

# Employment Law

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### SOUTH AFRICA

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## Unlawful termination of employment contracts: No automatic right to specific performance

In the Labour Appeal Court (LAC) case of *Passenger Rail Agency of South Africa and Others v Ngoye and Others* [2024 45 ILJ 1228 (LAC)] the LAC affirmed that the dispute resolution procedures in the Labour Relations Act 66 of 1995 (LRA) do not defeat an employee's right to rely on the common law contractual recourse, provided that the applicant pleads their case on this basis, as the right to not be unfairly dismissed is not the only right that may be implicated as a result of a dismissal.

Litigants should carefully consider the prospects of success before instituting a contractual dispute or challenging the lawfulness of the termination, as opposed to using the unfair dismissal mechanisms contained in the LRA. Particular consideration should be given to the appropriate relief available once the employment contract is found to have been unlawfully terminated. Where an employment contract is found to have been unlawfully terminated, specific performance, i.e. reinstatement, is not a relief that automatically follows; it is a discretionary relief.

Courts are reluctant to grant specific performance in the context of employment contracts. When dealing with a claim for specific performance in the face of an unlawful termination of an employment contract, the LAC highlighted that:

- The granting of specific performance where breach of contract has occurred is subject to the court's discretion, which must be exercised judiciously.

- Employment contracts are different to commercial contracts in that they are personal contracts. As such, exercising the discretion to grant reinstatement as specific performance may entail satisfying the court that the continued employment relationship is tenable or that granting specific performance in the form of reinstatement will not lead to conflict within the workplace, particularly where the former employee was a senior employee or was required to interact with senior management.
- Financial prejudice that former employees may suffer as a result of losing their income does not constitute a basis for granting specific performance.

Employees who claim an unlawful termination (breach of contract) should consider a claim for damages and plead their damages claim in the alternative to specific performance.

The remedies contained in the LRA will only be considered in a claim contemplated under the LRA and are not available to contractual claims. A claim made in terms of a contract will invite the court to hand down contractual remedies that may not always be appropriate in the employment context.

**Jean Ewang, Sashin Naidoo and Khutso Mongadi**

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## Beyond status: Parameters of section 198D of the LRA, and competent relief for current and former employees



Section 198D of the Labour Relations Act 66 of 1995 (LRA) contains general provisions applicable to sections 198A to 198C, and vests the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council with the power to conciliate and arbitrate any dispute related to the interpretation or application of these subsections. This includes disputes related to the status of the employment relationship between a temporary employee and the client of a temporary employment service (TES). Once the CCMA determines that the employee is deemed an employee of the client in terms of section 198A(3)(b), is the scope of section 198D wide enough to empower the CCMA to grant substantive relief? What about those who are no longer “employed” at the time of lodging a dispute?

Recently, the Labour Appeal Court (LAC) held in *Bata SA (Pty) Ltd v SACTWU obo Members* [2024] 8 BLLR 866 (LAC) that the CCMA’s powers are limited to making a declaratory order recognising the employment status of current employees. Thereafter, the employee can either pursue an unfair dismissal or unfair labour practice claim under section 191 of the LRA or seek contractual remedies in terms of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

In respect of those who are no longer employees, the LAC held that while a court cannot issue a declarator in respect of employees who are no longer in the client’s employ, the court could pronounce on their status at the time that their employment ended. They would be entitled to relief under the LRA or BCEA.

In addition, the LAC iterated that an employee could pursue an unfair dismissal or unfair labour practice claim and rely on sections 198A – 198C to counter an employer’s claim that there was no dismissal or less favourable treatment compared to other employees doing similar work. This, without necessarily first seeking a declarator under section 198D.

In *Bata*, the South African Clothing and Textile Workers’ Union (SACTWU) referred a dispute on behalf of its members, current employees and those dismissed, contending that they were deemed employees of Bata and had been treated less favourably than its other employees in respect of wages and employment conditions. SACTWU argued that section 198D empowered the CCMA to quantify the monetary difference in wages and issue an award to this effect. Bata contended that section 198A only empowered the CCMA to grant declaratory relief in relation to whether

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the temporary employees were deemed employees of the TES' client and whether there was disparity in treatment. If so, any redress available would be premised on other provisions of the LRA or the BCEA. The declaratory relief is limited to those employed at the time of granting the declarator.

In the CCMA, it was found that that only current employees (at the time of arbitration) could be party to the dispute, and furthermore that its powers were limited to granting declaratory relief. Any incidental claims for backpay had to be pursued separately in the appropriate forum. On review, the Labour Court held that section 198D was an all-encompassing provision. It empowered the CCMA to not only determine whether the TES employees were deemed employees of the client and whether they were treated on the whole less favourably than other employees performing the same or similar work, but to go further and quantify the monetary value of the difference and backpay. The Labour Court reviewed and set aside the arbitration award and directed the re-hearing of the matter in the CCMA.

The LAC finally gave clarity on the conflicting judgments by the Labour Court in *Bata and Nama Khoi Local Municipality v SA Local Government Bargaining Council and others* [2019] 8 BLLR 830 (LC). Section 198D serves as a procedural tool to clarify the status of employees through a declarator in respect of current employees. Additionally, it may pronounce on the status of those who had already been dismissed at the time of the dispute, determining whether they were treated less favourably than other employees of the TES' client. This enables such employees to pursue appropriate claims under section 191 of the LRA or the BCEA.

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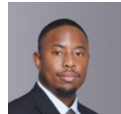
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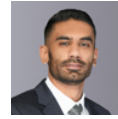
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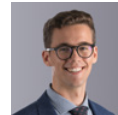
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