IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO. 35/2019**
In the matter between:

JABULANI MANANA **Appellant**

VERSUS

SWAZILAND BUILDING SOCIETY **Respondent**

Neutral Citation: *Jabulani Manana versus Swaziland Building Society (35/2019) [2019] [SZSC17] (5th June 2020)*

Coram: **MCB Maphalala Chief Justice**
Dr. B. J. Odoki JA
J.P. Annandale JA

Date Heard : 18th March 2020
Delivery Date : 5th June 2020

Summary: *Appeal against a Review by High Court of a Judgment by the Industrial Court. Competency of jurisdiction challenged. Held that existing grounds of review*

per case law precedents are outdated. Supreme Court enjoyned to depart from stare decisis *and expand permissible grounds of review under common law grounds, which is not static. Development and adaptation of law to meet changing needs in jurisprudence. Departure from decision in Takhona Dlamini v President of the Industrial Court and Nantex (Swaziland) (Pty) Ltd, Civil Appeal case No. 23/1997. Other grounds of appeal on the merits also dismissed. Appeal dismissed, with costs.*

JUDGMENT

Jacobus P Annandale JA:

[1] The Appellant herein was employed by the Respondent as a Mortgage Manager. During his erstwhile tenure on a permanent and pensionable basis he accumulated a substantial sum of benefits which was later paid out to him. This was because of a variation in the terms and conditions of his employment which came about when the Building Society decided to shift its focus on business relationships with its customers in order to be competitive with the banking sector in Eswatini.

[2] Integral in the shift of focus was a skills audit and review of performances by its managers and to monitor their support of the new strategic direction which it embarked upon. According to the employer it would also provide for "flexibility", whatever is meant by it, since it was deemed necessary to bring about a change in the employment relationship. To this end, following a process of consultation and engagement, the managers were moved from their permanent positions to fixed term contracts of employment "for the operational needs of the Respondent". The managers, including the Appellant, then agreed to enter into the new arrangement by signing the initial fixed term contracts of employment, with the Appellant doing so on the 31st day of May 2010, as Mortgages Manager.

[3] This contract of employment contains details of various terms and conditions of employment, inclusive of the usual corporate benefits, such as a gratuity. Clause 5 provides for a renewable term of employment of three years upon prior written notice of six months by the employee and also for the commencement of the contract on a date agreed by the parties, irrespective of the date of signature. On the 20th December 2012, the Appellant wrote to his Managing Director and stated his intention to renew his contract for a further three years upon its expiry on the 30th June 2013. Meanwhile, the managers

received substantial payouts as result of their withdrawal from the employers' pension fund, together with other terminal benefits. Gratuities under their contractual benefits followed later in time.

[4] During the period when the first fixed term of employment contracts existed, both managers and employer concluded that various imperfections and other shortcomings had to be attended to. Not all benefits tallied with that of pensionable employees, there was no clarity as to when periods of employment started and ended, and further modifications of such aspects were the subject of protracted efforts to deal with the issues. During this process of review and modification, no new contracts were entered into but the managers continued to be renumerated as per their first contracts and *ex gratia* payments were made, *in lieu* of the absent agreement on gratuities. In the case of the appellant, he received just over E 640 000 in the year 2016.

[5] Meanwhile, the Board of Directors assented to a redrafted standardized fixed term contract which was to set out the terms and conditions of employment of the managers. The Building Society sought and obtained their inputs during prior consultations, save for that of the appellant. The new or "third" contract

was then given to the managers for acceptance through signature, but the appellant would not comply. The Respondent sets out in some detail the fruitless interaction between them. The Appellant had some issues with the new contract. Correspondence went to and fro and it transpired that Mr. Manana had quite a different view from that which was held by his employer as to tacit renewal and extension of his fixed term employment. Seemingly, he held the belief to be "...actually on [my] third contract since the anniversary of my contracts is 1st June," as stated by him in a letter of the 15th August 2016.

[6] In contrast, his employer held the belief that the first contract expired on the 31st May 2013, and since the reworking of the standard contracts could not be timeously completed and presented for signing, the first contract continued to apply in the second term, which in itself was about "due to expire". This was in June 2016. However, their records were to reflect the end date of the second contract as the 31st May 2016.

[7] By mid-August 2016 a dooming rift between the parties manifested itself in the relevant correspondences between them. The Building Society stuck to

its guns, maintaining that the third contract had to be signed in order for the Appellant to maintain his position, since the first contract ended in May 2013, thereafter deemed to be extended until May 2016. Also, that it had nothing to do with the third contract for a third period after May 2016. Incidentally, I noted during a perusal of the record that the unsigned draft of this new contract holds in clause 2 that it is a "one (1) year fixed term contract", that "the term of service shall be for a period of 1 (one) year from the 01/06/2016 regardless of the date of signing", but inexplicably therefore continues to state that it "shall terminate on the 31/05/2018", quite an anomaly.

[8] All further efforts by the Respondent to get the third contract of employment accepted and signed came to nought. Clearly, the Building Society went the proverbial extra mile to retain the services of their Mortgages Manager, but on condition that there must be a valid (renewed) contractual agreement between them. That the manager held a different view is equally clear.

[9] One such manifestation is contained in an e-mail which he sent to the Managing Director. It sets the tone for the impeding litigation which subsequently followed. It reads that:

"According to legal advise (sic) I have obtained with regard to my contract issue, there is no need for me to sign anything because:

1. I am already on a contract which expires next year (.)

2. I have no intention of requesting for a new one taking me to 65 years.

3. It would be stupid for me to sign a new contract with less favorable prescriptions (sic) than the current one I have when I am already half way through my existing one (.)

It is my submission therefor that we allow the current contract to run its course."

[10] This e-mail is undated, but it would have been around mid-February 2018 when it was written. By then, it was the clear position of the Appellant that he had dug in his heels, so to speak, and regarded himself to remain in continuous employment on an extended contractual basis until retirement. This is fortified by his apparent legal advice and reiterates his view of less favorable terms and conditions of employment sought to be compelled upon him.

[11] By early December 2018, the Appellant and Respondent had a meeting, the latter being represented by Mr. Nhleko, its Managing Director. This followed a number of fruitless attempts to meet and resolve the issue but yet again, they failed to amicably resolve the matter of signing the third contract, with the appellant expressing unspecified misgivings about less favourable terms. He did however leave the meeting with a copy of the new contract to again review it and undertook to convey his decision by the 10th December, 2018.

[12] It was on this date that he notified his employer that since he already had a "tacit contract" he refused to sign a new one "unless the contract is identical to or an improvement to my existing arrangement". Further efforts to get him to sign or to accept the third contract of employment were again met with resistance. The Building Society then took a harder approach, their perspective being that his continued employment had to be regularised in line with their operational requirements, as resolved eight years previously. The final countdown came when he was told to sign or go. Unless he signed by the 10th January 2019, his employment would be deemed to be terminated. He obviously felt coerced into doing this and remained with his view that less favourable terms would not be pushed upon him, also that he already has an

existing contract of employment, one which was tacitly renewed and still remaining in force.

[13] The letter dated the 8th January, 2019 which was the last straw on the camel's back reads in part:

> "The matter has been discussed at length and you have made it clear that you will not sign the contract as you believe you have a valid rolling contract. In light of the fact that no Senior Manager can be allowed to work without a fixed term written contract and this fact has been explained to you in various meetings and in particular that no Manager can work in terms of an implied contract and that the terms in the new contract are not worse either for you or for the other Managers, SBS cannot allow this situation to continue and you be treated as an exception.
>
> In light of the above, SBS now gives you an ultimatum that should you not sign the enclosed written contract by the 10th January 2019 this letter serves to advise you that your services would be deemed to be terminated as of the 11th January 2019 and that will be your last working day."

[14] It is the reaction to this ultimatum which triggered the cause of this appeal, the first port of call being in the Industrial Court where the Appellant was favoured with a result in accordance with his own wishes, and more. Thereafter, the High Court in its review jurisdiction made it all undone, hence the appeal to this Court. Initially, the issue of tacit renewal or relocation of his contract of employment was held by the Industrial Court to have met the legal requirements, but then it was set aside on review due to stated errors of law and unreasonableness. The brunt of the present challenge is against both the legal findings and conclusions as well as a vigorous attack against the jurisdictional ability of the High Court to have taken the matter on review in the first place, in tandem with another ten stated grounds of appeal on the merits. Multipronged indeed.

[15] On a basis of urgency, and bypassing the usual Consolidation Meditation and Arbitration Commission (CMAC) route of dispute resolution in the belief that the relief which was sought centers only on a determination of questions of law, the Appellant sought from the Industrial Court an interdict and a

declaratory order. He framed the relief as follows, with the interdict to operate with interim effect pending final determination:

> "An order declaring that a valid and enforceable contract of employment between the parties, on the same terms and conditions as the first contract of employment entered into between the parties in 2010, had come into existence with effect from the 1st June 2016 and that the said existing contract shall endure until the 31st May 2019.
>
> An order interdicting the Respondent from terminating the employment of the Applicant or deeming same to be terminated should the applicant refuse to sign a different contract of employment with retrospective effect, as demanded by the Respondent in the Respondent's letter dated the 8th January 2019."

[16] The Learned Judge of the Industrial Court held that with the employee having been allowed to render uninterrupted services beyond the initial date of expiry

on the 31st May 2016, the contract was tacitly renewed. Also, that there was a relocated or novated contract, a new one instead of continuation of the expired contract. The Court felt that it needed to decide on the facts before it whether the parties tacitly agreed to a new contract of the same duration or if they continued the employment relationship on the basis of an indefinite period pending the signing of a new contract. It was held that the intentions of the parties excluded any assumption that the relocated contract was going to be for a three – year fixed term period like the expired contract. The Appellant, then Applicant, was advised by the Court that if he thought that the new contract offered less favourable terms and conditions than previously, Section 26 of the Employment Act could provide recourse.

[17] The Industrial Court then ordered that:

> "An order is made declaring that there is a valid and enforceable contract of employment between the parties for an indefinite period pending the signing of the contract.
>
> The Respondent is interdicted from terminating the contract of employment of the Applicant in the manner

envisaged by the letter dated 08th January 2019 (Annexure "JM9") or by any other illegal means."

Each party were to pay their own costs."

[18] It is this order which was set aside on review by the High Court with costs (including certified costs of counsel) against the present Appellant. It is the order of the High Court which is now appealed against by Mr. Manana, the employee of the Eswatini Building society, the Respondent.

[19] At the outset, it must be recorded that this Court is suitably impressed with the meticulously prepared Heads of Argument and well articulated presentations by both counsel who represented the litigants. The well substantiated arguments are founded on numerous relevant authorities and legal precedent. Also notable is the absence of a range of condonation applications, which regrettably seem to have become the norm rather than exceptions. We record our commendation to both counsel in equal measure, even though both cannot be victorious.

[20] The grounds of appeal against the impugned judgement on review are split into ten different compartments, each with its attendant sub-reasons. Four

grounds of review which were upheld, come into play. Issue is also taken with factual findings and the evaluation of evidence, with a further ground based on the invocation of Section 26 of the Employment Act of 1980. A further challenge lies against the finding of employment since June 2016 having been on a day to day basis, in tandem with the absence of holding the contract *post* June 2016 to be a relocated contract on the same terms as previously. The second ground of appeal lies against a refusal by the High Court to strike out alleged new matter in the Respondent's replying affidavit, which challenged the reasonabless of the Industrial Court's decision on review thereof, a failure to apply its mind to the evidence vis-à-vis the refusal to sign a new contract in relation to the declaratory order of an indefinite contractual period. Also, the manner in which the Reviewing Court dealt with the complaint that the Building Society was not afforded the opportunity to ventilate and argue the implications of an indefinite period of employment.

[21] The main thrust of the argument on appeal centers on the reviewability or otherwise of the original decision by the Industrial Court which favoured the employee. The Appellant relies on legal precedent and its scope and ambit, as was set out by Tebbutt JA with Kotze P and Browde JA concurring, in the leading authority on the aspect of reviewability under common law grounds

by the High Court of cases which originated in the Industrial Court. The decision in Takhona Dlamini v President of the Industrial Court and Nantex (Swaziland) (Pty) Limited, Civil Appeal 23/1997 comes strongly to the fore. It enjoins this Court to decide herein whether it still needs to be followed *in strictu* or whether the time has come to deviate from it, amplifying the remedy of judicial review in this context and extending it to also include further options, thereby bringing our law up to present day requirements.

[22] This same authority was raised as a point *in limine* at commencement of the review application to argue that review is not a competent remedy. The Respondent relied upon Section 19(5) of the Industrial Relations Act of 2000 which provides that:

> "A decision or order of the Court or arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law."

"The grounds permissible at common law" has not been spelled out in the legislation and has been the subject of some controversy over the years. The impugned judgment on review does not provide any specifics of the reasons

why this point was dismissed as being unmeritorious by the Learned Judge *a quo*, save to have rather brusquely stated that the legal issues were comprehensively argued by counsel but that in his considered view, there was no merit in the point *in limine.*

[23] This terse dismissal of the important legal issue concerning the jurisdictional ability of the High Court to embark on the review of the matter in the first place is in stark contrast with the in-depth consideration of the other issues which were exhaustively analyzed, considered and then decided. Importantly, with the very same point receiving a lion's share of argument on appeal, it deprives this Court of being able to evaluate the reasoning for dismissal by the Learned Judge *a quo*, but it therefore also enables us to deal with this jurisdictional issue afresh.

[24] The leading local authority on which the Appellant relies is Takhona Dlamini *(supra)* which was decided in 1997, more than twenty years ago. The then prevailing legal authorities, legislation and requirements were meticulously, thoroughly and exhaustively dealt with by the late Tebbutt JA and concurred by Kotze P and Browde JA.

[25] As distinct from a right to appeal against a decision of the Industrial Court to the Industrial Court of Appeal "on a question of law", the legislation provides for the retention of the jurisdiction of the High Court, at the request of any interested party, for a decision or order of the Industrial Court to be "subject to review …on grounds permissible at common law".

[26] At page 13 of Takhona Dlamini *(supra)* the then Appeal Court for Swaziland held:

> "Those grounds embrace *inter alia* the fact that the decision in question was arrived at arbitrarily or capriciously or *mala fide*, or as a result of unwarranted adherence to fixed principle, or in order to further an ulterior or improper purpose, or that the Court misconceived its function or took into account irrelevant considerations or ignored relevant ones, or that the decision was so grossly unreasonable as to warrant the inference that the Court has failed to apply its mind to the matter. (See Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd & Another 1988 (3) SA 132 (AD) at 152A –

E). Those grounds are, however, not exhaustive. It may also be that an error of law may give rise to a good ground for review (see Hira and Another v Booysen and Another 1992 (4) SA 69 (AD) at 84B)."

"In Hira *(supra)*, Corbett CJ referred *inter alia* to the case of Local Road Transportation Board and Another v Durban City Council and Another 1965 (1) SA 586 (AD) in which Holmes J A, delivering the judgment of the Court, cited with approval the decision in Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551, the headnote whereof reads:

"A mistake of laws per se is not an irregularity but its consequences amount to gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined".

In such a case, that would be an irregularity justiciable on review".

[27] At page 16 of Takhona Dlamini the Court of Appeal continued to say that the legislature:

> "... specifically retained in the High Court power to review decisions of the Industrial Court on common-law review grounds. The distinction between an appeal against an error in law and a review where a material error of law is involved is succinctly and clearly set out by Corbett CJ in Hira's case *supra* at p. 90D –E, where, following his comprehensive review of the relevant cases in South Africa he said thus:
>
> "As would appear from a number of the cases to which I have referred, the Courts have often relied upon a distinction between (a) an error of law on the 'merits' and (b) one which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result not to exercise the discretion or power or to refuse to do so. A category (a) error ... has been held not to be reviewable whereas a category (b) error has been held to be a good ground for review at common law".

> The Learned Chief Justice considered at 90E-F that it was difficult in principle to draw a clear line of distinction between the two. Nevertheless the distinction exists and whether the error of law falls into category (a) or category (b) must, in my view, depend on the particular facts of the case."

[28] The Appellant raised the same issue of the alleged incompetence to review the judgment of the Industrial Court in the Court *a quo*, as was also argued on appeal. It was argued that there could not have been an error of law which resulted in a failure to exercise its discretion or power, since it actually did hear and determine the merits of the application and as such, review could not have been a competent remedy. Thus, it was argued in both the application for review and on appeal, that no reliance was placed on the accepted common law grounds for review, but instead that it was hinged on an alleged failure to exercise its powers and discretion appropriately, not that it failed or refused to exercise it capabilities at all, which only if it was so, would have rendered it to be reviewable.

[29] In both Lukhele v Swaziland Water & agricultural Development Enterprise Ltd (47/2011) [2012] SZSC [30-31] and James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] SZSC 65 [21], the Supreme Court confirmed that errors of law may give rise to a good ground of review. In the latter case of James Ncongwane, Ota JA with SA Moore JA and MCB Maphalala JA (as he then was) concurring, listed a number of examples as extracted from current Jurisprudence of when circumstances exist which would render relevant decisions to be reviewable under common law grounds. At para [21] she mentions seven such grounds being decisions arrived at:

1) arbitrarily or capriciously; or 2) *mala fide*; or 3) as a result of unwarranted adherence to a fixed principle; or 4) where the Court misconceived its function; or 5) where the Court took into account irrelevant considerations or ignored relevant ones; or 6) where the decision was so grossly unreasonable as to warrant the inference that the Court had failed to apply its mind to the matter; or 7) an error of law may give rise to a good ground of review.

[30] I cannot but agree with this, and restate that the list is not exhaustive, with each case to be dealt with on its merits. Furthermore, these grounds cannot remain static or be regarded as being cast in stone. As time goes on and

growing requirements of litigation so require, there will be an expansion. From early Roman times when the Corpus Iuris Civilis and particularly the Code of Justinian were compiled and issued between AD 529 and 534, or the earlier Institutes of Gaius in AD 161, or the later scholarly work of the great Dutch Jurists, till the present day, law has always been in an orderly developing phase. Even the current Industrial Relations Act of 2000 updated the previous version of 1996, where for instance, Section 19(5) which provides for the review jurisdiction of the High Court from the Industrial Court, now also includes decisions by arbitrators.

[31] In Lukhele *(supra)* the *dictum* in James Ncongwane that "an error of law may give rise to a good ground of review" (as long earlier already held in Hira) was reiterated. At para 32 it was again held that "an error of law by the Industrial Court in the circumstances in question was an irregularity justiciable on review in the High Court". Again in Dlamini v President of the Industrial Court and Another [1998] SZSC 2, decided only one year after Takhona Dlamini, the Supreme Court held (at page 19) that a case will be reviewable where the lower court or tribunal failed to properly apply its mind to the matter before it. It ties in with the reviewability of decisions or orders

where there was a failure to consider the relevant considerations or the totality of evidence before it, thereby resulting in an error of law.

[32] "Irrational" is a further nomenclature that has surfaced in recent judicial pronouncements in the course of review. In our neighbouring jurisdiction, "irrational" has become a "buzzword" or frequently used term when decisions of public office holders have been challenged on review and set aside by the Courts of Law. I shall not endeavor to trace the origin and genesis of this term, save to refer to the decision of the Constitutional Court of South Africa in Democratic Alliance v President of the Republic of South Africa and Others, Constitutional Case No. 2013 (1) SA 248 (CC) where the principle of irrationality was considered in the context of when the High Court has the power and jurisdiction to review and set aside a decision of a inferior decision maker, in the present matter *mutatis mutandis* that of the Industrial Court on review. There, it was held that:

> "There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the

second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality thus renders the final decision irrational".

[33] I do not hold any reservations about the further adoption of this ground of review in our already expanded grounds of reviewability under the common law of decisions from the Industrial Court by the High Court. Again, it might not fit into the impeded restrictions of interpretation which might have well sufficed in 1997, but which in my view, need to be brought up to the present day requirements of a less restrictive limitation as to when the High Court is empowered and enjoyned to adjudicate relevant decisions on review.

[34] A further ground for review which has come to the fore is that of "unreasonableness", as propounded by Professor Baxter in his often quoted

textbook, Administrative Law. At page 496, he proceeded to enumerate the categories under which the ground of unreasonableness is to be understood:

> "When one is called on to judge whether a decision is unreasonable, the decision might be viewed from various perspectives. For convenience these have been grouped into three categories, and it is under these heads that principles relating to abuse of discretion will expounded".

[35] The learned and well respected Professor then continued to say:

> " (i) Basis - if a decision is entirely without foundation it is generally accepted to be one to which no reasonable person could have come. Here there is some overlapping between dialectical and substantive unreasonableness, since there are indications that, while the courts will set aside administrative decisions which are supported by nothing at all, they will also set aside decisions which are complete *non sequitors* of the evidence available. Decisions will also be set aside where considerations

that are deemed relevant have not been taken into account or where irrelevant considerations have been used to support the decision. (ii) Purpose and motive – it is considered to be unacceptable for public authority to use its powers dishonestly. Equally unreasonable, though possibly with less reprehension, is the use of powers for purposes that are not completed by the enabling legislation. (iii) Effect – Reasonable people do not advocate decisions which lend to harsh, arbitrary, unjust or uncertain consequences. The court will review administrative acts, particularly subordinate legislation, in light of their effects and, should these be found to be unreasonable, the action will be set aside. These are not rigid categories; the way in which the challenge of unreasonableness is characterized will often depend on the terminology one uses or perspective one adopts. A perusal of the relevant dicta will reveal a welter of inconsistent terminology, as judges refer to '*mala fides*', 'improper purposes', 'improper motives', 'ulterior purposes', 'ulterior motives', 'improper considerations'. The reason for this, it is suggested, is that these terms all represent conceptions of the common term of unreasonableness".

[36] I agree with this exposition of the term "unreasonableness". I further propose that this concept and the application of unreasonableness should be incorporated into our law as a ground for the High Court to review a decision of the Industrial Court or an arbitrator whereby the scope and ambit of "the grounds permissible at common law" could be liberated from an overly restrictive application of the law as adumbrated over two decades ago. Furthermore, the unreasonableness should not be restricted to demonstrated "gross" unreasonableness, thus avoiding the trap of requiring that it has to be shown that undue weight has been placed on any singular issue.

[37] Past support for the incorporation of unreasonableness for a decision to be taken on review, as distinct from "grossly unreasonable", has been adumbrated by the Supreme Court in Councilor Mandla Dlamini v Musa Nxumalo Appeal Case No. 10/2002. This case was relied upon by Agyemang J in Usuthu Pulp Co. Ltd t/a Sappi Usuthu v President of the Industrial Court of Swaziland and Others Civil Case No. 4526/05[2009] SZHC 207 (01 September 2009) where the Learned Judge quoted that: "...in the light of modern approach to judicial review, the time has arrived in Swaziland to

jettison the narrow approach of gross unreasonableness…", and further relying on Hira *(supra)* at 93A-I referred to in Takhona Dlamini *(supra)* that "the court ought to review the decision of the Industrial Court in the present instance on the grounds of unreasonableness of the decision rather than on the requirement of the demonstration of gross unreasonableness", with further reference to the *dictum* of Innes CJ in Johannesburg Consolidated Investments CO. v Johannesburg Town Council 1903 TS III at 114-116, where that court held that:

> "Traditionally the review jurisdiction has been exercisable at common law with regard to lower court decisions, in respect of matters regarding the absence of jurisdiction, illegalities caused by bias and other interest in the cause, gross irregularities in the proceedings, the mis-reception of inadmissible evidence and the wrongful rejection of admissible evidence. In short it has been concerned with the questioning of the method of adjudications and not its result".

[38] The traditional approach to questioning only the method of adjudication and not its result has been questioned by Innes CJ as long ago as in 1903. Much water has passed under the bridge since then and current law has evolved significantly over the last century. A less rigid approach as that which was taken in Takhona Dlamini with the categorizing of types (a) and (b) with its inherent nuances of interpretation and application, which has become stale and past its "sell by date", has become necessary. In my considered view, updating and liberating the constrained approaches as to when a decision by the Industrial Court (or that of an arbitrator) may be reviewed by the High Court on grounds permissible at Common Law, has become essential in our law. The suffocating chains of restraint needs to be loosened enough to also allow an unreasonable decision to be challenged on review. It does not need to be shown as being grossly unreasonable. A failure to apply the mind to the subject matter, or to consider all of the relevant considerations, the failure to appreciate the import of relevant and admissible evidence or to decide a matter which is not supported by such evidence or evidence which does not reasonably justify the decision or a decision which is irrational, the list is not all-encompassing, – suchlike decisions which result in a collapse of legality should henceforthwith be able to withstand the scrutiny of judicial review

without the encumbrances of an over-emphasis of hurdles which serve to impediment the process of judicial review.

[39] As was stated by the Labour Appeal Court of South Africa in National Union of Metalworkers of South Africa v Assign Services and Others [2017] ZALAC 44, even though it refers to the review of an arbitrator's award and not a judgment the Industrial Court:

> "An incorrect interpretation of the law by a commissioner is logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable" (at para 32).

[40] Yet again, all indicators are that the time has come to move away from the more restrictive approach of reviewability of decisions by the Industrial Court as well as arbitrator awards, as enunciated in Takhona Dlamini *(supra)*. This Court may depart from its previous decisions when it becomes necessary to do so, as it is in the matter at hand. At the time it met the needs of the day but now, more than two decades later, it has reached its "use by date". The undue

limitations on the jurisdictional abilities of the High Court in its power to review needs to be unshackled and unreasonableness, irrationality, incorrectness and such, as already mentioned above, are by their very nature also material errors of law and adjudicable on review.

[41] It is therefore my considered view that even though the Court below did not give its reasons for rejecting the point *in limine*, it did not err in doing and holding so. The same point has also been comprehensively and incisively argued on appeal. It is the core of the Appellant's case that in the first place, the High Court could not at all have taken the matter on review. His counsel sagely avoided a direct response as to whether an appeal to the Industrial Court might have been a viable alternative. This Court is not called upon to express its view on this and likewise refrain from doing so.

[42] However, I do find that we are no longer able and willing to uphold and follow the now outdated judgment of this Court in Takhona Dlamini. I thus hold that this ground of appeal cannot be sustained and that it must therefore fail.

[43] The second ground of appeal, in tandem with the first, has also not been extensively dealt with in the assailed judgment of the High Court, or at all. Its terse pronouncement on the second point *in limine* merely refers to "...and the application in terms of Rule 6 (28) raised ..." in the quotation from paragraph 141 of the judgment already recorded above. It is merely covered in the phrase of reference to the lengthy address by both counsel, then followed by a "considered view that it has no merit". But does that mean that the Court did not apply its mind and erred in law? The absence of reasons again renders it impossible to follow the basis for so concluding, despite an otherwise well considered and motivated judgment.

[44] This second preliminary point refers to an application, presumply under Rule 6(28) in which the then Applicant, now Appellant, sought an order to strike out certain material from the replying affidavit of the Respondent. The gist of it was that "new grounds" for common law review were apparently added to the Replying Affidavit, instead of being pleaded in the Founding Affidavit.

[45] Firstly, I cannot locate any application under the auspices of Rule 6 (28) in the record. If such an application was indeed filed, it should have been

included in the record, since it would be a materially important pleading which was to be considered on review. Apart from an oblique reference to such an application in the penultimate paragraph of the judgment, and which was dismissed, the only further reference to it seems to be contained in the Heads of Argument. The contents of the Heads which were submitted in the High Court are to a great extent copied in the heads submitted on appeal.

[46] This second ground of appeal has it that the "new grounds" for review as made out in the Replying Affidavit and which were not ordered to be struck out would have resulted in the Court *a quo* incorrectingly reviewing the judgment and order of the Industrial court. In this second ground of appeal, the Appellant records the so called "new grounds" as follows:

> "Where the Industrial Court has failed to apply its mind to the matter before it, by applying the legal test or criterion incorrectly or failing to consider relevant considerations, its decision is unreasonable and is consequently subject to review"; and "Thus, the Industrial Court failed to properly apply its mind to evidence, in particular the first

> respondent's refusal to sign a new contract, in relation to its order that the first respondent's contract in indefinite;" and "In addition, the applicant was not given the opportunity to address the Court on the implications of it granting the respondent an indefinite contract. Thus, granting such relief constituted a gross irregularity on the part of the Industrial Court. The Industrial Court's judgment consequently stands to be reviewed and set aside".

[47] Though it is not specifically referred to in this ground of appeal, the Appellant also took issue with a further extract from the Replying Affidavit which reads as follows:

> "In addition, the Applicant was not given the opportunity to address the Court on the implications of it granting the Respondent an indefinite contract. Thus, granting such relief constituted a gross irregularity on the part of the Industrial Court. The Industrial Court's judgment consequently stands to be reviewed and set aside."

[48] In the High court, Appellant's Counsel seems to have argued that the essence for an Applicant on review was that its case and the foundation for it has to be established in the Founding Affidavit, and wholly so. It could not thereafter be that in a Replying Affidavit crucial elements of its case may be allowed to be added *ex post facto* in the Replying papers.

[49] Support for this contention, generally condensed in the often used phrase that "an Applicant must stand or fall by his Founding Affidavit", resonates in numerous authorities. In the High Court as well as on appeal, learned counsel for the Appellant referred to *inter alia*: Bayat v Hansa 1955 (3) SA 547 (N) at 553-D:

> ".....the principle which I think can be summarized as follows.....that an Applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavit filed with the notice of motion, whether he is moving *ex parte* or on notice to the Respondent, and is not permitted to supplement it in his replying affidavit (the purpose of which is to reply to averments made by the

Respondent in his answering affidavit), still less make a new case in replying affidavits".

[50] Another familiar *locus classicus* is Titty's Bar (Pty)Ltd and Bottle Store v ABC Garage (Pty)Ltd 1974 (4) SA 362 (T) at 368-H:

"It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish *locus standi* or the jurisdiction of the Court ..... in my view this practice still prevails."

[51] In the case of Mauerberger v Mauerberger 1948 (3) SA 731 (C) at 732 the same is said:

"It is quite clear that in notice of motion proceedings an Applicant must in his or her supporting affidavit set out fully his or her cause of action. It is not for the applicant to simply make general allegations, and when those

> allegations are dealt with in reply to come forward with replying affidavits giving details supporting the general allegations originally set out in the affidavit supporting the notice of motion……it is clearly settled law that in replying affidavits an applicant is not allowed to set forth details of allegations which should have appeared in the original affidavit supporting the notice of motion."

[52] That this principle has found its way into our domestic law bears no argument. It is trite. However, the contentious and supposedly "new grounds" for review in the replying affidavit must be seen for what it is. Generally, it may well be that a court will exercise its discretion in favour of a respondent who wishes to file a second set of further affidavits in order to deal with perceived new matter in replying affidavits. As far as I could ascertain, the record of appeal also does not contain any mention of such leave having been sought or denied. There is also a distinction between an applicant who had foreknowledge of the common law grounds of review on which he would rely in court but failed to comprehensively disclose and enumerate it in his Founding Affidavit, and the applicant who is faced with the respondent's answering affidavit wherein

it alleged that the Court has no review jurisdiction under common law grounds to entertain the matter at all.

[53] What the Applicant has done in reply was to re-assert his rights of review and reiterate the basis on which he bases his belief as to how he understands an error of law to render a matter reviewable under grounds permissible at Common Law.

[54] On a proper reading of the controversial extract from the replying affidavit as quoted above, I cannot agree with learned counsel for the Appellant that it should have been struck out by the Court *a quo*. It is not "new matter" as has been the case in the authorities on which reliance was placed. Moreover, I fail to see how the Appellant came to be prejudiced by not being favored with an order to strike out the offending words. It would go too far, in my respectful view, to hold that in the event that the Court indeed struck out the alleged "new grounds" of review, that the outcome of the matter would have been any different. The *ratio decidendi* of the impugned decision on review is not founded on the purported "new grounds" or "new matter" contained in the replying affidavit.

[55] Accordingly, the second ground of appeal cannot be upheld and stands to be dismissed. In coming to this conclusion, I have deliberately refrained from placing any reliance on the apparently absent record of any formal application to strike out. I also refrain from commenting as to whether an application to strike out requires it to be made by application on notice, or if it could as well be made from the Bar at the time when the matter is heard, as could possibly have been the case in this matter. Also, it was not an issue which was argued before this Court.

[56] The Appellant chose to set his aim for success in the appeal as wide as possible. The main thrust of argument on his behalf was focused on the inability of the Court *a quo* to have taken on the responsibility of reviewing the matter at all, based on the antiquated decision in Takhona Dlamini, as well as a refusal to strike out portions of the answering affidavit. Purposefully, in order to curtail the already overly long judgement on appeal, I have refrained from copying the text of the grounds of appeal which were filed, setting out the eleven grounds on which the decisive and well-motivated judgement is challenged. The remainder of his grounds of appeal could be encapsulated in a generic attack on the manner in which the High Court dealt with the issues at hand and came to the conclusion which it did, namely to set aside the

impugned judgment which was issued by the Industrial Court. Half of these are directed against conclusions of law based on the facts especially as to how it dealt with the legal question on tacit or implied renewal of contracts of employment, otherwise labelled as relocation of the contract, with the remainder against other perceived errors of law which also pertain to alleged misdirections by the Court and how it misconceived the relief which was prayed for *vis-à-vis* the eventual outcome on review.

[57] This shotgun approach of attack from all conceivable angles all boil down to the interaction in the workplace. On the one hand, the employer insisted that its terms and conditions of employment were spelled out in the initial contract, but when it proved to be inadequate, the contractual employment which was initially agreed upon was modified and came to be stipulated in a new third generation of contractual employment. The Appellant, who would have none of it, insisted that he was still employed on an extention of the initial agreement, a rolling or tacitly continuance of his initially agreed term of contractual employment. By his steadfastly refusal to agree to the third term of employment, the Building Society decided that if indeed so, it would be the end of their relationship. In the result, it caused him to seek relief in the Industrial Court which decided in his favour.

[58] However, the Industrial Court went beyond the prayers for relief and in further deciding the matter on an issue of law which did not go down well with the employer, it triggered an application for review, the outcome of which is now challenged on appeal by the employee on all fours.

[59] The main and underlying issue which encompasses the appeal on the remaining grounds lies with the alleged misconception of the Reviewing Court in the manner it dealt with the relocation of an employment contract. The Appellant avers that the error manifested itself by "(b)y holding the Appellant's contract as from the 1st June 2016 was not a relocated contract on the same terms of the previous two contracts, the latter of which expired on the 31st May 2016". This error, it is said, came about" by failing to attach any or sufficient weight to the fact that as at the 1st June 2016 no new contract had been formulated or signed," and with" that being the case, failing to find which terms and conditions, if not the same as before as alleged by the Appellant, were supposedly governing the employment relationship" as from the 1st June 2016 and thereafter. A further arrow in this quiver is the criticism of the Court " by failing to attach any or sufficient weight to the fact that the Respondent in August 2016 by way of letter stated that previous correspondence pertaining to terms and conditions of employment had

nothing to do with the third contract proposed by the Respondent" and finally, "by failing to a attach any or sufficient weight to the fact that the third contract proposed by the Respondent was only formulated and made available in December 2016 and therefore could not have found application on the 1st June 2016."

[60] It is understandable that the Appellant who was favoured by the finding of the Industrial Court and had his way of thinking endorsed, would be upset by the outcome of the review. He was thereby placed back to square one, in the same position as before he took his employer to task. He still finds himself without a new contract of employment, facing the reality of the Building Society's threat to have his services terminated due to his non acceptance of the new contract. The employer clearly and unequivocally refused to accept that an employee could dictate his own terms and conditions of employment, by insisting that a previously agreed upon contract, having run its initial course and thereafter operative for one further term, must continue indefinitely as a "rolling contract". He simply would not agree on an acceptance of the employment conditions offered by the Building Society and instead embarked on a process of litigation which ultimately ended up on an appeal to this Court in the hope that he would again be vindicated. Should this appeal be upheld

and the High Court's decision on review be set aside, it would be tantamount to an endorsement of the wrong outcome as initially pronounced by the Industrial court, mainly based on an incorrect application of law. It did so by concluding that the underlying conduct and facts obliged it to find that there existed a relocated contract which was to endure indefinitely, pending the signing of a new contract, on the same extended terms and conditions of employment. The employer was consequently interdicted from terminating his services as threatened in their letter of ultimatum (to sign or to go)"or by any other illegal means." I will soon revert to the question of whether the order was on par with the relief that was sought.

[61] As aforestated, the main thrust of the appeal concerns the application of law on tacit renewal of contracts of employment, conjunctive with an analysis and conclusions which may be drawn from the supporting evidence. Both the Industrial Court and High Court relied upon the same basic principle of law as was set out by Professor John Grogan in Workplace Law at page 45 of the 8th edition. The following extract is uncontentious and in my view, it correctly condenses the current legal position It reads:

"If after the agreed date for the termination of the contract the employee remains in service and the employer continues to pay the agreed remuneration, the contract is deemed to have been tacitly renewed, provided that an intention to renew is consistent with the parties' conduct."

[62] The different conclusions to which the two Courts below came are hinged on the latter part of the extract, the proviso which needs to be met before concluding that there was indeed a tacit renewal or relocation. The word "provided" prepositions that the conduct of the parties is consistent with an intention to renew, and it begs the question as to whether such intention must be mutual or if it could as well be unilateral. To so decide, it requires an examination of their conduct as is manifested in their evidence, that which each party expressed in relation to a continuation of the old or previous order of things, in contrast to a new order of things, a complete novation or restatement of their previous agreement. Importantly in my view, is the paramount principle of consistency in the mutual intention. Once the initial contract expires due to effluxion of time but the employee remains in service and the employer continues to pay the agreed renumetion, the only way to find

that the contract is "deemed to have been tacitly renewed" is when the intention to renew is consistent with their conduct.

[63] This intention to renew operates both ways. Each party to the prior agreement must desire the renewal and revival of the former relationship on the same basis as before. Tacitly or clearly expressed, their intention must be the same on both sides of the coin. No other conclusion than this can properly be drawn. It leaves no room for conditional differing nuances and interpretations to conclude that both parties desired the revival of their former relationship on the same terms and conditions of employment. These "same terms" need not be one hundred percent exactly identical, but must materially correspond. There might well also be ancillary aspects, such as the use of company assets or of a trade mark or suchlike aspect which fall outside the concept of "same terms." The mere fact that renumeration continues or that the employee continues to work, in itself, does not suffice.

[64] In the Commentary on the Pandects by Voet (Gane's translation) Vol. 7 – Book XLVI – Title 2 Section 2, the then prevailing and still acceptable definition of "Novation", being a voluntary act, reads thus:

> "Novation is termed voluntary when it takes place by the free covenant of the parties. It is a transformation and alteration of an earlier obligation, whether natural or civil, into another obligation, whether natural or civil, when a fresh cause is created out of a foregoing cause in such way that the earlier cause is destroyed".

(The source of novation as commented upon comes from the Digesta XLVI, 2, 1.)

It is important to note that there must be reciprocity between the parties involved. It is not unilateral or with diametrically opposed views as is the case in this appeal.

[65] This much is reiterated in Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others 2002 (1) SA 822 (SCA) at paragraph 4 where Harms JA with Mpati JA (as he then was) and Froneman AJA (as he then was) concurring, stated that:

> "After the termination of the initial agreement and prior to this letter the parties (in the light of the facts recited) conducted themselves in a manner that gave rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as existed before. Taken together, those facts establish a tacit relocation of a franchise agreement (comparable to tacit relocation of a lease)

between the appellant and Sirad. A tacit relocation of an agreement is a new agreement and not a continuation of the old agreement (Fiat SA v Kolbe Motors 1975 (2) SA 129 (O) at 139D – E; Shell at 985B – C). ...in determining whether a tacit contract was concluded a court has regard to the external manifestation and not the subjective workings of minds (Fiat SA at 138H – 139D."

[66] I emphasize the words "inescapable inference" because there is no room for a conclusion to the contrary that indeed the desire to renew on the same terms as before by both parties must be the one and only inference to be drawn from the external manifestation by the words and conduct of each. It does not leave room for the interpretation and expression of desires as sought by the Appellant. His employer, the Respondent, very clearly and unambiguously stated, repeatedly so, that the one and only way forward with their relationship was to be his acceptance of the terms and conditions as set out in the third contract which was offered to him for acceptance. Equally clear is that the Appellant manifestly refused to do so and rejected its acceptance. This simply cannot be held as an "inescapable inference that both parties desired the revival of their former contractual relationship on the same terms as existed before". Hence, the Industrial Court erred when it held to the contrary and

the High Court correctly held, on review, that there was not and could not have been such tacit renewal or relocation of the contract as the Appellant contends.

[67] Apart from the term "irresistible inference" as favored by Grogan, equally applicable terminology is employed by Christie in the Law of Contract in South Africa, 5th Edition, Lexis Nexis Butterworths at page 85 when he says that:

> "In order to establish a tacit contract it is necessary to prove, by the preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied that they were in agreement. If the Court concludes on the preponderance of probabilities that the parties reached agreement in that manner it may find the tacit contract established."

[68] A "preponderance of probabilities" which are "unequivocal" of a new tacit agreement simply underscore the requirement that both parties must be in agreement on the tacit renewal or relocation or novation of their contract.

Otherwise put, there must not be room for disagreement on their respective positions, as is very evident in the present matter.

[69] In addition, the openly expressed differences of opinion about future terms and conditions of continued employment militate against a conclusion of "tacit renewal" of the former extended terms. Only one party, the Appellant, held the firm view that his employment will continue as it was before, a "rolling contract" as he termed it, with an indefinite extention. The Respondent, to the contrary, saw the prior agreement as exhausted, having come to an end, with the only option being an agreement on the new terms and conditions as per the third contract, which the Appellant firmly refused to accept.

[70] The factual situation simply does not leave room for an "irresistible inference" that both parties desired the revival of their former relationship on the same terms as before. It was this misapplication of the requirement for tacit renewal which resulted in the successful review by setting aside that decisive finding which the Industrial Court erroneously found to be the case. Indeed, it was a reviewable error and the High Court cannot be faulted for doing what it did.

Accordingly, this ground of appeal and the underlying motivation for it must therefore also stand to be dismissed.

[71] The fourth ground of appeal lies against the finding that as from the 1st June 2016, the Appellant's employment was on a day to day basis. This is said to be so because it was not alleged as such in the Respondent's Answering Affidavit in the Industrial Court and by ignoring or overlooking the fact that the Appellant was paid on a monthly and not a daily basis.

[72] In paragraph 128 of the Review Judgment *a quo* the Learned Judge stated to "have no doubt in my mind therefore that the 1st respondent's employment during the period 1st June 2016 to the 31st May 2019 was on a day to day basis due to his refusal to sign the new contract presented to him by his employer – the Applicant". The appellant does not say how this finding of day to day remuneration, in contrast with weekly or fortnightly payment or on a monthly basis, which was the actual and factual basis on which remuneration continued, came to prejudice him in any manner, nor why such finding should serve as a basis for upholding his appeal against it. Surely there are different nuances in the interpretation and application of daily wages and monthly

wages. However, in my respectful and considered view, this ground of appeal does not suffice to upset the judgment on review.

[73] In considering the relief which was prayed for by the Appellant in the Industrial Court, the declaratory order which he sought, one must bear in mind that it was not hinged on the assumption that monthly remuneration instead of employment on a day to day basis had anything to do with his case. He sought a declaratory order to the effect that in fact, there existed a novated or relocated contract of three years duration. In lieu thereof, he was rewarded with a different order which declared his contractual employment to have been relocated as one of indefinite employment, pending an acceptance of a new contract. From the beginning, it was the Applicant, now Appellant, who bore the *onus* to prove his case of a new three - year contract, let alone the indefinite continuation of employment. He was thus required to not only prove what he claimed – an extension of his previous terms on the same conditions – but also that it was for the duration as claimed by him: the three year period from the 1st June 2016 until the 31st May 2019.

[74] Despite his failure to sufficiently motivate and prove his contention on a balance of the probabilities or at all, the Industrial Court found in his favour that beyond that what he came to seek, he was actually entitled to an amplified declaratory order to the effect that he was in fact to be favoured with an order that he has a "valid and enforceable contract of employment … for an indefinite period pending the signing of a new contract." That this could not have been countenanced by the Court of Review bears no argument when regard is to be given to the facts at hand. Letting alone for the time being whether such relief could properly have been substituted with what he prayed for, the mere fact that the Building Society continued to pay him on a monthly basis does not derogate from the fact that it was done in order to accommodate his reservations for the time being. There is no room to conclude that the employer wanted to get rid of the employee – on the contrary, they accommodated his whimsical and unclear stance of refusal to accept their offer of continued employment. He certainly could stretch a point. However, it was unambiguously stated that if he wanted to remain in service, it was dependant on an acceptance of the offered terms and conditions of service. Meanwhile, knowing that his services had not been formally terminated, they continued to pay his monthly salary. Although I do not view this as a day to day basis of remuneration but rather as a month to month continuation, the

contrary finding by the High Court does not lend itself to any substantive reason as to why it should be set aside. Accordingly, this ground of appeal also cannot be upheld.

[75] The fifth ground of appeal is stated to be that an error was committed "by holding that the Appellant's remedy was to invoke the provisions of Section 26 of the Employment Act of 1980, concerning less favorable terms and conditions and in particular ... the fact that the said section applies to a Form provided for in terms of Section 22 of the Act and that no such Form was referred to or was before the Court...and by failing to attach any or sufficient weight to the legal position that a relocated contract is a new contract and that the third contract proposed by the Respondent was a further entirely new contract and as such, that it was not a matter of less favorable changes to an existing contract, and by contracting itself in holding on the one hand, that there was no relocated contract on the same terms as before but on the other hand, in holding in effect that the terms as alleged by the Appellant as being the terms of the relocated contract, were capable of being changed unfavorably hence justifying invocation of the said Section 26." Quite a mouthful!

[76] Section 26 of the Employment Act of 1980 (Act 5 of 1980) deals with changes in the terms of employment. Whereas Section 22 of the Act requires of employers to furnish their employees with a completed copy of the Form as set out in the Second Schedule of the Act, within two months after the date of "the appointed day", being a date appointed by the minister, or within six weeks in relation to appointments subsequent to the appointed day". This Form under the Second Schedule sets out numerous details listed as terms and conditions of employment. If it so happens that the terms specified in the Schedule are changed, the employer is required to notify the employee in writing, specifying the changes which are being made, whereafter it will conditionally be deemed to be effective and part of the terms of service of the employee.

[77] When the employee opines that such changes would be less favorable than previously enjoyed by him, he has a fourteen day window period to set a prescribed procedure in motion whereby the Labour Commissioner may intervene, either setting aside the notification of less favorable terms or endeavoring to settle the matter, failing which the Industrial Court may make an order.

[78] From the records before us, there is no indication as to whether or not this procedure has been followed, no indication that the Appellant has notified his employer or the Commissioner in accordance with this statutory provision, or that any formal attempts to settle a dispute through either the Labour Commissioner or the Industrial Court on referral by the Commissioner, have been attempted or done. The first mention of this section was when the Learned Judge of the Industrial Court stated in his judgment that "the court is not presently called upon to make a determination on the validity or otherwise of the new contract. Such issues are dealt with in terms of Section 26 of the Employment Act." This sentiment was echoed in the penultimate paragraph of the judgment, immediately preceding its Order, wherein the Court advised:

> "If the Applicant is of the view that the new contract offers him lesser terms and conditions than he previously enjoyed, he has recourse in terms of Section 26 of the Employment Act."

[79] When the High Court took the matter on review, it was on alleged stated errors of law. I do not find any indication of basing the application for review on

the reference to Section 26, or even Section 22 or the Second Schedule of the Act. It was not stated to have been a ground of review. Nor could it be, since the Industrial Court did not base its decision on this legislative enactment. Nor did the High Court err on review in this regard. Again, the outcome of the review was also not dependant at all on any application of interpretation of the aforestated statutory aspects. In fact, I rather hold the view that there was no room in either Court to deal with this. It was not before either Court to make any determination on the material placed before it to pronounce on the applicability of section 26 of the Act, which has now been elevated to become a substantive ground of appeal on the merits. For example, apart from not being pleaded as such, neither the Form under Section 22 nor anything relevant to the prescribed procedure has been part of the adjudicative process. Whether or not the new contract indeed contains less favorable terms has never been the issue to decide, nor can it now be involved in the appeal.

[80] In my considered view, the fact that the Industrial Court decided to inform the Applicant that such a potential remedy might be availed to him, was not a reviewable error in law. Likewise, the High Court did not base its decision on this aspect. If to the contrary, it only would have erred if the reasoning was tainted with undue reliance on Section 26 of the Employment Act and its

ancialliary prescriptions, to determine if there was a valid complaint regarding less favourable terms of employment which could not be resolved by the intervention of the Labour Commissioner and referred to the Industrial Court for an appropriate order. None of this was done. Therefore, this ground of appeal must also fail.

[81] The sixth ground on which the Appellant relies is against the Learned Judge *a quo* "Holding that the Appellant was obliged to sign the third contract proposed by the Respondent and that the Appellant's refusal to do so constituted disrespect and disobedience to the employer."

[82] In the assessment of this aspect it remains important to focus on the impugned judgment itself and the effect that such finding could have had on the outcome of the matter when it was subjected to judicial review.

[83] First and foremost, we have long gone passed the era of slavery, servitude and forced labour. It bears no contradiction to agree with counsel for the Appellant that not only is the Appellant a free man, able to sell his specialized skills, training and abilities on a free market, but he can work at any institution

of his choice, he may freely choose his employer. Likewise, the Employer is also not forced to retain the services of an employee if the latter chooses to reject the remuneration package on offer, or finds it necessary to dictate his or her terms and conditions of employment, unless it coincides with what is on offer.

[84] That the High Court was alive to the fact that an employment contract is a voluntary agreement and not one of servitude or compulsion is clear from its judgment. That the Court did not regard his conduct as exemplary and a salutary example to be followed by the other managers is equally clear.

[85] The question remains as to whether or not the Court erred in coming to the conclusions on this aspect, as it did. I do not think it made a finding which is at odds with the totality of the evidentiary material which came to be considered. However, the retention of his position with the Building Society was justifiably dependant upon terms and conditions of service which were mutually agreed upon by the parties. If it was so that the Appellant would be adversely affected by a reduction or diminishing of his prior benefits, or is aggrieved by being forced to accept an adverse "new deal", he could have

chosen to follow the route via CMAC and resolution attempt, ultimately having the Industrial Court determine the matter on that basis, instead of the route of litigation which he chose to follow

[86] The legal advice which he followed was to the effect that he insisted on having an open ended "rolling contract" which he sought to be enforced, and as part of the bargain the Industrial Court even went so far as to interdict the termination of his services if the employer insisted on mutual agreement between the parties as expressed by signing a third contract of service. That this was untenable was recognized as such by the High Court, and in the course of doing so, it would be presumptious to expect only laudable and positive remarks about the situation.

[87] More importantly, there is no demonstratable error in the judgment appealed against that this aspect caused it to err, materially so or in any lesser degree which could conceivably result in an upholding of the appeal. This ground can therefore also not be upheld. The fact is simple: if the Appellant refused to accept the terms and conditions of service as set out in a third contract of employment indicated by his refusal to sign the document, nobody can force

him to sign, including the Respondent. However, if he refused to accept the deal, he equally so could not have expected the Respondent to continue paying him a salary and whatever other benefits to be derived from an employment relationship.

[88] The seventh ground of appeal lies against "upholding the Respondent's first ground of review to the effect that the Applicant obtained an order not prayed for by the Appellant."

[89] One does not need to take any myoptic view of the granted relief in contradistinction to the relief which was prayed for. On Notice to the other party, a defence had to be presented to the court in order for proper adjudication to occur. The "other side", as could also be used as an oft quoted and used term, needs to know what case it is to meet and the other side needs to know how best to deal with the issues at hand.

[90] Now, once it is allowed that there is overreaching of either judicial power or inconsindered variance between the two poles in opposition, where the relief which is granted exceeds the anticipated expectation of a reasonable finding

in accordance with the well established principles which aptly apply, it becomes an error which may well behove correction. In other words, borrowing a phrase from this eighth ground of appeal, it is when relief is granted which was not prayed for when judicial review becomes the remedy.

[91] It is always useful, especially so when armchair consideration is allowed, to look at the origin of a problem in order to deal with it. From a reading of the papers which were filed of record, the impugned judgment as well as the original, it does not seem to me that any of the litigants ever endeavored to persuade either of the Courts that the Applicant/ Appellant requested or prayed for an order such as now is highlighted.

[92] A contract of indefinite duration in contrast with a definitive or determinable duration are horses of entirely different colours. They should not be confused. The Applicant had his case to be that he is on "a rolling" contact, presumably to mean that it is of indefinite duration, forever and a day. Or until the cows come home or when the day finally comes that he agrees to accept whatever terms might be available at some future time.

[93] To my mind, it seems that if "the Court will therefore accept the Respondent's argument that the relocated contract was to endure pending the signing of a new contract by the parties", the deal is signed sealed and delivered. It is an irrevocable acceptance of the concept that the contract at hand is of indefinite duration, or up to a date which is readily ascernable, a rejection of the concept as advanced by the Employer, that the first signed contract had ended and that it was extended for diverse reasons for one further term of the same duration and other similarities. It profoundly contrasts with the loose and fast approach which was adopted by the employee.

[94] When seeking relief from the Industrial Court, it should recalled that an order was *inter alia* prayed for, as quoted in paragraph 3 of its judgment:

> "3.1 An order declaring that a valid and enforceable contract of employment between the parties, on the same terms and conditions as the first contract of employment entered into between the parties in 2010, had come into existence with effect from the 1st June 2016 and that the said existing contract shall endure until the 31st May 2019.

3.2 An order interdicting the Respondent from terminating the employment of the Applicant or deeming same to be terminated should the Applicant refuse to sign a different contract of employment with retrospective effect, as demanded by the Respondent in the Respondent's letter dated the 8th January 2019".

[95] In his reasons for the judgment, Nkonyane J recorded his views as to why the contract was "...tacitly renewed", then finding the relocated (novated) contract to be a new contract and not the continuation of the expired contract. He then went on to say that:

> "The Court must make a determination on the facts before it whether the parties tacitly agreed to a new contract on the same duration or continued the employment relationship on the basis of an indefinite period pending the signing of the new contract."

[96] With the apparent consensus of two assessors, the Industrial Court thus concluded:

"The intentions of the parties therefore exclude any assumption that the relocated contract was going to be for a three - year fixed term period like the expired contract. The Court will therefore come to the conclusion that the relocated contract was to endure pending the signing of the new contract."

[97] In turn, it resulted in the final order, which was taken on review and now appeal, the genesis of which is from that which was prayed for in the course of the application to review. The initial relief which was prayed for and which drew the lines of battle in the case it was to meet was set out to be that the first respondent (the applicant in the Industrial Court) sought the following relief from the Industrial Court:

"An order declaring that a valid and enforceable contract of employment between the parties, on the same terms and conditions as the first contract of employment entered into between the parties in 2010, had come into existence with effect from 1 June 2016 and that said existing contract shall endure until 31 May 2019".

[98] However, the Industrial Court afforded the first respondent the following relief:

> "A) An order is made declaring that there is a valid and enforceable contract of employment between the parties for an indefinite period pending the signing of the new contract."

Thus, the first respondent sought an order from the Industrial court declaring that his contract subsisted until 31 May 2019. Instead, the Industrial Court issued an order declaring that the first respondent's contract was indefinite.

[99] It was therefore quite in order for the aggrieved party to seek further recourse in law to undo the strongly felt perceived wrong to itself by way of filing a Judicial Review of the decision.

[100] In the view of the general remarks I have made above, and without detailing the reasons by the High Court as to how it decided on this, it stands to reason that in the event that the High Court erred in its judgment by dealing with this particular aspect, it did not materially sway its judgment for it to be set aside in its entirety.

[101] To base an appeal on the assumption that it has been all right, all along, for the Industrial Court to have granted relief way beyond that which it was mandated to exercise jurisdiction, and that it should serve to set aside the entire outcome of the review application, would in my view be tantamount to an abuse of the process. In any event, it was a reviewable error of law to have ordered the relief which went way beyond that which was sought. In tandem, it spread its tentacles to the other litigant, which was neither positioned nor required to address the Court on the ramifications and potential consequences of holding as it did. The other party was not heard on this watershed aspect.

[102] It therefore cannot be faulted as challenged in this ground of appeal. It is also destined to fail.

[103] Relocation of Contracts of Employment again rears its head in the eighth ground of Appeal.

[104] In the application to review the decision of the Industrial Court, it was contended that the latter Court incorrectly applied the test for relocation of contracts. Remunerated services in the course of the relationship between an

employer and an employee was argued to be that in the absence of a signed new contract, it could only be concluded that there existed a tacitly relocated contract. Since the Appellant has lost sight of who bore the burden of proof, it was expected of the Building Society to then suggest any other type of contract which could be said to fulfil the same function. But it remains to be seen if indeed the one and only conclusion must be that the situation has morphed itself into a relocated contract of employment for the continued relationship between the two.

[105] Purposefully, I have refrained from the often used mode of convenience when different grounds of appeal may "conveniently be grouped together". However, the entire drama around relocation of contracts, tacit renewals and so on, has already been extensively dealt with above, and with approval of the enunciation of the law as per Prof. Grogan.

[106] It was then concluded that the whole alleged issue regarding relocation of contracts does not meet the standards and requirements in order to be labelled and branded as an authentic "relocated contract". To avoid further prolixity,

there is nothing in this eighth ground of appeal to also avoid it from falling in line to be dismissed.

[107] The penultimate ground of appeal lies against a finding to the effect that it was not unlawful for the Respondent to issue a challenging ultimatum that if the agreement was not signed, the appellant would be dismissed, or more euphemistically stated, that his services shall be deemed to be terminated. This aspect has also been dealt with above.

[108] Learned Counsel for the Appellant argued that apparently, the Court *a quo* thought that because the Respondent engaged the Appellant in consultations with reference to operational requirements, that the Respondent's ultimatum was unlawful and if not to that extent, at least that the Appellant had repudiated the contract through his lack of material involvement in the consultation process. Ms van der Walt went on to argue that this scenario could have been possible in South Africa but that "operational requirements" do not have the same import and effect as in our neighboring jurisdiction.

[109] There, Section 188 (1) of the (South African) Labour Relations Act of 1995 stipulates that a dismissal which is based on an employer's operational requirements and so proven, is not unfair. On local soil, our Employment Act of 1980 does not provide for dismissal on the basis of operational requirements.

[110] The point remains that the original and deemed second contracts of employment had both run their course. That relationship replaced the former regime of "sign the dotted line and work for fifty years" which was mutually accepted to be due to "operational requirements". It ended up into two or three year contracts. But at the end of the day, it is water under the bridge, to use another cliché.

[111] The bottom line was that if the Appellant was to accept the then prevailing terms and conditions of service and sign the contract, he would be welcomed back as manager and have a new contract for a new period of time. If however he chose to refuse re-engagement on a new contract, he could not be forced to sign and accept it under duress or similar threat, but it was a choice which only he could exercise. If he chose to do nothing, he could not expect to

continue receiving a salary and other benefits. Simply put, he would be bypassed and regarded as a former employee.

[112] Since there was no evidence to sustain a finding that there is a high degree of probability, an "irresistible inference", that the parties were agreed to a renewal on the stipulated terms, it could not be sustained to hold to the contrary and dictate the relationship to now be "indefinite". There was no such mutual intention.

[113] In consequence, for whatever reasons, the High Court cannot be faulted in its finding on review that the totality of the Order had to be set aside. To undo this on the ground that the Respondent could not have taken the position which it did and now uphold the appeal on this ground, cannot be countenanced. Under the prevailing circumstances at the time, the Respondent was suitably justified to act as it did. It could not be expected to keep only one side of the bargain. The Appellant could not have expected his windfall of indefinite employment, on a "rolling contract", to continue for as long as it pleased him. That is not what they had conclusively agreed upon some years ago when the

first contract was signed. This ground of appeal also does not persuade me to hold in favor of the Appellant.

[114] The tenth ground of appeal against the whole judgment of the Court below is centered against the upholding of the fourth ground of review. The Industrial Court saw it fit to declare the existence of an indefinite contractual period of employment, pending the signing of a new contract.

[115] By analogy, *dies certus, incertus* or conditional upon the occurrence of an uncertain event in the future has been the downfall of many testamentary bequest. To state that something will continue indefinitely, but that it will change character once it so happens to occur that a new agreement is reached and formalized, simply does not tie in with the relief which the Court was to consider. The manager had made it very clear that he has no intention whasoever to sign a third contract. This alone removes any conceptual speculation of the event which would overtake the "indefinite contract", as was held in the Industrial Court, to ever occur. It is a closed door, non-return. To rub some further salt, the order itself is based on a finding of tacit renewal.

[116] Against this, it needs to be recalled that at the time when the Industrial Court was directly approached for relief, the then Applicant prayed for a declaratory order, a "valid and enforceable contract of employment between the parties, on the same terms and conditions as the first contract...and that the said existing contract shall endure until the 31st May 2019".

[117] Thus, an acknowledgement of the averred fact of renewal is asked for, but importantly, there is finiteness in the matter. It only seeks continuation or extention until the 31st May 2019. With all respect, the 31st May 2019 cannot be equated with "indefinite".

[118] Neither of the litigants pleaded for such relief. Indefinite with the potential to morph into a third contract once it is signed, especially so when rejection of such an event is so clear, it could not rightly have been sustained on review. It is an error of law which could as well have followed the route of an Appeal to the Industrial Court of Appeal, where it would have had a sporting chance of success. Instead, the dissatisfied litigant decided to rather pursue the entire body of complaints by way of Judicial Review in the High Court.

[119] The High Court did not endorse the finding that the contractual employment relationship between the two litigants is one of indefinite duration. Nor that when an uncertain future event occurs, that of the signing of a third contract which has already been repudiated by the Appellant, "indefinite" would change into something new.

[120] In any event, we do not live in the middle ages. We have no system whereby a recalcitrant party could be forced to sign a contract of employment, even under physical threat of bodily injury. But on the other hand, we also do not live in a world where an employee who refuses to accept the terms and conditions of employment as offered to him, may emphatically reject it but insist on being paid and employed as has happened in the past. Such a scenario cannot be perpetuated.

[121] It is therefore my considered view, that it is unrealistic to expect that this ground of appeal could persuade this Court to uphold the Appeal and set aside the findings of the High Court in its review jurisdiction. This ground should the also fail.

[122] Perhaps in the belief in the power of numbers, otherwise maybe to cap the arsenal of reasons why the Appellant behoves this Court to set aside the whole Review Judgment of the High Court, yet another ground of appeal has been included. This all encompassing eleventh ground of appeal is stated thus: "in not dismissing the Application [in] view of all of the foregoing". This final arrow in the quiver of the Appellant is entirely superfluous. No more need to be said about it.

[123] When all is said and done, I remain entirely unconvinced about success in this appeal. Multifaceted attacks and criticisms of the impugned judgement have been considered, weighed and rejected.

[124] Accordingly I make the following order:

a) The Appeal against the judgment on review in the High Court is ordered to be dismissed, with costs.

b) Costs of Counsel are certified to have been necessitated and justified by the exigencies of the litigation.

JACOBUS P. ANNANDALE

JUSTICE OF APPEAL

I agree

MCB MAPHALALA CJ

I agree

DR. B. J. ODOKI JA

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