

THE LABOUR COURT OF SOUTH AFRICA, RANDBURG

Not Reportable
Case no: JR2646/2022

In the matter between:

VR LAW INCORPORATED

First Applicant

WERNER JANSE VAN RENSBURG

Second Applicant

SUNCICA HESSEL – ENKE

Third Applicant

and

WENDY FERGUSON

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

JOHNNY MATHEBULA N.O.

Third Respondent

Heard: 20 January 2024

Delivered: 20 May 2024

This judgment was handed down electronically by emailing a copy to the parties. The 20th of May 2024 is deemed to be the date of delivery of this judgment.

Summary: Review of arbitration award concerning existence of dismissal – Review test concerning existence of dismissal is correctness rather than reasonableness

Review of arbitration award concerning existence of dismissal – Correct approach to resolving factual disputes where mutually destructive versions is method described in SCA decision of Stellenbosch Farmers' Winery Group

Review of arbitration awards – when award set aside court has wide discretion to make appropriate order under section 145(4) of the LRA – when pertinent issues not fully canvassed in CCMA appropriate to order convening of pre-arbitration conference and *de novo* hearing

JUDGMENT

MEYEROWITZ AJ

Introduction

[1] The first respondent in this matter, Ms Wendy Ferguson (Ms Ferguson), referred a dispute to the CCMA raising a variety of disputes regarding a variety of respondents. On 8 September 2022 the CCMA ruled that the first applicant in these proceedings, a law firm by the name of VR Law Incorporated (the Firm), was the correct employer party, and that the dispute was confined to an allegation of unfair dismissal made by Ms Ferguson against the Firm.

[2] The matter was arbitrated on 5 October 2022 with the Firm arguing that Ms Ferguson had not been dismissed. The third respondent in these proceedings, Mr Johnny Mathebula *N.O.* (the Commissioner), held in his award dated 17 October 2022 that Ms Ferguson had been unfairly dismissed, and duly ordered the Firm to pay her an amount of R21,300.00 representing four months' salary and some further monies allegedly owing to her as a result of her employment contract.

[3] The Firm launched review proceedings in this court on 23 November 2022 and then filed the record in terms of Rule 7A(6) on 9 December 2022. On 15 December 2022 Ms Ferguson, who is unrepresented in these

proceedings, produced a document purporting to be an answering affidavit. This document is unsatisfactory in several respects. Firstly, there is no filing sheet, service affidavit or court stamp. Secondly, Ms Ferguson was not entitled to file an answering affidavit until after the Firm had filed its notice in terms of Rule 7A(8). Thirdly, the commissioner of oaths states that the affidavit was deposed to on 15 December 2022 even though the document has been stamped by the CCMA on 14 December 2022. Finally, the document does not confine itself to the issues before this court.

[4] Given that Ms Ferguson is unrepresented I am willing to consider this document. However, in light of my findings below much of the content thereof is irrelevant.

[5] On 28 December 2022 the Firm filed its supplementary affidavit and Rule 7A(8) notice. Instead of an answering affidavit, on 27 February 2023 Ms Ferguson filed an "*application to dismiss the review application*". This document is defective for several reasons but chiefly because the supporting affidavit has not been properly commissioned. All the commissioner of oaths says is that the document is a true copy of the original. I will not be taking this document into account.

[6] At the hearing of this matter on 20 February 2024 I explained the defects in Ms Ferguson's opposition but held that I would nonetheless allow Ms Ferguson to argue her case on the merits.

The facts and analysis of evidence

[7] In April 2021 Ms Ferguson requested the Firm to represent her in a maintenance dispute she was having with her ex-husband as well as in certain other legal disputes. As a result of further negotiations the parties reached the following commercial arrangement. Firstly, Ms Ferguson agreed to share ownership of her skin care business with the Firm's executive director, Mr Werner Janse Van Rensburg (Mr Van Rensburg), and with his wife Ms Suncica Hessel-Enke (Ms Hessel), on the basis of the three of them going into business

together. Secondly, the Firm would represent Ms Ferguson in her maintenance dispute on a contingency basis. Thirdly, the Firm would employ Ms Ferguson as a receptionist and a driver for Mr Van Rensburg's daughter in return for a salary of R4,000.00 per month. Ms Ferguson's employment was confirmed in a written contract of employment dated 22 April 2021.

[8] During the arbitration Ms Ferguson testified on her own behalf and Mr Van Rensburg testified on behalf of the Firm. On Mr Van Rensburg's version Ms Ferguson approached him on Thursday, 5 August 2021 and explained that she was no longer able to work as a receptionist because she was too busy with her skin care business. Mr Van Rensburg said that he could see how busy she was because she had repeatedly been using the Firm's resources to make marketing material for her business.

[9] Mr Van Rensburg asked Ms Ferguson what she wanted to do and she explained that she wanted to concentrate on her business. Mr Van Rensburg said that he appreciated her position, but that it placed him in a difficult position regarding transporting his daughter from school in the afternoons. He asked if she would still be willing to pick his daughter up from school even if she (Ms Ferguson) would no longer be working at the Firm's offices, and she agreed to this arrangement saying that Mr Van Rensburg could put the arrangement in a contract.

[10] Mr Van Rensburg then prepared a letter confirming the above arrangement. According to the letter Ms Ferguson would still be employed by the Firm but her duties would largely be confined to fetching Mr Van Rensburg's daughter from school, in exchange for a reduced salary of R3,000.00 per month. Mr Van Rensburg went through the letter with Ms Ferguson and she explained that she was happy with the contents. Mr Van Rensburg signed the letter on behalf of the Firm, and Ms Ferguson signed the letter next to her name and the words "*received and accepted*". Ms Ferguson was apparently very happy and, before leaving his office, she gave Mr Rensburg a hug.

[11] Contrary to the Commissioner's findings on this issue, I am satisfied that the above document (the Re-Employment Letter) constituted a valid written alteration to Ms Ferguson's contract of employment dated 22 April 2021. I must also point out that, in my view, the signature on the Re-Employment Letter certainly appears to be Ms Ferguson's signature – despite the fact that Ms Ferguson denies signing the letter. There are several other examples of her signature in the papers before me and each of those signatures (including the one on the Re-Employment Letter) are nearly identical but nonetheless ever so slightly different – as one would expect a signature to be.

[12] At arbitration Ms Ferguson presented a very different version of what took place in early August 2021 (which I shall narrate below). However, it is common cause that on Friday, 6 August 2021 she received an email from the Firm's receptionist, Mr Mpho Morupa (Mr Morupa), containing a writ of execution in her favour relating to her maintenance dispute. She responded to Mr Morupa by copying Mr Van Rensburg and complaining that the warrant was only for R40,000.00 when, in her view, it should have been for a figure closer to R1,364,000.00.

[13] On Monday, 9 August 2021 (a public holiday) Ms Ferguson wrote a lengthy email to Mr Van Rensburg and Ms Hessel complaining about their business relationship and the manner in which the Firm was representing her in her maintenance and other legal disputes. She then said that "*I will be going to the CCMA tomorrow to find out which of my rights as an employee [are affected by]...*", and she proceeded to list her duties as a receptionist at the Firm and complain about having to perform other tasks in addition to working at the reception desk. She then said that "*I had already arranged another position but I was now being paid R1000 less, which is a breach of contract that I would be paid R4000 each month in a receptionist position as part payment for you [Mr Van Rensburg] taking on my court cases*" and "*you just removing R1000.00 off my salary I was promised by both of you, is not legal as you have not finalised any of my court cases as per our legally binding agreement*".

[14] Mr Van Rensburg replied later that day saying that "*Writer [Mr Van Rensburg] time and time again informed all [his staff] that you are taking fetching and dropping off my daughter and that although you cannot fulfil the position of receptionist, I want you to assist me as I cannot see you sleeping in your car again. Yet, despite having discussed with you and you having accepted that you no longer work as a receptionist, but that you would assist writer to fetch and drop-off writer's daughter at R3000.00, you now turn around and pretend that you do not know of this*" and "*Now you attempt to... insinuate that writer agreed to render legal services to you free of charge because you will be a receptionist. This is totally untrue... Now that writer is taking away your opportunity to make use of our "free" facilities but still agreed to pay you R3,000 per month, now you want to approach the CCMA?? This is thankless. So in terms of the arrangement to fetch and drop off Leane, I do not want you to further assist with Leane and hereby give you notice that it immediately stops... You have shown your utter ungratefulness. Tomorrow, writer shall withdraw with immediate effect from all your criminal matters. Writer shall also after your instructing the registrar to cancel the writs immediately desist to further assist you with any of your civil matters*".

[15] At 01h34 on Tuesday, 10 August 2021 Ms Ferguson forwarded the email chain to, *inter alia*, the Legal Practice Council (LPC), the Mail & Guardian newspaper and the editor of the Daily Maverick, copied Mr Van Rensburg and Ms Hessel, and complained about her relationship with them while at the same time making a slew of personal allegations against Mr Van Rensburg. Mr Van Rensburg responded at 07h31 denying the allegations and calling them lies. Ms Ferguson responded at 10h20 by saying in all capital letters, "*If you disgusting lewd man, ever make contact with me again, I will take you to court have you got that!!!!*" and "*[I] am on my way to the CCMA...*". She also saw fit to make further inflammatory remarks accusing him of being sexist and racist.

[16] At arbitration the Firm argued that Ms Ferguson became enraged when she discovered that the Firm had only managed to secure R40,000.00 for her maintenance matter, and that the relationship deteriorated through the correspondence described above. Ms Ferguson then, according to the Firm,

referred a dispute to the CCMA and disingenuously claimed that she had been dismissed when in fact there had been no dismissal.

[17] Ms Ferguson presented a different and oftentimes inconsistent version of events. She initially stated that on Thursday, 5 August 2021 she had a meeting with Mr Van Rensburg about their business relationship. Ms Hessel then joined them virtually because she was in Germany apparently furthering the interests of their skin care business. When Ms Ferguson accused Ms Hessel of improperly using Ms Ferguson's skin care patents, the following took place "*[Ms Hessel] blew up screaming and shouting on the computer... [she said that I] must wait until she gets back and she is just going to show me you know what is going on and the whole thing, and Mr Van Rensburg said to her, enough. Miss Ferguson will you please wait outside of the board room which I did, and about twenty minutes later, he came to me, and he said to me, we will have to find another way of doing this. And I said well I am not happy with that, those patents belong to me. And he finished the conference with [Ms Hessel] and went to his office and he presented me with a typed letter saying, termination of receptionist employment and re-employment in a personal capacity, that was on the 5 August, 2021... and he signed it; I refused to sign this. I said I am not doing the same duties that you expect me to do and you have taken R1 000.00 off of that...*".

[18] Ms Ferguson had initially said that Ms Hessel had said to her that she "*must wait until she gets back and she is just going to show me you know what is going on and the whole thing*" but later she told the Commissioner that "*his wife fired me that same day and told me to pack my things...*". When the Commissioner asked for confirmation that Ms Hessel had fired her she prevaricated saying "*She said to me you're not going to be working here for much longer, and that is when he said to me, please leave the room*". Not working there "*much longer*" is entirely consistent with Ms Ferguson's version that the parties intended her employment to terminate by the end of the year (when, accordingly to Ms Ferguson, her legal cases would be finalised and she could concentrate on her skin care business).

[19] When the Commissioner asked Ms Ferguson if she received a salary for August 2021, she again prevaricated this time about not having signed the Re-Employment Letter:

COMMISSIONER: *Were you expecting payment in August of 2021?*

WENDY ANN FERGUSON: *Well, I was going to go into this new role of this personal capacity, and I have never heard back from them ever, I phoned, I e-mailed.*

COMMISSIONER: *But you did not sign that, you did not sign the contract.*

WENDY ANN FERGUSON: *I said I am not happy with this.* COMMISSIONER: *You did not sign it.*

WENDY ANN FERGUSON: *Of you taking off R1 000.00.* COMMISSIONER: *Yes.*

WENDY ANN FERGUSON: *You pay me the full R4 000.00 till the end of December otherwise I am not going to sign this.* (my emphasis)

[20] In her typed referral to the CCMA Ms Ferguson said that she was dismissed on 12/08/2021 and that the dispute arose on 08/12/2021. Her referral form was dated 9/1/2021 which cannot be true because this would antedate her employment with the Firm. In all probability these dates suffer from mistakes of dyslexia and Ms Ferguson meant to say that the dispute arose on 12 August 2021 and that her form is dated 1 September 2021.

[21] During cross-examination Ms Ferguson produced a completely different (and frankly rather suspect) version of her referral form purportedly dated 4 August 2021. This was a handwritten document in which she claimed being dismissed on "*Thursday 1st August 2021*" and that the date of her dismissal was "*Thursday*". The Firm denied ever having received this form and confirmed only having received the typed version of the form. In her application for condonation for the late filing of her referral, Ms Ferguson alleged that she had been dismissed on 5 August 2021.

[22] During her testimony Ms Ferguson initially said that she had been dismissed on 5 August 2021. However, during cross-examination by the Firm's Mr Brits, Ms Ferguson claimed that she submitted the referral form to the CCMA

on 4 August 2021. When Mr Brits explained that this would have been prior to her stated day of dismissal, she said that she had actually been dismissed on the day before on 4 August 2021.

[23] Ms Ferguson then proceeded to change her version entirely. She had originally said that she met with Mr Rensburg and Ms Hessel on Thursday, 5 August 2021 and that, after the three of them had an argument about their skincare business, Ms Hessel said to her *“you’re not going to be working here for much longer”*. Mr Van Rensburg then presented her with the Re-Employment Letter which she refused to sign. Now she said that actually the previous day, Wednesday, 4 August 2021, Ms Hessel had fired her by telling her to *“pack up my things and work from home”* and then only the following day the Re-Employment Letter was sent to her (on one occasion she even said via email). This version is contradicted by her earlier testimony that only mentioned one meeting and that Mr Van Rensburg *“presented me with a typed letter”* and that the letter was *“handed to me”*.

[24] Under cross-examination Ms Ferguson reiterated that she did not sign the Re-Employment Letter saying *“No, I never signed it, you have copied my signature on there and I can prove it”* and *“I can prove it is not my signature, I have taken it to a forensic expert”*. This forensic expert, if they even existed, was never called to give testimony.

[25] Mr Van Rensburg’s version of events has been recorded above and he was left largely unscathed by cross-examination (notwithstanding Ms Ferguson putting demonstrably false propositions to Mr Van Rensburg on more than one occasion).

[26] However, a few allegations made by Mr Van Rensburg in chief were never put to Ms Ferguson under cross-examination. These include the allegation that Ms Ferguson hugged Mr Van Rensburg after they signed the Re-Employment Letter, and that she harassed Mr Van Rensburg’s daughter at her school by showing her, and then later him, the middle finger and screaming

obscenities at them. Ms Ferguson nonetheless vociferously challenged these allegations during her cross-examination of Mr Van Rensburg.

[27] In his Award the Commissioner criticised Mr Van Rensburg for not responding to the allegation that Ms Hessel had verbally dismissed Ms Ferguson on 5 August 2021 (although Ms Ferguson said that this had actually taken place on 4 August 2021). In my view the criticism was entirely unwarranted because that allegation was never put to Mr Van Rensburg. In any event, the allegation was contradicted by Ms Ferguson herself during her own testimony when she varied between whether it was the husband or the wife who allegedly dismissed her.

Application of the law to the facts

[28] If Ms Ferguson was not dismissed by the Firm then the CCMA would have lacked jurisdiction to determine her dispute any further.¹ The test on review regarding the jurisdiction of the CCMA is one of correctness rather than reasonableness.² Accordingly, if I find that the Commissioner incorrectly held that the Ms Ferguson had been dismissed, then the Award falls to be reviewed and set aside.

[29] In the present matter the Commissioner was confronted with two competing versions from two different witnesses. In *Sasol Mining (Pty) Ltd v*

¹ *Mthembu (supra)* at [12]

² *Mthembu v The Commission For Conciliation, Arbitration and Mediation and Others* (JR2315/2016) [2022] ZALCJHB 159 (30 May 2022) at [12] to [14]; See also *SA Rugby Player's Association & others v SA Rugby (Pty) Ltd and others* (2008) 29 ILJ 2218 (LAC) at para 41; *Trio Glass t/a The Glass Group v Molapo NO and others* (2013) 34 ILJ 2662 (LC) at para 22, *Kukard v GKD Delkor (Pty) Ltd* (2015) 36 ILJ 640 (LAC) at para 12, fn 2; *Pecton Outsourcing Solutions CC v Pillemer NO and others* (2016) 37 ILJ 693 (LC) at para 16; *MEC, Department of Health, Eastern Cape v Odendaal and others* (2009) 30 ILJ 2093 (LC); *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen and others* (2012) 33 ILJ 363 (LC); *Majatladi v Metropolitan Health Risk Management and others* (2013) 34 ILJ 3828 (LC)

*Ngqeleni NO & Others*³ this court held that the correct method of resolving factual disputes of this nature can be found in the dictum of Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others*⁴:

[5].... To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

[30] For the reasons set out in the previous section, Ms Ferguson was a poor witness. Her testimony was littered with internal and external contradictions, and in my assessment she was a disruptive, evasive and aggressive witness.

³ (2011) 32 ILJ 723 (LC); recently affirmed in *Minister of Correctional Services v Mashiya & Others* (2023) 44 ILJ 1536 (LC)

⁴ 2003 (1) SA 11 (SCA)

She also clearly harboured an intense grudge against Mr Rensburg and Ms Hessel as a result of their deteriorating business relationship.

[31] Mr Van Rensburg's testimony contained no internal contradictions, and the only external contradictions came from the oftentimes self-serving *ipse dixit* of Ms Ferguson. I suppose Mr Rensburg had equal reason to dislike Ms Ferguson, so there is perhaps a risk of bias from his side as well. Nevertheless, on the issue of credibility I find Mr Van Rensburg to have been a far more credible witness than Ms Ferguson.

[32] As Nienaber JA anticipated, credibility and probability usually tend to pull in the same direction, and that is no less the case in this matter. It is clear from her email dated Friday, 6 August 2021, and then again on the public holiday of Monday, 9 August 2021, that Ms Ferguson still had a working relationship with Mr Van Rensburg. In the former email she instructs the Firm (Mr Van Rensburg is carbon copied) to increase the amount of the writ of execution in her favour. In the latter email she starts by wishing Mr Van Rensburg an enjoyable public holiday, and then complains about their business relationship. These emails are entirely inconsistent with her claim that the parties had a relationship ending, employment terminating, argument on either Wednesday, 4 August or Thursday, 5 August 2021.

[33] The above emails are far more in keeping with Mr Rensburg's version that the parties mutually agreed to alter Ms Ferguson's employment on Thursday, 5 August 2021. As Ms Ferguson types her email of Monday, 9 August 2021, she gets more and more worked up until invective starts spewing in capital letters. Then she alludes to the new employment relationship by saying "*There has been no progress whatsoever on any of the court cases... [I] was mysteriously told that I was no longer needed as a receptionist - which is actually a verbal contract between yourself and myself Werner that I work at your office in payment for the work you are doing on my court cases, but it seems and this was a one sided arrangements!!!! I hereby state that the agreement was broken I am sure by you [Ms Hessel] as [Mr Van Rensburg] and I had already arranged another position but I was now being paid R1000 less,*

which is a breach of the contract that I would be paid R4000 each month in a receptionist position as part payment for you Rensburg taking on my court cases". (my emphasis)

[34] Ms Ferguson appears to be acknowledging the new employment relationship as per the Re-Employment Letter, but then decides that the arrangement is somehow in contravention of a verbal agreement she had with Mr Van Rensburg that she would work as a receptionist in exchange for him representing her in her maintenance and other legal disputes. In his contemporaneous response Mr Van Rensburg denies the verbal agreement and expresses his astonishment at her disavowal of the new employment relationship as per the Re-Employment Letter.

[35] In light of this undisputed correspondence, and the weight of both sets of testimony, it is highly unlikely that either Mr Van Rensburg or Ms Hessel unilaterally dismissed Ms Ferguson on either 4 or 5 August by forging Ms Ferguson's signature on the Re-Employment Letter. In my view the Commissioner was wrong to accept Ms Ferguson's version that her signature had been forged. Against the weight of evidence something more was required to make this finding, notably testimony from Ms Ferguson's promised forensic expert.

[36] On the probabilities it is far more likely that Ms Ferguson was not happy with her role as receptionist and willingly agreed to only fetch Mr Van Rensburg's daughter in exchange for R1,000.00 less a month, so that she would have more time to work on her business. Then, over the long weekend, Ms Ferguson realised that she would no longer be able to utilise the Firm's resources to market her company, that receiving R1,000.00 less a month would make her life a lot more difficult, and that her maintenance dispute was not going to yield the kind of money she was hoping for. She then sent an inflammatory email to Mr Van Rensburg on 9 August 2021 threatening to go to the CCMA "*to find out which of my rights as an employee [are affected by the Firm's conduct]*", and thereafter the relationship soured. It is very unlikely that Ms Ferguson had already been to the CCMA on 4 August 2021 as she stated in

her testimony, or that she had already been dismissed on either 4 or 5 August 2021

[37] I therefore find, on a balance of probabilities, that Ms Ferguson had agreed to the new employment relationship on 5 August 2021 per the Re-Employment Letter.

[38] However, what happened after Monday, 9 August 2021 is less clear. It is true that in his email of the same day Mr Van Rensburg said to Ms Ferguson *“in terms of the arrangement to fetch and drop off Leane, I do not want you to further assist with Leane and hereby give you notice that it immediately stops...”* Whether these words constitute a dismissal I cannot say; there was simply not enough evidence before the CCMA. It could be that Mr Van Rensburg is telling her to no longer fetch his daughter without threatening stop her R3,000.00 salary. It could also perhaps be an acknowledgment of Ms Ferguson’s repudiation of the new employment arrangement, but then again it could also be a dismissal in terms of the new employment arrangement. Certainly, it is unlikely that the parties could have continued working together after Ms Ferguson said in her email dated Tuesday, 10 August 2021 *“If you disgusting lewd man, ever make contact with me again, I will take you to court have you got that!!!!”*.

[39] In my view the Commissioner incorrectly held that Ms Ferguson had been dismissed on 5 August 2021. There was also not enough evidence to make a finding that she had been dismissed on any other date, and in any event Ms Ferguson did not attempt make out a case to that effect.

[40] Given that Ms Ferguson failed to prove her dismissal⁵ the Award falls to be reviewed and set aside. The only remaining question is whether I should refer the matter back to the CCMA or substitute the Commissioner’s finding with a ruling that the CCMA lacks jurisdiction to hear her dispute. In terms of section 145(4) of the LRA I have a wide discretion to make an order I deem appropriate

⁵ Ms Ferguson bore the onus in terms of section 192(1)

under the circumstances. In *Rustenburg Platinum Mines Ltd v CCMA*⁶ this court held that before exercising its discretion to determine a dispute rather than referring it back to the CCMA, the Labour Court must be satisfied that (a) the end result is a foregone conclusion and that it would merely be a waste of time to order the CCMA to reconsider the matter; (b) further delay would cause unjustifiable prejudice to the parties; (c) the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction; or (d) the court is in as good a position as the CCMA to decide the matter.⁷

[41] I am not satisfied that any of the abovementioned factors have been met in this case. Whether or not Ms Ferguson was dismissed on or after 9 August 2021 is an issue that was not fully ventilated in the CCMA. It would therefore be inappropriate for me to grant an order conclusively finding that the CCMA lacked jurisdiction to hear her dispute. In its amended notice of motion the Firm prayed in the alternative that, if the review is granted, the dispute should be enrolled in the CCMA only after the parties have concluded a pre-arbitration conference. This seems to be a very sensible thing to do. In the circumstance I make the following order:

Order

1. The arbitration award issued by the second respondent under case number GAJB19465-21 dated 17 October 2021 is reviewed and set aside in terms of section 145 of the Labour Relations Act 66 of 1995.
2. The dispute is referred back to the second respondent for arbitration *de novo* before a commissioner other than the third respondent.

⁶ (2007) 28 ILJ 417 (LC) at paras 9-25 (and the cases collected there); more recently affirmed in *SA Custodial Management (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2013) 34 ILJ 1255 (LC) at [28]

⁷ The use of “or” before d) is different from the “and” used in *Rustenburg Platinum Mines (supra)*. However, it would appear that “or” was the intention (see A Myburgh and C Bosch et al, “Reviews in the Labour Courts”, Lexis Nexis, 2016 at p452. See also *Palluci Home Depot (Pty) Ltd v Herskowitz & Others* (2015) 36 ILJ 1511 (LAC) at [58]

3. Prior to commencement of the *de novo* arbitration proceedings contemplated above, the first applicant and the first respondent must convene a pre-arbitration conference, and sign the relevant pre-arbitration minute, as contemplated by Rule 20 of the second respondent's Rules.

4. There is no order as to costs.

Mark Meyerowitz
Acting Judge of the Labour Court of South Africa

Appearances:

For the First Applicant:

Attorney Roedolf Brits

Instructed by:

VR Law Incorporated, Sandton

For the First Respondent:

In person