



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1416/2024

In the matter between:

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA

FIRST APPELLANT

THE MEMBERS LISTED

IN ANNEXURE 'X1'

FURTHER APPELLANTS

and

SCAW SOUTH AFRICA (PTY) LTD

RESPONDENT

Neutral citation: *NUMSA and Others v SCAW South Africa (Pty) Ltd*
(1416/2024) [2026] ZASCA 126 (29 September 2026)

Coram: MEYER and GOOSEN JJA and MJALI, MOLITSOANE and
DIPPENAAR AJJA

Heard: 5 May 2026

Delivered: 29 September 2026.

Summary: Claim for payment of severance pay due in terms of the contract of employment – application of s 41 of the Basic Conditions of Employment Act – whether employer may rely on the defence in terms of s 41(4)

– whether offer of alternative employment unreasonable – effect of order dismissing claims.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Windell J sitting as court of first instance) *sub nom National Union of Metal Workers of South Africa and Others v SCAW South Africa (Pty) Ltd* [2023] 8 BLLR 852 (GJ), (2023) 44 ILJ 1807 (GJ):

- 1 The appeal succeeds in part.
- 2 The order of the high court is set aside and replaced with the following:
 - ‘a No order is made on the application.
 - b The applicants are ordered to pay the respondent’s costs, jointly and severally, the one paying the other to be absolved.’
- 3 The appellants are ordered to pay the costs of the appeal, such costs to include the costs of two counsel.

JUDGMENT

Goosen JA (Meyer JA and Mjali, Molitsoane and Dippenaar AJJA concurring):

[1] The appeal is against an order of the Gauteng Division of the High Court, Johannesburg (the high court), dismissing the appellants’ claims for severance pay upon retrenchment. The appeal is with the leave of the high court. The first appellant is the National Union of Metalworkers of South Africa (NUMSA), a registered trade union. It acts as a representative trade union on behalf of its members, the further appellants. The further appellants were all employees of SCAW Metals South Africa (Pty) Ltd (SCAW), a manufacturer of steel products.

The facts

[2] SCAW has traded as a steel manufacturer for many years. Its operations comprised four divisions: cast products, grinding media products, wire rod products, and rolled products. Between 2016 and 2018, SCAW underwent a corporate restructuring. Its rolled products and wire rod products divisions were purchased in a merger involving an entity named Barnes Southern Palace. The Competition Commission approved this in February 2018. SCAW corporatised its two remaining divisions. This process resulted in SCAW issuing letters of appointment to its employees in each corporate division. These conditions of employment were on terms no less favourable than applied prior to the restructuring.

[3] On 8 October 2019, SCAW gave notice to its employees and respective unions, including NUMSA, that it was considering closing the wire rod corporate division. It invited participation in a consultation process regulated by s 189A of the Labour Relations Act 66 of 1995 (the LRA). Both parties agreed that, during this process, they had presented and considered several proposals.

[4] On 10 December 2019, SCAW presented an offer to its employees and NUMSA for, as an alternative to retrenchment, employment subject to the following conditions:

- a. That 58 employees be retrenched;
- b. That employees accept a 13% reduction in wages to be implemented in two phases – 6.5% on 1 March and 6.5% on 1 October 2020;
- c. That there be a wage freeze from 1 July 2020 to 30 June 2021;
- d. That a wage increase of 3 % be implemented for the period 1 July 2021 to 30 June 2022; and

- e. That a 5 % wage increase be implemented for the period 1 July 2022 to 30 June 2023.

[5] NUMSA and the employees it represented rejected SCAW's offer. On 13 December 2019, SCAW issued retrenchment notices to the further appellants, all of whom were employed in the wire rod corporate division. In its termination letter, SCAW stated that '[i]n light of your unreasonable refusal to accept an alternative offer of employment. . . you are not entitled to, and will not be paid any severance payment.'

[6] On 26 February 2020, NUMSA referred a dispute to the Metal and Engineering Industries Bargaining Council (MEIBC) under s 41(6) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA). This referral was subsequently withdrawn.

In the high court

[7] On 5 November 2020, NUMSA¹ and the further appellants launched an application in the high court declaring that SCAW had breached the further appellants' terms and conditions of employment by failing, upon their dismissal, to pay them severance pay as provided in their contracts of employment. They alleged a breach of the agreement and sought an order directing SCAW to pay the amounts due.² In the alternative, they sought an order of specific performance

¹ It is not immediately apparent why NUMSA entered the fray as the first applicant. The claim is clearly based upon the terms of the contract of employment between SCAW and the further applicants. The relief pertains only to such contractual relief as may be available to the further applicants. While the further applicants were (or are) all members of NUMSA and were represented by NUMSA in their negotiations and interactions with SCAW prior to their dismissal for operational reasons, NUMSA has no legal interest in the relief to which the further applicants might be entitled. Its interest would not accord it *locus standi* in relation to the contractual claim which the further applicants pursued. No declaratory relief relating to the interpretation of relevant legislation was sought. Nothing, however, was made of this anomaly, either in the high court or before this Court.

² The amounts claimed were set out in a schedule to the notice of motion.

to the same effect. In addition, they claimed interest on the amounts claimed, payable from 13 December 2019, the date of their dismissal.

[8] The further appellants' claims were premised on their employment contracts. It was common cause that each of the appellants had, during the initial restructuring of SCAW, been issued with letters of appointment which included the following provision:

‘15. SEVERANCE PAY

It has been the practice, precedent and policy of SCAW to pay severance pay on the following basis:

- Two weeks per completed year of service and pro-rated uncompleted years of service. Both weeks are calculated on Cost to Company (includes company contributions);
- One month's notice based on Cost to Company;
- Ex gratia payment based on the Basic Employment Cost (BEC). The ex gratia payment is based on:
 - 0 – 5 completed years = no payment
 - 6 – 10 completed years = 1 week
 - 11 – 15 completed years = 2 weeks
 - 16 years and above = 3 weeks'

[9] The appellants asserted that the high court had inherent jurisdiction to hear the matter, as confirmed by s 77(3) of the LRA. They further alleged that SCAW's reliance on s 41(4) of the BCEA was misplaced because s 41 was irrelevant given the contractual nature of the claim, and because the further appellants were not claiming payment of the minimum prescribed severance pay under s 41(2) of the BCEA. They asserted that the contracts of employment did not permit SCAW to withhold payment of the agreed severance and ex gratia payments due to the further appellants.

[10] SCAW's defence, as might be expected from the correspondence before the application commenced, was that it offered the further appellants alternative

employment, which they unreasonably rejected. The appellants were therefore, in terms of s 41(4) of the BCEA, not entitled to severance pay under s 41(2) of the BCEA.

[11] SCAW contended that clause 15 of the letter of appointment provides only for payment of the specified amount, including the ex-gratia payment, in excess of the minimum prescribed by s 41(2) of the BCEA. It does not exclude the operation of s 41(4) of the BCEA, in light of s 5 of the BCEA, which provides that the BCEA takes precedence over any agreement concluded between an employer and employee.

[12] SCAW further contended that determining the reasonableness of the employees' refusal to accept an offer of alternative employment falls within the jurisdiction of the MEIBC and the Labour Court. The dispute ought therefore to have been referred to the MEIBC. SCAW further stated that the dispute could not, in any event, be resolved without reference to oral evidence. It could not occur, so they asserted, in motion proceedings where final relief is sought.

[13] NUMSA and the further appellants, in reply, reasserted the contention that s 41 of the BCEA was irrelevant. The appellants did not rely on any alternative if s 41 was held to apply. They accordingly did not address the reasonableness of their rejection of the offer in their papers.

[14] The high court, as already stated, dismissed the appellants' claims. It identified three questions to answer. The first was whether it had the necessary jurisdiction to entertain the claims. It answered this question in the affirmative, on the basis that the claims were contractual. The second was whether SCAW had a defence under s 41(4) of the BCEA. The high court held that the section applied. The third question was whether the high court could determine the

further appellants' entitlement to severance packages. The high court addressed this issue in the context of the contention by SCAW that s 41(6) required referral of the dispute to the MEIBC. It found that s 41(6) of the BCEA provided a specialist dispute-resolution mechanism for determining entitlement to severance packages. The appellants had to use that dispute mechanism. On this basis, the case was dismissed.

The issues

[15] Both parties accepted that a single overarching issue arises in this appeal. It is whether a claim for severance pay founded on a term of an employment contract falls outside the provisions of s 41 of the BCEA. This requires consideration of specific questions.

[16] The first is whether a claim for severance pay, which by agreement exceeds the minimum amount payable for severance as provided in s 41(2) of the BCEA, is to be regarded as a claim 'in terms of subsection (2)' for purposes of s 41(4) of the BCEA. If the answer to this question is no, then in relation to such claim, forfeiture for unreasonable refusal to accept an alternative offer of employment does not arise. The further appellants would, on this basis, be entitled to payment of the amounts that SCAW contractually undertook to pay upon dismissal for operational reasons.

[17] If the answer is affirmative, then an employer may rely on s 41(4) to avoid the obligation to pay severance. In this event, the further question arises whether the high court has jurisdiction to determine a dispute regarding entitlement to severance pay arising from the application of s 41(4) of the BCEA.

[18] A third aspect flows from this. If it is held that s 41(6) of the BCEA does not preclude the high court from resolving the entitlement dispute in proceedings

properly before it, then what determination, on the facts of this case, ought to have been made?

The high court's jurisdiction

[19] Although the high court was required to consider this aspect and decided that it did have jurisdiction, the issue was not pursued before this Court. I touch upon it because it will be relevant to the third issue that arises.

[20] Sections 73A read with s77 of the BCEA are dispositive of the jurisdiction issue. Section 73A provides, in relevant part, that:

‘(1) Despite section 77, any employee or worker as defined in section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination or a collective agreement.

(2) Subsection (1) does not apply to employees or workers earning in excess of the threshold prescribed by the Minister in terms of section 6 (3).

(3) An employee or worker, other than the employee or worker referred to in subsection (1), may institute a claim concerning the failure to pay any amount contemplated in subsection (1) in either the Labour Court, the High Court or, subject to their jurisdiction, the Magistrates’ Court or the small claims court.’

[21] Section 77 in turn provides that:

‘(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.

(1A) The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of sections 33A, 43, 44, 46, 48, 90 and 92.

(2) The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or omission of any person in terms of this Act on any grounds that are permissible in law.

(3) 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.

(4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.’

[22] The effect of these provisions is the following:

1. Any employee or a worker who earns below the threshold provided by the National Minimum Wage Act is entitled to refer a dispute regarding payment of the amount due to the CCMA;
2. An employee or worker who does not so refer a dispute is entitled to pursue a claim for payment of a disputed amount in either the Labour Court, High Court or Magistrate’s Court or Small Claims Court. The latter dependant upon their monetary jurisdiction;
3. The Labour Court and High Court have concurrent jurisdiction to adjudicate any matter concerning a contract of employment, irrespective whether that contract incorporates a basic condition of employment provided by the BCEA; and
4. The exclusive jurisdiction of the Labour Court to determine matters concerned with the BCEA does not preclude a party in civil proceedings or in an arbitration from relying upon a provision of the BCEA.

[23] These provisions therefore make it plain that the high court had jurisdiction to adjudicate the appellants’ claims based on the terms of their contracts of employment. It is also clear that, in those proceedings, either party could rely on a basic condition of employment incorporated into the contract by virtue of the BCEA. In this instance, SCAW sought to rely upon s 41(4). From the point of view of jurisdiction, there was no reason why the high court could not adjudicate the defence based upon s 41(6) of the BCEA. I shall return to this hereunder.

The application of s 41(4) of the BCEA

[24] An employer-employee relationship is a contractual relationship. The contract need not, save in certain specified circumstances which are not presently relevant, be in writing. Whether the agreement is oral or written, certain terms may be express, and others may be implied. These are general principles of contract.

[25] Section 41 of the BCEA addresses severance pay. It provides as follows:

‘(1) For the purposes of this section, “operational requirements” means requirements based on the economic, technological, structural or similar needs of an employer.

(2) An employer must pay an employee who is dismissed for reasons based on the employer’s operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936), severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.

(3) The Minister may vary the amount of severance pay in terms of subsection (2) by notice in the *Gazette*. This variation may only be done after consulting NEDLAC and the Public Service Co-ordinating Bargaining Council established under Schedule 1 of the Labour Relations Act, 1995.

(4) An employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2).

(5) The payment of severance pay in compliance with this section does not affect an employee’s right to any other amount payable according to law.

(6) If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to—

- (a) a council, if the parties to the dispute fall within the registered scope of that council; or
- (b) the CCMA, if no council has jurisdiction.’

[26] The BCEA does not define the term ‘severance pay’. It is, however, clear that severance pay is the amount of money, calculated with reference to the

ordinary remuneration payable to the employee and their period of service, that an employer is obliged to pay to an employee whose contract of employment is terminated as a result of the ‘operational requirements’ (or insolvency) of the employer.

[27] The central question in the appeal requires interpretation of the section. That exercise requires assigning meaning to the section having regard to the language used, the context in which it is used, and the purpose the provision seeks to achieve.³ It is a unitary exercise which, as this Court in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* explained:⁴

‘It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, “[t]he inevitable point of departure is the language of the provision itself”.’ (Citation omitted)

[28] Section 41(2), quoted above, imposes an obligation upon an employer to pay severance pay ‘equal to at least’ one week’s remuneration for each completed year of service, calculated as provided in s 35 of the BCEA. Subsection (4) provides that an employee who has unreasonably refused an employer’s offer of alternative employment is not entitled to severance pay ‘in terms of subsection (2)’.

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 para 18.

⁴ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; 2022 (1) SA 100 (SCA); [2021] 3 All SA 647 (SCA) para 25.

[29] The appellants contended that since the amount claimed, based upon the contract of employment, was in excess of that provided by subsection (2), it was not a claim ‘in terms of subsection (2)’. For this reason subsection (4) did not apply. SCAW argued that the obligation to pay severance arose from s 41(2). The subsection imposes an obligation to pay severance of ‘at least’ the prescribed minimum. SCAW's undertaking to pay an amount in excess of the minimum did not deprive it of the protection afforded by subsection (4) if its offer of alternative employment was unreasonably refused.

[30] On a plain reading, section 41 (2) imposes an obligation on employers to pay severance pay when certain events occur. The obligation is not limited to paying the stipulated minimum amount. Subsection (2) therefore contains two elements: a general obligation to pay severance and a stipulated minimum amount payable.

[31] In *SA Typographical Union obo Van As and Others v Kohler Flexible Packaging (Cape) (A Division of Kohler Packaging Ltd) (SATU)*,⁵ the Labour Appeal Court (LAC) held that the only logical interpretation that can be given to the words ‘at least’, as used in the subsection, is that they should mean ‘not less than’. It held that s 41(2) was intended to create a statutory minimum to serve as a safety net for employees.⁶ In *Irvin & Johnson Ltd v Commission for Conciliation, Mediation and Arbitration and Others (Irvin & Johnson)*,⁷ the LAC found that s 41(2) of the BCEA establishes a general obligation upon all employers that, if an employee is dismissed for operational reasons, the employee becomes entitled to severance pay.

⁵ *SA Typographical Union on behalf of Van As & Others v Kohler Flexible Packaging (Cape) (A Division of Kohler Packaging Ltd) (SATU)* (2002) 23 ILJ 1248 (LAC).

⁶ SATU para 21.

⁷ *Irvin & Johnson Ltd v Commission for Conciliation, Mediation and Arbitration and Others (Irvin & Johnson)* (2006) 27 ILJ 935 (LAC) para 39.

[32] These findings accord with the BCEA's broader purpose and the mechanism it employs to achieve it. Section 2 of the BCEA sets out its primary objects as giving effect to and regulating the right to fair labour practices conferred by s 23 of the Constitution and to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation. The section provides that the BCEA does so 'by establishing and enforcing basic conditions of employment' and by 'regulating the variation' of those basic conditions of employment.

[33] The BCEA aims to ensure that all employer-employee contracts of employment (save certain classes of employees expressly excluded from the operation of the BCEA) contain certain basic conditions of employment. Thus s 4 provides:

'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.'

[34] The default position, therefore, is that a basic condition of employment stipulated in the BCEA is, by operation of law, incorporated into a contract of employment, *except to the extent that the contract contains a term more favourable to the employee than that provided by the BCEA*.

[35] Section 41(2) is, self-evidently, a basic condition of all employment contracts. It is incorporated into the employment contract governing the

relationship between the appellants and SCAW, except to the extent the contract provides for payment of more than the stipulated minimum severance pay.

[36] Consistent with the plain language of s 41(2) and the judgments of the LAC, to which I have referred, both elements of the section are incorporated into the contract of employment: the obligation to pay and the stipulated minimum amount, unless the contract expressly provides for a more favourable payment. I shall return to this hereunder.

[37] Section 41(4) has enjoyed the attention of both the Labour Court and LAC on several occasions. In *Irvin & Johnson*, the question was whether employees who had accepted an offer of employment from a third party were entitled to payment of severance pay. That issue had arisen in the context of a dispute about whether the employees concerned had been dismissed for operational reasons. Irvin & Johnson (I&J) provided a canteen for its employees. It employed several employees to run the canteen. It decided to outsource that service. It entered negotiations with a catering company (KKS). They agreed that KKS would employ all the I&J canteen employees at the same remuneration. I&J then terminated their employment. The employees claimed severance pay.

[38] The LAC accepted that for purposes of their claims the employees had been dismissed for operational reasons. It undertook an extensive examination of the purpose of severance pay under s 41 of the BCEA and, in particular, the purpose of s 41(4). This need not be recounted here. It suffices to state that having found that s 41(2) imposes a general obligation upon employers to pay severance upon dismissal for operational reasons, the LAC went on to hold that s 41(4) creates an exception to this general rule,⁸ the exception being that an employee who

⁸ *Irvin & Johnson* paras 39 – 40.

unreasonably refuses an offer of alternative employment is not entitled to severance pay.

[39] The LAC then considered the mischief that s 41(4) sought to remedy. It stated that:

‘It seems that the purpose was to discourage employees from unreasonably rejecting offers of alternative employment arranged by their employers simply because they might prefer cash in their pockets in the form of severance pay. It can also be said that the BCEA sought to promote employment and to give employers an incentive to take steps to try to get alternative employment for their employees facing dismissals for operational requirements instead of simply giving them money in the form of severance pay and leaving them on their own to look for alternative employment.’⁹

[40] In *Lemley v Commissioner for Conciliation, Mediation & Arbitration and Others*¹⁰, the LAC affirmed this understanding of the purpose of s 41(4) when it asserted that:

‘The import and purpose of s 41(4) is clear: an employee is not entitled to insist on being paid severance pay where he or she unreasonably refuses to accept the employer’s offer of alternative employment. There are compelling reasons why the legislature saw fit to limit the payment of severance pay in this manner. Not only does it incentivise an employer to provide alternative employment, but it also seeks to limit job losses on retrenchment.’¹¹ (Citations omitted.)

[41] It is worth noting that dismissal for operational reasons is extensively regulated by ss 189 and 189A of the LRA. A reading of those provisions underscores the requirement for fairness and good-faith engagement between the parties to mitigate the effects of retrenchment. One stated goal of such a

⁹ *Irvin & Johnson* para 41.

¹⁰ *Lemley v Commissioner for Conciliation, Mediation & Arbitration and Others (Lemley)* (2020) 41 ILJ 1339 (LAC).

¹¹ *Lemley* para 13.

consensus-seeking exercise is to avoid job losses. Employers must consider finding alternative employment opportunities.

[42] What meaning then must be attached to the phrase ‘in terms of subsection (2)’ as it is used in s 41(4). Does it limit the operation of subsection (4) only to claims for payment of the minimum prescribed by subsection (2)?

[43] In contending for this narrower construction, the appellants relied on *Molapo Technology (Pty) Ltd v Schreuder & Others (Molapo Technology)*.¹² In that matter a question had arisen about the jurisdiction of the Labour Court to adjudicate a claim for payment of severance pay. The claimants had sought a declarator that they were entitled to payment of severance pay. In doing so, they relied on the terms of their contracts of employment and the rules of the pension fund to which they belonged. The Labour Court was required to consider the effect of s 41(6) of the BCEA. It held that s 41(6) did not exclude its jurisdiction. That section applies where the only dispute relates to the entitlement to severance pay.

[44] On appeal to the LAC, Molapo Technology asserted that the Labour Court had not enjoyed jurisdiction because there had not been a referral to the CCMA or a Bargaining Council as required by s 41(6). The LAC disposed of the jurisdiction challenge on a different basis to that of the Labour Court, which had held that s 41(6) did not apply because the dispute was not only about an entitlement to severance pay. The LAC took the view that:

‘In my view, if the appellant seeks to rely on s 41(6) to contend that the Labour Court had no jurisdiction in respect of this matter, the appellant should satisfy the court not only that this dispute is only about the entitlement to severance pay but also that the entitlement to severance pay is “in terms of this section” as prescribed in s 41. I say this because the severance pay that

¹² *Molapo Technology (Pty) Ltd v Schreuder & Others (Molapo Technology)* (2002) 23 ILJ 2031 (LAC).

s 41(6) refers to is said to be one “in terms of this section”. It seems to me that where the severance pay that is claimed is not in terms of s 41 but is in terms of a contract or the rules of a pension fund, it cannot be said that the claim is for the payment of severance pay “in terms of” s 41.¹³

[45] The appellants placed great store in this passage. They contended that the phrase ‘in terms of this section’ had been held to exclude claims for severance pay which were based on contract. The same meaning ought to attach to the phrase ‘in terms of subsection (2)’. In that event, so the appellants argued, since their claims were not in fact for payment of severance in terms of s 41(2), s 41(4) could not apply.

[46] At face value, the passage from *Molapo Technology* suggests that a contractual claim for payment of severance pay is not a claim ‘in terms of s 41’. However, the passage must be understood in the context of the case that was before the LAC. The judgment makes clear in the passages that follow the quoted passage that the claimants had relied on an obligation to pay severance imposed by the terms of the employment contract and the rules of the pension fund. The judgment does not record the terms specifically, but a fair reading shows that this weighed with the court. The LAC considered that claim to be ‘not in terms of the section.’

[47] *Molapo Technology* is therefore distinguishable from the present matter on the facts. In this case, the appellants did not assert that their contracts of employment (styled their letters of appointment) imposed on SCAW an obligation to pay them severance pay upon dismissal for operational reasons. Indeed, they did not plead such an obligation. They asserted only that they were entitled to payment of the amount stipulated in Clause 15, to which I have

¹³ *Molapo Technologies* para 27.

referred. Clause 15, however, nowhere imposes an obligation to pay severance upon dismissal for operational reasons. The obligation to pay severance could therefore arise only from the general obligation imposed by s 41(2).

[48] In any event, it is difficult to conceive that the LAC sought to draw a rigid distinction between claims ‘based on contract’ and claims ‘based on statutory provisions’ set out in the BCEA. Such a distinction would be artificial, if not contrary to the statutory mechanisms employed by the BCEA. I have already pointed to these. Simply put, the BCEA imports into every contract of employment certain basic conditions as terms of that contract. If the employment contract is silent about a matter which falls within the ambit of a basic condition, then by operation of law that condition is a term of the employment contract.

[49] An employee may formulate a claim based on the contract of employment and assert that it contains a basic condition, as provided in a provision of the BCEA. Such a claim would self-evidently be one in contract. Is it to be supposed then that, because the cause of action is based on contract, it is not one that accords with, or ‘in terms of’ a provision of the BCEA? Can the application of the BCEA depend on how a claim is pleaded? I would think not. That would undermine the BCEA's purpose.

[50] There is a more compelling reason why the phrase ‘in terms of this section’ or ‘in terms of subsection (2)’ does not mean that a claim in contract excludes the operation of s 41. Section 41(2) imposes an obligation to pay severance. It applies to all employment contracts, except those classes of employees excluded from the operation of the BCEA. The obligation arises ‘in terms of subsection (2).’ Subsection (2) also deals with the amount to be paid where it sets a prescribed minimum. If an employer agrees to pay in excess of the minimum, the subsection imposes an obligation to pay that agreed amount.

[51] Thus, where subsection (4) speaks of a claim in terms of subsection (2), it must be understood to refer to either of the obligations imposed by that subsection. If it were to be read to mean that subsection (4) only applies where the claim is for the payment of the prescribed minimum amount, the purpose of subsection (4) would be seriously undermined. Employers who had agreed to pay more than the minimum would have no incentive to engage in bona fide attempts, as required by ss 189 and 189A of the LRA, to minimise the effect of retrenchments by finding alternative employment. Only employers who had not agreed to pay more than the minimum would reap the benefit if employees unreasonably refused alternative employment. Equally, such a restrictive interpretation of subsection (4) would impose no constraint on the unreasonable conduct of employees who had bargained for payment above the minimum. And employees who had been unable to secure payment in excess of the minimum would be held to a reasonableness standard when refusing alternative employment. Such a construction would give rise to absurdity.

[52] I return to the facts of this case. As indicated, the letters of employment do not, in terms, impose an obligation upon SCAW to pay the amounts set out in clause 15. That obligation arises from the general obligation imposed by s 41(2). Their claims for payment are therefore claims, ‘in terms of subsection (2)’. Accordingly, subsection (4) applies to the determination of their entitlement to severance pay in the amounts they claimed. The high court was therefore correct to conclude that SCAW could rely on s 41(4) as a defence to the claims for payment.

Jurisdiction to adjudicate the defence

[53] It is necessary to deal with this aspect because the high court came to a finding that s 41(6) regulates the dispute between the parties. It was, the high

court found, a dispute only about the appellants' entitlement to severance pay. Since s 41(6) requires reference to a bespoke and specialist dispute resolution process, it had to be invoked. Since it was not, the dispute could not be determined, and the claims fell to be dismissed.

[54] It seems to me that the high court operated under the belief that s 41(6) is mandatory. The high court can be excused for thinking that this is so, since such construction appears to have been asserted by the LAC. In *Molapo Technology* it said that s 41(6) 'required' that a dispute only about entitlement to payment of severance pay be referred to a Bargaining Council or the CCMA.¹⁴ I am, however, not aware of any authority that has specifically interpreted s 41(6) in the context of s 73A and s 77(3) of the BCEA. Section 73A was introduced several years after the *Molapo Technology* judgment.

[55] I harbour doubt that s 41(6) imposes a mandatory obligation to refer such dispute to arbitration. Firstly, it states that an employee 'may' refer such dispute. Secondly, the jurisdictional scheme in s 73A and s 77 points strongly to an election by an employee, rather than an obligation. However, deciding this question is unnecessary.

[56] I take this view because the high court was not concerned with a referral by an employee. It held, quite rightly, that it had jurisdiction to adjudicate the appellants' contractual claims. In this case, SCAW raised a defence to that claim, relying on s 41(4) of the BCEA. If the high court had jurisdiction to adjudicate the claims premised on a breach of an obligation or enforcement of the obligation, it necessarily also had jurisdiction to decide a defence based on an exception to

¹⁴ *Molapo Technology* para 31, where the LAC said: 'The only provision in the BCEA that requires a dispute relating to severance pay to be referred to arbitration is s 41(6) but that provision requires that the dispute be only about entitlement to severance pay in terms of s 41.'

the imposed obligation. This is how *Molapo Technology* had characterised s 41(4). Furthermore, s 77(4) of the BCEA contemplates a situation where a party, in civil proceedings before a high court, may rely upon a provision of the BCEA to establish that a basic condition of employment constitutes a term of a contract of employment.

[57] The high court therefore erred in holding that it could not adjudicate the defence raised by SCAW and that the dispute could only be resolved by invoking s 41(6) of the BCEA. That being so, could the high court have determined the issue on what was before it? In my view, the answer is no. I say so for the following reasons.

[58] The appellants had prosecuted their claims by way of motion proceedings. They did so in circumstances where (a) SCAW had made it very clear that it regarded the appellants' rejection of the offer of alternative employment as unreasonable, and (b) they had referred a dispute about their entitlement to severance pay to the MEIBC and then withdrawn that referral upon legal advice. They therefore knew, when the motion proceedings were launched, that SCAW would contend that, by reason of s 41(4), they were not entitled to severance because they had unreasonably refused an offer of alternative employment.

[59] The appellants framed their cause of action as a breach of a contractual obligation entitling them to payment, or as an action to enforce a contractual obligation to pay. I have already mentioned that they did not allege the contractual obligation to pay the severance. They asserted only that they were entitled to receive the amounts provided in clause 15 of their letters of appointment. When SCAW filed its answering papers, it pleaded reliance upon s 41(4), as might have been expected, and alleged that the appellants had unreasonably refused the offer of employment. The obligation to pay severance arose from s 41(2).

[60] The reply is instructive. The appellants took issue with the offer on the basis that it was addressed to NUMSA. This turned out to be incorrect. It was addressed to and delivered to each of the appellants. The appellants did not deny that their rejection of the offer was unreasonable. Instead, they contended that the section does not apply to a contract claim. The appellants did not advance an alternative based on a denial of unreasonableness.

[61] What could the high court have decided on what was before it? Although SCAW pleaded that the refusal of the offer was unreasonable, it did not assert any primary facts to support its conclusion. SCAW's assertion was not denied. The appellants offered no facts to counter the assertion that the refusal was unreasonable. Therefore, no basis was presented upon which reasonableness could be determined, nor could any factual dispute arise that might have been resolved under the principles applicable to disputes of fact in motion proceedings. This Court is, of course, in precisely the same situation. Whether an employee's refusal of an offer of alternative employment is reasonable is necessarily fact-based and requires applying an objective standard. Motion proceedings are not best suited to resolve such disputes. SCAW appreciated the difficulty. It stated in its answer that the dispute over whether the rejection of the offer was reasonable could not be determined on motion. This stance is correct.

[62] The high court dismissed the appellants' claims. It did so because it considered that the real dispute between the parties required referral to the MEIBC. However, dismissal of an application is a decision in favour of the respondent.¹⁵ As indicated above, neither party had presented evidence upon which the high court could have determined the s 41(4) dispute. On this basis, a

¹⁵ *Purchase v Purchase* 1960 (3) SA 383 (N).

decision in favour of SCAW could not be made. I accept that the high court made it plain that it was not deciding the issue. On this basis, it made the dismissal order in error. Had the high court exercised the jurisdiction that I contend it had, it is likely to have come to the view that upon the papers before it no decision could be made on the application. In that event the proper order would have been one of absolution from the instance. Rule 6(6) of the Uniform Rules contemplates that the court might make no order on the application other than a costs order. This Court held in *African Farms and Townships Ltd v Cape Town Municipality*¹⁶ that such an order is the equivalent of an order of absolution.

[63] Rule 6(6) permits a court that makes no order in an application to nevertheless make an order of costs. In my view, the costs order made by the high court must stand. The appellants came to court on a basis that could not succeed. They failed to establish that s 41 does not apply to determining their entitlement to severance pay. They were alerted from the outset that the reasonableness of rejecting the offer was central to SCAW's case. Their election not to proceed with their initial referral to the MEIBC and to pin their colours firmly to the mast of a contractual claim was in error. As a result, they failed to secure the relief they had set out to obtain. In these circumstances, a costs order against them in the high court is appropriate. The partial success of the appeal, in the sense that the high court's order falls to be replaced with one of absolution, is insubstantial. There is no reason why they should not be ordered to pay the costs of the appeal, nor that the costs should not include those occasioned by the employment of two counsel.

[64] I therefore make the following order:

- 1 The appeal succeeds in part.
- 2 The order of the high court is set aside and replaced with the following:

¹⁶ *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563E-F, *Liberty Group Limited t/a Liberty Life v K & D Telemarketing and Others* [2020] ZASCA 41 para 13.

- ‘a No order is made on the application.
- b The applicants are ordered to pay the respondent’s costs, jointly and severally, the one paying the other to be absolved.’
- 3 The appellants are ordered to pay the costs of the appeal, such costs to include the costs of two counsel.

G GOOSEN
JUDGE OF APPEAL

Appearances:

For the appellants: M Forere and B Soyapi

Instructed by: Letsholo Manashoe Inc., Johannesburg
Rampai Attorneys, Bloemfontein

For the respondent: A E Franklin SC and R Itzkin

Instructed by: Wilken Inc, Johannesburg
Kleingeld Attorneys Inc., Bloemfontein.