Employment Law

9 February 2026

South Africa

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Labour Appeal Court confirms enforceability of restraints following dismissal

In our alert titled *"Does the dismissal of an employee affect a restraint of trade?"* dated 7 April 2025, we considered the Labour Court's decision in *Backsports (Pty) Ltd v Motlhanke and Another* [2025] ZALCJHB 68 (18 February 2025). In that judgment, the court held that a restraint of trade could not be enforced where an employee was dismissed for misconduct. In effect, the Labour Court found that dismissal resulted in the former employer forfeiting the right to enforce the restraint of trade.

Given that this finding represented a clear departure from established authority on the enforceability of restraints of trade, we expressed the view that the issue was ripe for reconsideration on appeal.

That reconsideration has now occurred. On 27 October 2025, the Labour Appeal Court in *Backsports (Pty) Limited v Motlhanke and Another* [2026] 1 BLLR 8 (LAC) set aside the Labour Court's decision, strongly reaffirming the principle that the reason for the termination of employment does not affect the enforceability of a restraint of trade.

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Background

Backsports (Pty) Limited operates in the internet communications and technology sector, providing broadcasting, advertising, social media and production services. Mr Ofentse Motlhanke was employed by Backsports as a senior stream lead from 1 January 2024 until his dismissal on 16 October 2024.

Motlhanke's contract of employment contained a restraint of trade clause in terms of which, for a period of 12 months following the termination of his employment, he was prohibited from directly or indirectly:

- competing with Backsports;
- soliciting work from Backsports' customers; or
- soliciting Backsports' employees to join any business undertaking operating in the same field of activity.

Following his dismissal, Backsports received information indicating that Motlhanke was acting in breach of his restraint obligations and accordingly sought to enforce the restraint of trade agreement.

The Labour Court's approach

One of the principal reasons advanced by the Labour Court for refusing to enforce the restraint was that Motlhanke had not voluntarily left his employment. The court held that it would "*be an injustice and an unjustified limitation of an individual's rights*" to enforce a restraint agreement against an employee who had been dismissed by his former employer.

On this basis, the Labour Court concluded that the dismissal of an employee deprives a former employer of the right to enforce a restraint of trade agreement against that employee.

The Labour Appeal Court's findings

The Labour Appeal Court held that the Labour Court had clearly deviated from binding authority, in particular *Reeves and Another v Marfield Insurance Brokers CC and Another* [1996] (3) SA 766 (A).

In Reeves, the Appellate Division was confronted with the question of whether a restraint of trade remains enforceable where the termination of employment is the result of an unlawful or unfair dismissal. The court held that wording such as *"ceases to be employed"* demonstrates an intention that the restraint operates once the employment relationship has come to an end. The circumstances in which the employment relationship terminates, or the underlying cause of its termination, are irrelevant to the operation of the restraint provision.

The Labour Appeal Court emphasised that the only exception to this principle arises where the employer's conduct amounts to fraud or bad faith – for example, where an employee is hired and dismissed with the sole purpose of imposing a restraint. In such circumstances, a court may decline to enforce the restraint on that basis alone.

In the present case, the restraint provisions referred simply to the *"termination date"* and contained no qualification linked to the reason for termination. Applying the authority of Reeves, the Labour Appeal Court confirmed that the restraint of trade agreement was enforceable despite the circumstances that led to the termination of Motlhanke's employment.

The Labour Appeal Court further held that the Labour Court's finding that Backsports had waived its right to enforce the restraint of trade by dismissing the employee constituted a clear misdirection.

Key takeaways

The Labour Appeal Court's decision confirms and reinforces the settled legal position that the reason for the termination of employment does not affect the enforceability of a restraint of trade agreement. Employers can take comfort from the following principles:

- The manner of termination is irrelevant to enforceability. Whether an employee resigns, is dismissed for misconduct, or is retrenched, a restraint of trade will remain enforceable provided it meets the requirements of reasonableness. The only exception is where the termination was fraudulent or effected in bad faith, such as for the sole purpose of imposing the restraint.
- Clear drafting remains essential. Employers should continue to ensure that restraint of trade clauses are clearly drafted and expressly provide that the restraint operates from the termination date, irrespective of the reason for termination. This judgment provides welcome clarity and restores legal certainty regarding the enforceability of restraints following dismissal.

Yvonne Mkefa, Chantell De Gouveia and Thato Makoaba

Labour Court confirms that seeking alternative employment does not constitute misconduct

In the recent decision of *Lucchini South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JR1794/22) [2025] ZALCJHB 589 (19 December 2025), the Labour Court confirmed that an employee cannot be dismissed for seeking alternative employment, even if that employment is with a competitor.

This case illustrates the limitations placed on employers when dealing with employees who are seeking new opportunities. It also confirms that an award of compensation must factor in patrimonial and non-patrimonial loss suffered by the employee.

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Facts

Mahabeer was employed as safety, health, risk and quality manager at Lucchini South Africa (Pty) Ltd (Lucchini) with effect from January 2021. Within six months of his employment, he was suspended and charged with several allegations of misconduct, including breaching his employment contract by taking steps to secure alternative employment with Scaw Metal/Cast Products (Cast Products), a direct competitor, during the course of his employment; ransoming the value of Lucchini's intellectual property during mutual separation discussions; dishonesty for failing to disclose his employment negotiations with Cast Products during retrenchment consultations; refusing to provide his laptop password to Lucchini; and misusing a relocation allowance.

Mahabeer was summarily dismissed following the conclusion of a disciplinary hearing.

Aggrieved by his dismissal, Mahabeer referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner found that his dismissal was substantively unfair and awarded him maximum compensation equivalent to 12 months' salary.

Lucchini reviewed this award in the Labour Court.

On review, the Labour Court upheld the substantive unfairness of Mahabeer's dismissal, but reduced the award of compensation to six months.

In arriving at its finding, the Labour Court examined each of the allegations of misconduct and concluded that the CCMA commissioner had correctly found that the charges were "*trumped up*", without merit and appeared motivated by Lucchini's desire to force Mahabeer out after he indicated his intention to resign and join a competitor. None of the charges constituted a basis for Mahabeer's dismissal. In particular:

- An employee has a constitutional right to seek alternative employment, even with a competitor, and may not be punished merely for trying to improve their career prospects. Clauses in employment contracts that attempt to prevent employees from seeking alternative employment are unenforceable as they are contrary to public policy. Similarly, for the same reasons, the Labour Court rejected Lucchini's claim that Mahabeer had acted dishonestly by not disclosing his employment discussions with Cast Products during retrenchment consultations.
- Regarding the provision of the laptop password, the Labour Court accepted that Mahabeer had created the password himself, that the HR manager did not hold authority over him, and Lucchini still had access to the device through its IT provider. This meant that refusing to provide the password did not amount to insubordination.

Although the Labour Court agreed that Mahabeer's dismissal was substantively unfair, it took issue with the CCMA's decision to award maximum compensation on the basis that any compensation awarded must be "just and equitable", taking into account not only financial loss, but also factors like emotional distress, humiliation and the seriousness of the employer's conduct. The CCMA had incorrectly recorded that Mahabeer was unemployed at the time of the arbitration, when in fact he had secured new employment within three months of his dismissal. While financial loss is not the only relevant consideration, the Labour Court held that this error influenced the quantum awarded. It therefore reduced the compensation to six months.

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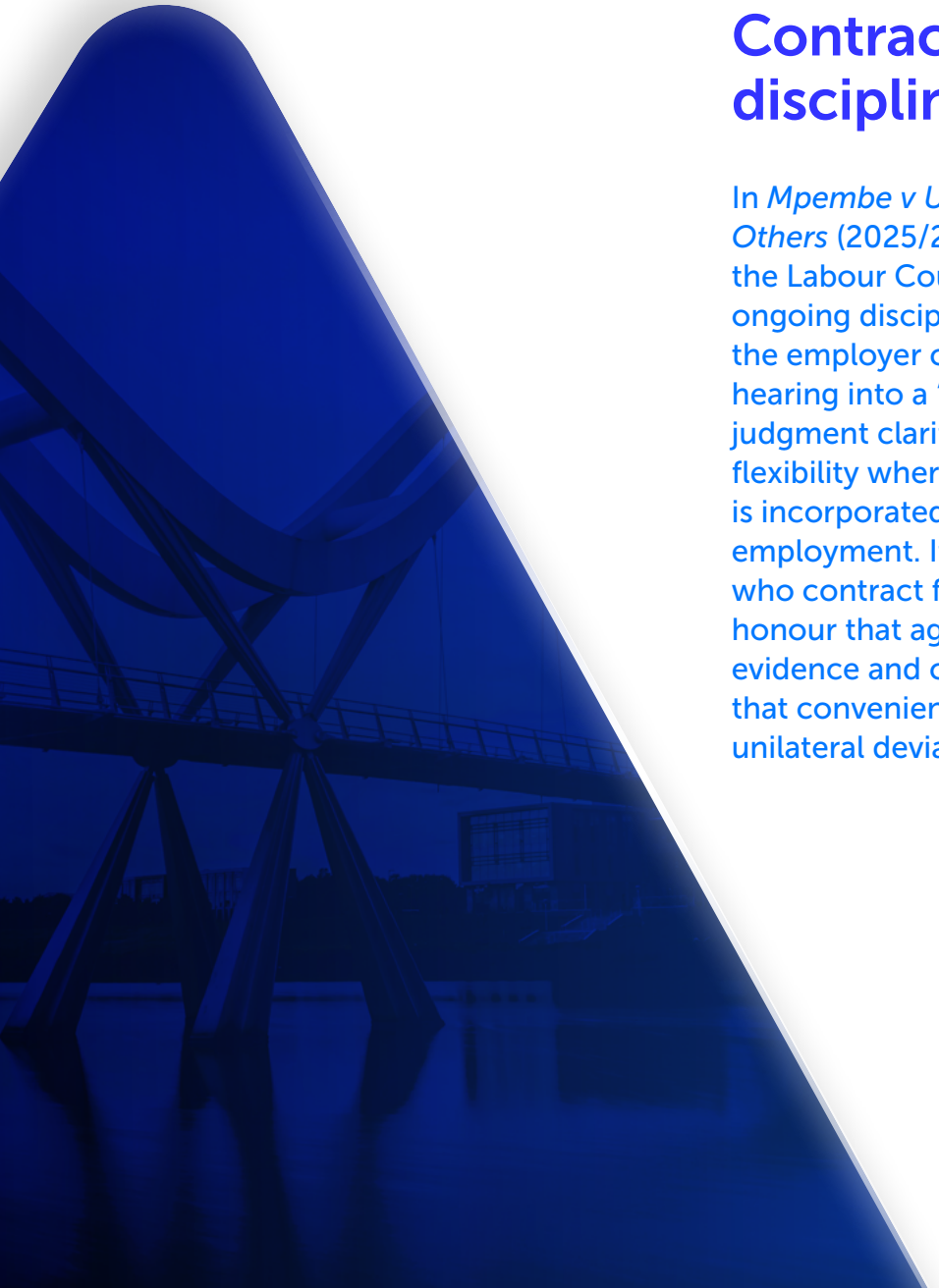
Key takeaways

This case confirms that an employee may seek alternative employment (while employed) without the fear of being dismissed. Even negotiations with a competitor do not constitute prima facie misconduct. Clauses in employment contracts seeking to prevent an employee for seeking alternative employment, are contract to public policy and unenforceable.

Employers may not attempt to punish employees for pursuing better opportunities. If they do, a dismissal will almost certainly be found to be unfair. Where an employer elects to pursue disciplinary action, the disciplinary charges must be legitimate, and supported by the evidence.

Jean Ewang, Taryn York and Ra'ees Ebrahim



Contractual rights and procedural fairness in disciplinary process

In *Mpembe v University of Zululand and Others* (2025/248322) [2025] ZALCD 49, the Labour Court urgently intervened in ongoing disciplinary proceedings after the employer converted an adversarial hearing into a "paper hearing". The judgment clarifies the limits of procedural flexibility where a disciplinary code is incorporated into the contract of employment. It confirms that employers who contract for a formal process must honour that agreement, including oral evidence and cross-examination, and that convenience or speed cannot justify unilateral deviation.

The Facts

The employee was the director of supply chain management at the University of Zululand and faced serious misconduct charges, with dismissal contemplated. Recalled from leave in early December 2025, she received a charge sheet and a virtual hearing was set for 5–12 December, supported by extensive documentation, including a forensic report. Although legal representation was permitted, compressed time frames hindered her efforts to secure counsel. Postponement requests were refused. After she sought an adjournment and the chairperson's recusal, the chairperson ruled that the hearing would proceed on paper: the employer would file written submissions; the employee would have a short period to respond in writing; and the chairperson would decide guilt and sanction without oral evidence, witnesses or cross-examination. The employee approached the Labour Court to set aside the ruling and to compel compliance with the employer's disciplinary code.

The Labour Court's analysis

A central pillar of the court's reasoning was that the disciplinary code formed part of the contract of employment. Jurisdiction was thus founded in section 77(3) of the Basic Conditions of Employment Act 75 of 1997, and the dispute had to be assessed through the lens of contractual lawfulness rather than the more flexible standards of procedural fairness under the Labour Relations Act 66 of 1995.

The disciplinary code conferred on employees the rights to:

- lead evidence;
- call witnesses; and
- cross-examine the employer's witnesses.

Against that backdrop, the unilateral conversion to a paper process was a material breach of the contractually binding disciplinary framework. While employers often cite *Avril Elizabeth Home for the Mentally Handicapped v CCMA* [2006] 27 ILJ 1644 (LC) to justify informality, the court reaffirmed the caveat in that judgment: where a collective agreement or employment contract prescribes a more formal, adversarial model, the employer is bound by it.

The employer argued that its policy allowed deviation because it only needed to be followed "as far as reasonably possible". The court drew the distinction between impossibility and inconvenience: deviation may be justified where stipulated procedures are impossible to follow, not merely inconvenient. The desire to conclude a hearing expeditiously does not meet the threshold of unreasonableness required to depart from a binding code. If employers elect to incorporate an elaborate code into contracts, they must live with its consequences.

The Labour Court also distinguished fairness from lawfulness. Even if a paper process might, in some circumstances, be procedurally fair under general labour law principles, it was unlawful here because it stripped the employee of her contractual rights. The denial of cross-examination and the opportunity to lead evidence constituted ongoing, irreparable harm. Once lost during a live process, those rights cannot be restored after the fact through arbitration or compensation.

While the court declined to remove the chairperson, it set aside the ruling that converted the hearing into a paper process and directed the employer to comply with the disciplinary code. The court emphasised that where an employer suspects delaying tactics, the lawful response, particularly under a contractually incorporated code, is to manage the process within that framework (e.g. refuse unreasonable postponements or proceed in absentia where the code permits), not to rewrite the rules during the process.

Key takeaways for employers

- **Contractual disciplinary codes matter:** Where a disciplinary code is incorporated into an employee's contract, employers are legally bound to apply it. Employers are advised not to contractually incorporate disciplinary codes.
- **Flexibility has limits:** Employers cannot unilaterally dilute or bypass procedural rights for speed or convenience when those rights are contractually entrenched.
- **Managing employee delays lawfully:** Where unreasonable delays are experienced, control the process within the parameters of the code.

Nadeem Mahomed and Haydon Anderson

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