THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

LABOUR COURT

Reportable

Case no: JR1195/19

In the matter between**:**

ANDREW PANDEKA CHIMPHONDAH **Applicant**

and

HOUSING INVESTMENT PARTNERS (PTY) LTD **First Respondent**

COMMISSIONER PIET VAN STADEN *N.O* **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

Heard: **03 March 2021 (via Zoom)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 31 May 2021.**

Summary: **Review application – CCMA jurisdiction in terms of section 74(2) od the BCEA – contractual claim for performance incentive bonus not remuneration as defined in the BCEA – alternatively, ousted by 4(c) of BCEA – CCMA had no jurisdiction.**

Constructive dismissal – *de novo* determination of the jurisdictional as to whether there as dismissal – senior employees

are expected to endure the pressures inherent in their positions which are generally commensurate with their generous salary packs.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This is a review application by Mr Andrew Pandeka Chimphondah (Mr Chimphondah) in terms of section 145 of the Labour Relations Act[1] (LRA) against the arbitration award issued by Commissioner Piet Van Staden (Commissioner) under case number GAJB1927/18 dated 23 April 2019 under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA). The basis for the Commissioner's award was, firstly, that Mr Chimphondah failed to prove that he was contractually entitled to the claimed Short-Terms Incentives (STI's) and Deferred Short-Term Incentive (DSTI) against his erstwhile employer, Housing Investment Partners (Pty) Ltd (HiP); and secondly, that the termination of his employment consequent to his resignation constitutes a constructive dismissal.

[2] Mr Chimphondah also seeks condonation for the late delivery of his commissioned affidavit by 2 days. HiP is opposing both applications. I deem it unnecessary to be arrested by the condonation application in the light of the fact that the delay in launching the review application is negligible and the explanation is acceptable. There is patently no evidence that HiP has suffered any prejudiced due to the delay. I am therefore inclined to grant condonation, which I do so grant.

Review test

[3] The review test is trite and well-articulated in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SA Rugby Players Association Union & Another* SA Rugby Players Association,[2] where

[1] Act 66 of 1995, as amended.
[2] [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC*);* (2008) 29 ILJ 2218 (LAC) (*SA Rugby Players Association*) at paras 39-41.

LABOUR COURT

the Labour Appeal Court (LAC) held that the inquiry into the jurisdiction of the CCMA entails the determination whether '*objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not, exist the CCMA had no jurisdiction irrespective of its finding to the contrary'*.[3] That is so, the LAC further stated, because *'[the] CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court'.* [4]

[4] This notion was avowed by the LAC in *Ukweza Holdings (Pty) Ltd v Nyondo and Others*[5] and aptly expounded in *HC Heat Exchangers (Pty) Ltd v Araujo and Others,*[6] albeit in the a context of contractive dismissal, where it was stated that *'where the issue to be considered on review is about the jurisdiction of the CCMA or bargaining council, it is not about a reasonable outcome. What happens is that the Labour Court is entitled, if not obliged, to determine the issue of jurisdiction on its own accord… In doing so, the Labour Court determines the issue de novo in order to decide whether the determination by the arbitrator is right or wrong'*.

The contractual claim

[5] Mr Chimphondah commenced his employment by HiP as its Chief Executive Officer (CEO) on 15 October 2014. He resigned from HiP on 19 July 2018 and he claimed, together with the contractive dismissal dispute, unpaid STI's for 2016 and 2017 and the balance of DSTI equivalent to three months' salary in respect of 2015.

[6] Clause 6 of Mr Chimphondah's employment contract provides:[7]

LABOUR COURT

[3] See: *Solid Doors (Pty) Ltd v Commissioner Theron and Others* (2014) 35 ILJ 3360 (LAC) *at para 19 (Solid Doors); Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others* (2019) 40 ILJ 1539 (LAC) (*Solidarity*) at para 5; *Gold One Ltd v Madalani & Others* (2020) 41 ILJ 2832 (LC) (*Gold One*) at para 25.
[4] *SA Rugby Players Association supra* n 2.
[5] [2020] 6 BLLR 544 (LAC); (2020) 41 ILJ 1354 (LAC) (*Ukweza*) at para 12.
[6] [2020] 3 BLLR 280 (LC) (*HC Heat Exchangers*) at paras 35 to 39.
[7] See: Record Vol 1, page 14.

'6. **Remuneration – payments & Deductions**

6.1 The employer shall be paid a Total Guaranteed Package (TGP) as specified in Housing Investment Partners' Offer of Employment per month or such increased amount awarded by the employer from time to time.[8]

6.1.1 **Salary**: R150, 000.00 total cost-to company per month, which equates to an annual package of R1.8, per annum.

6.1.2. **Incentives**: From the 2015 calendar year the employee's package will include a performance-based variable pay short-term incentive:

6.1.2.1. The annual incentive value will be up to a maximum of 10 month's salary, 40% of which will be paid in cash in March/April of the year following the review year and 60% of which will be paid 3 years' later subject to business performance targets being achieved.

6.1.2.2. Both the annual performance scorecard and the subsequent 3 year business targets will be agreed upon on an annual basis at the start of the calendar year of review.'

[7] Mr Michael Goemans (Mr Goemans), who was a member of the Board of HiP when Mr Chimphondah was recruited, seems to be the architect of the incentive scheme referred to in clause 6.1.2 above. In a policy document headed *'Variable Incentive for HiP Executive'* (incentive scheme policy), Mr Goemans explained the incentive scheme as follows:[9]

'**Summary**

[8] See: Record Vol 1, page 124, the Offer of Employment which states that:
'**Guaranteed salary:** R150, 000.00 total cost-to company per month, which equates to an annual package of R1.8m.
Benefits: …Short-term Incentives scheme: From the 2015 calendar year our package will include a performance-based variable pay short-term incentive…'

[9] See: Record Vol 1, pages 23 -24.

LABOUR COURT

This note describes a proposed incentive structure for HiP executives… The proposal has changed from the previous thinking, where share based long-term incentives were suggested, to instead recommend an annual cash short term incentive bonus, some of which will be deferred for 3 years (and potentially ratcheted up or down) based on longer term company performance…

Short-Term Incentive (STI)

- Annual short-term incentives (STI) should apply to execs and all other HiP permanent staff.
    - A Balanced Scorecard (BSC) should be negotiated annually with each member of staff. This is the tool to ensure that staff focus, energy and remuneration is aligned to the strategy and business plan and that their performance is in line with expectations.
    - There are likely to be differences in BSC's between execs, sales staff and non-sales staff.
    - An STI is easily constructed in relation to level of seniority and relative performance against each person's BSC.
- On an annual basis the Remco should approve the targets for STI payout.
- Key executives (at this stage deemed to be the CEO, CFO and SH) should also be incentivised with longer-term incentives, in the form or a deferred STI.

Deferred Short-Term Incentive (DSTI)

- The purpose of deferring a portion of the short-term incentive is to align the executives with the longer-term outcomes expected by the shareholders and to attract and retain their services in a competitive employment market.
- …
- The simplest and most flexible way to offer this in HiP is to defer a portion of the STI, and pay it in cash if the company targets are met in future.

LABOUR COURT

- The maximum (based on company and personal performance) multiples of monthly salary proposed as annual incentives are as follows:
    - CEO
        - 10 x monthly salary - 3 months' bonus in cash (STI)

          - 7 months' bonus deferred for 3 years (DSTI)
- …
- Deferred payouts can be ratcheted / geared based on extent to which the business plan is achieved (set towards the end of year, for a future 3 year period). For alignment, it is proposed that the same targets and scale be used for the CEO…with ratchet as follows:
    - Achievement of 3-year business plan targets: 100% DSTI payout
    - Achievement of stretch business plan targets: 150% DSTI payout
    - Partial achievement of targets: 50% of DSTI Payout.
- As for STI targets, on an annual basis the Remco should determine which business plan targets should be included in the 3-year DSTI scheme. The anticipation is that the HiP Manco profit target will be the main factor (making profit is largely driven by mortgage sales success, fundraising/ investment attractive success and internal operational success, all of of which the shareholders require the HiP Executives to deliver).

Staff exits

- Should any of the individual exit the business (by own choice or not), any unpaid DSTI will lapse (with no value). This can be difficult to handle should there be a non-consensual exit shortly before a due date, and require rigorous performance management. '

LABOUR COURT

[8] Mr Chimphondah claimed the unpaid STI's and the balance of the DSTI (performance incentive bonus) in terms of section 74(2) of the Basic Conditions of Employment Act[10] (BCEA) which provides that:

> 'If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator hearing the matter may also determine any claim for an amount that is owing to that employee in terms of this Act or the National Minimum Wage Act, 2018.' (Emphasis added)

[9] So, the question is whether the amounts claimed by Mr Chimphondah in respect of unpaid performance incentive bonus are owing to him in terms of the BCEA so as to clothe the Commissioner with the jurisdiction in terms of section 74(2) of the BCEA. Penitently, section 1 of the BCEA defines a 'basic condition of employment' to mean 'a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment'. While section 4 of the BCEA provides:

> '**4 Inclusion of provisions in contracts of employment**
>
> A basic condition of employment constitutes a term of any contract of employment except to the extent that –
>
> (a) any other law provides a term that is more favourable to the employee;
>
> (b) the basic condition of employment has been replaced, varied, or excluded in accordance with the provisions of this Act; or
>
> (c) a term of the contract of employment is more favourable to the employee than the basic condition of employment.' (Emphasis added)

[10] On 18 May 2021, I issued a directive inviting the parties to file supplementary written submissions specifically dealing and addressing the following:

> 10.1. Whether section 74(2) of the BCEA is applicable; and

[10] Act 75 of 1997, as amended.

LABOUR COURT

10.2. Whether the CCMA had jurisdiction to deal with the contractual claim if regard is had to section 4(c) of BCEA.

[11] The parties duly obliged and the Court is indebted to both counsel for helpful written submissions.

[12] The core of Mr Chimphondah's submissions is that the definition of remuneration is wide enough to include salaries and all extras or benefits, per the decision of the LAC in *Apollo Tyres South Africa (Pty) Ltd v CCMA,*[11] where it was further observed that:

> 'Many benefits that are payment in kind form part of the *essentialia* of practically all contemporary employment contracts. Many extras are given to employees as a quid pro quo for services rendered just as much as a wage is given as a quid pro quo for services rendered. The cost to employer package has become, for many employees and employers, a standard contract of employment. PAK Le Roux points out that extras are often important issues during the negotiation of contracts of employment and the link between salaries or wages and benefits or extras is illustrated by the fact that contributions to medical aid schemes and pensions and provident schemes are often agreed to on the basis of a "salary sacrifice" because this is a tax effective way of structuring an employment package.'[12]

[13] On the strength of the above authority, Mr Chimphondah contends that section 74(2) is applicable because his construal claim falls within the definition of remuneration regulated and payable in terms of BCEA. Moreover, his claim is not one pertaining to a contractual term more favourable than a basic condition of employment in terms of section 4(c). The BCEA does not limit its application to remuneration of a certain monetary value to the exclusion of remuneration of a higher monetary value. Its provisions and obligations on remuneration apply to all remuneration, it is further submitted.

[14] Conversely, HiP contends that section 74(2) is not applicable as Mr Chimphondah relies on his employment contract rather than the BCEA; a claim that rests on the interpretation and application of clause 6.1.2 of his

[11] [2013] 5 BLLR 434 (LAC) (*Apollo Tyres*) at para 25.
[12] Ibid at para 26.

LABOUR COURT

employment contract. On this basis alone, HiP further contends, that the CCMA did not have jurisdiction to consolidate Mr Chimphondah's contractual claim with the constructive dismissal dispute; and ought to have directed that a separate dispute be referred to the Labour Court in terms of section 77 of the BCEA. To bolster this contention, HiP referred to various authorities,[13] including the unreported judgment of this Court in *Sing Li v Omega Holdings Ltd,*[14] per Woodroffe AJ, where it was stated, in comparable circumstances, that the applicability of section 74(2) depends on whether the applicant relies on a contract or the BCEA for their claim. The Court further considered the relationship between sections 4, 74(2) and 77 of the BCEA and stated that:

> 'In this matter the money claims are linked to a dismissal, but the Applicant does not plead reliance on the BCEA in order to found those claims. The money claims are founded in the contract alleged between the parties. It may be so that some of these claims also straddle certain sections of the BCEA but the pleader places no reliance on those sections in order to found the money claims. Accordingly, the Applicant does not plead that these claims are in respect of amounts due to the Applicant in terms of the BCEA. The claims all arise and are so claimed, so the Applicant says, in terms of a contract of employment between the parties. Therefore, in my opinion, Section 74 (2) is of no application to these claims.'[15] (Emphasis added)

[15] While most pertinent authority is the LAC decision, per Sutherland JA, in *Zapop (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others,*[16] where, similarly the controversy pertained to the interpretation of section 74(2), albeit, as regards the CCMA jurisdictional competence to adjudicate a claim for unpaid commission. Sutherland JA opined that:

> '[32] The jurisdictional controversy is confined to whether the section contemplates a commission claim. No genuine debate exists that the commission was not part of Cunningham's remuneration…

[13] See: *Tsika [M] v Municipality of Buffalo City* (EL51/2007; ECD151/2007) [2008] HC, where Grogan AJ confirmed that the CCMA's jurisdiction in terms of section 74(2) is limited to disputes about an alleged breach of the BCEA.
[14] Unreported judgment, (JS 591/02) [2003] ZALC 36 (25 April 2003) (*Omega Holdings*).
[15] Ibid paras 9-10.
[16] (2016) 37 ILJ 1882 (LAC) (*Zapop*).

LABOUR COURT

[33] However, it is argued by Zapop that, having regard to s 74(2), a commission payment is not an amount 'owing [to Cunningham] in terms of this Act. This submission is premised on the cited phrase meaning that entitlement to an 'amount' is limited to a statutorily prescribed entitlement. The argument runs that the BCEA does not prescribe an entitlement to 'commission', as distinct from entitlements, e.g. to accrued leave pay and ordinary remuneration.

[34] This argument overlooks the fact that it is a contravention of the BCEA to fail to pay an employee remuneration that is due. The legal obligation to pay remuneration, apart from contract itself, is contained in s 32 of the BCEA. Section 32(4) in particular requires an employer to effect payment not later than seven days after the completion of the period for which the remuneration is payable. That period, in Cunningham's case, is when Zapop is paid by the client and the commission falls due to be paid… Properly read, the section can be purposively interpreted to encompass entitlements that fall due late than a default period. Self-evidently, the due date for payment triggers the obligation to pay, and the duty of the employer to pay must be fulfilled within seven days of that date.

[35] Revelas J in *Schoeman & Another v Samsung Electronics SA (Pty) Ltd*, held, in distinguishing a 'benefit' from 'remuneration', that commission is encapsulated by the notion of remuneration:

> 'Commission payable by the employer forms part of the employee's salary. It is a quid pro quo for services rendered, just as much as a salary or a wage. It is therefore part of the basic terms and conditions of employment.' (Emphasis added and footnotes omitted)

[16] Grated, the definition of remuneration per *Apollo Tyres*[17] is wide, but the context is pivotal. In my view, what flows from *Zapop*[18] is that, even post *Apollo Tyres,* there is still a line between a 'benefit' and 'remuneration', as blurry as it might

[17] *Supra* n 11.
[18] *Supra* n 16.

LABOUR COURT

be, which must be observed, particularly in instances pertaining to the basic conditions of employment in terms of the BCEA.

[17] Mr Chimphondah contends, as I understand, that, since remuneration is a matter regulated by the BCEA, remuneration meets the requirement of being *'owing to an employee in terms of the BCEA';* as envisaged in section 74(2). I agree with this argument to the extent, as stated in *Zapop*, that '*a contravention of the BCEA to fail to pay an employee remuneration that is due. The legal obligation to pay remuneration, apart from contract itself, is contained in s 32 of the BCEA. Section 32(4) in particular requires an employer to effect payment not later than seven days after the completion of the period for which the remuneration is payable'*[19].

[18] Then again, the question that arises here is whether Mr Chimphondah's performance incentive bonus constitutes a remuneration in terms of the BCEA. Section 1 of the BCEA defines 'remuneration' as 'any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State'; and it is given a specific meaning in section 35(5) BCEA which provides:

> '**35. Calculation of remuneration and wages.**
>
> (1) An employee's wage is calculated by reference to the number of hours the employee ordinarily works.
>
> (2) For the purposes of calculating the wage of an employee by time, an employee is deemed ordinarily to work –
>
> (a) 45 hours in a week, unless the employee ordinarily works a lesser number of hours in a week;
>
> (b) nine hours in a day, or seven and a half hours in the case of an employee who works for more than five days a week, or the number of hours that an employee works in a day in terms of an agreement concluded in accordance

[19] *Supra* n 16 at para 34.

LABOUR COURT

with section 11, unless the employee ordinarily works a lesser number of hours in a day.

…

(5) (a) The Minister may by notice in the Gazette, after consultation with the Commission and NEDLAC, determine whether a particular category of payment, whether in money or in kind, forms part of an employee's remuneration for the purpose of any calculation made in terms of this Act.[20]

(b) Without limiting the Minister's powers in terms of paragraph (a), the Minister may—

(i) determine the value, or a formula for determining the value, of any payment that forms part of remuneration;

(ii) place a maximum or minimum value on any payment that forms part of remuneration; and

(iii) for the purposes of any calculation, differentiate between different categories of payment and different sectors.'

[19] In the present instance, as correctly contended by HiP, it is easily discernible from the clause 6.1.2 of Mr Chimphondah's employment contract and his letter of appointment that the performance incentive bonus is a benefit payable over and above the guaranteed remuneration, which is a quid pro quo for services rendered. It is obviously payable at the discretion of the employer if certain requirements have been fulfilled per the inventive scheme policy and eligibility is not automatic.

[20] It follows that *Zapop* is distinguishable because what served before the LAC in that matter was a claim that pertained to the payment of a commission, a remuneration. Conversely, a performance incentive bonus is, in my view, not a remuneration and, in turn, not a basic condition of employment as contemplated

[20] Calculation of Employee's remuneration has been published under Government Notice No. 691 in Government Gazette 24889 of 23 May, 2003.

LABOUR COURT

in terms of the BCEA. As such, I am unable to agree with the finding in the unreported judgment of this Court per Moshoana AJ, as he then was, in *Bidvest Bank Ltd v Rafee*[21] where he found that the commissioner had jurisdiction to determine the contractual claim for bonus in terms of section 74(2) since it was not only an unfair labour practice claim but also a claim arising from an employment contract, and, accordingly, the employee had a choice on how he could claims it.

[21] Plainly, section 74(2) empowers the CCMA to determine a claim that is owing to the employee in terms of BCEA. Certainly, also concede, by contrast, is that a contractual claim for a bonus is justiciable in terms of the BCEA, but only in terms of section 77(3) which provides that:

> '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'. (Emphasis added)

[22] Even if remuneration is defined generously to include any kind of monetary benefits in terms of the employee's employment contract, once it is shown that they are benefits paid over and above the guaranteed salary, a quid pro quo for services rendered, then the exception in terms of section 4(c) would still oust the jurisdiction of the CCMA in terms of section 74(2).

[23] To suggest otherwise would obviously be incongruous with the intent of the BCEA as crafted by the drafters[22] which is to, *inter alia*, ensure that the working conditions of unorganised and vulnerable workers meet minimum standards that are socially acceptable in relation to the level of development of the country. In fact, this interpretation is buttressed by the provisions of section 70(b) the BCEA which limits the powers of a Labour Inspector to issue a compliance notice in respect of any amount payable to the employee as a result of failure to comply with the BCEA if that employee earns in excess of the threshold determined by the Minister in terms of section 6(3) of the BCEA, which

LABOUR COURT

[21] (JR 1412/11) [2013] ZALCJHB 35 (8 February 2013) at para 11.

[22] See: *Memorandum on the Objects of the Basic Conditions of Employment Bill,* 1997 - *Basic Conditions of Employment Bill* [B98B-97], https://www.gov.za/sites/default/files/gcis_document/201409/b98b-97.pdf.

was R205, 433.30 per annum, then. In essence, even if Mr Chimphondah's performance incentive bonus claim in terms of section 74(2) was not debarred by section 4(c), he would still not be eligible to avail himself to the enforcement machinery provided for in terms of section 60 of the BCEA given the fact that his guaranteed remuneration was R1.8million per annum.

[24] Obviously, this accords with the legal position to statutory interpretation set out by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard & another,*[23] where it was stated that:

> 'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and
>
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in *(a).*'

[25] As observed by the Constitutional Court in *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others,*[24] referred to with approval in *Democratic Alliance*:[25]

LABOUR COURT

[23] [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28. See also *Association of Mineworkers & Construction Union & others v Chamber of Mines of SA & Others* (2017) 38 ILJ 831 (CC) (*AMCU*) at fn 30; *Democratic Alliance v Speaker, National Assembly & others* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) (*Democratic Alliance*) at paras 19-28.

[24] 2010 (2) SA 181 (CC) (2009 (10) BCLR 978; [2009] ZACC 11) (*Bertie van Zyl*) para 32.

[25] Supra n 7 *Democratic Alliance* at paras 27-28.

> 'The text [of a statutory provision] must be interpreted in the context of the Act as a whole, taking into account whether the preamble and the other relevant provisions in the Act support the envisaged construction.'[26]

[26] Consistent with the BCEA's intent to protect the unorganised and vulnerable workers through the enforcement machinery in chapter 10, Section 74(2) renders it convenient for the employee who is subsequently dismissed whilst having a claim in terms of the BCEA to have that claim determined together with the unfair dismissal claim in terms of section 191 of the LRA.

[27] Certainly, what ensues from this construction is that there are other groups of employees who may be excluded from the reach of this provision simply because their claims stem from elsewhere, but the BCEA. Nonetheless, they are not without a recourse. They can vindicate those rights in terms of section 77(3).

[28] I, accordingly, conclude that, properly construed and given the facts and context, the applicability of section 74(2) to this matter is ousted by the fact that Mr Chimphondah's unpaid performance inventive bonus constitutes a benefit as opposed to remuneration, a basic condition of employment in terms of the BCEA; alternatively, by section 4(c). It follows that the Commissioner had no jurisdiction to entertain Mr Chimphondah's contractual claim.

[29] In the circumstances, the award in this regard stands to be reviewed and set aside and substituted with the order that the CCMA had no jurisdiction to entertaining Mr Chimphondah's contractual claim. Of course, Mr Chimphondah may still avail himself to the recourse provided for in terms of section 77(3). If he decides to do so, there is, in my view, nothing that might prevent the parties from agreeing to use the record of the arbitration proceedings as evidence instead of a hearing *de novo.*

LABOUR COURT

[26] In *Hoban v Absa Bank Ltd t/a United Bank and Others* 1999 (2) SA 1036 (SCA) ([1999] 2 All SA 483; [1999] ZASCA 12) para 20 the word 'context' was defines to mean not only the 'parts of a legislative provision which immediately precede and follow the particular passage under examination', but 'includes the entire enactment in which the word or words in contention appear'. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

Constructive dismissal

[30] Mr Chimphondah's main claim is that the Commissioner erred in finding that he failed to prove a case of constructive dismissal pursuant to section 186(1)(e) of the LRA.[27] The parties notably accept the review test as outlined above as trite.[28]

[31] That takes me to the merits. In *Solid Doors (Pty) Ltd v Commissioner Theron and Others*,[29] the LAC stated that for constructive dismissal to be established, the following three requirements must be to be present:

> '…The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. …If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer.'[30] (Emphasis added)

[32] Pertinently, as held by the LAC in *National Health Laboratory Service v Yona and Others*:[31]

> '…a constructive dismissal occurs when an employee resigns from employment under circumstances where he or she would not have resigned but for the unfair conduct on the part of the employer toward the employee, which rendered continued employment intolerable for the employee…The test for proving a constructive dismissal is an objective one. The conduct of the

[27] Section 186(1)(e) provides that: 'Dismissal means that - … an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee'.
[28] See: paragraphs 2-4 *supra*.
[29] *Supra* n 3 at para 28.
[30] See: *Conti Print CC v Commission for Conciliation, Mediation and Arbitration and Others* 2015] 9 BLLR 865 (LAC) at paras 7-9.
[31] (2015) 36 ILJ 2259 (LAC) at para 30; see also *Bakker v Commission for Conciliation, Mediation and Arbitration and Others* (JR1078/14) [2018] ZALCJHB 13; [2018] 6 BLLR 597 (LC); (2018) 39 ILJ 1568 (LC) at paras 5-16.

LABOUR COURT

> employer toward the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with. Resignation must have been a reasonable step for the employee to take in the circumstances.' (Emphasis added)

[33] In the present instance, Mr Chimphondah tendered his resignation through an email dated 19 July 2018, with the heading '*Resignation from the Position of Chief Executive*', addressed an email to the Chairperson of the Board, Ms Prabashini Moodley (Ms Moodley) and the Chairperson of the Board's Remuneration Committee (REMCO), Mr Samson Moraba (Mr Moraba) stating the following:[32]

> 'Let me take this opportunity to thank you for giving me an opportunity to lead your company for 5 years.
>
> I wish to tender my resignation from the above position and I am willing to serve my notice period to ensure a smooth handover is concluded should you so require.
>
> I have learnt a great deal from you both and the Board for which I am grateful.
>
> My humble request is that consideration be given to payment of the balance of my Deferred Short-Term incentive and
>
> The 2017 Short term incentive based on the recommendation from Remcom to Board.
>
> I am pleased that since taking over HiP from 2014 the following was achieved under my leadership:
>
> 1. Increase on the assets under management from R100m to 1.2 billion in 5 years.
> 2. Reduction in Cost to income from 414% to 100%.
> 3. Recruitment of a strong management team.
> 4. Raising of R2billion in funding…

[32] See: Record Vol 1, pages 119-120.

LABOUR COURT

5. Clean External Audit reports for 4 years.

I still have a lot to learn and will continue learning from you both and fellow Board members.

I wish you, the Board, Management and wonderful staff of HiP the success that they deserve.

I look forward to spending time with my family the first week of August in celebration of my daughter's birthday.

Trusting this is in order'

[34] It is common cause that HiP waived Mr Chimphondah's notice period because he had indicated that he was intending to spend time with his family, and was accordingly paid *in lieu* of notice. Even though Mr Chimphondah denied that he had a job offer elsewhere when he resigned, it later transpired that indeed he took up employment with the Tanzanian Reserve Bank. Mr Chimphondah concedes that he subsequently approached HiP for a character reference which was required by his new employer and was duly provided. Ms Moodley testified that she was astounded by Mr Chimphondah's constructive dismissal claim because he did not address any intolerability in his job prior to his resignation or in his resignation letter.

[35] Despite the above turn of events and Mr Chimphondah's concession that he did not specifically and formally lodge a grievance to deal with his complaints while in the employ of HiP, he is adamant that his resignation was due to the specific complaints which I deal with hereunder.

[36] The complaint against the conduct of Mr Johan Coetzee (Mr Coetzee), a board member, which was an attempt to frustrate Mr Chimphondah in his position and a blatant attack his integrity.

36.1. Even though it is common cause that Mr Coetzee was a difficult member of the Board and had a strained relationship with Mr Chimphondah, it would seem that the other members of the Board were supportive of Mr Chimphondah. He also concedes that the erstwhile chairperson of the board, Mr Marshall Rapiya (Mr

LABOUR COURT

Rapiya) specifically dealt with improper conduct by Mr Coetzee in a forceful manner while Ms Moodely was more engaging and apparently welcomed dissenting voices in the board. In the end, the issue was more about the style of leadership in dealing with the board members. Yet, Ms Moodley was resolute that she did support Mr Chimphondah and denied that he was left to fend for himself. This was corroborated by Mr Moraba, who testified that he did also lend support and coaching to Mr Chimphondah.

36.2. What is also curious is that some of the complaints against Mr Coetzee date back from 2014, during Mr Rapiya's tenure which ended in 2016; the period that he, Mr Chimphondah, commends for the support he enjoyed from Mr Rapiya. Notwithstanding Mr Coetzee's conduct and personality, Mr Chimphondah continued to work for HiP and, as mentioned in his resignation letter, accomplished outstanding results and never lodged any formal grievance.

36.3. It is not clear from the record as to what was the incident that triggered Mr Chimphondah's decision to reign on 19 July 2018. In fact, I doubt that there is any given the contents and tone of his resignation letter.

[37] As stated in *Agricultural Research Council v Ramashowana NO & Others,*[33] it is patently opportunistic of Mr Chimphondah to hinge his constructive dismissal claim on the incident that took place three years prior to the date of his resignation. Granted, there could be instances where the working conditions were rendered intolerable over a period of time. Still, it must be clear from the evidence that the employee had no reasonable option but to resign and he did so within a reasonable time from the trigger event, which may have been a once-off outrage or the last straw following an earlier string of events.[34]

[33] (2018) 39 ILJ 2509 (LC) at para 19.
[34] Ibid.

LABOUR COURT

[38] The complaint against HiP's decision in July 2017 to place Mr Chimphondah on probation and the failure to provide feedback as to whether the probation was lifted after December 2017.

38.1. Nothing much turns on this issue because Mr Chimphondah did not refer to it in his resignation letter, like all his other complaints. As stated above, it is illogical that the decision that was communicated in July 2017 could really inform the decision to resign a year later when nothing had been done to formally challenge it.

38.2. In any event, the LRA provides expeditious dispute resolution processes to deal with probationary disputes.[35] The reason is to avoid the type of disputes that emerges when there is no longer a persisting employment relationship. Mr Chimphondah, as a senior employee, should have been better advised in terms of dealing with his grievances.

[39] The complaints pertaining to the failure to approve business plan strategies; rejection of approved funding from SL Investments; instituting 360º in a bid to look for a tangible evidence to frustrate Mr Chimphondah; investigation against Mr Chimphondah over unfounded allegations; and Mr Chimphondah being undermined by Ms Moodely when she had meetings with the CFO. Ms Moodely gave a reasonable explanation in response to all these complaints.

39.1. The business plan strategies for 2016 and 2017 had been approved and, in any event, there was no evidence that failure to

LABOUR COURT

[35] See: unreported case of this Court in *Kanozi Mlotha v Community Schemes Ombud Service & Others* Case no: JR322/19, 20 November 2020 at para 58 were it stated:

'The last point I wish to briefly address is the CCMA Con-arb process. It cannot be overemphasised that the LRA dictates that labour disputes be expeditiously resolved moreover when it comes to the probationary unfair labour practice disputes, which are inherently urgent. Hence, Con-arb process is obligatory and that the arbitration should commence automatically consequent to a filed conciliation so as to avoid unnecessary delays in finalising probationary disputes. It therefore stands to reason failure commence with the arbitration immediately after a failed conciliation offends the quintessence of section 191(5A)(c) of the LRA. Consequently, the probationary disputes end up being confounded to the prejudice of the applicant employee.' (Emphasis added)

approve the 2018 business plan strategies inhibited Mr Chimphondah's overall performance.

39.2. It was business decision not to approve funding from SL Investment because it was risky.

39.3. The 360º assessment was not targeted at Mr Chimphondah only but all the HiP Executives. It was a sheer coincidence that took place during the probationary period.

39.4. The investigation against Mr Chimphondah was informed by a legitimate business rationale as it related to a claim that was lodged by Mr Tichareva in respect of R1,5 million. The claim emanated from the contracts that were signed but not submitted to the board. The investigation was launched pertaining to the validity of those contracts and the amount claimed.

39.5. Ms Moodely denied that she undermined Mr Chimphondah by having meetings with the CFO as she had duly informed him of the need to do so.

[40] The last complaint pertains to the non-payment of performance incentive bonus.

40.1. Given the conclusion I have come to in relation to Mr Chimphondah's contractual claim in terms of section 74(2), I deem it prudent not to say much on this issue, save to state that this complaint is untenable if regard is had to the resignation letter.

40.2. It is, thus, mind boggling that Mr Chimphondah could claim that the non-payment of his performance incentive bonus rendered his continued employment intolerable when the Board's decision not to pay him was only communicated after he had tendered his resignation.

LABOUR COURT

40.3. In addition, Mr Chimphondah conceded in cross examination that he had agreed to the deferral of some of the claimed amounts because of the liquidity issues.

[41] Taken as a whole, the main hurdle facing Mr Chimphondah is that he did not avail himself to the internal grievance procedure. In *Solidarity obo Van Tonder v Armanents Corporation of South Africa (SOC) Limited and Others,*[36] referred to by HiP, the LAC had the following to say on failure to follow the grievance procedure:

> 'It may be that the appellant had a legitimate complaint about the performance outputs and appointments to his division. But such matters occur often and are run of the mill points of difference or tension in any workplace. Grievance procedures exist for that very purpose. They are the compulsory means of resolving conflict over run of the mill disagreements between subordinates and their superiors. A proper application of the grievance procedure aims at testing the legitimacy of any difference of opinion and through conciliation hopes to find workable remedial solutions.' (Emphasis added)

[42] It is evidently ill-considered for the employee to resign without warning or giving the employer the opportunity to remedy the cause of complaint.[37] Moreover, in instances, as typified in this case, involving senior employees who are expected to endure the pressures inherent in their positions, including difficult personalities, which are generally commensurate with their generous salary packs.

[43] Tritely, intolerability is a high threshold, far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter an obnoxious, rude and uncompromising superior who may treat employees badly.[38] Put otherwise, intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee's tolerance to a breaking point.[39] This notion is instructively

[36] [2019] ZALAC 55; [2019] 8 BLLR 782 (LAC); (2019) 40 ILJ 1539 (LAC) at para 44.
[37] See: *Albany Bakeries LTD v Van Wyk & Others* (2005) 26 ILJ 2142 (LAC) para 28.
[38] See: *HC Heat Exchangers*, *supra* n 7 at para 49; see also, *Billion Group (Pty) Ltd v Ntshangase and Others* (2018) 39 ILJ 2516 (LC) at para 11.
[39] *Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others* (2019) 40 ILJ 1539 (LAC) at para 39.

LABOUR COURT

underscored in *Jordaan v Commission for Conciliation, Mediation and Arbitration and Others*,[40] where LAC referred with approval to its earlier decision in *Old Mutual Group Schemes v Dreyer*stated,[41] and stated that:

> 'This dictum represents a salutary caution that constructive dismissal is not for the asking. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal. An employee, such as the appellant, must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination, is available to her.' (Emphasis added)

[44] Having regard to the overall facts in the present instance, it cannot, in my view, be said that there is any conduct on the part of HiP, viewed objectively, that was intended to bring the employment to an end and, consequentially, Mr Chimphondah did not voluntarily resign. Stated otherwise, Mr Chimphondah would have remained in the employ of HiP, but for the intolerable turn of events. Nor can it be said that Mr Chimphondah had no reasonable option but to resign.

[45] It follows that the Commissioner correctly found that Mr Chimphondah failed to prove a case of constructive dismissal. So, the award in this regard is unassailable and must stand.

Conclusion

[46] In all the circumstances, the part of the award that deals with Mr Chimphondah's contractual claim in terms of section 74(2) falls to be reviewed and set aside. While the part that deals with the constructive dismissal claim is beyond reproach and must stand.

[47] I deem it superfluous to remit that matter back to the CCMA given the conclusion that I have arrived at above. Accordingly, the award stands to be reviewed and set aside to the extent that the Commissioner incorrectly clothed himself with the jurisdiction in terms of section 74(2) and to be substituted with

[40] (2010) 31 ILJ 2331 (LAC) at page 2336.
[41] (1999) 20 ILJ 2030 (LAC) at 2036; see also *Asara Wine Estate & Hotel (Pty) Ltd v JC Van Rooyen & Others* (2012) ILJ 363.

LABOUR COURT

an order that the CCMA had no jurisdiction to entertain Mr Chimphondah's contractual claim.

Costs

[48] I am disinclined to award costs against Mr Chimphondah as the circumstances of this case dictate that each party pays its own costs.

[49] In the premises, I make the following order:

Order

1. The arbitration award issued by the Commissioner under case number GAJB1927/18 dated 23 April 2019 is reviewed and set aside, to the extent that the Commissioner dealt with Mr Chimphondah's contractual claim in terms of section 74(2) of the BCEA, and replaced with the following order:

   'The CCMA has no jurisdiction to deal with Mr Chimphondah's contractual claim in terms of section 74(2) of the BCEA.'

2. There is no order as to costs.

_____

` P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: ?

Instructed by: ?

For the Fourth Respondent: ?

Instructed by: ?

LABOUR COURT