



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

DATE

SIGNATURE

CASE NUMBER: 6258/15

DATE: 21 October 2022

SANOJ JEEWAN (aka MARK)

Plaintiff

V

TRANSNET SOC LIMITED

First Defendant

EY (ERNST & YOUNG)

Second Defendant

JUDGMENT

MABUSE J

- [1] This matter came before me as a special case at which stage it involved only the Plaintiff, Mr Sanoj Jeewan (“Mr Sanoj”) and the First Defendant, Transnet Soc Limited (“Transnet”). This was the stage during which the court had to adjudicate only the special pleas raised by Transnet against Mr Sanoj’s claim.

THE BACKSTORY

- [2] For purposes of convenience, I shall refer to the Plaintiff as “Mr Sanoj” and to the first Defendant as “Transnet”.
- [3] Mr Sanoj was, at all material times, employed by Transnet as the Corporate Governance Manager in terms of a written contract of employment signed by the parties on 2 October 2006. During such material times, Mr Sanoj was also subjected to the Transnet Disciplinary Code and Procedure (TDCP) as contained in s 16 of the Contract of Employment.
- [4] As a Corporate Governance Manager Mr Sanoj was the forensic champion of Transnet and his duties included the coordination of investigations, forensic fraud prevention and detection, taking remedial and corrective action, reporting to Transnet’s forensic working group and ensuring that everyone in his division knew the contents of the fraud prevention plan and all the concomitant policies. Mr Sanoj also oversaw the internal control and compliance functions of Transnet
- [5] Transnet had a fraud prevention plan which included such policies as Code of Ethics, Policy Declaration, Interest and Related Disclosures. The Second Defendant conducted forensic investigations into the conduct of Mr Sanoj and made certain findings. Based on such findings, Transnet laid a charge of misconduct against Mr Sanoj. The charge against Mr Sanoj was that he had breached his contract of employment with Transnet

and the Code of Ethics as he had established and participated in a fraudulent scheme with an external service provider. First, he was interviewed on such findings on 20 April 2010. On 21 April 2010, Mr Sanoj was suspended. On the same date he submitted his letter of resignation. It is not clear whether Transnet accepted his letter of resignation or simply ignored it. What is clear though is that despite his letter of resignation, Transnet decided to proceed with a disciplinary hearing against him. On 7 May 2010, Transnet notified him that he should attend a hearing on 14 May 2010. He was subjected to a disciplinary hearing on 14 May 2010. He was found guilty and dismissed with immediate effect from his employment on 14 May 2010.

[6] Mr Sanoj subsequently referred, a dispute relating to his dismissal in terms of s 191 of the Labour Relations Act 66 of 1995 (the LRA) to the Transnet Bargaining Council (“the Council”) and sought reinstatement to his employment. S 191 of the LRA deals with disputes about unfair dismissal and unfair labour practices. S 191(1)(a) provides that:

“If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing within:

(i) the council, if the parties to the dispute fall within the registered scope of that council; or

(ii) the commission if no council has jurisdiction.”

S191(2)(a) provides that:

“Subject to subsections (1) and (2) an employee whose contract of employment is terminated by notice, may refer the dispute to the council or the commission once the employee has received that notice.”

He had alleged in his referral, that his dismissal by Transnet was procedurally and substantively unfair. On 25 January 2012, Adv Van der Schyff, who appeared for Mr Sanoj at the disciplinary hearing informed the hearing that Mr Sanoj withdrew the dispute that the dismissal by Transnet was substantively unfair. The matter then

proceeded with the dispute regarding the procedural fairness of his dismissal and costs. Mr Sanoj had initially challenged his dismissal by Transnet on the five grounds. At the hearing of the disputes that took place on 1 September 2011, and continued 24 and 25 January 2012, he abandoned two of those grounds and proceeded only with three of those grounds namely:

[6.1] lack of impartiality on the part of the chairman of the disciplinary hearing which was allegedly evidenced by statements he had made during the hearing.

[6.2] inadequate time given to him (the Plaintiff), to prepare for his disciplinary hearing.

[6.3] failure on the part of Transnet to call *viva voce* evidence at the disciplinary hearing, thereby depriving him, the Plaintiff, of any opportunity to cross-examine witnesses.

[7] Commissioner Esther van Kerken (“Ms van Kerken”) ruled in favour of Transnet in respect of all the above mentioned three grounds:

[7.1] Ms van Kerken dealt with the three disputes fully under the following headings:

[7.1.1] the first complaint regarding procedure. The alleged lack of impartiality of the chairperson. She dealt with this complaint or ground substantially even with reference to reported authorities. In conclusion she found that, based on the evidence before her, she was not persuaded that the transcript of the disciplinary hearing showed that the chairman was biased. She found furthermore that Mr Sanoj had failed to discharge his onus to prove his allegation of bias. She held that, on this case alone, Mr Sanoj’s case should fail.

[7.2] The second complaint against the procedure, alleged inadequate time to prepare.

On this ground she was satisfied that Mr Sanoj, and his legal team had had sufficient time to prepare and even pointed to eight instances in which Mr Sanoj and his legal team had, or should have had, sufficient time.

[7.3] The third issue, the alleged failure to call *viva voce* evidence at the disciplinary hearing other than that of Mr du Toit, whose evidence was permitted based

on affidavit, thereby depriving the applicant of the opportunity to cross-examine witnesses: Ms van Kerken noted that, according to the transcript, after Mr du Toit had testified, the chairperson of the disciplinary hearing asked a Ms Asmal, who was representing Mr Sanoj, whether she had any questions for him. In response she responded that “no, we do not”. She noted further that the transcript did not show that Ms Asmal reserved her cross-examination of Mr du Toit or that she was prevented from doing so. She concluded that Mr Sanoj’s legal representative had the opportunity to cross-examine Mr du Toit but elected not to do so. She found that the objection on procedure, on this ground, should fail.

[7.4] Then she assessed the procedural fairness of the dismissal. Having found that there was no basis for the grounds raised by Mr Sanoj, she proceeded to establish whether there was any evidence that supported Transnet’s case that it had effected the dismissal of Mr Sanoj with a fair procedure. Ms van Kerken was satisfied that Transnet effected the dismissal of Mr Sanoj with a fair procedure.

[8] Mr Sanoj then issued combined summons in this Court against Transnet claiming against Transnet payment of the sum of R57,374,996.02; interest on the said amount at the prescribed rate of interest; costs of the suit and further and or alternative relief. Mr Sanoj’s action against Transnet was based on delict and in the alternative, on common law. His grounds of action against Transnet are based on a contract. In these grounds he states that:

“4.1 The first defendant breached paragraph 1.1 of the TDCP in the following manner:

4.1.1 despite its obligation to ensure that the plaintiff was protected from arbitrary action, the first defendant acted arbitrarily when it terminated the plaintiff’s contract of employment on 14th May 2010.

4.1.2 *the first defendant's action was arbitrary because it was done prematurely, namely, while the disciplinary hearing and the forensic investigations of the plaintiff's alleged misconduct was still pending.*

4.2 *The first defendant breached paragraphs 4.4; 5.2; 5.3 and 5.10.3 of the TDCP in the following manner:*

4.2.1 *the first defendant subjected the plaintiff to disciplinary action for a reason that was not fair, namely that the plaintiff had established and or participated in a fraudulent scheme with an external service provider whereas this allegation was not true.*

4.2.2 *the first defendant failed to ensure that the plaintiff was dismissed in accordance with a fair procedure. The disciplinary hearing held on 14 May 2010 was unfair and unlawful because the first defendant's appointed chairperson was overtly biased, as evidenced by the extracts of the record quoted below in favour of the first defendant in the following respects... (Mr Sanoj then enumerated all respects in which he alleged Transnet was biased).*

4.2.4 *The first defendant dismissed the plaintiff prior to, instead of, after the conclusion of the disciplinary hearing. The plaintiff's termination letter was signed by the first Defendant and served on the Plaintiff on 14 May 2010 whereas the disciplinary hearing had apparently continued 17th May 2010 without the plaintiff's knowledge. As a consequence, the plaintiff was denied the opportunity of properly presenting his defense to the allegations against him.*

4.3 *The first defendant breached paragraphs 4.4 and 4.5 of the TDCP by failing to treat him fairly... (He then proceeded to furnish reasons why he made those allegations).*

4.4 *The first defendant breached paragraph 5.3 TDCP in that the first defendant terminated the plaintiff's contract of employment on 14 May 2010 without first ensuring and or satisfying itself that the plaintiff's disciplinary hearing was*

procedurally fair or that the plaintiff's was dismissed for a fair reason or that the disciplinary hearing was first properly concluded.

4.5 *The first defendant breached paragraph 6.2.2 of the TDCP in the following manner: The plaintiff then set out the respects, three of them, in which he contended that the first defendant breached paragraph 6.2 .2 of the TDCP as follows:*

4.3.3 *The first defendant ought to have considered disciplinary action only after the finalization of the forensic investigations ... (In other words, he contends that he was unfairly dismissed).*

4.3.4 *The first defendant impliedly misrepresented to the plaintiff on 7 May 2010 via the notice to attend the disciplinary hearing that was set down for 14 May 2010 that forensic investigation into the Plaintiff's alleged misconduct had been finalized ... (Again, this means that he was unfairly dismissed).*

4.3.5 *the forensic investigation was neither completed as at 07 May 2010 when the plaintiff was served with the notice to attend the disciplinary hearing nor by 14 May 2010 when the hearing commenced."*

In paragraphs 2.4;3.5 up to 4.9 of the particulars of claim Mr Sanoj deals with unfair dismissal.

[9] In paragraph 4.10 to 4.16 of his POC Mr Sanoj deals with how the chairperson of the Transnet disciplinary committee was biased during the disciplinary hearing. In paragraph 4.11 he expands on the allegations of the bias of the chairperson. In this paragraph he stretches out the way he alleges the chairman of the disciplinary proceedings was biased against him.

[10] Based on what is contained in those paragraphs 4.10 to 4.16 he states that Transnet is in breach of his contract of employment, which breach violates his rights in terms of s 23

of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”). He states furthermore that the said breach occurred because Transnet did not dismiss him for a fair reason and furthermore that his dismissal was not in accordance with a fair procedure.

[11] He then arrives at two conclusions firstly, that the chairman of the disciplinary committee was biased against him in favour of Transnet and secondly, that Transnet had unjustifiably and unlawfully dismissed him from his employment. In brief, he implied that because the chairman of the disciplinary committee was biased against him, his dismissal was unfair. He implied furthermore that Transnet had no valid reason in law to dismiss him.

[12] In respect of his claim of delict, Mr Sanoj repeated his allegations as contained in paragraph 4 of his POC.

[13] He states that Transnet had a contractual and or legal duty to discipline him for a fair reason in terms of the TDCP. It also had a duty to ensure that he was subjected to administrative action that was lawful, reasonable, and procedurally fair. According to him, Transnet failed to discipline him with the required legal and or contractual duty to ensure that he was subjected to administrative action that was lawful, reasonable, and procedurally fair and as set out in paragraph 4 of his POC. Then he concludes that, based on the foregoing, Transnet’s conduct was wrongful.

SPECIAL PLEAS

[14] To the foregoing allegations set out in Mr Sanoj’s POC, especially paragraph 4 thereof, Transnet raised the following three special pleas:

[14.1] jurisdiction;

[14.2] prescription;

[14.3] res judicata.

Special Plea of jurisdiction

[15] It was pleaded by Transnet in respect of this special plea that this court does not have any jurisdiction to entertain Mr Sanoj's claim for damages because:

[15.1] the basis of Mr Sanoj's claim is that Transnet dismissed him substantially and procedurally unfairly on 14 May 2010. According to counsel for Transnet, the following paragraphs demonstrate clearly that the Plaintiff's claim of breach of contract is that he was substantively and procedurally unfairly dismissed by the First Defendant on 14 May 2010:

"24.1 In paragraph 3.6 the plaintiff alleges that on 14 May 2010 the first defendant subjected him to disciplinary hearing and summarily dismissed him on the same date;

24.2 in paragraph 3.7 he states that he referred a dispute to the Transnet Bargaining Council;

24.3 in paragraphs 4 and 4.1 the plaintiff alleges that the first defendant acted arbitrarily when it terminated his contract of employment on 14 May 2010, and he says in subparagraph 4.1.2 that the termination was arbitrary because it was done arbitrarily whilst the disciplinary hearing and the forensic investigation of the plaintiff's alleged conduct was still pending;

24.4 in paragraph 4.2 the plaintiff alleges that the first defendant breached specifically provisions of the Transnet Disciplinary Code and Procedures (TDCP) in that it subjected him to disciplinary action for a reason that was not fair and that the defendant failed to ensure that he was dismissed in accordance with a fair procedure;

24.5 under subparagraphs 4.2.2 and 4.2.3 the plaintiff complains about the behaviour of the chairperson of the disciplinary hearing which culminated in his dismissal on 14 March 2010;

24.6 in paragraph 4.2.4 the plaintiff alleges that the first defendant dismissed him before the conclusion of the disciplinary hearing and denied him the opportunity of properly presenting his defence to the allegations against him;

24.7 under paragraph 4.3 the plaintiff claims that the first defendant breached paragraphs 4.4 and 4.5 of the TDCP by failing to treat him fairly and he gives examples under subparagraphs 4.3.1 and 4.3.2; 24.8 under paragraph 4.4 the plaintiff claims that the first defendant breached paragraph 5.3 of the TDCP in that it summarily terminated his contract of employment on 14 May 2010 without ensuring and/or satisfying itself that the plaintiff's disciplinary hearing was procedurally fair, or that the plaintiff was dismissed for a fair reason or that the disciplinary hearing was first properly concluded;

24.9 under paragraph 4.5 the plaintiff alleges that the first defendant breached paragraph 6.2.3 of the TDCP in that the charge sheet against the plaintiff was vague and misleading;

24.10 under paragraphs 4.7 and 4.7.1 the plaintiff alleges that the first defendant breached paragraph 6.2.3 of the TDCP in that when it delivered a notice to him on 7 May 2010 to attend a disciplinary hearing, it failed to simultaneously deliver the bundle of documents that it used as evidence against him. He says the documents were delivered in drips and drabs on 11, 12 and 14 May 2010, and that as a result he (the plaintiff) and his legal representative were prejudiced in their ability to prepare for the hearing;

24.11 *in paragraph 4.11 the plaintiff alleges that in addition to being overtly biased, the chairperson of the disciplinary hearing failed to conduct a disciplinary hearing on 14 May 2010 in terms of paragraphs 6.3 of the TDCP, and the plaintiff gives examples*
under *subparagraphs 4.11.1 to 4.11.5;*

24.12 *in paragraph 4.17 the plaintiff alleges that the conduct of the first defendant as alleged in paragraphs 4.1 to 4.16 of his particulars claim, breached his contract of employment and violated his rights in terms of Section 23 (fair labour practice) and section 33 (just administrative action) of the Constitution of the Republic of South Africa, 1996. He states that “the breach occurred because the plaintiff was not dismissed for a fair reason and in accordance with*
a fair procedure;

24.13 *in paragraph 4.18 the plaintiff concludes that “in the circumstances the first defendant unjustifiably and unlawfully dismissed the plaintiff from his employment.”*

[15.2] With regard to the delictual claim, counsel for Transnet stated as follows:

“In paragraphs 5 to 5.11 of his particulars of claim the Plaintiff claims, in the alternative, against the First Defendant on delict. The alternative delictual claim of the Plaintiff is also based on the allegation that the First Defendant dismissed him substantively and procedurally unfairly on 14 May 2010. This is borne by the following:

“25.1 *in paragraph 5 the plaintiff repeats all the allegations that he made*
under *subparagraph (4) which obviously include the allegations in*
paragraph 4 *and its subparagraphs right up to subparagraph 4.18.*
Needless to say, it *follows that the delictual claim is based on the same*
allegations that the *plaintiff has made for the contractual claim.*

25.2 *The only other information that the plaintiff adds are elements of delict, namely wrongfulness, fault and causation which are contained in paragraphs 5.1 to 5.11.*

25.3 *In paragraphs 5.2 to 5.4 the plaintiff claims that the defendant had a contractual and/or legal duty to discipline him in terms of TDCP and for a fair reason. He alleges further that:*

“The first defendant also had a duty to ensure that the plaintiff is subjected to administrative action that was lawful, reasonable and procedurally fair”. He then alleges that the first defendant failed to discipline the plaintiff with the required legal and/or contractually duty and that the failure was wrongful.

25.4 *Under paragraphs 5.5 to 5.6 the plaintiff alleges that the first defendant could reasonably foresee and did foresee the harm that the plaintiff would suffer as a direct result of his wrongful conduct. He alleges that the wrongful conduct done by the first defendant are those contained in paragraph 4 and that these were done to ensure that the plaintiff was dismissed from his employment. He then alleges that the first respondent therefore acted intentionally.*

25.5 *In paragraph 5.8 the plaintiff alleges that he was not afforded a fair hearing.*

25.6 *In paragraph 5.10 the plaintiff alleges that if the court finds that the defendant’s actions were not intentional then it must find that the first defendant was grossly negligent, needless to say those are the actions alleged in paragraph 4.”*

[16] According to Transnet, in terms of section 191 of the LRA the power to determine whether a dismissal is procedurally and substantively unfair lies with the Commission for Conciliation Mediation and Arbitration (“CCMA”). In the case of Mr Sanoj, the power lay

with the Transnet Bargaining Council. Transnet then pleaded that on that basis this court has no jurisdiction to hear Mr Sanoj's claim.

[17] The plaintiff claimed in replication that his claim is not for relief available to him in terms of the LRA. According to him, his claim is based on the common law breach of his contract of employment and in the alternative on delict. He concluded by stating that the court or this court does have jurisdiction to hear his claim.

[18] It was argued by counsel for Transnet, on the authority of ***Chirwa v Transnet Limited And Others [2007] ZACC 23; 2008 (4) SA 367 (CC)*** and relying on what the Court had to say in paragraphs [59] to [67] that this Court has no jurisdiction to hear Mr Sanoj's claim. Before citing the paragraphs on which Mr Mathipa relied, I wish to copiously cite paragraphs [41] up to [43] of the same judgments. By these paragraphs the Constitutional Court (Concourt) emphasized that disputes relating to employee-employer relationships which arose from the LRA should be addressed through the mechanism created by LRA. The Concourt recognised the dispute between Chirwa and Transnet as employment related. Writing for the majority Skweyiya J said the following in paragraphs [41] to [43]:

"[41] It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.

[42] *The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the audi alteram partem principle and the rule against bias. If the process does not, the employee will be able to challenge her or his dismissal and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices.*

[43] *Judicial review of an administrative decision can only result in an administrative decision being set aside. This does not prevent an employer from restarting a disciplinary process; neither does it prevent an employee from being dismissed after a fresh hearing that cures the original defect. On the other hand, the forums provided for by the LRA allow for a variety of purpose-built, employment-focused relief; none of which is available under the provisions of PAJA.”*

[19] Briefly the facts of the case of Ms Nelisiwe Chirwa (“Ms Chirwa”) are as follows. Ms Nelisiwe Chirwa was dismissed by the Chief Executive of Transnet Pension Fund. The fund was a business unit of Transnet. She was dismissed for poor performance. She referred a dispute to the CCMA in terms of section 191(1)(a)(ii) of the LRA. After conciliation had failed for more than 30 days to resolve the matter, Ms Chirwa did not pursue the matter further under the provisions of the LRA. Instead, she approached the Johannesburg High Court where she sought the review and correction or setting aside of the decision to dismiss her from the employment of the Transnet Pension Fund.

[20] The central issue before the Constitutional Court was whether the High Court had concurrent jurisdiction with the Labour Court in respect of Ms Chirwa's claim. Such a case had to be decided on its own merits. That is why Skweyiya J said, "*in respect of Chirwa's claim*". Justice Skweyiya, stated the following in paragraphs [59] to [67]:

"[59] The starting point for the enquiry as to whether the High Court has concurrent jurisdiction with the Labour Court in respect of Ms Chirwa's claim is section 157(1) of the LRA, which provides that the Labour Court has exclusive jurisdiction over all matters that "are to be determined by the Labour Court." Thus, where exclusive jurisdiction over a matter is conferred upon the Labour Court by the LRA or other legislation, the jurisdiction of the High Court is ousted. The effect of section 157(1) is therefore to divest the High Court of jurisdiction in matters that the Labour Court is required to decide except where the LRA provides otherwise.

[60] It is apparent from the provisions of section 157(1) that it does not confer "exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee." It seems implicit from the provisions of this section that the jurisdiction of the High Court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations. The jurisdiction of the High Court will only be ousted in respect of matters that, in the words of section 157(1) "are to be determined by the Labour Court." This is evident from section 157(2), which contemplates concurrent jurisdiction in constitutional matters arising from employment and labour relations.

[61] Ms Chirwa's complaint is that Mr Smith "failed to comply with the mandatory provisions of items 8 and 9 of Schedule 8 to the LRA." Schedule 8 contains the Code that sets out guidelines that must be taken into account by "[a]ny person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure". Thus, unlike

in Fredericks, the applicant here expressly relies upon those provisions of the LRA which deal with unfair dismissals. Indeed, this is the claim she asserted when she approached the CCMA. It is apparent that when she approached the High Court, she made it clear that her claim was based on a violation of the provisions of the LRA, including items 8 and 9 of Schedule 8 to that Act. However, she elected to vindicate her rights not under the provisions of the LRA, but instead under the provisions of PAJA.

[62] The LRA provides procedures for the resolution of labour disputes through statutory conciliation, mediation, and arbitration, for which the CCMA is established; and establishes the Labour Court and the Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from it. Unfair dismissals and unfair labour practice are dealt with in Chapter VIII. Section 188 provides that a dismissal is unfair if the employer fails to prove that the dismissal was for a fair reason or that the dismissal was effected in accordance with a fair procedure. Item 9 in Schedule 8 to the LRA sets out the guidelines in cases of dismissal for poor work performance.

[63] Ms Chirwa's claim is that the disciplinary enquiry held to determine her poor work performance was not conducted fairly and therefore her dismissal following such enquiry was not effected in accordance with a fair procedure. This is a dispute envisaged by section 191 of the LRA, which provides a procedure for its resolution: including conciliation, arbitration, and review by the Labour Court. The dispute concerning dismissal for poor work performance, which is covered by the LRA and for which specific dispute resolution procedures have been created, is therefore a matter that must, under the LRA, be determined exclusively by the Labour Court. Accordingly, it is my finding that the High Court had no concurrent jurisdiction with the Labour Court to decide this matter.

[64] Ms Chirwa was correct in referring her dismissal to the CCMA as an unfair dismissal in terms of section 191(1)(a)(ii) of the LRA. The constitutional right she sought to vindicate is regulated in detail by the LRA. In this regard, the remarks made by Ngcobo J in relation to a specialist tribunal in *Hoffmann v South African Airways* are apposite. Ngcobo J, when invited to express an opinion on SAA's policy to test aspirant employees for HIV/AIDS, said the following:

"The question of testing in order to determine suitability for employment is a matter that is now governed by s 7(2), read with s 50(4), of the Employment Equity Act. In my view there is much to be said for the view that where a matter is required by statute to be dealt with by a specialist tribunal, it is that tribunal that must deal with such a matter in the first instance. The Labour Court is a specialist tribunal that has a statutory duty to deal with labour and employment issues. Because of this expertise, the Legislature has considered it appropriate to give it jurisdiction to deal with testing in order to determine suitability for employment. It is therefore that Court which, in the first instance, should deal with issues relating to testing in the context of employment." (Footnote omitted.) (Emphasis added.)

The LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective of who the employer is and includes the State and its organs as employers.

[65] Ms Chirwa's case is based on an allegation of an unfair dismissal for alleged poor work performance. The LRA specifically legislates the requirements in respect of disciplinary enquiries and provides guidelines in cases of dismissal for poor work performance. She had access to the procedures, institutions and remedies specifically designed to address the alleged procedural unfairness in the process of effecting her dismissal. She was, in my view, not at liberty

to relegate the finely tuned dispute resolution structures created by the LRA. If this is allowed, a dual system of law would fester in cases of dismissal of employees by employers, one applicable in civil courts and the other applicable in the forums and mechanisms established by the LRA.

[66] Ms Chirwa is not afforded an election. She cannot be in a preferential position simply because of her status as a public sector employee. There is no reason why this should be so, as section 23 of the Constitution, which the LRA seeks to regulate and give effect to, serves as the principal guarantee for all employees. All employees (including public service employees, save for the members of the defence force, the intelligence agency and the secret service, academy of intelligence and Comsec), are covered by unfair dismissal provisions and dispute resolution mechanisms under the LRA. The LRA does not differentiate between the State and its organs as an employer, and any other employer. Thus, it must be concluded that the State and other employers should be treated in similar fashion.

[67] Nonetheless, Ms Chirwa chose to abandon the process she had started in the CCMA and approached the High Court where she contended that her right to administrative justice, protected by section 33 of the Constitution, had been breached. She was ill-advised in abandoning the process that she had started in the CCMA. This is the route that she should have followed to its very end.”

[21] In burnishing his argument, counsel for Transnet raised the following reasons:

[21.1] having been dismissed by Transnet on 14 May 2010, Mr Sanoj referred a dispute to the Transnet Bargaining Council in terms of s 191 of the LRA on the initial allegations that his dismissal was both substantively and procedurally unfair;

[21.2] the dispute was arbitrated before Commissioner Ms Ester van Kerken. At the tipping end of the arbitration proceedings, Mr Sanoj jettisoned the allegations that his dismissal was substantively unfair. It is now this allegation that is at the heart of Mr Sanoj's current case;

[21.3] on 1 February 2012, the Commissioner, Ms van Kerken, issued an award following the arbitration process. In the said award she held, among others, that Mr Sanoj was dismissed fairly by Transnet. In other words, she found in favour of Transnet;

[21.4] strictly speaking, an award in the arbitration proceedings is a judgment of the Commissioner on issues that were brought before her for adjudication. In terms of the language of the LRA such a judgment is called an award. What was before the tribunal were both the substantively and procedurally unfairness of Mr Sanoj's dismissal. In brief, the Commissioner had to decide whether Mr Sanoj was dismissed fairly by Transnet. In deciding this issue, the Commissioner would have a look at a wide spectrum of the issues including whether Mr Sanoj was procedurally and substantively unfairly dismissed. A withdrawal by Mr Sanoj of the allegations of substantive and procedural dismissal towards the conclusion of the arbitrary proceedings was immaterial to the award because there was no way, in my view, that the Commissioner could have ruled or found that Transnet effected the dismissal of Mr Sanoj following a fair procedure if there was evidence of substantive and procedural unfairness. In my view, the finding by the Commissioner that Transnet effected the dismissal of Mr Sanoj with a fair procedure, implies that in all respects Mr Sanoj was dismissed properly by Transnet for valid reasons after Transnet had followed all its dismissal procedures properly;

[21.5] at the stage when Mr Sanoj withdrew his allegations of substantive and procedural unfairness, the Commissioner had heard all the evidence,

including whether there was any substance in the allegations of substantive and procedural unfairness. For that reason, she would not have ruled otherwise;

[21.6] in terms of s 158(1)(4) read with s 145 of the LRA, Mr Sanoj was entitled to take the award for review to have it reviewed and set aside. Ss 158(1)(a) and 145 of the LRA give the Labour Court the power to review and award. According to Transnet's counsel this means that this court is ousted from reviewing the award. Accordingly, this court does not have the power to review the arbitration award, in the face of ss 158 and 45;

[21.7] by failing to have the award reviewed by the Labour Court, as referred to by s 158(1)(a) read with s 145, it is assumed that Mr Sanoj has accepted the award and has decided to abide by it, irrespective of the nature of the relief he now seeks. The substratum of the issues he took for arbitration and the current claim against Transnet is the same. Therefore, any attempt by Mr Sanoj to claim before this court, whether on the basis of a breach of contract and/or delict for damages based on the same grounds he submitted to the Transnet Bargaining Council, even if he claims that the relief he claims is not based on the provisions of the LRA, amounts to an attempt to ask this Court to review the award of the Commissioner van Kerken, which has now become final. What Mr Sanoj now does is to ask this Court to rehear the same issues that have already been heard and decided upon by Transnet Bargaining Council;

[21.8] then on 29 January 2015 Mr Sanoj caused a copy of the combined summons in the current action to be served on Transnet. In it Mr Sanoj had claimed that on 14 May 2010 he was substantively and procedurally dismissed unfairly by Transnet as he alleged in paragraphs 4 to 4.16 of his particulars of claim;

[21.9] referring to his action against Transnet, Mr Sanoj claims that he is vindicating his rights by means of common law. What is clear though is that he has veered from the course set out in the LRA. Mr Sanoj has now completely abandoned the LRA procedures according to which he had referred a dispute to the Transnet Bargaining Council in terms of s 191 of the LRA;

[21.10] according to counsel for Transnet, for this Court to entertain Mr Sanoj's claim, it will have to decide firstly, whether he was substantively and procedurally unfairly dismissed as alleged in paragraphs 4 to 4.16 of his particulars of claim. He confirms that this can only be done by applying the provisions of the LRA. On that basis, he submits that this claim by the Plaintiff is a matter that falls squarely within the exclusive jurisdiction of the Transnet Bargaining Council or of the Labour Court. If he was disgruntled by the decision of Ms van Kerken he was at large to seek relief in terms of s 158(1)(g) read with s 145 of the LRA. That choice is still open to him provided he applies for condonation;

[21.11] Mr Mathipa submitted that Mr Sanoj was not entitled to abandon the specially designed mechanism of the LRA and to approach this Court on an issue that in law could be dealt with by another legally established tribunal. Relying on the *Chirwa* judgment, he argued that Mr Sanoj must first exhaust the remedies provided by the provisions of the LRA before approaching this Court. If this Court were to extend its jurisdiction over Mr Sanoj's claim, it will be promoting a dual system for dealing with cases of unfair dismissal.

[22] At the heart and kern of Mr Sanoj's case is his claim of unlawful breach of his contract of employment and an alternative claim in delict in terms of the common law. He claims that his claim is not about the unfairness of his dismissal, and he is not asking this Court to review and set aside the arbitration award. Significantly, Mr Sanoj contends that his

current claim is not the same claim that was before the Transnet Bargaining Council as it has a different cause of action. He contends that, in this claim, he is enforcing his contractual rights in terms of the common law. According to him it is not a statutory claim in terms of the LRA. He states furthermore that at the trial of this matter, the issue for determination will be whether Transnet breached the contract of employment when it dismissed him, not whether it breached or violated the LRA. He has disavowed any reliance and remedies in terms of the LRA in his particulars of claim.

[22.1] He contends that he has demonstrated with reference to his particulars of claim that he has pleaded a clearly identifiable and recognisable claim for the relief founded on unlawful breach of his contract of employment in terms of common law. Just like **Chirwa**, he claims that he is enforcing his contractual rights. Relying on **Baloyi v Public Protector and Others (CC103/20) [2020] ZACC 27; 2021 (2) BLLR101 (4C) [2021] 4 BLLR 325 (CC) paragraph [41]**, where the Court stated that:

"The approach endorsed, in Makhanya aligns with a series of judgments from the Supreme Court of Appeal that have confirmed that a contractual claim arising from breach of a contract of employment falls within the ordinary jurisdiction of the High Court, notwithstanding the fact that the contract is one of employment," he argued that a claim arising from breach of a contract of employment falls within the ordinary jurisdiction of the High Court. Then he concludes that on this basis the High Court has jurisdiction to hear his claim, and therefore, that this High Court has jurisdiction to entertain his claim against Transnet.

[22.2] All that the Court said in **Chirwa**, is that you may not start your dispute in one forum and midstream suddenly move it to another forum. Once you have elected to use one forum, you must stick to it until your dispute is concluded. By way of analogy, you may not start your dispute, like Mr Sanoj, or like **Chirwa**, by taking it to the bargaining council and after an award has been made, like the present case, you take your matter to the High Court.

[22.3] The fundamental difference between **Chirwa** and **Baloyi** and **Makhanya** on which Mr Sanoj relies is that **Chirwa** started her matter in accordance with the LRA and while the matter was still there decided to continue with a dispute in the High Court, whereas **Baloyi** and **Makanya** took their matters straight to the High Court.

[22.4] In **Chirwa** the Concourt recognised and classified the dispute between **Chirwa** and Transnet as employment related.

[22.5] The Court made it clear that every case should be decided on its own merits and that is the reason it stated that:

“The starting point from the enquiry as to whether the High Court has concurrent jurisdiction with the Labour Court in respect of Ms Chirwa’s claim (My own underlining) is s 157(1) of the LRA.” The Concourt did not state that *“in respect of employer-employee disputes”*.

[22.6] Furthermore, it identified the source of Ms Chirwa’s claim or complaint as being the LRA items 8 and 9 of Schedule 8 of the LRA. It then concluded that Ms Chirwa relied on the provisions of the LRA.

[22.7] The Concourt also identified Ms Chirwa’s problem as the type of dispute whose source is s 191 of the LRA. It remarked that the said section provides a solution to the disputes emanating from s 191 of the LRA. The mechanism provided by s191 of the LRA includes conciliation, arbitration, and review by the Labour Court. It concluded that the Labour Court has exclusive jurisdiction to determine such disputes.

[23] Despite what Mr Sanoj states in his replication, his claim is predicated on the allegation that he was substantially and procedurally unfairly dismissed on 14 May 2010. In my view, this is as clear as crystal from paragraphs 4 to 4.16 of his particulars of claim. But for his dismissal, Mr Sanoj would not be having any claim against Transnet. His claim is not because the Commissioner made an award in favour of Transnet, nor is it because

he was not successful at the arbitration. Mr Sanoj's claim and alternative are based on what Transnet allegedly did to him when it dismissed him on 14 May 2010.

[24] Mr Sanoj's contention that his claim is the unlawful breach of his contract of employment and the alternative claim in delict in terms of the common law does not, however, have any merit, in my view. His claim is about the unfairness of his dismissal even if he is not asking the Court to review and set aside the arbitration award. What is clear though is that the substratum of his claim for unlawful breach is the so-called alleged fact that he was dismissed unfairly. He also stated clearly that the breach of contract of employment was committed when he was dismissed on 14 May 2010. His dismissal by Transnet, on 14 May 2010, was the *sine qua non* of the breach of contract of employment he is alleging.

[25] I am fortified, in my view, by the following paragraphs from the judgment of Botha J, in ***Jones and Another v Telkom South Africa Ltd and Others (2006) BLLR 513 (T)*** in which he stated as follows:

"In this case I am convinced that a vital component of the issue to be determined concerns unfair dismissals, unfair labour practices, and dismissals based on operational requirements, all issues that ultimately resort under the exclusive jurisdiction of the Labour Court. The applicants have attempted to disavow a reliance on unfair dismissal in their prayers, but it is clear from the body of their affidavits that they consider the process adopted by the first respondent as one that has unfairly led to the termination of their employment, either as from 31 March 2005 or 31 May 2005.

It does not have to say that it is a constitutional issue. Even to determine where the process followed was fair, constitutionally speaking, one will have to begin to establish whether it was fair in terms of the Labour Relations Act. Constitutional issues cannot be determined in the abstract. In this case what is at stake is the fairness of a restructuring

process. Whether the process was fair has to be judged according to the facts of the case and in the context of the national legislation that gives effect to s 23(1) of the Constitution.”

[26] *In casu*, the same as in the **Jones** case *supra*, the vital component of the issue to be decided relates to the unfair dismissal of Mr Sanoj by Transnet. In my view, this is an employment related matter. For this Court to determine whether Transnet breached the employment contract it had with Mr Sanoj, the Court must, by using the LRA, first determine whether Mr Sanoj was unfairly dismissed, which have already been determined by the award of the Transnet Bargaining Council and, of paramount importance to the issues at hand, issues which are within the exclusive domain of the LRA. Mr Sanoj has tried to distance his case from the application of the principles of the LRA, but it is clear from the particulars of claim that he considers the process adopted by Transnet Bargaining Council as the one that has unfairly led to the termination of his employment on 14 May 2010.

[27] It is irrelevant to label his cause of action as common law or a constitutional issue. I align myself with the comments made by Botha J that:

“Even to determine whether the process followed, in other words, whether the termination of the contract of employment was done properly or unlawfully, one will have to begin to establish whether it was fair or unlawful in terms of the LRA.”

Truly constitutional or common law issues cannot be decided in the abstract. They must be decided with reference to the LRA, in other words, whether the termination of the agreement of employment was done according to the requirements of the LRA. Mr Sanoj was ill-advised to abandon the mechanism created by the LRA and to try to solve his dispute with Transnet by referring such dispute to this Court. He should have started with such mechanism and not reverted to this Court for the issue brought before this

Court. This Court has no jurisdiction in such matters as the one that Mr Sanoj has brought before it in the current matter. In my view, the special plea must succeed.

Special Plea of Prescription

[28] The second special plea that Transnet has raised against Mr Sanoj's claim is that of prescription. Transnet has pleaded the following facts in the special plea of prescription:

[28.1] the basis of Mr Sanoj's claim for damages against Transnet is his alleged unfair dismissal from his employment which took place on 14 May 2010;

[28.2] the claim constitutes a debt for purposes of sections 11(d) and 12 of the Prescription Act 68 of 1969 (the Act);

[28.3] the debt was due and owing by Transnet on 14 May 2010, the date on which Transnet dismissed Mr Sanoj;

[28.4] Mr Sanoj commenced action by means of summons which he served on Transnet on 29 January 2015 which is more than three years after the debt arose;

[28.5] In the premises, Mr Sanoj's claim has become prescribed in terms of the Act.

[29] In his replication to Transnet's special plea of prescription, Mr Sanoj replied as follows:

[29.1] it is denied that the debt was due and owing by Transnet on 14 May 2010;

[29.2] the Plaintiff's claim arose on 1 February 2012 when the arbitration award was issued;

[29.3] the Plaintiff's claim has therefore not prescribed.

COMMON CAUSE FACTS

[30] It is not in dispute that:

- [30.1] Transnet and Mr Sanoj had an employer-employee relationship;
- [30.2] on 14 May 2010 Transnet, the employer, terminated such relationship when it dismissed Mr Sanoj from his employment;
- [30.3] Mr Sanoj commenced the current litigation against Transnet based on unfair dismissal;
- [30.4] a copy of the combined summons issued by Mr Sanoj against Transnet was served on Transnet on 11 February 2019;
- [30.5] in his summons Mr Sanoj claims damages based on his unfair dismissal.

THE LAW

[31] The process of extinctive prescription or otherwise called limitation of actions has the effect of extinguishing a debt after the lapse of a specified period. For every kind of debt, the law fixes some period after a lapse of which the debtor may, if he so wishes, claim that the creditor's right against him has ended. The period of prescription is contained in s 11 of the Act. S 11(d) of the Prescription Act provides that:

"The period of prescription of debt shall be the following:

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[31.1] There is no doubt that the period of prescription of the debt involved *in casu* is three years. The only dispute between the parties is the date on which such debt arose in terms of s 12(1) of the Prescription Act:

"12(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due."

[31.2] According to Transnet's counsel, the debt became due on the day Mr Sanoj was dismissed, in other words, on 14 May 2010. According to Mr Sanoj the debt only became due on 1 February 2012 when the arbitration award was issued;

[31.3] Mr Sanoj relied on the termination letter issued by Transnet on 14 May 2010. Paragraph 6.3.4 of the TDCP, to which Mr Sanoj was referred, provided that: “... refer the matter to CCMA or Bargaining Council with jurisdiction over dispute within 30 days.”

He contends that he exercised his rights, referred the matter of his unfair dismissal dispute to the Transnet Bargaining Council for arbitration. In brief, Mr Sanoj’s case is that referring a dispute of unfair dismissal to the Transnet Bargaining Council interrupts or prevents the running of prescription.

[31.4] The Act sets out the circumstances under which the running of prescription may lawfully be interrupted or prevented from running:

[31.4.1] in terms of s 14(1) of the Act, the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor. It must be clear that the conduct relied upon as interrupting prescription amounts to an acknowledgement of liability. The interruption of prescription by an acknowledgement has the effect that the prescription starts to run afresh from the day on which the interruption took place;

[31.4.2] *in casu*, this is not Mr Sanoj’s case that the prescription or the running of prescription which started to run on 14 May 2010 was interrupted by an express or tacit acknowledgement of liability by Transnet, the debtor.

[31.5] Secondly, in terms of s 15(1) of the Prescription Act, the running of prescription is interrupted by the service on the debtor of any process by which the creditor claims payment of the debt. It is not Mr Sanoj’s case that the running of prescription of his claim was interrupted by service of any process in which he claimed from Transnet within 3 years of 14 May 2010.

[31.6] The running of prescription is interrupted again by an agreement between the creditor and the debtor in terms of which the due date of the debt is postponed. Again Mr Sanoj has not pleaded that he and Transnet had agreed to postpone the due date of the debt.

[31.7] Accordingly, Mr Sanoj's reason why he did not institute an action or why he did not commence the current action within three years of 14 May 2010 does not constitute a valid reason. The reason he furnished did not prevent nor did it interrupt the running of prescription.

[32] Mr Sanoj should have realised that it is not unusual for two rights to be asserted arising from the same facts. This is exactly what happened in this matter, according to his particulars of claim. I need not belabour this point laboriously as it has been fully dealt with by the Court from paragraph [41] to paragraph [46] of ***Makhanya v University of Zululand 2010(1) SA 62 (SCA), (Makhanya)***, the matter on which Mr Sanoj himself relies. In paragraph [12] of ***Makhanya*** the Court classified three claims as follows:

"Last there is the potential (I emphasize that I refer only to the potential) for three separate claims to arise when an employee's contract is terminated. One is for infringement of his or her LRA right. Another is for infringement of his or her common law right. And where it occurs in the public sector, that is for infringement of his constitutional right.

[An LRA right is enforceable only in the Commission for Conciliation, Mediation and Arbitration (CCMA) or in the Labour Court.]

The common law right is enforceable in the High Courts and in the Labour Court. A constitutional right is enforceable in the High Courts and in the Labour Court."

In respect of two distinct claims arising from precisely the same facts, the Court referred to the case of ***Lillycrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd 1985 (1) SA 475 (A)***.

[33] I accept that in respect of the enforcement of both his contractual and constitutional rights, the High Court retained their jurisdiction in terms of the Constitution. I also accept that based on his particulars of claim, Mr Sanoj has two claims arising from the same facts, one arising from the infringement of his LRA over which the labour forums have exclusive power to enforce LRA rights to the exclusion of the High Court and the other, the infringement of his common law right or as he was in the public sector, the infringement of his constitutional right over which the High Court and the Labour Court both have the power to enforce the common law and constitutional rights. In my view, based on his particulars of claim, Mr Sanoj should have asserted his claim based on infringement, that is common law or constitutional rights, within three years of 14 May 2010. In conclusion, his current claim against Transnet has, accordingly, been extinguished by Prescription. His claim ought to be dismissed with costs.

Special Plea of Res Acta Judicata

[34] The Plaintiff pleaded as follows regarding the third special plea of *res judicata*:

[34.1] the basis of the Plaintiff's claim is that he was procedurally and substantively unfairly dismissed by the First Defendant from his employment on 14 May 2010;

[34.2] the Plaintiff referred a dispute to Transnet Bargaining Council in terms of s 191 of the Labour Relations Act alleging that his dismissal was substantively and procedurally unfair;

[34.3] on 1 February 2012, the Commissioner of the Council delivered an award to the effect that the dismissal of the Plaintiff was procedurally and substantively fair. The Plaintiff's current claim for payment of damages suffered as a result of his alleged unfair dismissal by the First Defendant is a claim for something on the same ground and against the same party;

[34.4] the First Defendant pleads that, accordingly, the Plaintiff's claim was finally adjudicated by the Council, a forum of competent jurisdiction.

[35] In his replication Mr Sanoj pleaded as follows:

[35.1] the Plaintiff's claim is for damages based on his unlawful dismissal, or alternatively, delict;

[35.2] the Plaintiff's cause of action in his present claim is different to his cause of action at the arbitration;

[35.3] the Plaintiff's present claim is accordingly not for the same thing and on the same ground, therefore Mr Sanoj does not seek the same thing twice or more than once. I agree with Mr Sanoj that his present claim is not for the same thing. In arbitration proceedings he sought reinstatement to his former employment while in the current claim he seeks damages. The crucial point is the following. For the Court to determine whether Mr Sanoj has suffered damages, it must decide the very same issues that already have been decided by the arbitration proceedings. It must decide whether Mr Sanoj was unfairly dismissed by Transnet before it can decide whether Transnet breached any contract of employment between it and Mr Sanoj. The issue regarding breach of contract cannot be determined in isolation.

[36] It is a fundamental principle of our law that there must be an end to litigation. A defendant may plead *res judicata* as a defence to a claim which raises an issue disposed of by a judgment *in rem*. The defence may also be based upon a judgment *in personam* delivered in a prior action which was between the same parties, concerned the same subject matter and founded in the same cause of action. In deciding whether the point has already been decided between the parties, in a manner sufficient to justify

a plea of *res judicata*, a distinction has to be made between judgments in *rem* and judgments in *personam*. If a judgment which is contended constitutes a bar from the second action was a judgment that affects either the status of a person and if it concerns parties domiciled or properly situated within the jurisdiction of this Court, such judgment becomes conclusive against all the world regarding what that judgment settles as to the status of such person or property or as to the rights entitled to the latter and as to whether disposition it makes in regard to the disposition of the property. Should the judgment be merely a judgment in *personam*, a plea of *res judicata* would be upheld only if certain requirements are satisfied. To establish whether the judgment was in *rem* or merely in *personam*, it is of paramount importance to have regard to:

[36.1] the issues raised in the pleadings;

[36.2] to analyse the judgment to ascertain precisely what decision was given. In this regard see ***Pretorius v Barkly East Divisional Council 1914 A.D. 407 at 409*** where Searle J, stated that “*in order to determine the complaint, the pleadings and not the evidence must be looked at*”. See also ***Boshoff v Union Government 1932 TPD 345 at 350***. The Court in the Boshoff matter had the following to say:

“For a plea of res judicata to succeed, it is not necessary that the cause of action in the narrow sense, in which that phrase is sometimes used, should be the same in the latter case as in the earlier case. If the earlier case necessarily involved a judicial determination of some question of law or issue of fact in the sense that the decision could not have been legitimately or rationally pronounced without at the same time determining that question in issue, then such determination, though not declared on the face of the recorded decision is deemed to constitute an integral part of it and will be res judicata in any subsequent action between the parties in the same subject matter.”

[37] A litigant that pleads that a point in issue is already *res judicata* because of an earlier judgment must show the following:

- [37.1] that there has already been a prior judgment;
- [37.2] by a competent court;
- [37.3] in which the parties were the same;
- [37.4] the same point was in issue.

[38] From this principle flows the rule that legal proceedings can be stayed if it can be shown that the point in issue has already been adjudicated between the parties. In the judgment of ***Evins v Shield Insurance Co. 1986 (2) SA 814 (A) at 835***, the Court stated that:

“Closely allied to the “once-and-for-all” rule, is the principle of res judicata which establishes that where a final judgment has been given in a matter by a competent Court, then subsequent litigation between the same parties or their privies, in regard to the same subject matter and based upon the same cause of action is not permissible and, if attempted by one of them can be met by the exceptio rei judicatae vel litis finitae. See also Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472;

[39] A defence that there has been a determination and award by arbitrators can be pleaded as *res judicata*. In this regard, see ***Schoeman v Van Rensburg 1942 TPD 175; Verhagen v Abramowitz 1960 (4) (SA) 947 [CPD] at 950; Zygos Corporation v Salem Redierna AB 1984 (4) SA 444 (C) at 456***. In *Schoeman's* matter it was contended, however, the award of an arbitration was not *res judicata* because it was not a final judgment by a competent court.

*“It was contended furthermore that a competent Court meant a Court of law. The authorities referred to by Adv Rumph showed that that is not the true position. A passage from van Leeuwen showed that an award of an arbitrator is equivalent to *lis finita* and that the matter has been determined and it is *res judicata*.*

*Then Barry J, referred to a book by Redman, Arbitration and Awards, and stated that it showed that an award of an arbitrator is treated in the same way as a judgment by a Court of law and is regarded as *res judicata*.*

In *Martin v Boulanger 49 LTR 62* it was decided that an award of an arbitrator can be considered as *res judicata*." I have neither been able to find, nor I was referred to, any case which upset the Schoeman's case.

[40] In *Verhagen v Abramowitz 1960 (4) (SA) 947 [CPD] at 950 U-H* the court had the following to say:

"It is clear, however, from a perusal of this judgment that the Court was dealing with the position when there has been a submission to arbitration, but nothing further has happened."

Then the court proceeded to state the law as follows:

"When a matter has been referred to arbitration for a decision and an award has been given the situation is materially different."

Then referring to the *Strutt v Selma's and Another 1959 (2) SA 536* it stated that:

*"A party to an arbitration is not entitled to seek a decision of the Court on the very matters already referred to arbitration, and when an award has in fact been made, it has been held that such an award is equivalent to *lis finita* and as between the parties the matter is *res judicata*."*

The court also relied on *Schoeman v Van Rensburg 1942 TPD 175 at 177*.

Then relying on Voet the court stated that:

*"Voet states that an exception of *res judicata* is allowed to prevent inexplicable difficulties from arising from discordant and maybe mutually contradictory judgment; on account of one and the same matter in dispute being again and again brought forward in different actions."*

A matter can only be *res judicata* if, in fact, there has been a full and final adjudication.

Finally, on this point, in *Strutt v Selma's and Another 1959 (2) SA 536 [C] and [D]*, the court stated that:

“A party to an arbitration is not entitled to seek a decision of the Court on the very same matters already referred to arbitration.”

I am satisfied that there has been full and final adjudication of the matter constituting Mr Sanoj’s claim. Transnet has, in my view, shown that the matter before this Court constitutes the same matter that Sanoj had placed before Transnet Bargaining Council. Transnet has therefore succeeded in proving its special plea of res judicata. That special plea is therefore upheld.

The following order is hereby made:

[1]. The First Defendant’s special pleas of jurisdiction, prescription, and res judicata are hereby upheld.

[2] The Plaintiff’s claim is hereby dismissed, with costs

**PM MABUSE
JUDGE OF THE HIGH COURT**

Appearances:

Counsel for the Plaintiff:	The plaintiff appeared in person
Instructed by:	The plaintiff appeared in Person
Counsel for the Claimants/Respondents:	Adv MK Mathipa
Instructed by:	Ningiza Horner Attorneys
Date heard:	14 October 2021
Date of Judgment:	21 October 2022