(1) Reportable: Yes/~~No~~
(2) Of interest to other Judges: Yes/~~No~~
(3) Revised

Signature Date 8 June 2026

**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

Case No: 2025-082158

In the matter between:

**PARDON GAMBAKWE** **Plaintiff/Applicant**

and

**UNIVERSITY OF THE WESTERN CAPE** **Defendant/Respondent**

**Heard: 18 February 2026**

**Delivered: 8 June 2026**

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**JUDGMENT**

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**MACROBERT, AJ**

Introduction

[1] This matter concerns an opposed special plea raised by the Defendant challenging this Court's jurisdiction to adjudicate the dispute on the following basis.

[2] The Plaintiff referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) per form 7.11 in accordance

with section 186 (2)(d) of the Labour Relations Act[1] (LRA) alleging that he had suffered an occupational detriment for having made a protected disclosure in accordance with the Protected Disclosures Act[2] (PDA).

[3] This dispute was referred before the Plaintiff was dismissed by the Defendant.

[4] The Plaintiff was subsequently dismissed by the Defendant but did not refer another dispute to the CCMA alleging an automatically unfair dismissal in terms of section 187(1)(h) of the LRA for having made a protected disclosure as defined in the PDA.

[5] The unfair labour practice dispute the Plaintiff referred to the CCMA was conciliated by the CCMA after the Plaintiff had been dismissed.

[6] The conciliating Commissioner issued a certificate of non-resolution describing that the dispute conciliated was an automatically unfair dismissal dispute in terms of section 187(1)(h) of the LRA, whereafter the Plaintiff referred the dispute for adjudication by this Court.

[7] The Defendant has taken issue with this and has raised a special plea contending that no section 187(1)(h) automatically unfair dispute had been referred for conciliation to the CCMA which is an essential pre-requisite for this Court to adjudicate that dispute, and that there had been no attempt to conciliate that dispute.

[8] The Plaintiff opposes the special plea on the grounds set out below.

The factual backround

[9] On 22 January 2025 the Defendant issued the Plaintiff with a notice to attend a disciplinary inquiry in which he confronted charges relating *inter alia* to conduct detrimental to the maintenance of good order within the Defendant's workplace.

[10] on 4 February 2025 the Plaintiff referred an unfair labour practice dispute to the CCMA in terms of section 186 (2)(d) of the LRA in which he challenged the

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[1] Act 66 of 1995, as amended.
[2] Act 26 of 2000.

disciplinary action instituted against him as an occupational detriment (other than a dismissal), in contravention of the PDA.

[11] The Plaintiff's disciplinary hearing took place over three days, concluding on 18 February 2025. After having been found guilty of the allegations he was summarily dismissed on 4 March 2025. As mentioned above, the Plaintiff did not refer a dispute to the CCMA to challenge the fairness of his dismissal.

[12] The unfair labour practice dispute that the Plaintiff had referred to the CCMA for conciliation took place on 6 March 2025, 2 days after his dismissal. After unsuccessful conciliation, the Commissioner issued a certificate of non-resolution on 6 March 2025.

[13] The certificate of non-resolution by the Commissioner, described that the dispute conciliated was an automatically unfair dismissal dispute in terms of section 187(1)(h) of the LRA, with which the Defendant takes issue because no such dispute had been referred for conciliation by the Plaintiff, and it would have been impossible for the Plaintiff to refer such dispute as he was dismissed some 28 days after his initial unfair labour practice referral.

[14] After the Commissioner issued the certificate, the Plaintiff referred an automatically unfair dismissal for adjudication by this Court in terms of section 187(1)(h) of the LRA.

[15] Hence the raising by Defendant of the special plea as to whether this Court has jurisdiction to adjudicate the automatically unfair dismissal dispute, given the facts set out above and below, and the law applied to the facts which the Court deals with below.

[16] The key issue of this case is whether the Labour Court has the jurisdiction to hear a case classified by the employee as an unfair labour practice but classified by the Commissioner as an automatically unfair dismissal.

Analysis

[17] The leading case on this issue was that of the Labour Appeal Court in *NUMSA v Driveline Technologies (Pty) Ltd and another*[3]. This was followed by the Constitutional Court decision in *NUMSA V Intervalve (Pty) Ltd and others*[4] although the facts in that matter are somewhat different to those *in casu*, involving a joinder application which the Court is of the view is not applicable here.

[18] Defendant's attorney contended in argument that the principles involved in the *Intervalve* decision as to referring disputes for conciliation have force in this matter.

[19] Aside from analysing the applicable sections in the LRA, particularly section 191 thereof, Plaintiff's counsel relied in argument primarily upon the Constitutional Court decision in *September and others v CMI Business Enterprises CC*[5] (not referred to by Defendant's attorney in argument). In short the Constitutional Court decision in *September* overturned the LAC decision in *Driveline*, the facts of which are briefly set out below.

[20] The *September* matter came before the Constitutional Court as an application for leave to appeal against a judgment of the LAC. The dispute which was referred to the CCMA for conciliation was one of unfair discrimination in terms of section 10 of the Employment Equity Act[6]. After unsuccessful conciliation, the Commissioner recorded the nature of the dispute confirming it, as referred, as one of discrimination.

[21] The affected employees alleged that the matter conciliated was in fact one of unfair dismissal grounded upon a claim of constructive dismissal due to unfair discrimination. They referred the dispute to the Labour Court for adjudication as an automatically unfair dismissal in terms of sections 187 and 191 of the LRA.

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[3] (J324/97) [1999] ZALC 157 (11 October 1999) (*Driveline*).
[4] 2015 (2) BCLR 182 (CC) (*Intervalve*).
[5] [2018] BLLR 431 (CC) (*September*).
[6] Act 55 of 1998.

[22] The Labour Court granted default judgment in their favour. The employer applied for rescission of judgment which was denied. The employer appealed to the LAC. The LAC applied *Driveline* and held that:

22.1 An unfair discrimination dispute and not an unfair dismissal dispute was referred to the CCMA for conciliation;

22.2 It was not clear whether a dismissal had occurred as the employees themselves did not believe that they were constructively dismissed when the referral was made;

22.3 The Labour Court had erred in finding that conciliation of an unfair dismissal had taken place in terms of section 191(4) of the LRA as no admissible evidence supported this finding; and that the Labour Court was not entitled to venture beyond what the referral form and the certificate of outcome stated to determine what had been canvassed at the CCMA conciliation.

[23] It will readily be seen how closely aligned the facts in the *September* matter are to the facts *in casu.*

The decision of the Constitutional Court in *September*

[24] The Constitutional Court referred to section 135 of the LRA read with CCMA Rule 15, which states as follows:

> "A certificate issued in terms of section 135(5) that the dispute has or has not been resolved, must identify the nature of the dispute and the parties as described in the referral document or as identified by the commissioner during the conciliation proceedings."
>
> (Emphasis added).

[25] The Constitutional Court held that the commissioner has a duty to determine the true nature of the dispute. The Court, per Theron J who wrote the judgment for the majority held that:

> "The Labour Appeal Court adopted an overly formalistic approach as it held that to answer whether the real dispute had been conciliated necessitates a very narrow factual enquiry which entails only looking at two aspects, namely, "the characterisation on the referral form and the contents of the certificate of outcome." The Labour Appeal Court failed to take into account the purpose and context of the Labour Relations Act and the dispute resolution mechanisms for which it provides. By relying only on the referral form and the certificate of outcome the Labour Appeal Court essentially held that no evidence from the conciliation proceedings may be led as evidence in subsequent proceedings."[7]

[26] At paragraph 52[8], Theron J writes;

> "It would therefore be wrong to adopt the Labour Appeal Court's approach, which essentially precludes the courts from referring to evidence outside the certificate of outcome and referral form, to determine the nature of the dispute conciliated. The general rule is that the referral form and certificate of outcome constitute prima facie evidence of the nature of the dispute conciliated. However, if it is alleged that the nature of the dispute is in fact different from that reflected in such documents, the parties may adduce evidence as to the nature of the dispute."

[27] And at paragraph 54, the learned Judge held that even if the certificate of outcome does not correctly reference the dispute that was canvassed at conciliation, it would be formalism of the highest degree to ignore substance.

[28] Accordingly the Court held in paragraph 56, that the purpose of conciliation is to attempt to resolve the dispute prior to litigation, and thus, even though a party refers a dispute other than the dispute that was conciliated, in this instance, the real dispute was identified and an attempt was made to resolve the dispute through conciliation. Thus, the requirement of conciliation in terms of section 191(4) of the LRA was satisfied, and the Labour Court had jurisdiction to grant default judgment.

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[7] Id fn 5 at para 44.
[8] *September* (Id fn 5).

Conclusion

[29] It is clear to this Court that the principles and *ratio decidendi* espoused by the LAC in *Driveline* have been overturned by the Constitutional Court in *September*, which this Court is duty bound to follow and apply in this instance.

[30] The respective facts and matrixes thereof are on par in the respective matters.

[31] The CCMA Commissioner's certificate of outcome in this matter characterises the dispute as referred by the Plaintiff to the CCMA as a section 187(1)(h) dispute, issued after the conciliation, which took place after the dismissal of the Plaintiff by the Defendant.

[32] It is more than highly probable that the dispute referred to the CCMA by the Plaintiff was conciliated as a section 187(1)(h) automatically unfair dismissal dispute, of which the conciliating Commissioner would have been aware as the dispute was conciliated after the plaintiff's dismissal, *albeit* but two days thereafter.

[33] it is clear that the Plaintiff was dismissed by the Defendant upon the same factual matrix as existed at the time that he referred his unfair labour practice dispute, and constituted an alleged occupational detriment as described in the PDA and section 187(1)(h) of the LRA.

[34] The certificate of outcome of the conciliation, which took place after the Plaintiff's dismissal indicates that the conciliating CCMA Commissioner identified the true nature of the dispute that was actually conciliated (as per *September* above), as also per the facts set out above.

[35] Accordingly, and in line with the Constitutional Court's reasoning in *September*, and the other cross-references made by it to sections of the LRA as set out in its judgment, including section 191, and section 191(4), have been complied with in this matter. To hold otherwise, as per the Constitutional Court in *September*, would be to ignore the substance of the dispute referred and would be overly formalistic.

[36] Accordingly, and for the reasons given above, this Court finds that it has jurisdiction to adjudicate the referral of an automatically unfair dismissal in terms of section 187(1)(h) of the LRA.

[37] Given the somewhat unique circumstances and nature of this matter, and in the interests of fairness and justice, it would be best to make no order as to costs.

[38] Accordingly, and in the premises, the Court makes the following order:

Order:

1. The Defendant's special plea is dismissed;

2. This Court has jurisdiction to adjudicate Plaintiff's referral as an automatically unfair dismissal in terms of section 187(1)(h) of the LRA;

3. There is no order at to costs.

J.M.J MacRobert

Acting Judge of the Labour Court of South Africa

Appearances:

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| For the Plaintiff | : | Zola Mcasiso of Bowman Gilfillan Inc |
| For the Defendant | : | Adv G. Viljoen |
| Instructed by | : | Attorney M. Scott |