

EMPLOYMENT ALERT

IN THIS ISSUE

THE ELECTION DICTATES THE REMEDY – THE EFFECT OF REPUDIATION AND THE REMEDIES AVAILABLE TO AN INNOCENT PARTY

In the case of *Septoo v City of Johannesburg* (2018) 39 ILJ 580 (LAC), Ellense Septoo (the Appellant) was employed as a senior human resources manager on a five-year contract in terms of which she would receive an annual remuneration of R550,000 (the initial contract).

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The Appellant accepted the offer which gave rise to the second employment contract. She did however reserve her rights in respect of the initial contract.

At the close of the Appellant's case, the court a quo granted absolution from the instance in that she had failed to establish a cause of action entitling her to relief.

In the case of *Septoo v City of Johannesburg* (2018) 39 ILJ 580 (LAC), Ellense Septoo (the Appellant) was employed as a senior human resources manager on a five-year contract in terms of which she would receive an annual remuneration of R550,000 (the initial contract). Approximately one month after the conclusion of the initial contract, the Appellant was advised that the person who had contracted with her on behalf of the City of Johannesburg (Respondent) did not have the authority to offer her remuneration exceeding R435,296 per annum. On this basis, a new offer of employment was made, on the same terms set out in the initial contract, only at a reduced remuneration of R435,296 per annum. The Appellant accepted the offer which gave rise to the second employment contract. She did however reserve her rights in respect of the initial contract.

On 7 December 2009, the Appellant instituted proceedings against the Respondent, seeking an order for specific performance on the grounds of repudiation of the initial contract. Throughout the pre-trial conference and the proceedings in the court a quo, it was argued by the Appellant that whilst she had accepted the cancellation of the initial contract and consequently the terms of the second offer, she had nonetheless reserved her rights in respect of the initial contract. At the close of the Appellant's case, the court a quo granted absolution from the instance in that she had failed to establish a cause of action entitling her to relief.

On appeal, the Labour Appeal Court (LAC) had to determine the effect (if any) a reservation of rights would have on the cancellation of a contract and the remedies applicable. Despite the Appellant's submissions, the LAC found that rights cannot be reserved for the purposes of enforcing a contract that a party elects to cancel. The LAC noted that in the case of a repudiation, an innocent party has an election to either accept the repudiation, cancelling the contract and later seek damages or may elect to refuse the repudiation, thereby seeking to enforce the contract through an order of specific performance. Such an innocent party



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CONTINUED

In this case, the Appellant should have pleaded damages in the alternative, but she had failed to do so.



must make this election at the time of the repudiation and cannot both approbate and reprobate the contract. Therefore, the choice to either accept or reject the repudiation is mutually exclusive and cannot be exercised simultaneously.

The LAC held that an election to accept the repudiation and cancel the contract, as the Appellant had done, by implication excludes the remedy of specific performance. In this case, the Appellant should have pleaded damages in the alternative, but she had failed to do so. On this basis, the relief sought by the Appellant for the payment of damages was inconsistent with the claim for specific performance. The appeal was dismissed.

This judgment demonstrates that a reservation of rights, although necessary in the protection of a client's interests, cannot be used to circumvent and vary the common-law contractual remedies available to parties at the time of an alleged breach or repudiation of a contract. Regardless of the intentions of the party, should they elect to accept repudiation of a contract, such party's rights are limited to a claim for damages consequent upon an agreement in respect of its cancellation.

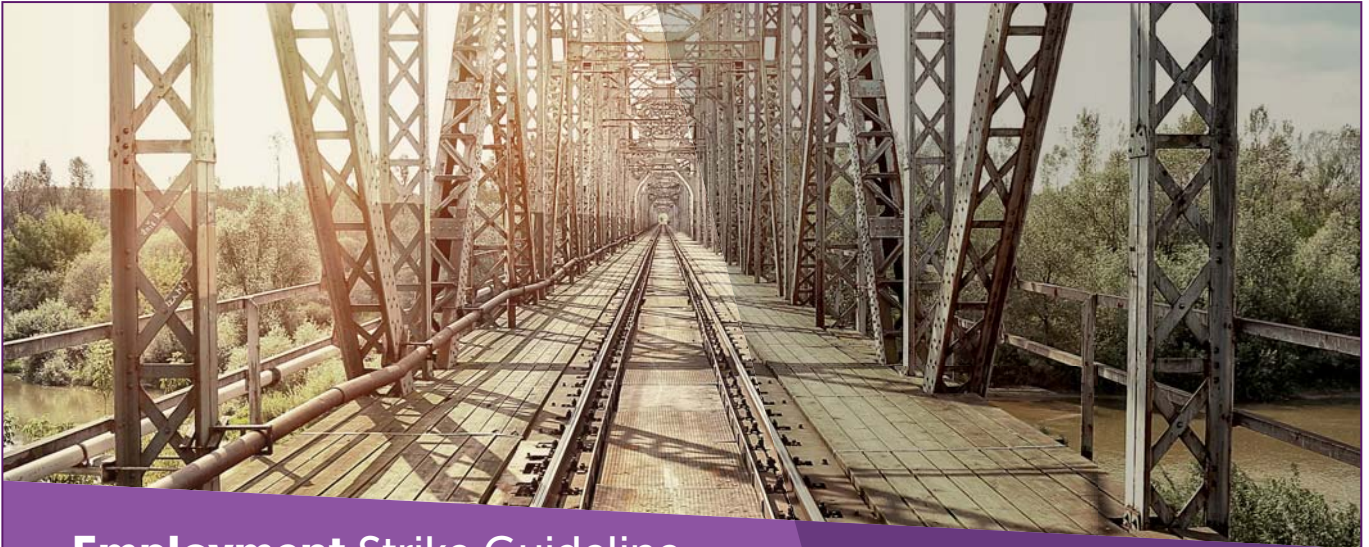
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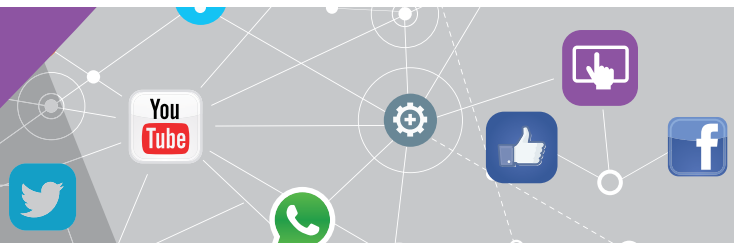
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