



REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 78/11

In the matter between:

RAND WATER

Appellant

and

JOHAN STOOP

First Respondent

JOHANNES BUCKLE

Second Respondent

Date of hearing: 22 August 2012

Date of Judgment: 08 November 2012

Summary: -Contract of employment- Employees dismissed for fraud and employer incurred losses- Employer claims damages in terms of s77 (3) of the of the Basic Conditions of Employment Act, 75 of 1997-

-Employees raised point *in limine* that Labour Court lacks jurisdiction- Labour Court has jurisdiction when the issue in dispute is related to, linked to, or connected with an employment contract- Employer entitled to claim damages from employees

Employees' point *in limine* dismissed with costs.

CORAM: WAGLAY AJP, ZONDI AJA and MUSI AJA

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## JUDGMENT

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WAGLAY AJP

### Introduction

[1] This is an appeal against the finding by the Labour Court that it had no jurisdiction to determine the appellant's damages claims against the first and second respondents because the claims did not concern a contract of employment, or a contract of employment as envisaged by s77 (3) of the Basic Conditions of Employment Act, 75 of 1997 (hereafter the "BCEA"), and that the Labour Court, in any event, had no jurisdiction to entertain a claim for damages against the respondents.

### Background facts

[2] The Respondents are former employees of the appellant. They were charged with and found guilty of misconduct by an independent chairperson at an internal disciplinary hearing.

- [3] The findings of the disciplinary hearing included a finding that the respondents' misconduct '... caused R7.8 million losses to Rand Water [the employer].'
- [4] The respondents believing their dismissals to be both substantively and procedurally unfair referred it as a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. Conciliation failed to resolve the dispute. The Appellant then successfully applied to the Director of the CCMA to transfer the respondents' claims for adjudication to the Labour Court under the provisions of s191(7) of the Labour Relations Act no.66 of 1995 (hereafter the LRA).
- [5] The first respondent served the referral for his unfair dismissal claim in terms of the LRA upon the appellant and in turn, the appellant instituted a counter-claim against him for damages in terms of the BCEA. Before the second respondent could refer his unfair dismissal dispute to the Labour Court, the appellant instituted a claim for damages against the second respondent in terms of the BCEA and the second respondent then instituted a counter-claim for unfair dismissal in terms of the LRA.
- [6] Although the respondents applied independently to challenge their dismissals in the Labour Court, the disputes have now been consolidated. In both cases, the respondents claim that their dismissals were unfair and seek reinstatement. The appellant, in turn has instituted a claim for damages against them for breach of contract.

*The pleadings against the first respondent*

- [7] The particulars of the counter-claim against the first respondent (applicant in the pleadings) read as follows:

'25. The Applicant, acting personally, and the Respondent, duly represented by its Acting General Manager, concluded a written contract of employment on or about 23 August 1999. A copy of the written employment contract is annexed marked "A".

26. It was an implied, alternatively, a tacit term of the contract of employment that:

26.1 the Applicant had the duty to perform his services diligently and in the exercise of the care and skill which can be reasonably expected of a person with their knowledge and experience;

26.2. the Applicant had a duty to act in good faith, including the duty to work honestly, to desist from any form of nepotism or favouritism, to act within their authority and to comply with the Respondent's procurement rules and policies, as well as section 57 of the Public Finance Management Act, 1999;

26.3. in his relationship with suppliers, including SWR Projects CC, the Applicant undertook in addition to the aforesaid duties not to engage in (to) any form of collusion or unfair business practices and/or promote honesty and integrity and to look after and act in the best interests of the Respondent.

27. The Applicant, as a senior employee employed by the Respondent, owed the Respondent a fiduciary duty of loyalty, trustworthiness and good faith.

28. As a senior employee, the Applicant was charged with the financial responsibility of approving payments to contractors to the Plaintiff, including SWR Projects CC.

29. For the period 2002 to 2007, SWR Projects CC was the approved supplier and was awarded several tenders by the Respondent from which it derived the right to perform various projects for the Respondent.

30. Pursuant thereto, SWR Projects CC duly represented, entered into various joint venture agreements with the Respondent, duly represented. The joint venture agreements were all concluded in Johannesburg.

31. It was an implied, alternatively, a tacit term of each of the joint venture agreements that:

31.1. the parties to the joint venture would act in good faith in relation to each other and/or act in such a manner so as to advance the joint venture for their mutual benefit;

31.2. SWR Projects CC would claim only such monies from the Respondent as were due and owing;

31.3. SWR Projects CC would support any claim for payment from the Respondent with vouchers or proof of expenditure in the case of the joint (Jo) venture;

31.4. SWR Projects CC would:

31.4.1. charge the correct rate for services rendered; and/or

31.4.2. charge only for work done; and/or

31.4.3 charge the agreed or usual, or a reasonable price for goods and services rendered.

32. In each case mentioned above, the Applicant was, as part of his duties, to approve invoices submitted by SWR Projects CC for work that it had done and for which it was entitled to payment.

33. The Applicant was obliged, in terms of his contract of employment, to ensure that SWR Projects CC submitted invoices in compliance with its obligations set out in paragraph 31 above and/or to approve only those invoices for which SWR Projects CC was entitled to be paid for actual work done in accordance with the agreed, alternatively the usual, further alternatively the reasonable rates.

34. During the period 13 May 2002 to August 2007, the Applicant and SWR Projects CC conspired to defraud the Respondent by inducing the Respondent's Accounting Department to effect payments to SWR Projects CC for sums that the Applicant and SWR Projects CC knew were not owing and/or due and payable to SWR Projects CC. In amplification thereof:

34.1. SWR Projects CC submitted invoices to the Respondent, represented by the Applicant for work not done and/or which reflected overcharges and/or the incorrect rate and/or charges for work duplicated and/or charges contrary to the tender documents and/or without proper supporting documents ("the defects").

34.2. The Applicant approved payments in respect of the invoices contemplated in paragraph 34.1.above knowing of the defects.

34.3 Induced by these actions, the Respondent paid SWR Projects CC the sum of R8 091 607.16 for which the Respondent was not liable.

35. Alternatively, even if fraud cannot be proved by approving the payments to (20) SWR Projects CC, the Applicant breached his contract of employment with the Respondent in one, more, or all of the following ways:

35.1 By failing to perform their services diligently, and in the exercise of due care.

35.2 By failing to act in the best interests of the Respondent.

35.3 By failing to comply with the Respondent's procurement policies.

35.4 By failing to act in good faith.

35.5 By acting in collusion with SWR Projects CC.

36. The Applicant accordingly materially breached all the terms of the contract of employment pleaded above.

37. Had the Applicant performed his contractual obligations, the Respondent would not have suffered any loss.

38. Consequently, as a result of the Applicant's breach of the employment contract, the Respondent suffered damages in the sum of R8 091 607.16 to put it in a position it would have been in had the Applicant complied with his employment duties.

39. The Applicant has admitted causing the Respondent loss in the sum of R748 096.40.

40. In the premises, the Applicant is liable to the Respondent in the sum of R748 096.40.

41. As a result of the Applicant's conduct, the Respondent paid SWR Projects CC the sum of R8 091 607.16 when such sums were not owing.

42. In the premises, as a result of the Applicant's breach, as aforesaid, the Respondent has suffered damages, in the amount of R7 343510.70' [my underlining]

*The pleadings against the second respondent*

[8] In the case of the second respondent although the counter-claim<sup>1</sup> is not framed by the appellant in identical fashion, it is similar to the counter-claim filed against the first respondent. Again, the appellant asserts that the second respondent breached his contract of employment in the same manner as the first respondent. The allegation is made that as a result of the breach of the employment contract, the appellant suffered damages.

[9] There is, in the second respondent's pleading, one major difference: an alternative claim, in delict, is pleaded as follows:

'6.2 Its jurisdiction to order the Respondent to pay the Applicant's damages arises from two independent sources:

6.2.1 Firstly, section 77 (3) of the Basic Conditions of Employment Act, 1997,

And

6.2.2 Secondly, the Court's inherent powers empowers, under section 158(1)(a)(iv) of the Act, which allows the Labour Court to make any appropriate order, including an award of compensation in any of the circumstances contemplated by the Labour Relations Act, 1995 (Act);

By virtue of the Court's broad powers under the Act, the Court has powers to entertain delictual action against employees instituted by the employer.

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<sup>1</sup> I shall refer to both the appellant's claim against the second respondent and its counter-claim against the first respondent as "counter-claims"

6.3 The Court's power to grant relief against the Respondent arises from its broad and inherent powers under the Act, which permit it to award damages in delict.'

### The exception

[10] The respondents raised a point *in limine* against the appellant's counter-claim. The point *in limine* was that the Labour Court had no jurisdiction to entertain a claim for damages.

### The judgment of the Court *a quo*

[11] The point *in limine* was argued and the Labour Court (Bhoola J) handed down the following judgment:

'[1] .....

"[2] The applicants contend that the counterclaim is a delictual claim in that it is based on fraud. Christie, states: "Fraud is a delict, and it is no less a delict because it is connected with the making of a contract or takes the form of a fraudulent misrepresentation inducing a contract" [**Christie: The Law of Contract in South Africa** 3<sup>rd</sup> ed (LexisNexis Butterworths, Durban, 1996) at 239]. The respondent denies that this is a delictual claim and asserts that it arises from contract, and that this Court in any event [has] concurrent jurisdiction with the High Court to determine the counterclaim.

[3] Section 77(3) of BCEA provides that this Court has concurrent jurisdiction with the civil courts to hear and determine "any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract'.

[4] The clear and ordinary meaning of "concerning" is "about; regarding; on the subject of' as was held in **University of the North v Franks and Others** [[2002] 8 BLLR 701 (LAC) at 711C], I agree with Mr Ackermann's submission that it means "involving" or "having a proximity to" which requires that the application or claim should have a direct bearing or effect on the employment contract. This, he



submitted, will apply to terms and conditions relating to termination of the contract, the interpretation of the contract or specific performance. In the present instance, the applicants are one step removed from the situation and a determination of the allegations of fraud will have no bearing on an employment contract which is no longer in existence. This Court is not called upon to determine whether the applicants did defraud their employer or not, whether the contract should be terminated because of such conduct. The counter claim moreover has no relationship to the claim arising from the substantive and procedural fairness of the dismissal, nor will it involve the same evidence.

[5]...

[6] For these reasons, the counter claim cannot be said to concern the contracts of employment of the applicants and this Court accordingly lacks jurisdiction. Therefore, the objection in limine is upheld with costs.'

### The appeal

- [12] The appellant raised a number of grounds of Appeal, but I believe it may be more appropriate to deal with the issues raised by the respondents as not all of the issues raised by them were dealt with by the Court *a quo*.
- [13] The first issue raised by the respondents in support of their point *in limine* was that the Labour Court, had no jurisdiction to entertain the appellant's counter-claims as these were essentially pure delictual claims and not claims linked to, or connected with the employment contract that at one time existed between the appellant and the respondents.
- [14] The point *in limine* was argued on the pleadings without any evidence being tendered. On the pleadings, it is demonstrably clear that the counter-claims arose directly from the same set of facts that resulted in the respondents' dismissal. The counter-claims pleaded are that the respondents committed fraud whilst in the employ of the appellant and as such they breached their duty of

good faith, axiomatically, the committing of fraud during their employment breached the essence of the contract of employment that existed between them.

- [15] The Court can only test the issue of jurisdiction, in the absence of any evidence, with reference to the claims as pleaded. The Constitutional Court in the matter of *Gcaba v The Minister for Safety and Security and Others*<sup>2</sup> said:

'75. Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa* [supra] and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the Court's competence."<sup>3</sup>

- [16] The counter-claims are pleaded as arising out of and related to the contract of employment that existed between the appellant and the respondents. Whether the claims were one in delict I shall deal with later, but the fact that the claims arose out of a contractual relationship is what is pleaded. Furthermore, the alternative claims as pleaded is based on the allegations that even if the appellant fails to discharge its *onus* of proving that the respondents committed fraud, the respondents would have been found to have breached their contracts of employment by not acting diligently or in good faith or in the appellant's best interest. These claims therefore, *prima facie* are claims that are contractual. In *Sappi Novoboord (Pty) Ltd v Bolleurs*,<sup>4</sup> it was said that:

'It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully : *Pearce v Forster & others* (1886) QB 356 at 359; *Robb v Green* (1895) 2 OB 1 at 10; *Robb v Green* (1895) 2 QB (CA) at 317; *Gerry Bouwer Motors (Pty)*

<sup>2</sup> [2009] 12 BLLR 1145 (CC) at para [75].

<sup>3</sup> See also *SA Maritime Safety Authority v. Mckenzie* [2010] 5 BLLR 488 (SCA) at para 7.

<sup>4</sup> (1998) 19 ILJ 784 (LAC) at para 7.

*Ltd v Preller* 1940 TPD 130 at 133; *Premier Medical & Industrial Equipment Ltd v Winkler & others* 1971 (3) SA 866 (W) at 867H. The relationship between employer and employee has been described as a confidential one (*Robb v Green* at 319). The duty which an employee owes his employer is a fiduciary one “which involves an obligation not to work against his master’s interests” (*Premier Medical & Industrial Equipment Ltd v Winkler* at 867H; *Jones v East Rand Extension Gold Mining Co Ltd* 1917 TH 325 at 334). If an employee does “anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him”: *Pearce v Forster* at 359. In *Gerry Bouwer Motors (Pty) Ltd v Preller* it was said at 133: “I do not think it can be contended that where a servant is guilty of conduct inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him.” The conduct of an employee in receiving a commission which arises out of the employment relationship without the knowledge of his employer constitutes a lack of faith: *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) [787] 39 Ch D 339 (CA) at 363 -4; *Levin v Levy* 1917 TPD 702 at 705; *Gerry Bouwer Motors (Pty) Ltd v Preller* at 133.’

- [17] The contractual link to the claim is also secured by the fact that in our common law every employee undertakes to exercise due and reasonable diligence in the discharge of the duties he is contracted to discharge.<sup>5</sup>
- [18] The counter-claims as pleaded not only raise the issue of fraud committed by the respondents but expressly aver that the damages allegedly suffered by the appellant were a result of the respondents’ failure to serve it honestly and faithfully and by their failure to exercise due and reasonable diligence. In the circumstances I am satisfied that the counter-claims were based on the contract of employment between the parties.
- [19] The second ground raised by the respondent was that even if the claims were based on an employment contract, appellant should pursue its claims against the respondents in the civil courts, not in the Labour Court, as the Labour Court

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<sup>5</sup> See in this respect *Wallace v Rand Daily Mails* 1917 AD 479 at 482.

should only deal with disputes involving unfair dismissals and unfair labour practice.

- [20] The above ground was misconceived in light of s77(3) of the BCEA, in terms of which the appellant instituted its claims against the respondents. S77(3) provides as follows:

‘The Labour Court has concurrent jurisdiction with the Civil Courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.’

- [21] Generally the Labour Court and this Court have held that if an issue in dispute relates to; is linked to; or connected with an employment contract then the Labour Court does have jurisdiction in terms of s77(3) of the BCEA to entertain such a dispute. See *Penta Publication (Pty) Ltd v Schoombie and others*,<sup>6</sup> *Vorster v Real Africa Corporate Services (Pty) Ltd*,<sup>7</sup> and; *Mafihla v Govan Mbeki Municipality*;<sup>8</sup>
- [22] In the matter of *Tsika v Buffalo City Municipality*,<sup>9</sup> the court in my view properly held that the Labour Court had wide powers in terms of the BCEA and that in terms of s77A(e) the Labour Court may make any order that it considers reasonable on any matter concerning a contract of employment in terms of s77(3). The court added that such orders may include an order for specific performance; an award of damages or an award of compensation.<sup>10</sup>

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<sup>6</sup> [2001] 2 BLLR 199 (LC) here the Labour Court held that an employer was entitled to enforce a confidentiality clause in an employment contract even after termination of the employment relationship.

<sup>7</sup> [2003] 2 BLLR 208 (LC)

<sup>8</sup> [2005] 4 BLLR 334 (LC) here the Labour Court considered if there was a breach in the termination of an employment contract, if so, the relief that should be granted.

<sup>9</sup> [2009] 3 BLLR 272 (E).

<sup>10</sup> Section 77A sets out the powers of the Labour Court to make orders and provides that ‘...**the Labour Court may make any appropriate order, including an order -- (e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation.**’

- [23] This Court in the matter of *Langeveldt v Vryburg Transitional Local Council and Others*,<sup>11</sup> said that the right of a dismissed employee, who believes his dismissal to constitute a repudiation of a contract of employment, to accept repudiation and claim damages, or reject the repudiation and hold the employer to the contract may by virtue of s77(3) of the BCEA be enforced in the Labour Court. This was reinforced in the recent matter of *South African Football Association v Mangope*<sup>12</sup> where the LAC upheld a claim for payment of damages consequent to the repudiation of an employment contract. Also in the matter of the *University of the North v Franks and Others*,<sup>13</sup> this Court said that the termination of a contract of employment and the terms and conditions upon which the termination took place are matters concerning an employment contract.
- [24] A claim for damages arising out of a breach of a contract of employment was also upheld by the Labour Court in *SA Music Rights Organisation Ltd v Mphatsoe*<sup>14</sup>. In this matter, the Court upheld the employer's right to claim damages from the employee who failed to work his full notice period.
- [25] A similar argument as raised by the respondents in the Court *a quo* was raised at the SCA in the matter of *Makhanya v University of Zululand*.<sup>15</sup> The Court there noted that:

‘... The jurisdictional challenge is curious because claims for the enforcement of contracts are commonplace in the high courts. Some eight years ago it was argued before this Court – in *Fedlife Assurance Ltd v Wolfaardt* [2002 (1) SA 49 (SCA)]- that claims for the enforcement of contracts of employment had been excluded from the jurisdiction of the high courts by the Labour Relations Act 66 of 1995 (“LRA”) but that argument was rejected, and is not sought in this case to be revived. And if there is any residual doubt as to whether a high court has the power to consider such a claim it is put to rest by section 77(3) of the Basic

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<sup>11</sup> [2001] 5 BLLR (LAC).

<sup>12</sup> As yet unreported case no JA 13/11 delivered on 7 September 2012.

<sup>13</sup> [2002] 8 BLLR 701 (LAC) at para 29.

<sup>14</sup> [2009] 7 BLLR 696 (LC).

<sup>15</sup> [2009] 8 BLLR 721; [2009] 4 All SA 146 (SCA) at para 2.

Conditions of Employment Act 75 of 1997 (“BCEA”), which was enacted after the LRA, and which makes it perfectly clear that the high courts have not been divested of their ordinary jurisdiction to enforce contracts of employment (the section confers equivalent jurisdiction on the Labour Court also to consider such claims).’(my emphasis and footnote omitted)

- [26] One of the corollaries to a breach of contract is a claim for damages or specific performance.
- [27] Respondents’ further argument was that if s77(3) of the BCEA allowed for claims arising out of a contract of employment to be adjudicated by the Labour Court, then on a proper interpretation of s77(3), the jurisdiction of the Labour Court was limited to interpretation and enforcement of the terms of a contract of employment.
- [28] According to the respondents, the use of the phrase in s77(3) that the concurrent jurisdiction of the Labour Court with the Civil Courts to hear and determine ‘...any matter concerning a contract of employment, irrespective of any basic condition of employment constitutes a term of that contract...’ meant that the Labour Court can do no more than interpret the terms of the contract of employment in a dispute even, when the term(s) in dispute do not form part of the basic conditions of employment.
- [29] Extending the above argument the respondents submitted (which submission was accepted by the Court *a quo*) that the meaning to be attached to the word “concerning” in the phrase “concerning a contract of employment” was, as held in the *University of the North v Franks and Others*<sup>16</sup> – “about”; regarding and “on the subject of”. These meanings the respondents say mean “involving” or “having proximity to” and, as such, the argument continued, because of the meaning ascribed to the word “concerning” as set out above, the Labour Court’s jurisdiction in relation to a contract of employment is limited to enforcement of the

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<sup>16</sup> [2002] 8 BLLR 701 (LAC) at 711 C.

terms of the employment contract and does not include adjudication of allegation of fraud, especially where the contract has been terminated. The respondents added that the interposing of the contractual terms relating to the service provider made the appellant's claim "one step removed" from a contract of employment.

[30] Firstly, the argument that s77(3) of the BCEA only permits the Labour Court to interpret the terms of an employment contract and enforce it, is neither reasonable nor logical. This is demonstrably clear when regard is had to s77A(e) of the BCEA which sets out the remedy the Labour Court may grant in respect of a dispute referred to it in respect of a dispute arising out of an employment contract.<sup>17</sup> Secondly, the meaning ascribed to the word "concerning" in the relevant phrase in s77(3) is acceptable save that attributing "having proximity to", to the word "concerning" cannot be correct. The word "concerning" while conveying a cause and effect does not convey a meaning that some causes and effects are acceptable and others not or that there has to be a direct or indirect link between the contract of employment and the claim.

[31] Furthermore, the only reason for interposing the service provider in the particulars of claim appears, *prima facie*, to make plain how the respondents' general duties would apply to their contracts of employment. Additionally, the fact that when the claims were instituted the respondents were no longer in an employment relationship is of no consequence. The cancellation of a contract does not prevent a party from claiming damages for a breach of that contract. The right had accrued before the termination of the contract and as such the appellant is entitled to enforce its right irrespective of the termination of the contract that created that right<sup>18</sup>. The fact that at the commencement of the action no employment relationship existed is of no consequence to the issue of

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<sup>17</sup> See footnote 11.

<sup>18</sup> See *SAFA v Mangope* (supra) and *Crest Enterprises Ltd v Rycklof Beleggings Bpk* 1972 (2) SA 863 at 870 F-G where the Court cited with approval what Salmond and Williams on *Contracts*, 2<sup>nd</sup> edition (1945) said at 566- '...every obligation which has accrued due between the parties before the rescission of the contract, and which creates a then existing cause of action remains unaffected by the rescission and can still be enforced'.

jurisdiction because the claim had accrued before such termination. It was also erroneous of the Court *a quo* to find that fraud generally cannot amount to a breach of contract; the Court *a quo* further ignored the alternative claim. In any event I fail to appreciate what the phrase “one step removed” from contract of employment is intended to mean. A claim arises from a contract or it does not, one cannot have degrees of connection between a claim and a contract.

[32] A further argument raised by the respondents in its point *in limine* was that the BCEA does not confer jurisdiction over a contractual claim for damages that are illiquid because the Labour Court principally is a Court of equity.

[33] The Labour Court is both a Court of law and a Court of equity. What this implies is that in matters before it, it should apply the appropriate principles. Sometimes it must apply both these principles on an issue: for example when determining whether to grant costs in a matter referred to it, but where the pleadings involve a contractual claim and no reliance is placed on unfair behaviour, principles of law must apply to determine the dispute. In the present case, the Labour Court would do exactly what the High Court would do in adjudicating the damages claim. The Labour Court, like the High Court, will sit as a Court of law and not as a Court of equity. Its jurisdiction is concurrent to the jurisdiction of the High Court.

[34] Also the fact that the claim is illiquid does not make it a claim which the Labour Court cannot adjudicate. There is simply no basis to assert that liquidity is a pre-requisite for the Labour Court to entertain a contractual claim<sup>19</sup>.

[35] The respondents also averred that, the appellants’ claim is a delictual one and therefore cannot be entertained in terms of s77(3) of the BCEA. Once again the respondents are wrong. There is no doubt that fraud is a delict but the fraud alleged in the pleadings is connected to the contract of employment between the appellant and the respondents. This was not a fraud committed against the appellant by persons unconnected to it. The allegation is that the respondents

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<sup>19</sup> See *SAFA v Mangope* (Supra).



abused their positions as servants of the appellant. They committed fraud against their employer by abusing the positions they held as employees.

[36] Finally, the respondents submitted that the BCEA was partisan towards employees and that the s77 of the BCEA only contemplated claims by employees against their employers and not *vice versa*. There is simply no warrant for interpreting the BCEA in a partisan manner. The BCEA benefits both employers and employees. This is clear from a number of provisions. For example, the rules relating to deductions from employees' salaries and the rules relating to notice pay are for the benefit of both parties. Providing employees with minimum conditions of employment creates industrial peace which is to the benefit of both parties. The BCEA was designed to promote the right to fair labour practice which is available to everyone employees and employers alike. If the employee can claim damages for breach, so too can the employer, to suggest otherwise is to argue that this section is unconstitutional.

[37] In my view, the respondents either ignored or failed to appreciate the fact that unfair labour practice and unfair dismissal claims are regulated by the LRA and not the BCEA and that while their claims are under the LRA, the appellant's counter-claims are under the BCEA and are permissible.

### Conclusion

[38] A teleological approach to interpretation of the BCEA is clearly appropriate, but this approach does not and cannot licence an Alice in Wonderland interpretation. Words must mean what they ordinarily mean not what we want them to mean: *S v Zuma and Others*,<sup>20</sup> *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and Others*,<sup>21</sup> *Daniels v Campbell and Others*,<sup>22</sup> *Investigating Directorate; Serious Economic Offences and Others v Hyundai*

<sup>20</sup> (1995) 4 BCLR 401 (CC) at 412 especially at para 17 E-G.

<sup>21</sup> 2000 (2) SA 1 (CC) at para 25.

<sup>22</sup> 2004 (5) SA 331 (CC) at para 19.

*Motor Distributions (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*,<sup>23</sup> and *Hoffman v South African Airways*<sup>24</sup>.

[39] I am satisfied that s77(3) read with s77A (e) favours an interpretation bringing within its ambit the type of claim instituted by the appellant in this matter as;

39.1 The word “*concurrent*” in s77 (3) places the Labour Court in exactly the same position as the High Court with the same powers and authority in relation to matters concerning a contract of employment.

39.2 The last part of the s77(3) provides the Labour Court with jurisdiction irrespective of whether any basic condition of employment constitutes a term of the employment contract. This demonstrates that the Labour Court has jurisdiction over any claim as long as it involves a contract of employment

39.3 The words “*concerning a contract of employment*” mean about or in connection with an employment contract. The pleaded claim clearly falls within this categorisation.

39.4 The words “*any matter*” in s77(3) are broad and the literal interpretation does not limit the claims, in relation to a contract of employment, to a specific category. Damages, both liquid and illiquid, are included.

[40] The argument that the counter-claim is not competent because it bears no relation to the claim arising from substantive and procedural fairness of the respondents’ dismissal is also misconceived. Generally a counter-claim is not required to be linked or related to the claim in convention, so long as the Court has jurisdiction to entertain it, it can be raised. In this matter however, the counter-claims arise from the same facts that gave rise to the dismissal, so the question of leading totally unrelated evidence does not arise. The difference only

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<sup>23</sup> 2001 (1) SA 545 (CC) at paras 50 to 56.

<sup>24</sup> 2001 (1) SA 1 (CC) at para 42.

relates to the fact that the dismissal dispute will be entertained in terms of the LRA and the Court will determine it on the basis of its equity jurisdiction whereas the same facts with regard to the counter-claim will be entertained in terms of the BCEA and the Court will determine it on basis of its Law jurisdiction.

[41] In the circumstances, the point *in limine* raised by the respondents should have been dismissed.

[42] In the result, I make the following order:

- (i) The appeal is upheld with costs;
- (ii) The Order of the Court *a quo* is replaced with the following order:

‘The respondents’ point *in limine* is dismissed with costs.’

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Waglay AJP

I agree

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Zondi AJA

I agree

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Musi AJA

APPEARANCES:

FOR THE APPELLANT:

Adv F.A. Boda

Instructed by Cliffe Dekker Hofmeyer Inc

FOR THE FIRST RESPONDENT:

Adv M. F. Ackerman

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Adv J. T Delpont

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