. There was an objection filed in terms of Rule 28(3) on 10 November

as confirmed by the parties in the Order dated 15 November 2021. In as far as Rule

28(5) is referred to by the plaintiff, this does not reflect the true status of the matter

before the court on 11 April 2022. Rule 27[[2]](#footnote-2) of the Uniform Rules of Court deals with

removal of bar, extensions of time and condonation for late pleas and had no relevance

in determining the issues at hand. In my view the papers as they stood meant that

there was virtually no opposition to exceptions raised by the defendants, furthermore,

the amendments raised after the 24 November 2021 are not as a result of an

application launched in terms of Rule 28(4).

[13] In as far as the plaintiff’s heads of argument which deal in particular with the

exceptions are concerned, Mr Mullins for the excipient contended that the exceptions

taken were good. The heads of argument filed on behalf of the plaintiff a day before

the hearing and were seen by me on the morning of the hearing deal primarily with

the application for condonation as it was contended that the exceptions could not be

dealt with in view of the condonation application which stayed such hearing. I have

already expressed agreement that the Rule 28(5) read with Rule 27 were not

applicable to the condonation application, therefore there was no opposition to the

exceptions, which are good and remain extant. I have appraised myself of all the

exceptions summarised above and accompanying heads of argument of the excipient

and deal very briefly with a few (while not excluding the remaining not dealt with) ,

which in my view render the particulars of claim excipiable.

[14] **The Second, Third, Fourth and First Exceptions:**

**Second Exception**

(a) It is contended for the defendants that the plaintiff could have sued for damages

for dismissal in the alternative to his claim for reinstatement before the Labour Court,

that is ‘without in any way rendering the one remedy dependent on the other not being

granted’. The second claim as stated in paragraph 78 and 81 and in the prayers sought

are inconsistent “ in paragraph 78: *“the plaintiff seeks to set aside a decision taken by*

*the first defendant …to dismiss”* and paragraph 81: “*as a result the plaintiff seeks a*

*declaratory order that his dismissal by the first defendant was unlawful and the*

*contract deemed extant”.* Prayer (a) “*a declaratory order that the plaintiff’s dismissal*

*by the first defendant was unlawful and the contract deemed extant”,* of the particulars

of claim the plaintiff seeks both orders to be granted simultaneously.

**Third Exception**

(b) It is contended for the excipient that this court cannot entertain a claim for

damages arising out of a dismissal when the exact relief is sought in another court

(the Labour Court as per annexure “M2” to the particulars of claim – seeking

reinstatement in the Labour Court and seeking damages for dismissal in this court).

The particulars of claim “should have explicitly stated the claim for damages is

conditional upon the reinstatement failing”.

**Fourth Exception**

(c) It is contended for the excipient that the plaintiff had a choice to seek his

remedy under the Common Law or in terms of the Labour relations Act and Basic

Conditions of Employment Act both referred to as the Labour Law dispensation[[3]](#footnote-3). It

was contended that a claim based on the Common Law had limitations. Where the

employment was not for a fixed term, on termination by the employer the employee

would be entitled to a salary equivalent to a month[[4]](#footnote-4); the employee had no right to a

‘perpetual employment’. Furthermore, it was contended that the plaintiff’s claim to

entitlement of a salary ‘he would have earned had he been in the first defendant’s

employ until retirement isn’t in accordance with his common law rights. Where the

plaintiff relies on a Labour Law dispensation the remedy available to the plaintiff rests

with such statutory remedies afforded by the statutes. For example in Baloyi *supra[[5]](#footnote-5)*

**First Exception**

It is contended that the particulars of claim as submitted in paragraphs 1.1 and

1.4 consist of irrelevant, scandalous and vexatious allegation and innuendo rendering

them totally defective. Further, that a striking out application would be unnecessarily

burdensome especially where it would require of the excipient to deal with each and

every allegation. In my view, this would render the task burdensome where the

excipient would still in addition have to deal with the rest of the grounds of exception.

[15] The above concludes my reasons for the order granted.

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**V.V. TLHAPI**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

**APPEARANCE**

**ORDER GRANTED ON : 11 APRIL 2022**

**FOR THE FIRST APPLICANT : Adv L Mahasha**

**INSTRUCTED BY : MAKHAFOLA & VERSTER INCORPORATED**

**FOR THE 1st to 9th DEFENDANTS : Adv K Magano**

**INSTRUCTED BY : SAVAGE JOOSTE & ADAMS INC**

**DATE OF JUDGMENT : 05 JANUARY 2023**

1. 1995 (2)SA 73 (TK) at 77F-I [↑](#footnote-ref-1)
2. Rule 27

   (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as it seems meet,

   (2) Any such extension may be ordered although the application therefore is not made until after the expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the result of the expiry of anytime so prescribed or fixed whether such results flow from the terms of any order or from these Rules.

   (3) The court may on good cause shown condone any non-compliance with these Rules.

   (4) After a rule nisi has been discharged by default of appearance by the applicant the court or a judge may revive the rule and direct that the rule so revived need not be served again. [↑](#footnote-ref-2)
3. Fedlife Assurance Ltd v Wolaardt 2002 (1) SA 49 (SCA) ; Transman (Pty) Ltd v Dick and Ano 2009 (4) SA 22 (SCA); Baloyi v Public Protector & Others 2021 (2) BCLR 101 (CC) paras [ 28]. [39], [40], [48]…..”[But] the fact a cause of action is limited in certain for a must not be interpreted as obliging an applicant only to pursue that particular cause act…….

   …….[D]isputes arising from contracts of employment do not, without mare, fall withing the exclusive jurisdiction of the Labour Court…..

   The mere potential for an unfair dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court notwithstanding the fact that other potential causes of action exist.....

   A claim for contractual breach, absent reliance on any provision of the LRA can be identified on Baloyi’s papers. [↑](#footnote-ref-3)
4. South African Maritime Safety Authority v Mckenzie 2010(3)SA 601 (SCA) “[a] cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanism of the LRA to obtain a remedy provided for in the LRA” [↑](#footnote-ref-4)
5. Paragraphs [38] and [30] “Had Ms Baloyi sought a claim of unfair dismissal, she would have been required, in terms of section 157(1) of the LRA, to approach the Labour Court. This is because unfair dismissal claims fall within the exclusive jurisdiction of the Labour Court. The reason for this delineation is that the Labour Court and the Labour Appeal Court were ‘designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining” [↑](#footnote-ref-5)