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The Breakdown of the Trust Relationship and Intolerability in the Context of Reinstatement in the Modern Law of Unfair Dismissal (1)

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Abstract

One of the principles firmly established in Masetlha v President of the Republic of South Africa 2008 1 SA 566 (CC) is that the remedy of reinstatement cannot be ordered where the trust relationship between the employer and the employee has broken down irretrievably. As much as this case was not decided on the basis of the Labour Relations Act 1995 (LRA), it has had the effect of influencing determinations based not only on the remedy of reinstatement canvassed under the auspices of that Act, but also of all other enactments dealing with dismissal from employment. Apart from the recent case of Moyane v Ramaphosa 2019 ZAGPPHC 835 which, like in Masetlha, also involved the legality or rationality of the constitutional exercise of the executive power of the President, there are other cases involving the application of interim interdicts seeking to enforce the reinstatement of the Chief Executive Officers of an SOE; a business corporation and quite a number invoking the interpretation of section 193(2) (b) of the LRA. This discussion, therefore, sets out to investigate the ramifications of the various employment-related legislation wherein the employees suspended for misconduct pending disciplinary enquiry or dismissed for misconduct which turns out to be unfair seek reinstatement as a remedy. And, in either case, breakdown of the trust relationship or intolerability comes up for discussion.

Keywords: Reinstatement; breakdown of the trust relationship; intolerability; fair and equitable order; specific performance; interdicting suspension; employer-employee relationship; incompatibility.

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1 INTRODUCTION

There can be no doubt that trust is considered to be an important element of the employment relationship whether in the private business enterprise or in the public sector.[1] Business risk, it is said, is "predominantly based on the trustworthiness of company employees and that the accumulation of individual breaches of trust has significant economic repercussions."[2] Or, as cutely put by the Zambian Supreme Court, "an employment relationship is anchored on trust and once such trust is eroded, the very foundation of the relationship weakens."[3] The judgment of the Constitutional Court in the controversial case of *Masetlha v President of the Republic of South Africa*[4] tends to be overshadowed by the legality and rationality aspects of the conduct of the President of the Republic of South Africa and the question whether the President was under a legal obligation to have given the spy chief an opportunity to be heard before he terminated the former's contract of employment. A further scrutiny, however, reveals that *Masetlha* is also authority for the proposition that the remedy of reinstatement cannot be ordered where the trust relationship between the employer and the employee has broken down irretrievably and, on this point, both the majority and the minority judges of the Constitutional Court were *ad idem*.

It has been pointed out that although "reinstatement is the default remedy to an unfairly dismissed employee, it is made subject to whether the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or it is not practicable for the employer to reinstate or re-employ the employee. Reinstatement is therefore a discretionary remedy."[5] For instance, the Labour Appeal Court (LAC) held in *Dunwell Property Services CC v Sibande*[6] that:

> In order to determine whether or not an unfairly dismissed employee should be reinstated, as contemplated in s 193(2) of the LRA, the overriding consideration in the enquiry should be the underlying notion of fairness between the parties, rather than the legal onus, and that 'fairness' ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment.[7]

This article sets out to examine the common trend in the recent cases decided since *Masetlha* on the issue of breakdown of the trust relationship between the employer and employee and to show that it is important to ascertain whether the relationship could be encouraged to continue or whether it would be intolerable for the parties directly concerned to continue such a relationship. One thing that is clear from the cases investigated in this study, is that the relationship of trust is applicable to every employment whether of a high or low profile employee. The employer/employee trust relationship must be shown to exist in every employment situation: it would not make any difference that the employee, as in *Masetlha* or in the case of *Moyane v Ramaphosa,*[8] was appointed by the Head of State or that the employer is a State Owned Enterprise (SOE) in which the employee was the Chief Executive Officer as in *Gama v Transnet (SOC) Ltd.*[9] Or, where the employee in question was the Chief Executive Officer of a registered corporation as in *Old Mutual Ltd v Moyo.*[10] This discussion commences with the instances where the employer–employee relationship has been said to have broken down. According to Brassey, this is not a talk of a "confidential relationship between a corporate conglomerate and its workmen on the shop floor."[11] Rather, it is about

1 *Hadebe v SALG Bargaining Council* 2014 ZALCD 26 (11 June 2014) para 11 (*Hadebe*). Both the English and Australian courts are firm on the fact that there is implied in an employment relationship a requirement of trust and confidence for that relationship to flourish. See e.g. *Malik v Bank of Credit and Commerce International SA* 1998 AC 20 at 34; *Western Excavating (ECC) Ltd v Sharp* 1978 QB 761; *Courtaulds Northern Textiles Ltd v Andrew* 1979 IRLR 84; *South Australia v McDonald* 2009 104 SASR 344; *Commonwealth Bank of Australia v Barker* 2014 HCA 32 (10 September 2014). See also Freedland, *The Personal Employment Contract* (2003) 155.
2 Per Pillay J, *Miyambo v CCMA* 2010 10 BLLR 1017 (LAC) para 13 (*Miyambo*).
3 *Chimanga Changa Ltd v Ngombe* 2010 ZR vol. 1, 208 220.
4 2008 1 SA 566 (CC) (*Masetlha*).
5 *Sibiya v CCMA* 2015 ZALCD 37 (12 June 2015) para 21 per Cele J.
6 2011 32 *ILJ* 2652 (LAC) para 31. See also *FNB v Language* 2013 *ILJ* 3103 (LAC) paras 28–30 (*FNB*); *Zilwa Cleaning and Gardening Services CC v CCMA* 2010 31 *ILJ* 780 (LC) (*Zilwa*).
7 *Equity Aviation (Pty) Ltd v CCMA* 2009 1 SA 390 (CC) para 39 (*Equity Aviation*).
8 2019 1 All SA 718 (G) (*Moyane*).
9 Noted in *SAFLII* as *Gama Siyabonga v Transnet SOC Ltd* 2018 ZALCJHB 452 (22 November 2018) (*Gama*).
10 2020 ZAGPJHC 1 (3 January 2020) (*Old Mutual I*).
11 Brassey "Specific Performance – A New Stage for Labour's Lost Love" 1981 *ILJ* 62.

the confidential relationship between such a corporate conglomerate, the State itself or a national corporation that is involved in the cases analysed herein. It concerns the investigation of the breakdown of the trust relationship aspect of the *Masetlha* judgment and the attempt to evaluate the recent cases of *Moyane, Moyo* and *Gama* in that light. The idea, here, is not to confine this discussion to these four cases. The volume of the materials available for analysis on intolerability in the context of reinstatement in accordance with the prescripts of section 193(2)*(b)* of the Labour Relations Act 66 of 1995 (LRA)[12] are closely related to the concept of breakdown of the trust relationship between the employer and the employee. In other words, these expressions – "breakdown of trust relationship" and "intolerability" - are two different ways of saying the same thing: that the employee is no longer welcome at the workplace. The implications of these two forms of expressions to the remedy of reinstatement are accordingly dealt with in this same space albeit in two instalments.

2 WHERE TRUST IN THE EMPLOYER–EMPLOYEE RELATIONSHIP HAS BROKEN DOWN

In *De Beers Consolidated Mines v CCMA,*[13] Conradie JA held that:

> Dismissal is not an expression of moral outrage, much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. This dismissal has little to do with society's moral opprobrium of minor theft; it has everything to do with operational requirements of the employer's enterprise.[14]

Where an employee has committed an act of dishonesty and the position he/she occupied required him/her to be honest, the question that needs to be asked is whether his/her conduct impacted on his/her employment relationship in such a way that his/her actions resulted in the breakdown of the trust relationship between him/herself and the employer.[15] Dishonesty is viewed in a very serious light by the courts and in most instances it results in a breakdown of the most relationships between the parties.[16] In *Toyota SA Motors (Pty) Ltd v Radebe*,[17] in coming to the conclusion that the dishonesty was gross, the court took into account the fact that the employee had shown no remorse for his misconduct and had persisted in lying to his employer throughout the proceedings that followed. The court described the employee's conduct as amounting to "gross dishonesty" which meant that it was dishonesty of such a degree that was completely indefensible on any ground. It was also held in this case that although a long service record of an employee could be a mitigating factor where the employee is guilty of misconduct, there are certain acts of misconduct which are of a serious nature that length of service cannot salvage it. Dishonesty is one such example. In other words, "the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction."[18] Dishonesty goes to the core of the employment relationship and the seniority of the offending employee may constitute an

12 Act 66 of 1995 (hereinafter the LRA).
13 2000 9 BLLR 995 (LAC) para 22 (*De Beers Consolidated Mines*).
14 *Miyambo* para 13.
15 *Hadebe* paras 9–10. In *Singh v FNB* 2014 ZALCD 44 (9 September 2014) paras 83 and 104 where the dismissal was found to be substantially and procedurally unfair, but the arbitrator awarded compensation rather than reinstatement for the reason that the trust relationship remained affected, it was held that the decision to award compensation rather than the primary remedy of reinstatement is one that no reasonable decision-maker could have come to, and stands to be set aside.
16 See e.g. *Toyota SA Motors (Pty) Ltd v CCMA* 2016 37 *ILJ* 313 (CC) para 19; *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO* 2017 38 *ILJ* (LAC) paras 28-30; *Murray v Minister of Defence* 2008 29 *ILJ* 1369 (SCA) para 6; *Central News Agency v CCAWUSA* 1991 12 *ILJ* 340 (LAC) at 344F-I.
17 2000 21 *ILJ* 340 (LAC) paras 16 and 26 (*Radebe*).
18 *Radebe* paras 15–16. See also in *Malapalane v Glencore Operations* 2018 39 *ILJ* 2467 (LAC) where the LAC found that, where a senior laboratory employee misrepresented the results of a coal test which resulted in the employer mining company suffering enormous financial loss and reputational damage, it was not necessary to determine whether the employee had the intention to deceive, all that had to be shown was that the employee misrepresented to the company that the results were correct and accurate. The court upheld the employee's dismissal. Similarly, in *Nkomati Joint Venture v CCMA* 2018 39 *ILJ* 2484 (LAC) where an employee responsible for checking the veracity of information in the payroll spreadsheet had altered the formula in the spreadsheet to benefit himself, the LAC found that the employee's conduct was dismissible and upheld his dismissal.

aggravating factor.[19]

It has been held that even though the employee might have rightfully been dismissed on the ground of dishonesty, there could be a mitigating factor to justify imposing a sanction short of dismissal. Thus, in *De Beers Consolidated Mines,*[20] Conradie JA expressed the view that it would be inconceivable for an employer to take back into its employ an employee who had committed an act of misconduct and shows no remorse for his or her conduct. "Where, as in this case, an employee, over and above having been found guilty of having committed an act of dishonesty, falsely denies having committed misconduct, an employer would, in particular where a high degree of trust is reposed in an employee, be legitimately entitled to say to it that the risk of continuing to employ the offender is unacceptably great."[21] It has been held that dismissal is appropriate in circumstances where as:

- In *Kalik v Truworths (Gateway),*[22] the misconduct involved elements of dishonesty where an employee removed a make-up tester from a store without permission.
- In *Hullet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry,*[23] the employee was found guilty of unauthorised removal of scrap metal from the premises. In both of these cases, the court was of the view that there was no scope for the application of mitigating factors.
- In *Shoprite Checkers (Pty) Ltd v CCMA,*[24] it was held that the mitigating factors, such as length of service or the relatively insignificant value of items pilfered, would not hold sway in assessing sanction. Once dishonesty is established, it is deleterious of the trust relationship.

3 *MASETLHA* AND THE TRUST RELATIONSHIP

There can be no doubt that since the *Masetlha* judgment was delivered some twelve years ago, no discussion of the breakdown of the trust and confidence in the employment relationship could be carried out without touching base with the judgment even at the risk of repetition.

3 1 The Majority Judgment on Breach of Trust

It was held in *Masetlha* that although it was clear that there had been a breakdown of the trust between the President and the spy chief/applicant, but that alone was not a sufficient ground to justify a unilateral termination of his contract of employment.[25] At the same time, the breakdown of that relationship of trust constituted a rational basis for dismissing the applicant from his post as the director-general of the National Intelligence Agency.[26] On the other hand, the irretrievable breach of trust will be relevant for the purposes of remedy; the ordinary remedies for breach of contract of employment are either reinstatement or full payment of benefits for the remaining period of the contract. Even if the applicant had succeeded in his claim for unlawful termination of his fixed term contract as the director-general of the National Intelligence Agency, the case was not one where reinstatement would be ordered because of the special relationship of trust that should exist between the parties.[27] The reason being that it would not be proper to foist upon the President a director-general of an important intelligence agency he does not trust. Nor would the public interest be served by the head of an intelligence

19 *Moeketsi v Transnet Bargaining Council* 2018 ZALCJHB 398 (05 December 2018) para 17.
20 *De Beers Consolidated Mines* paras 9 and 24.
21 *De Beers Consolidated Mines* para 25. This approach of the LAC was adopted by the Labour Court of Namibia in *House and Home (A trading Division of Shoprite (Pty) Ltd v Majiedt* 2013 2 NR 333 (LC) paras 63–64 where the facts were similar to those in *De Beers Consolidated Mines*. Hoff J held that the risk of continuing the employment relationship was simply a risk unacceptably great to take especially in view of the seriousness of the offence of stock loss reflected in the charge on extreme poor stock control, the previous conviction of a similar offence, the failure of the first respondent to take remedial action after the previous substantial stock loss, and the irremediable breakdown of the trust relationship between the appellant and the first respondent. In effect, an order of reinstatement in such a circumstance constituted a material misdirection by the arbitrator. Such a finding, on a proper evaluation of the evidence, would not have been reached by a reasonable arbitrator. The order of reinstatement was accordingly set aside.
22 2007 28 *ILJ* 2769 (LC).
23 2008 29 *ILJ* 1180 (LC). See also *BMW (SA) Ltd v Van der Walt* 2000 21 *ILJ* 113 (LAC).
24 2008 9 BLLR 838 (LAC).
25 *Masetlha* para 88.
26 *Ibid* para 86.
27 *Ibid* paras 97–98.

service who says he has lost trust and respect for his principals, the President and the Minister. The difficulty of the applicant obtaining the order of reinstatement was further compounded by his admission that he was seeking reinstatement more for personal vindication of his reputation than to be returned to his previous office. Although this argument would appear to have weakened the applicant's case rather than strengthening it; reinstatement has never been known as necessarily curative of reputational damage essentially where the relationship of both parties has broken down. Without necessarily buying into that submission, Moseneke DCJ responded to it in the following interesting and informative passage in his judgment:

> I have understanding for this personal quest to protect and restore his reputation. It is neither frivolous nor a matter which does not engage the cardinal constitutional value of dignity. At the inner heartland of our rights culture is human dignity. This has implications for the manner in which public power is exercised. Public power, even though properly conferred, must be exercised in a manner that would not violate the human dignity of those concerned, including reputation, which is an incident of one's sense of self-worth."[28]

That human dignity was implicated in the termination exercise is one thing, and the proposition that an order of reinstatement is what is required in the circumstances to repair it, is another matter. Reinstatement, a purely employment remedy, has underlying principles governing when it could be made by a court. The existence of mutual trust is vital when a court decides that issue. The fact is that if a finding of wrongful conduct has been made, whether it is constitutional or contractual, reinstatement is not the only way to vindicate such breach, more often than not, compensation plays an important role as well. And, if monetary award is considered to be adequate in reputational injuries such as in the law of defamation, wrongful arrest, detention and malicious prosecution cases, why then, could it not fulfil the same purpose in unlawful termination of an employment contract as in the peculiar circumstances of *Masetlha*? Another reason why the applicant in *Masetlha* could not succeed in his claim for the remedy of reinstatement is that having not found that the conduct of the President had breached any constitutional provision, what remedy the court would order would technically speaking, be purely of academic relevance. The jurisdiction of the court to make any order that was just and equitable in terms of section 172 of the Constitution[29] including even ordering that the financial tender made to the applicant to place him in the same financial position that he would have been in but for the termination of his services, is dependent upon it declaring that any law or conduct was inconsistent with the Constitution and therefore invalid.[30] That was not the judgment of the majority in this case.

3 2 The Minority Judgment on Breach of Trust

The *Masetlha* case elicited a very strong dissenting judgment from Ngcobo J (as he then was) whose conclusion was in stark contrast with that of the majority. Ngcobo J had held that the President had no power to unilaterally alter the applicant's terms and conditions of office so as to terminate the employment contract prior to the expiry date. The judge of the Constitutional Court came to that conclusion upon the finding that the President had breached the duty to act fairly by not consulting with the applicant before taking the decision to relieve him of his duties. The President had acted beyond his powers conferred by section 209(2) of the Constitution and section 3(3)*(a)* of the Intelligent Services Act[31] read with sections 3B(1)*(a)*, 12(2) and 12(4)*(c)* of the Public Service Act[32] and, therefore, was in breach of the doctrine of legality. The President's conduct was therefore inconsistent with the Constitution and fell to be declared as such under section 172(1)(a) of the Constitution. The question is whether Ngcobo J was persuaded that the order to reinstate the applicant was the most effective remedy that would flow from his holding that the President had acted unconstitutionally? Ngcobo J reiterated what he had said in *Hoffman v South African Airways*[33] to the effect that the requirement of

28 *Masetlha* para 98.
29 Act 108 of 1996 (hereinafter the Constitution).
30 *Ibid* paras 97–99.
31 Act 65 of 2002.
32 Act 103 of 1994 (hereinafter the Public Service Act).
33 2001 1 SA 1 (CC) (*Hoffman*). For nuanced exposition, see See also Okpaluba "Extraordinary Remedies for Breach of Fundamental Rights: Recent Developments" 2002 *SAPL* 98, esp.111-117 and "Developing the jurisprudence of Constitutional Remedies for Breach of Fundamental Rights in South Africa: Analysis of *Hoffman* and related cases" 2017 *SAPL* 1.

a just and equitable order under section 172(1)(b) means that it must be fair and just in the circumstances of the case.[34] Accordingly, he stated:

> Fairness in this case requires a consideration of a triad consisting of the interests of the applicant, the interests of the President as the head of the national executive and the public interest. All these interests converge in the requirement of trust which is fundamental to the relationship between the head of the NIA and the President who is the commander-in-chief of the defence force. What is required is a careful balancing of these various interests.[35]

In normal circumstances, reinstatement would have been the most effective remedy for the applicant, but the question was whether reinstatement was a just and equitable order to make in this particular case? In answering this question, the court had to bear in mind the following factors: (a) the nature of the relationship between the parties; (b) whether the parties can still work with each other; (c) the balance of the contract period; (d) the desirability of reinstating the applicant in his former position; and (e) the need to place the applicant in the same position that he would have been but for the violation of his constitutional right. In the considering the above factors, Ngcobo J found that the execution of the sensitive but constitutional responsibilities of the parties, complete trust was necessary. Absolute trust was fundamental to the relationship between the President as the head of the national executive and the head of the NIA.[36] Now, that the trust in the relationship has broken down irreparably, it would be too much to expect of human nature to require that the applicant and the President should continue to work together. In the circumstances, therefore, reinstatement would neither serve the interests of the applicant, nor the interests of the President. Neither would it serve that of the public which has an interest in the mutual trust between the President and the applicant.[37]

4 THE DEVELOPMENTS SINCE *MASETLHA*

Even though *Masetlha* involved a constitutional attack on the exercise of the executive power of the President and that the only case in the present presentation that is close to it is that of *Moyane*, yet, what binds the cases and brings them together in this discussion is the term 'reinstatement'. This is notwithstanding that the case in question was canvassed under the Promotion of Administrative Justice Act;[38] the Public Service Act; the South African Police Service Act[39] or any other enabling legislation in the public sector employment sphere; or that the employment situation comes under section 193(1)*(a)* and 193(2)*(b)* of the LRA. The common denominator is that in determining whether to issue an order for the reinstatement of the applicant, the court or arbitrator must consider whether the trust and confidence in the employment relationship could be said to have broken down or, in the language of the LRA, whether continued employment would be intolerable.

4 1 *Gama v Transnet (SOC) Ltd*

The applicant as the Group Chief Executive of Transnet, was served with a notice to show cause as to why his employment should not be terminated for a breach of trust and confidence in him as the most senior managerial executive at Transnet.[40] After the applicant's failure to interdict the respondents from terminating his contract of employment contrary to the procedure set out in their Code,[41] the respondents proceeded to terminate his contract with six months' notice, which notice would be paid *in lieu* of the notice period. In the present case, the applicant, *inter alia*, asked the court to set aside the decision of the respondents to terminate his contract; order that he remain in his position as the Group Chief Executive of Transnet; and to prohibit the respondents or anyone acting under their authority from interfering or preventing him from carrying out his responsibilities in terms of his contract as such Group Chief Executive Officer of Transnet.[42] In the alternative to the foregoing, the applicant requested the court to direct that pending the outcome of the arbitration proceedings, the applicant was entitled to

34 *Hoffman* paras 42–43 and 45.
35 *Masetlha* para 212; *Ibid* 45.
36 *Masetlha* paras 215–216.
37 *Ibid* paras 217–219.
38 Act 3 of 2000 (hereinafter PAJA).
39 Act 68 of 1995.
40 *Gama* para 6.
41 *Ibid*.
42 *Gama* paras 13.4, 13.5 and 13.6.

remain in his position as the Chief Executive Officer.[43] In effect, the applicant was seeking an order for his effective reinstatement.[44]

It was argued by the applicant that in terms of the Code which forms part of his contract, allegations of misconduct must be investigated, and the matter referred to a disciplinary hearing. Failure to comply with this procedure constituted a breach of his contract of employment for which he specifically asked for specific performance. On behalf of the respondents, it was contended that since the applicant failed to make representations as to why his contract should not be terminated for lack of trust and confidence between the parties, his contract was accordingly terminated.[45] Prinsloo J had no hesitation in holding that in order to succeed in his claim, the applicant had to make out a case of a *prima facie* right to the relief he sought; he had to show that the notice of termination was unlawful; and that an arbitrator would grant him specific performance by reinstating him in his former post.[46] In holding that the applicant could not succeed on any of these grounds, Prinsloo J advanced two reasons. In the first place, the applicant has been unable to show that the termination of his contract by the Board of Transnet was unlawful because he could not show that the Board was not entitled to terminate his contract of employment according to the procedure contained in the notice he received on 1 October 2018. The applicant might have correctly claimed a contractual right to disciplinary inquiry, but failed to show that, not being an allegation of misconduct, it applied to the circumstances of loss of trust and confidence in his ability to manage Transnet.[47] The second reason was that the applicant must show that an arbitrator would order his reinstatement. After drawing attention to Transnet as a R7 billion business that employed 55 000 individuals, and the applicant as Group Chief Executive, is responsible for the entire operation as "the brain and nerve centre of the company and if there is a loss of trust and confidence the executive ability and integrity resulting in his removal from the position, a court or arbitrator would not intervene to reinstate in those circumstances."[48] Confirming that the Board had lost trust and confidence in the applicant's ability to manage Transnet in light of the information set out in the applicant's letter of termination, Prinsloo J went further to say:

> What is worse is that the Board has taken a decision to sue the applicant for the sum of R166 million that was paid out as an undue overpayment from Transnet Regiments Capital. The Board is responsible for the said litigation and submitted that it cannot have the applicant as a Board member participating in decisions about the litigation against him. It is most undesirable for Transnet to have at the helm the man whom it is suing for R166 million. These are serious issues that this court cannot ignore, more so where the applicant has not filed a replying affidavit to dispute or challenge any of the averments made by the respondents.[49]

It was held that the applicant had not shown that there was a real possibility that an arbitrator would order his reinstatement and was therefore not entitled in the interim to be reinstated pending a disciplinary or arbitration hearing. In other words, specific performance in the form of reinstatement was not appropriate in the circumstances where there was a breakdown of the trust between an executive manager of a company and its Board. Rather, contractual damages or alternative remedies would be more appropriate in those circumstances.[50]

4 2 Interim Reinstatement as SARS Commissioner: *Moyane v Ramaphosa*

The applicant in *Moyane* was the Commissioner of the South African Revenue Services (SARS) appointed for a five-year period, from 29 September 2014 to 29 September 2019. He was however suspended with immediate effect via a letter issued by the President of the Republic on 19 March 2018 pending the institution of disciplinary proceedings against him. In the letter, the President pointed out a number of important considerations which he took into account in taking the decision to suspend Mr Moyane. Apart from the interests of the public in seeing that SARS is a vital aspect of "the Government's commitment to eradicate poverty, create jobs, build infrastructure necessary for the safety and health of the South African people"; it was

43 *Ibid* para 13.8.
44 *Ibid* para 14.
45 *Ibid* paras 29–30.
46 *Ibid* para 39.
47 *Ibid* paras 40 and 42.
48 *Gama* para 44.
49 *Ibid* para 45.
50 *Ibid* paras 46–47 and 51.

also stated: "Developments at SARS under his leadership, have resulted in a deterioration in public confidence in the institution, and in public finances being compromised. For the sake of the country, and the economy, this situation could not be allowed to continue, or worsen." In particular, "the President has lost confidence in his [Commissioner Moyane's] ability to lead SARS, as his obligation to be responsible for the performance of SARS and its functions impact on the public purse, and therefore the well-being of the nation as a whole. This is an exceptional circumstance that requires urgent and immediate action."[51]

Meanwhile, following the interim report of the SARS Commission appointed by the President which had recommended, *inter alia*, the removal of the applicant from office, the President invited the applicant to make representations as to why he should not be removed. Receiving no response from the applicant, the President delivered a letter notifying the applicant of his removal as Commissioner of SARS.[52] In opposing his application to be reinstated as Commissioner, albeit on suspension with full benefits, particular emphasis was placed on *Masetlha* while the applicant relied on the minority judgment of Ngcobo J[53] and later the judgment in *Albutt v Centre for the Study of Violence and Reconciliation*.[54] This was done to the effect that the President's executive power to dismiss the applicant was constrained not only by the principle of legality and rationality but also the requirement of procedural fairness.[55] Apart from merely relying on personal financial interests which conflated with the national interests,[56] the applicant, as the trial judge found, failed to demonstrate a *prima facie* right to an order reinstating him in the position as Commissioner of SARS, preventing the President from appointing a new Commissioner and preventing the Commission from handing down its final report. Instead, the applicant made bland and vague reliance on imaginary constitutional rights without any attempt to link them to the present matter.[57]

On the issue of the breakdown of the trust relationship which is of particular interest to this article, it was held that the primary relief sought by the applicant was reinstatement, although he had neither demonstrated nor could he demonstrate such a right. Reinstatement is a discretionary remedy in the law of employment which does not even apply to present case. But, assuming that the applicant was able to prove that his contract of employment was terminated unlawfully, an order of reinstatement would not automatically follow in instances where it is not only discretionary but also where a special relationship of trust exists between the employer and the employee. Such a special relationship of trust must exist between the President and the Commissioner of SARS. The President must implicitly trust the particular Commissioner that he will properly, conscientiously and lawfully carry out the functions assigned to the particular officer under section 9 of the South African Revenue Service Act.[58] Clearly, such a trust relationship had broken down irretrievably in the present case. This is illustrated by the fact that since the release of the interim report by former Judge Nugent as commissioned by the President, the applicant had openly and at various occasions attacked the integrity and dignity of the President to such an extent that it would be obvious to any reasonable observer that nothing like a trust relationship would have remained between the President and his appointee, the Commissioner of SARS.[59] As Fabricius J put it:

> It is clear that the applicant has no respect for either the institution of the Office of the President, nor the First Respondent personally. He has accused the President of abdicating his powers to administer. He alleged that the President violated his oath of office. He avers that the President had waged a co-ordinated assault on his constitutional right. He submits that all the President's actions were part of a 'pre-rehearsed script'. He says that the President was motivated by ulterior and improper motives. At the same time, however, as I have said, he has ignored the quagmire that SARS had sunken into under his leadership. He offers no explanation, gives no evidence, refuses to cooperate in any respectable and meaningful way,

51 *Moyane* para 1.
52 *Ibid* para 9.
53 *Masetlha* para 180.
54 2013 3 SA 293 (CC).
55 *Moyane* para 33.
56 *Ibid* para 33.
57 *Ibid* para 34.
58 Act 34 of 1997.
59 *Moyane* para 36.

and seeks to undermine and defame at every possible opportunity.[60]

In a summary, the court held that the applicant had failed to establish a *prima facie* right to set aside the third respondent's ruling of 2 July 2018, or the President's acceptance of the SARS Commission's recommendation since:

(a) the Commission was lawfully established and acted within its terms of reference;

(b) the interim report was lawfully issued;

(c) the President was empowered to remove the applicant in terms of section 6(1) of the SARS Act and did so lawfully and rationally;

(d) the applicant's employment contract with SARS provided no impediment to his removal from office by the President; and

(e) the applicant was afforded an opportunity to be heard by both the Commission and the President, which he spurned with disdain.

Furthermore, the applicant had alternative remedies. His narrow financial interest is by far outweighed by the national interest.[61]

4 3 Specific Performance in the Context of the Breakdown of Trust: *Moyo v Old Mutual*

Before the trial court in *Moyo v Old Mutual*,[62] the applicant had asked for reliefs, *inter alia*, temporary reinstatement in his position as Chief Executive Officer of Old Mutual and an interdict to restrain the first to seventeenth respondents from taking any steps towards appointing any person into the position of CEO of Old Mutual. The respondents contended that specific performance was not the most suitable in this situation especially because, if reinstated, the applicant and the Board will have to work together to advance the interests of the respondents. This contention, according to Mashile J, had no firm ground to stand on because if either party does not work to promote the interest of the respondents, it will be immediately obvious. That could lead to numerous forms of redress. In the case of the applicant, it might in fact lead to justifiable dismissal.[63] The conclusion that the respondents first accused the applicant of conflict of interest and misconduct and then denied him of the procedures laid down in the contract, specifically Clause 25, is unavoidable. Having done so, they then invoked Clause 24.1.1, which in reality had nothing to do with the situation that they faced with the applicant. The point is, Clause 24.1.1 was incorrectly applied and the dismissal cannot be justified on that ground. Both the suspension and subsequent dismissal were unlawful.[64] The court accordingly ordered that the applicant be temporarily reinstated in his position as CEO of the first respondent; and that the respondents were restrained from taking any steps towards appointing any person to the position of CEO of the first respondent.[65] In coming to the conclusion it did, the trial court found support for its construction of the provisions of the employment contract in *Somi v Old Mutual Holdings (Pty) Ltd*[66] and *Motale v The Citizen 1978 (Pty) Ltd*[67] and rejected the contention that it should follow *Gama*, the reason being that "the facts that led the court in the *Gama* matter to decide as it did are radically dissimilar from the present case."[68]

Not satisfied with the judgment of Mashile J in the court *a quo*, the appellants approached the full court of the High Court of the Gauteng Division, Johannesburg challenging the orders of the court *a quo* in *Old Mutual v Moyo*.[69] In a unanimous judgment delivered by Meyer J, it was held that bearing in mind the special relationship of trust and confidence that should exist between the chief executive of Old Mutual and its board, this is not a case where it has been demonstrated on the interdict application papers that Mr Moyo has a realistic prospect of obtaining specific performance (reinstatement) in due course. Specific performance is a primary and not a supplementary remedy in South African law.[70] It is an ordinary remedy which

60 *Ibid*.
61 *Ibid* para 42.
62 2019 ZAGPJHC 229 (30 July 2019) (*Moyo I*).
63 *Moyo I* para 65.
64 *Ibid* para 67.
65 *Ibid* para 68.
66 2015 36 *ILJ* 2370 (LC).
67 2017 ZALCJHB 22 (27 January 2017).
68 *Moyo I* para 47.
69 4 BLLR 401 (GJ) [full court of three Judges] (*Old Mutual II*).
70 *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C).

a plaintiff in a proper case is entitled to. The court will, as far as possible, give effect to a plaintiff's choice to claim specific performance but has the discretion in a fitting case to refuse and leave the plaintiff to claim damages. However, each case depends on its own facts and circumstances.[71]

The century-old law and practice in South Africa has been that specific performance as a remedy is not available at common-law to enforce a contract of employment.[72] The reason for this, which accords with what is obtainable in England,[73] was explained by Innes CJ in *Schierhout v Minister of Justice*[74] that, owing to the trust which imports a close relationship, no court could by its order compel an employee to work for an employer or to perform his duties faithfully and diligently for that employer.[75] The remedy for breach of the contract of employment has always been damages.[76] Meyer J then cited the examples of cases where orders for specific performance of contracts of employment will not normally be granted in the exercise of the court's discretion which include three of the cases discussed above: *Masetlha; Moyane* and *Gama.* The passage in the majority judgment in *Masetlha* was that of Moseneke DCJ where he said that "even if the contract of employment were terminated unlawfully, Mr Masetlha would not be entitled to reinstatement as a matter of contract. Reinstatement is a discretionary remedy in employment law which should not be awarded here because of the special relationship of trust that should exist between the head of the Agency and the President."[77] The passage referred to in *Moyane* is the paragraph where Fabricius J held that reinstatement cannot be ordered where the trust relationship has broken down irretrievably as in the present case.[78] While in *Gama,* Prinsloo J had held that "specific performance in the form of reinstatement is not appropriate where there is a breakdown of trust between an executive manager of a company and its board. Contractual damages or alternative remedies are more appropriate in those circumstances."[79]

Meyer J then held that Mr Moyo's position as Chief Executive of Old Mutual requires that a special relationship of trust and confidence exists between him, the chairperson and the board, that they are able to work together as an effective and integrated team, and that interpersonal compatibility forms an inherent requirement of his appointment as the chief executive. Although all these requirements were expressly stated in his contract of employment, no such requisite relationship of trust and confidence existed between Mr Moyo and the Old Mutual board at the time of hearing this application. This is notwithstanding who was to blame for the breakdown – the board, the chairperson or Mr Moyo.[80] There were acrimonious exchanges between the chairperson of the board and Mr Moyo with regard to the NMT issue which has generated litigation between them.[81] It was therefore held that Mr Moyo had failed to establish the first prerequisite for an interim interdict, that is, a *prima facie* right to reinstatement that requires protection pending the finalisation of the action in which he claimed reinstatement as a contractual remedy. The court *a quo* should have refrained from granting an interim interdict reinstating Mr Moyo in the position of Chief Executive of Old Mutual and restraining the latter from appointing any other person to that position.[82]

Even after the foregoing full court judgment, the applicant proceeded to launch another application in *Moyo v Old Mutual*[83] seeking to interdict the respondents from taking any further steps in the ongoing advertisement and/or recruitment process in respect of the position of Chief Executive Officer of Old Mutual. In other words, the application sought the reinstatement of the applicant as Chief Executive Officer of Old Mutual. Lamont J held that

71 *Old Mutual II* para 85. See also *Haynes v King Williams Town Municipality* 1951 2 SA 371 (A) at 378–379.
72 See Okpaluba "Specific Performance and Reinstatement in Swazi Labour Law: English or South African Approach?" 1999 *Anglo-American LR* 287.
73 See e.g. per Knight Bruce LJ *Johnson v Shrewsbury and Birmingham Railway Co.* 1853 43 ER 358 (CA). See also Okpaluba "Dismissal and Reinstatement in a West Indian Jurisdiction" 1974 *Anglo-American LR* 251 251–256.
74 1926 AD 99 107. See also Okpaluba 1974 *Anglo-American LR* 251 297–302.
75 See also *Gründling v Beyers* 1967 2 SA 146 (W) 146F-G; *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 4 SA 151 (T).
76 *Old Mutual II* para 86.
77 *Masetlha* para 88.
78 *Moyane* para 36.
79 *Gama* para 47.
80 *Old Mutual II* para 93.
81 *Old Mutual II* para 94.
82 *Old Mutual II* para 95.
83 2020 7 BLLR 739 (GJ) (*Moyo II*).

the ordinary remedies of contract are either reinstatement or full payment of benefits for the remaining period of the contract and relying on Moseneke DCJ in *Masetlha*[84] that the existence of an irretrievable breach of trust furnishes a good reason not to give effect to a request for reinstatement.[85] Once more, the court rejected Moyo's application on the same ground that it would not exercise the discretion which it has in favour of the applicant in circumstances where specific performance should not be granted by reason of breakdown of the trust relationship between the applicant and the respondent. In addition any order made at present will be of a short effective duration by reason of the fact that the full court has already decided the issue and the appeal court will shortly decide whether the full court decision was correct or not.[86]

4 3 Analogy with Interdicting a Suspension

In its first judgment of the decade, the Johannesburg Labour Court was confronted with an urgent application in *Matlala v Greater Tzaneen Local Municipality*[87] seeking an order declaring his suspension by the respondent/employer invalid and unlawful and that his suspension be uplifted with immediate effect and he be reinstated into his normal duties with the respondent. Surprisingly, the matter did not involve unfairness or unfair labour practice or any other provision of the LRA. The case of the applicant was based on whether his suspension was lawful under the Local Government: Disciplinary Regulations for Senior Managers (the Municipal Regulations)[88] made in terms of the Local Government: Municipal Systems Act.[89] Like in the other instances where final relief was sought in the form of an interdict, the applicant must show that: a clear right of his existed; an injury was actually committed or apprehended; and that there was no satisfactory alternative remedy of which he could avail himself.[90] Snyman AJ held that it is trite that the LC has jurisdiction under section 158 of the LRA, to entertain an application for urgent intervention in the case of suspension of an employee but, as it has been observed earlier in the discussion regarding urgent declaratory relief and interdicting a disciplinary inquiry, such intervention must be done only in exceptional circumstances. That is to say, that the applicant must show compelling and extraordinary circumstances as to why the court should intervene and not allow the disciplinary process against him or her to run its course.[91] The short duration and purpose of the suspension under Regulation 6 may well constitute compelling and extraordinary circumstances especially where there is no material non-compliance with the regulations.[92]

Accepting the urgent nature of the matter, Snyman AJ took into account the fact that the applicant was suspended as Municipal Manager on 12 November 2012, he first engaged the respondent through his attorney on 14 November 2012, demanding that the suspension be lifted, and when no response was forthcoming he brought the present application on 19 November 2012.[93] If Regulation 6 and the actual terms of the applicant's contract of employment were not complied with by the respondent in effecting the suspension of the applicant, the suspension would be unlawful and the applicant would succeed in demonstrating the existence of a clear right.[94] In answering the question whether there was any compliance depends on when Regulation 6 could be complied with is an event that could only happen if the employer had reasonable belief in the existence of serious misconduct. Such a belief requires proof of a *prima facie* evidence and not actual proof or detailed specificity.[95] Regulation 6 also stipulates that senior managers concerned must be given the opportunity to make representations and must receive proper notice of intention to suspend. The notice must describe the misconduct

84 *Masetlha* para 88.
85 *Moyo II* para 24.
86 *Moyo II* para 32.
87 2020 ZALCJHB 2 (3 January 2020) (*Matlala*).
88 GN 344 of GG 34213 of 21 April 2011.
89 Act 32 of 2000.
90 *Matlala* para 3. See also *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 1 SA 252 (SCA) para 20.
91 *Mere v Tswaing Local Municipality* 2015 36 *ILJ* 3094 (LC) para 18 (*Mere*). See also Maloka "Interdicting an In-house Disciplinary Enquiry with Reference to *Rabie v Department of Trade and Industry* 2018 ZALCJHB 78" 2019 *JJS* 10; Maloka and Peach "Is an Agreement to Refer a Matter to an Inquiry by an Arbitrator in Terms of Section 188A of the LRA a Straightjacket?" 2016 *De Jure* 368.
92 *Matlala* para 21.
93 *Matlala* para 22.
94 *Ibid* para 23. See also *Mere* para 18; *Biyase v Sisonke District Municipality* 2012 33 *ILJ* 589 (LC) para 20 (*Biyase*).
95 *Ibid* para 24. See also *Mothogoane v Lepelle-Nkumpi Local Municipality* 2019 40 *ILJ* 1072 (LC) para 22.

the manager allegedly committed; the council's justification for its in-principle decision; and invite representations in relation to both.[96] The nature of the misconduct and the purpose of the proposed suspension must be clearly set out so as to enable the manager in question to make meaningful representations.[97] The reason given for the applicant's suspension of 12 November 2019 refers to the allegations of misconduct in the notice of 23 October 2019 which did not set out any allegations of misconduct on the part of the applicant. So, the failure to set out the misconduct for which the applicant was suspended and failure to indicate why the suspension was necessary, were at odds with what was contemplated in Regulation 6.[98] For these reasons there has been a material failure on the part of the respondent to comply with the prescripts of Regulation 6, hence the suspension of the applicant was unlawful.[99] Further, the applicant could not have resorted to the LRA or its arbitration institution as his application for the unlawfulness of his suspension had nothing to do with the LRA, to that extent, the applicant had no alternative remedy to fall back on.[100] Finally, the consideration of the prejudice issue favoured the applicant. Surely, he would be prejudiced in the discharge of his functions if he be excluded from the workplace without cause or reason. As Snyman AJ captured it:

> The longer this suspension endures, the more difficult it will be for a person fulfilling the kind of functions of the applicant to properly and effectively resume work. The situation is exacerbated by the fact that the respondent's council immediately appointed a new acting municipal manager. The simple reality also is, and as matters stand, there is no indication of what the applicant has even done wrong, and on a *prima facie* basis, at the very least, he appears to have been doing a proper job until the suspension landed. It is in the interest of the public and the statutory functions the applicant is meant to discharge under the Systems Act that the applicant's suspension be lifted.[101]

It was held that nothing prevents the respondent from subsequently suspending the applicant in the future insofar as it complies with the prescripts of Regulation 6 by: formulating the misconduct the applicant allegedly committed on a *prima facie* basis; indicating what reasons as contemplated by Regulation 6(1) would necessitate the suspension; and by calling upon the applicant to make representations as to why he should not be suspended. The applicant had, in the present circumstances, met the requirements necessary to obtain the order sought in this case hence the suspension must be lifted and he be allowed to resume his duties without further delay.[102]

5 INTOLERABILITY OF THE EMPLOYMENT RELATIONSHIP[103]

Intolerability is a term encountered in different aspects of the contemporary law of unfair dismissal in South Africa. For instance, in dealing with incompatibility as a ground for dismissal as could be seen through the lens of *Watson v SARU*,[104] intolerability crops up. Thus, it may be difficult for the employment relationship to thrive where the breakdown of trust meets with incompatibility of the employee in the workplace, with the ultimate solution for the employer being to dismiss the employee in question. Even in the absence of incompatibility, a breakdown of the trust and confidence between the employer and the employee would ordinarily make continued employment intolerable such that an application for an order of reinstatement may not be granted as borne out by the cases of *Masetlha*; *Gama*; *Moyane* and *Moyo*. In similar vein, a perusal of the case law dealing with breakdown of the employment relationship in the context of constructive dismissal brings to mind the conduct of the employer causing the intolerability in the workplace that prompted the employee to resign and claim constructive dismissal. The present study is not too dissimilar to the *Masetlha*-type of case except that, in those cases, the disciplinary process either did not take place as in *Masetlha* itself; or that such process had just begun as in the other three cases where the applicants

96 *Mere* para 37; *Mojaki v Ngaka Modiri Molema District Municipality* 2015 36 *ILJ* 1331 (LC) para 29.
97 *Matlala* para 25. See also *Lebu v Maquaasi Hills Local Municipality (2)* 2012 33 *ILJ* 653 (LC) para 16 (*Lebu*); *Mere* paras 35–42.
98 *Matlala* paras 31–33.
99 *Idem* para 35. See the *Lebu* para 17.
100 *Ibid* para 36. See also *Gallocher v Social Housing Regulatory Authority* 2019 40 *ILJ* 598 (LC) para 81; *Biyase* para 30.
101 *Matlala* para 37.
102 *Ibid* paras 38–39.
103 Rycroft "The Intolerable Relationship" 2012 *ILJ* 2271.
104 2017 ZALCJHB 264 (30 June 2017).

pursued their matters on the basis of the judicial review principles of legality and rationality and not the arbitration process of the LRA. Whereas, in the cases earmarked for this article, the dismissals have been found to be unfair through the arbitration process and the concern of the courts turn on whether the primary remedy of reinstatement under section 193(1)*(a)* was the appropriate remedy; and/or whether section 193(2)*(b)* of the LRA would apply to prevent that remedy from being ordered in the particular case. As much as the conduct of the employee is a factor common to all the cases in the two groups, neither *Masetlha* nor any of the other three cases involved, was decided on the basis of the provisions of section 193(1)*(a)* and 193(2)*(b)* of the LRA as the cases discussed in the present context. It logically follows that the question which was posed by Moshoana J in *Mosiane v CCMA*[105] as to the true meaning of section 193(2)*(b)* of the LRA is apt and thus opens this discussion. Also discussed are instances where reinstatement was considered but intolerability arising from the conduct of the employee that led to the dismissal; conduct at the disciplinary proceeding stage; or post dismissal conduct appeared to stand on the way of such an order.

6 WHAT IS THE MEANING OF THE EXCEPTION IN SECTION (193)(2)*(b)*?

Moshoana J rightly posed the question in *Mosiane v CCMA* thus: "What is the meaning of the exception in section 193(2)*(b)*?" In answering that question, Moshoana J held that since the section makes reference to the circumstances surrounding the dismissal, it then follows that it is those circumstances that should make continuation of employment intolerable. In other words, it would mean "circumstances confined to the dismissal itself" since "anything not connected to the dismissal should not be a factor."[106]

The judge found support in an earlier LC case of *New Clicks SA (Pty) Ltd v CCMA*[107] where it was held, *inter alia*, that if section 193(2)*(b)* were to be interpreted to mean that because at one point, the employer had a strong suspicion that an employee was guilty of misconduct, then, such must render continued employment intolerable. If that being the case, the primary remedy which is reinstatement will never avail an employee dismissed for misconduct. On the contrary, the court held that "the section must be interpreted to mean that evidence need to be led to substantiate the fact that continued employment would be intolerable. Such may include but not limited to evidence of a fallout between the dismissed employee which is caused by a factor independent of the allegations of misconduct or closely connected to the misconduct alleged."[108] The court further warned that the Commissioner should sparingly and after careful consideration of all the circumstances invoke the provisions of section 193(2)*(b)* to deny the primary remedy of reinstatement.[109] In the final analysis, there must be convincing evidence or what the LAC has described as "extraordinary reason" to deviate from granting the relief stipulated in section 193(1)*(a)* or *(b)*;[110] or to enable the Commissioner to arrive at a contrary conclusion for, "to deny the individual employee job security albeit with capped compensation, offends the very basic principle upon which the right to labour practice is founded."[111]

The employee in *Department of Finance and Economic Development, Gauteng v Mosome*[112] was charged with insubordination by a departmental disciplinary enquiry for "displaying gross insubordinate behaviour towards [her supervisor] by using unacceptable language that demonstrated disrespect by saying to her supervisor that she must be stupid, she must stop calling her at home, (when she was contacted while she was supposed to be on duty), also telling her supervisor [she] does not deserve the post she holds."[113] The arbitrator found that her dismissal was substantially unfair but would not order reinstatement because the employment relationship between her and the employers had irretrievably broken down with no prospects of reconciliation. The arbitrator therefore awarded her seven months' pay as compensation.

105 2019 ZALCJHB 164 (27 June 2019) (*Mosiane*).
106 *Mosiane* para 19.
107 2008 29 *ILJ* 1972 (LC) paras 8–13, 15, 17 and 19 (*New Clicks SA*).
108 *New Clicks SA* para 11.
109 *Ibid* para 15.
110 *Afgen (Pty) Ltd v Ziqubu* 2019 40 *ILJ* 2276 (LAC) para 25.
111 *New Clicks SA* paras 17, 19 and 21.
112 2014 ZALAC 46 (19 September 2014) (*Mosome*).
113 *Mosome* para 6.

The Labour Court set aside the award, remitted the matter to allow further evidence as to why the dismissed employee should or should not be reinstated in accordance with section 193(2) of the LRA. The second arbitrator appreciated that the only issue before her was to determine whether the employee after having been found guilty of insubordination by the first arbitrator was unfairly dismissed or whether she ought to have been reinstated or re-employed in terms of section 193(2) of the LRA. Further, the second arbitrator appreciated that in terms of section 193(2)*(b)* of the Act, an exception to the primary remedy of reinstatement or re-employment in the case of a dismissal provided, where pursuant to section 193(2)*(b)* "the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable."[114] Having applied her mind to the totality of the evidence, the second arbitrator found that the appellant had conclusively established that the employment relationship between the parties had irretrievably broken down to such an extent that the employment relationship could not be resuscitated hence a continued employment relationship would be intolerable.[115] The LAC upheld the second arbitrator's finding that the derogatory, insulting, contemptuous and disrespectful conduct on the part of the employee towards her supervisor struck the core of the employment relationship such that reinstatement of the first respondent would be intolerable because the employment relationship had irretrievably broken down, not only with her supervisor, but also the Head of her Department.[116] Since the employee's insubordination "affected the heart of the employment relationship", the second arbitrator rationally and properly exercised her discretion under section 193(2) not to reinstate but to compensate the employee.[117]

Ordinarily, the LAC would have considered reinstatement in *FNB v Language* where a 34-years long-service employee with an unblemished record who, in frustration of lack of action by the employer, took the path of self-help and reversed the charge of R63.00 from his personal account with the bank. But, as Davis JA held, the difficulty with regard to appropriateness of an order of reinstatement was that the unfairly dismissed employee "displayed an extraordinary, vexatious, and ill-tempered attitude towards appellants and its staff during the course of the proceedings. Personally and through his legal representative, he accused appellant of falsifying documentation, stealing his money, a deliberate concealment of facts and documents, of lying of 'people who are scrupulous' and of lacking *bona fides*."[118] Although he said he was "livid" but at no stage did he show any remorse, explained his frustration or sought reconciliation with the employer. An employee's misconduct following dismissal is relevant in determining reinstatement.[119] Had he acted in a fashion which exhibited some form of reflection and remorse, a decision to issue a final written warning and hence to reinstate, on whatever conditions might have appeared appropriate, could then have been a suitable option. In the present circumstances, reinstatement is not a viable option because the trust between the parties would have been jeopardised by the acrimonious conduct of the employee. What is left for this unfairly dismissed employee in terms of section 193(1) of the LRA is compensation. Accordingly, Davis JA held that given the nature of the offence and the employee's unblemished record, but taking into account the fundamental break in trust, the preferred approach at the disciplinary proceedings would have been to have found him guilty as charged and to order the employer to pay compensation in the amount of 12 months' salary.

6 1 *Ngcobo v SAPS*

At the stage when the arbitrator or the Labour Court comes to deliberate upon whether it would be intolerable to continue to work with the dismissed employee, it should be borne in mind that the employee's dismissal would have been adjudged to be substantively unfair. At this stage, the employer's case would not be to justify the fairness of the dismissal since that opportunity had come and gone, the responsibility of the employer must be to show why the remedy of reinstatement would not be an appropriate remedy because of the intolerability of the dismissed employee at the workplace. The question is: "has there been conduct, without reasonable cause, which is calculated or likely to destroy or seriously damage the relationship

114 *Ibid* para 9.
115 *Mosome* paras 23–24.
116 *Ibid* paras 25–29.
117 *Ibid* paras 33–34.
118 *FNB v Language* [2013] ZALAC 23; (2013) 34 *ILJ* 3103 (LAC) (1 January 2013) paras 28–31.
119 *Zilwa*.

of confidence and trust between employer and employee?."[120] It is in this light that the award made by the arbitrator in *Ngcobo v SAPS*[121] should be approached. The arbitrator had found that the employee was unfairly dismissed and the question that arose was whether there was sufficient evidence placed before the arbitrator in arriving at the decision not to require the employer to reinstate the employee.[122] According to the arbitrator: the applicant's failure to cross-examine the respondent's witnesses when they testified at the applicant's disciplinary enquiry; and his failure to state a case in response to the allegations levelled against him at the disciplinary enquiry has consequences. Added to these, the applicant's failure to participate properly in the disciplinary enquiry had rendered continuing employment intolerable and for that reason reinstatement would not be awarded and compensation would also be limited.[123] However, the critical ruling of the arbitrator on breakdown of the trust relationship in this case as quoted in the LC judgment is to the effect that:

> Trust is one that builds relations between the employer and the employee. The employee has been given a task to perform, duties by the employer and therefore, the employer, there is no way in any manner that he must perform his duties with diligence, commitment and must refrain from doing any misconduct that will damage the relationship. In this regard, the misconduct that was committed by the employee damaged the relationship between the employer and the employee.[124]

Harkoo AJ held that the second respondent's reliance on the evidence of Lieutenant-Colonel Malenga, who was chairperson of the disciplinary enquiry, and who gave evidence that the trust relationship between the employer and the employee had broken down, was misconceived. Further, to punish the employee, who was not found guilty of misconduct, with the ultimate dismissal, for his failure to cross-examine the respondent's witnesses when they testified at the disciplinary enquiry, or to state his case in response to the allegations levelled against him at the disciplinary enquiry or his failure to participate properly in the disciplinary enquiry, was grossly unfair.[125] The court held that given the circumstances of the case, the second respondent arrived at a decision that a reasonable decision maker could not reach and that the competent relief is that of reinstatement.[126] After citing per Nkabinde J in *Equity Aviation Services (Pty) Ltd v CCMA*[127] with respect to the meaning of the word 'reinstate' and the extent to which such an order would have a retrospective effect, Harkoo AJ held that the applicant in *Ngcobo v SAPS* was entitled to reinstatement retrospectively from the date of dismissal on 14 April 2012 on the same terms and conditions that prevailed prior to the dismissal.[128]

6 2 *SAMWU v Ethekwini Municipality*

It was argued in *SAMWU v Ethekwini Municipality*,[129] that the Commissioner wrongly concluded that a reinstatement order was not appropriate because, as found by him, the dismissal of the applicant was substantially unfair on the basis of inconsistency in the application of discipline. Further, that there was no evidence before the Commissioner to justify his finding that the misconduct of the applicant amounted to gross insubordination. The court held that inconsistency is not a rule unto itself. It is not a separate principle determinative of the fairness of a dismissal. Consistency is simply an element of disciplinary fairness. The finding that the respondent applied discipline inconsistently does not render irrelevant factors justifying exception to reinstatement as listed in section 193(2) of the LRA. In this case, the question was whether the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable. In any event, there was abundant evidence of failure to comply with lawful instructions tendered before the Commissioner to have enabled him rightly to come to the conclusion that reinstatement was not appropriate and would not have been

120 Rycroft 2012 *ILJ* 2287.
121 2015 ZALCD 27 (21 May 2015) paras 69–70 (*Ngcobo*).
122 *Ngcobo* paras 70–71.
123 *Ibid* para 76.
124 *Ibid* para 77.
125 *Ngcobo* para 78. See also *Edcon Ltd* para 21.
126 *Ibid* paras 81–82.
127 *Equity Aviation* para 36.
128 *Ngcobo* paras 85–86.
129 2016 ZALCD 6 (8 April 2016) paras 6–8 (*SAMWU*).

fair to the respondent.[130]

6 3 Elements of Dishonesty on the Part of a Driver

There is no doubt that the employees involved in the discussion above are all chief executive officers and very senior employees in their respective departments but it will be wrong to form the impression that it is only senior employees that are bound by the rules relating to trust and confidence and whose employment would be affected by a subsequent breakdown of the employment relationship. In order to remove that misapprehension reference should be made to the LAC judgment in *Autozone v Dispute Resolution Centre of Motor Industry*[131] where the employee involved was a driver in an enterprise who was dismissed for dishonest conduct by deliberately misrepresenting the amount to be paid to the casual workers under his charge. The critical issue to decide was whether the trust relationship had in fact broken down,[132] and whether the employee's conduct breached the trust relationship so as to render the continuation of the employment relationship intolerable.[133] Although the Labour Court had found that the evidence as a whole did not establish on the probabilities that the employee deliberately and falsely misrepresented the amount to be paid to the casual workers; it ordered the driver's reinstatement and that he should be issued a written warning, thus admitting inadvertently, that an offence was committed.[134]

The Labour Appeal Court did not think that the decision of the court below was a reasonable conclusion which an arbitrator should reach in the circumstances. Its decision could be summarised as follows: first, the idea that the driver was holding back the R30 until the job was completed was inherently improbable for, if the job was indeed incomplete, it was likely that he would have held back the entire amount until the job was finished. Second, as a driver, the employee had no authority to determine the amount of payment. Third, the evidence as a whole establishes on the probabilities that the driver deliberately and falsely represented to Mashego that the amount to be paid to the casual workers was R180 instead of R150 and that he intended to pocket the difference for his own benefit.[135] Fourth, an employer relying on irreparable damage to the employment relationship to justify a dismissal would be prudent to lead evidence to that effect, unless the conclusion that the relationship had broken down was apparent from the nature of the offence and the circumstances of the dismissal.[136] Fifth, where the offence in question reveals a stratagem of dishonesty or deceit, it can be accepted that the employer probably would lose trust in the employee, who by reason of the conduct alone would have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the relationship intolerable or unfeasible. Sixth, dishonest conduct, deceitfully and consciously engaged in against the interests of the employer, inevitably poses an operational difficulty. Thereafter, the employer would be hard pressed to place trust in such an employee. It would be difficult for such a deceitful employee to be entrusted with any task involving a measure of discretion or reliance in the future. The operational requirements of the employer alone may justify his dismissal. An employer is therefore entitled to have a driver it can rely on to act in good faith to advance and protect the employer's interests. Seventh, the conduct of the driver in this case, shows that he was not such a driver upon who the employer can repose such trust so that it was not necessary for the employer to produce evidence in such circumstances to show that the employment relationship had been irreparably destroyed.[137] Finally, the nature of the offence and the manner of its commission support a conclusion that the continuation of the employment relationship had become intolerable hence the employer could not reasonably be expected to retain this driver in its employ.[138]

130 *SAMWU* para 9–13.
131 2019 40 *ILJ* 1501 (LAC) (*Autozone*). See also Tshoose and Letseku "Breakdown of the Trust Relationship between Employer and Employee as a Ground of Dismissal: Interpreting the Labour Appeal Court's Decision in *Autozone*' 2020 *SA Merc LJ* 156.
132 *Autozone* para 9.
133 *Ibid* para 11.
134 *Ibid* para 7.
135 *Ibid* para 10.
136 *Autozone* para 12, citing, Grogan *Dismissal* (2012) 164–165.
137 *Ibid* para 13. See also *Department of Home Affairs v Ndlovu* 2014 ZALAC 112 (27 March 2014); *Quest Flexible Staffing Solutions (Pty) Ltd v Legobate* 2015 36 *ILJ* 968 (LAC); *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO* 2017 38 *ILJ* 881 (LAC). See also Grogan 2014 *EL* 13.
138 *Ibid*.

6 4 Employee Dismissed for Instituting Defamation Action

The applicant/employee in *Jonas v CCMA*[139] had alleged that although his dismissal was found to be substantively and procedurally unfair, the arbitrator committed a reviewable irregularity in not ordering his reinstatement and only awarded him ten months' remuneration as compensation. The applicant had been dismissed principally as a result of grievances lodged by his subordinates for his alleged disrespect, abusive and insolent behaviour towards some of them. What also stood was that the applicant improperly and disgracefully shouted at some of them in front of clients or members of the public. He had also been charged for prejudicing the administration, discipline and efficiency of the agency, in that he intimidated and victimised employees under his supervision. However, the arbitrator found that the evidence rather than leading to finding in favour of those alleging these acts of misconduct created an overwhelming impression "that there are a few dishonest employees who are trying to paint the applicant in a bad light."[140]

However, the main issue in this case was whether the arbitrator properly considered the issue of appropriate relief by not reinstating the applicant. The arbitrator needed sufficient reasons to justifying not awarding the applicant the primary remedy having found the dismissal to be substantively unfair. Although the arbitrator's reference to section 193(2)*(b)* was misplaced for whereas all indications are that intolerability not impracticability was in point.[141] Lagrange J accepted the applicant's submission that in determining whether reinstatement would be appropriate, the mere fact that some of the applicant's subordinates had testified that they did not want to work with him, particularly where the subordinates had been found to have made false complaints against him would not be a valid consideration. The nitty-gritty of the matter being whether the arbitrator could reasonably have concluded that the employment between the applicant and the employer had broken down because of the defamation action the applicant had instituted against his subordinates.[142] The judge rejected the argument that it is not necessarily a requirement that the reason for reinstatement being intolerable needs to emanate from the same events which gave rise to the disciplinary enquiry. In the judge's opinion: "where the essentially on other factors which might have warranted other disciplinary action, an arbitrator should be wary of falling into the trap of refusing the primary remedy of reinstatement because there might have been other grounds for disciplining the employee which could ultimately have led to his dismissal."[143] Reinstatement was therefore the proper remedy because the employer failed to show any tangible evidence that the conduct of the applicant had rendered the employment relationship intolerable. The court reiterated the warning previously advanced by the LAC in *DHL Supply Chain (Pty) Ltd v De Beer NO*[144] that sight should not be lost of the fact that reinstatement is the primary and default remedy unless displaced by factors that serve to outweigh its underlying rationale which is intolerability or impracticability and that those factors set very high thresholds. In conclusion, Lagrange J was not satisfied that the arbitrator considered the question in "the clinically objective manner" required in deciding such issues. In the final analysis, an order that the applicant be reinstated with retrospective effect to the date of his dismissal on 20 May 2013, was made in this case.[145]

TO BE CONTINUED

139 2017 38 *ILJ* 376 (LC) (*Jonas*).
140 *Jonas* para 4.
141 *Ibid* paras 5–6.
142 *Ibid* para 9.
143 *Ibid* para 10.
144 2014 35 *ILJ* 2379 (LAC) para 21 (*DHL Supply Chain*).
145 *Jonas* para 12–13.