

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO. C383/2023

In the matter between:

WESTERN CAPE EDUCATION DEPARTMENT

Applicant

and

WESLEY NEUMANN

First Respondent

**EDUCATION LABOUR RELATIONS
COUNCIL**

Second Respondent

JONATHAN GRUSS N.O.

Third Respondent

PREMIER OF THE WESTERN CAPE

Fourth Respondent

HELEN ZILLE

Fifth Respondent

BRAIN SCHREUDER

Sixth Respondent

PUBLIC SERVICE COMMISSION

Seventh Respondent

**DEPARTMENT OF PUBLIC SERVICE AND
ADMINISTRATION**

Eight Respondent

**NOTICE OF INTENTION TO APPLY
FOR LEAVE TO APPEAL**

BE PLEASED TO TAKE NOTICE that the Applicant (First Respondent in the review) intends to apply, on such date and at such time as this Honourable Court may deem fit, for leave to appeal to the Labour Appeal Court against the whole of the judgment and the orders handed down by the Honourable Acting Justice de Kock on 5 January 2026.

The grounds upon which leave to appeal will be sought, are the following:¹

1. The findings on insolence and insubordination

1. The Court erred in finding that the arbitrator's erroneous description of the charge as being one of insubordination instead of insolence was indeed one of the employee's grounds of review.
2. The employee instead submitted that the conclusion that his conduct constituted insolence or disrespect is not one that a reasonable decision maker could arrive at.
3. A reviewing court is not permitted to review by placing reliance on a ground not pleaded by the employee.²
4. In the alternative and in the event that the Court was permitted to review the arbitrator's decision on this basis, the Court erred in finding that the arbitrator's erroneous description of the charge as being one of insubordination instead of insolence was a significant error which led to an unreasonable outcome.
5. Even on the Court's own reasoning it was required, but failed, to apply the review test as restated by the LAC in Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others³ which restated

¹ For sake of convenience, the First Respondent on appeal will be referred to as "employee" and/or "Mr Neumann" and the Applicant on appeal as the "Department" or "employer".

² Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation Mediation and Arbitration and Others (JA28/2002) [2003] ZALAC 18; [2004] 1 BLLR 34 (LAC) (20 November 2003) at 15.

³ [2021] 5 BLLR 475 (LAC).

the review test in the following terms:

"Is the decision reached by the arbitrator one that a reasonable decision maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justifications for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator."

6. Under the Code of Good Practice, the arbitrator was required to do no more in the first instance than consider whether the facts demonstrated that the employee contravened a rule or standard regulating conduct in the workplace. The employee was obviously charged with breaching his duty of respect and subordination towards his employer and the uncontroverted facts demonstrated a serious and material breach of these duties irrespective of whether that serious breach was described as gross insolence or gross insubordination or both. This was so even if the arbitrator should have labelled the charge as insolence and not insubordination. The result - that Mr Neumann was guilty of serious misconduct warranting a fair dismissal - was accordingly capable of justification for reasons other than those given by the arbitrator.
7. Should a principal of a school do the following, then the decision to dismiss must, on any interpretation, fall within a band of reasonable outcomes:

- 7.1. Send a protest letter to the head of Department ("HOD") - in response to a valid instruction issued by the National Minister of Education and relayed and implemented by the provincial education authorities that he was required to ensure that grade 12 learners must return to school - in which he accuses the HOD of resorting to pre-1994 i.e. apartheid government methods of issuing instructions in a Baaskap manner;
 - 7.2. Accuse his employer of conducting itself in the manner of politicians and bureaucrats of fighting battles to the last drop of the blood of our children i.e. allege that it is prepared to recklessly risk the lives of children entrusted to its care;
 - 7.3. Accuse his employer of acting in an unintelligent and reckless manner;
 - 7.4. Accuse his employer of (repeatedly) defying cabinet decisions with regard to the duration and closure of schools.
8. The Court erred in not finding that this conduct constituted extreme defiance towards an authority figure expressed in extremely insulting and intemperate language, which by any measure should have been found to be beyond the pale and justifying dismissal as a reasonable outcome.
 9. The Court failed to mention that an aggravating factor was Mr Neumann's refusal to apologise for his misconduct, even after his legal representative informed the disciplinary hearing that his client would do so.

10. The Court erred in failing to have regard to and to consider and apply the finding in Palluci Home Depot (Pty) Ltd v Herskowitz & others⁴ where it was held that “There is a fine line between insubordination and insolence, and insolence may very well become insubordination where there is an outright challenge to the employer's authority”. Accordingly, the Court should have found that the acid test for a fair dismissal or justification thereof on either charge are essentially the same; the Court should therefore have found that :
- 10.1. respect and obedience are implied duties of an employee under contract law;
- 10.2. any proven serious repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her;
- 10.3. Both insolence or insubordination of a particularly gross nature justify dismissal.
11. In either event, as the Court should have found, Mr Neumann's insolence (repudiation of his duty to show respect) manifested in a context of reluctance to implement an instruction. Whether his insolence was coupled with an outright refusal to implement an instruction or conduct less than an outright refusal, the breach of the duties he owed to his employer was reasonably assessed by

⁴ (2015) 36 ILJ 1511 (LAC)

arbitrator to be sufficiently serious to justify dismissal.

12. The Court should also have found that the arbitrator justifiably found that Mr Neumann's conduct was of a particularly gross nature - made even more serious by the allegations of racist or an apartheid government style thinking on the part of the HOD or the Department in issuing the instructions.
13. The Court clearly erred in its finding in respect of these expressions: "this Court does not accept that the expressions used were done with a purpose or intention to classify Mr Schreuder as a racist or that it was used were specific racial undertones. The expressions used referred inter alia to Mr Neumann's extreme frustration caused by the climate of fear and uncertainty created by the Covid 19 pandemic and the manner in which Mr Schreuder was approaching Mr Neumann. The arbitrator failed to appreciate and consider the context in which the expressions were used" (paragraph 91).
14. The Court should indeed have found that had the employee only wanted to criticise his employer's alleged highhandedness he would have had no need to use loaded phraseology such as "pre-1994 methods", "Baaskap" and "blood of our children".
15. The Court should also have found that the Covid pandemic had placed extraordinary pressures not only on Mr Neumann but also on the education authorities and their leadership. Everyone was facing extraordinary pressures in dealing with the pandemic and the Education Department's line management had no special licence or latitude to behave badly. Teachers and school leadership who

disagreed with the decision to reopen schools were required to do so in a law-abiding and respectful manner.

16. The Court failed to mention that when the decision to reopen the school was indeed challenged in Court it was found that the decision taken by the education authorities was reasonable and consistent with the Constitution.⁵ The Court should accordingly have found that the gratuitous insults directed at the education authorities for the reopening of schools were baseless and lacking in justification.
17. The Court also incorrectly applied constitutional law principles on freedom of speech developed in the AfriForum v Economic Freedom Fighters and Others⁶ which dealt with the test for hate speech outside of an employment context as applicable to the standard of conduct permissible when it comes to the interaction between an employee (a school principal) and his employer. In the employment context a court was however required to find that the Constitution grants no licence to employees - even to shop stewards - to resort to defiance and needless confrontation in the exercise of constitutional rights granted to employees.⁷
18. The Court fails to refer to and apply the decision of the Constitutional Court in Head of Department, Department of Education, Free State Province v Welkom High

⁵ One South Africa Movement v The President of the Republic of South Africa (Solidarity Amicus Curiae) 2020 JDR 1301 (GP)

⁶ AfriForum v Economic Freedom Fighters and Others (1105/2022) [2024] ZASCA 82; [2024] 3 All SA 319 (SCA); 2024 (10) BCLR 1275 (SCA); 2024 (6) SA 1 (SCA) (28 May 2024)

⁷ National Union of Mineworkers & others v Black Mountain Mining (Pty) Ltd (2010) 31 ILJ 387 (LC); National Union of Metalworkers of SA on behalf of Motola v Johnson Controls Automotive SA (Pty) Ltd & others (2017) 38 ILJ 1626 (LAC)

School⁸ especially at paragraphs 199 to 201 which made it clear that a school principal may not in his interactions with the SGB place himself in conflict with instructions of the HOD. The Court should have held that as a person under a clear contractual and statutory duty to obey the instructions of the HOD, Mr Neumann's abusive letter was a further manifestation of his conflict-of-interest in breach of his lawful duty to act as the HODs representative on the SGB.

1.1 Elaboration on the finding that language was not racist.

19. The Court in finding that the expressions used were not racist because they were not made with the purpose or intention to classify Mr Schreuder as a racist applied the wrong test in law. The CC in Rustenburg Platinum Mine v Saewa (Obo Bester) and Others⁹ held that the correct test was whether, objectively, the words were reasonably capable of conveying to the reasonable hearer that the phrase had a racist meaning. The Court should accordingly have concluded, applying that test, that not only was Mr Neumann's use of the words racially loaded and derogatory, but that it would have been unreasonable for the arbitrator to have concluded otherwise.

20. The Court should also have found that false and misdirected accusations or imputations of racism or apartheid style government are also in and of themselves

⁸ Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another (CCT 103/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) (10 July 2013).

⁹ 2018 (5) SA 78 (CC).

serious misconduct.

21. The Court severely minimised the seriousness of the Mr Neumann's conduct by stating that his comments were merely intemperate and ill-advised but not racist or even especially serious thus requiring a sanction no greater than a final warning.
22. It is also evident from the train of the Court's reasoning that this conclusion was in the view of the Court the correct outcome, whereas the same factual and legal matrix could and should have driven the Court (applying a reasonableness test and not a correctness test) to conclude that the fairness of the dismissal was capable of being justified, even if the Court disagreed with the severity of the sanction.
23. The Court's erred in its finding that the undertaking in Mr Neuman's letter was in fact compliance with the HOD's instruction. What he indeed said was that if the national Minister (and not merely his HOD or the MEC) gazetted this instruction then and only then would he comply. This comment hardly detracted from his insulting and racist commentary directed at his employer the HOD.
24. This challenge to the lawful authority of his employer was further manifested after Mr Neumann was charged through his attempt to interdict his disciplinary hearing on the grounds that the HOD's appointment several years prior was unlawful. This challenge was also pursued in the High Court, which proceedings are still pending.

2. The finding that the employee was not responsible for dissemination of the offensive letter into the public realm

25. In finding that Mr Neumann was not responsible for the dissemination of the letter into the public realm, the Court failed to have proper regard to the fact that in making such finding the arbitrator had made a credibility finding that Mr Neumann's denial could not be believed.
26. The Court failed to find that it should be loath to impermissibly interfere with a credibility finding on review, especially given the context where the appearance of the letter in the press was coupled with the frequency and excessiveness of Mr Neumann's Facebook posts which supported the inference that his defiance was calculated to be made public.

3. Issues of principle

27. The Court having found that Mr Neumann's defiant and insolent language was protected by freedom of expression, it is important for the Labour Appeal Court to clarify to what extent and in what circumstances the constitutional right to freedom of speech might permit a principal to engage with his superiors in a disrespectful manner.¹⁰
28. The Department contends there are reasonable prospects of another court coming to a different conclusion. However, even if it is wrong on this score, leave to appeal should be granted for clarity on certain matters of principle. The Court marked its

¹⁰ Superior Courts Act 10 of 2017 s 17(1)(a)(ii)

decision as reportable and purports to make findings of principle in respect of the issues on which the decision of Labour Appeal Court is of importance to the Labour relations community. One such issue is the limits of provocative language and to what extent the right to freedom of speech protected Mr Neumann against dismissal in a context where he was under a duty of subordination and obliged to respect his employer.

4. The finding that the employee did not breach social media policies

29. Mr Neumann was charged with violating the provisions of Personnel Administrative Measures ("PAM") and a number of other policies relating to the use of social media. The Court found his defence that he was not aware of only one policy, the WC Social Media policy, sufficient.
30. As a principal who was regular user of Facebook, both the school page and his personal one and who was the custodian of policies and circulars, it can hardly be said that he was permitted to claim ignorance of the applicable rules. Further, a principal was self-evidently not permitted to distribute fake news and fearmongering in support of his stay away cause.
31. This despite the fact that Mr Neumann effectively conceded under cross examination that he was aware of the PAM and the other policies which prohibited irresponsibly criticising the government and further he knew that he could not bring his employer into disrepute.
32. Further, the Court failed to apply the principle that it was self-evident that a school

principal was not permitted to bring his employer into disrepute or to publicly encourage unlawful conduct.

33. Even if it was correct to find that Mr Neumann was not aware of the relevant rules (which is denied) the Court was required to find that as a school principal and member of management he could reasonably have been expected to be aware of the rule or standard.

5. Ad factual errors material to the outcome

5.1 Factual errors relating to safety concerns at Heathfield High School (HH)

34. The Court erroneously relied on and accepted Mr Neumann's version on school safety as "mostly undisputed". It is obvious from the cross-examination that it was not mostly undisputed. As a result of these factual errors the Court incorrectly found that Heathfield High was not safe and so it was reasonable for Mr Neuman to call for non-attendance. His personal fears were thus held to be reasonable, and relevant or mitigatory to his misconduct.
35. The issue was not so much the fears of Mr Neumann and some members of the SGB but whether the education authorities had rationally assessed the risks and found that it was sufficiently safe to return. These subjective individual fears cannot be the determinant of whether the instruction to return was legitimate and required obedience.
36. The evidence relied on by the Court to justify Mr Neumann's fears that contrary to

the decision of the authorities the school was not safe was in either event misconstrued by the Court.

37. In fact, the evidence showed that the school was safe for operation during the relevant period having regard to the following:

- 37.1. Jacqui du Plessis, the Circuit Manager, conducted a walkabout with a checklist on 2 and 3 June 2020, and issued a "readiness" instrument confirming that the school was compliant with the safety regulations and could open for Grade 12 learners.
- 37.2. The School Evaluation Authority ("SEA") conducted an inspection on 21 July 2020, finding the school compliant with health and safety regulations; specifically, they noted extra desks had been removed to accommodate social distancing (maximum 16 learners per class), sanitizer was provided for every learner, and ablution facilities were clean with liquid soap available.
- 37.3. Mr Neumann himself submitted a Temporary Revised Education Plan ("TREP") to the WCED in which he indicated the provisions taken to ensure the school was compliant and signed off that measures were in places for the matrics to safely attend.
- 37.4. It was common cause at the arbitration that by 2 June 2020, the school had received all required Personal Protective Equipment ("PPE"), including masks and sanitizer. The dispensers and thermometers were not required.

- 37.5. Guidelines issued by the HOD stated that because school buildings had been vacant for weeks, the short lifespan of the Coronavirus meant deep cleaning was unnecessary; instead, thorough cleaning with bleach and sanitizer was deemed sufficient to maintain safety.
- 37.6. During cross-examination, Mr Neumann conceded that the school was compliant with the guidelines and directions issued by the Department. He further admitted that the school was safe for matric attendance from 8 June 2020 through to 24 July 2020.
38. Mr Neumann's version that there was only one tap in the girls' bathroom, and then in the entire school, that was working, was contradicted by several witnesses called by the employer.
39. Mr Anthony Ram, who was a member of the cleaning staff (general worker) at Heathfield High School, in fact only died in 2021 and not in 2020 as found by the Court. Ms Syce testified that he had passed away around August or September when the infection rates had gone down. Mr Seymour confirmed that Mr Ram was a witness regarding the initial assault charge in the disciplinary hearing in 2021 before his death. The insulting letter was sent on 26 July 2020. Mr Ram's death in 2021 could thus not justify or excuse Mr Neumann's "intemperate language".
40. The Court incorrectly found that "people" connected to the school were dying (paragraph 55 re people connected to the school were dying). The impression was created that this was in some way connected to conditions at the school. Mr

Neumann testified that on 2 June 2020, shortly before staff were meant to arrive at school, a parent of a staff member passed away from COVID-19. This evidence was unconnected to conditions at the school.

41. The Court also failed to acknowledge or even refer to the decision relied on by the Department and cited by the arbitrator that the phased reopening of schools was indeed consistent with the constitution *inter alia* because the expert evidence relied on by the government was that the risk to children was low and that even if infected children seldom contacted serious illness. The Full Bench noted that there were other constitutional rights that needed to be given effect to in the decision to open schools including the right to basic education in the right to dignity. Mr Neumann's subjective views that the reopening of schools was dangerous and irresponsible treated by this Court as if they were well-founded is underpinned by reasoning inconsistent with what was found in the One South Africa¹¹ case.

5.2 Findings on exemptions form

42. The Department's case was that the exemption forms were a reasonable and lawful alternative for children to stay at home which Mr Neumann did not pursue. The Court found that Ms du Plessis gave Mr Neumann permission to hold on to the exemption forms. The Court also found that there was no deadline for the submission of the forms.
43. Ms du Plessis however explicitly testified that she did not give Mr Neumann

¹¹ See ft 5.

permission to "hang on" to the exemption forms or refrain from processing them. She confirmed that Mr Neumann was obliged to submit the forms by the deadline of 31 July 2020, which he did not do.

44. This evidence was relevant because it meant that parents who had children at school were given the option of keeping them at home lawfully which undermined Mr Neumann's stance that there should be no return to school.

6. The evidence relating to selective discipline.

45. The Court found that Mr Neumann was treated differently to Mr Wertheim (paragraph 88; 89) and "other principals" (paragraph 80) and "other employees" (paragraph 94) who were approached informally or for a "fireside chat".
46. There was no evidence of any principal or employee other than Mr Wertheim who was approached for a "fireside chat". Mr Stander testified that he had a "fireside chat" with Mr Wertheim after the principal's one social media post. Mr Stander confirmed that this intervention was successful, as Mr Wertheim did not post again after the discussion.
47. Mr Stander testified that the HOD also requested that he have a "fatherly chat" with Mr Neumann. Mr Stander attempted this engagement during a meeting with Mr Neumann on 7 July 2020, prior to the issuance of the formal instructions that led to Mr Neumann's charges. Mr Stander testified that the attempt was unsuccessful because Mr. Neumann and the SGB had already "taken a different position" and would not commit to indicating the school was open.

48. In other words, the Department did attempt through informal methods to convince Mr Neumann to tone down his strident opposition and open defiance. These attempts failed because Mr Neumann was not prepared to back down. The Department thus did not unfairly select him for formal discipline without even bothering first to attempt to convince him informally to behave appropriately. The case of Mr Wertheim was different as this constructive engagement proved to be fruitful whereas in the case of Mr Neumann it did not.
49. The Court failed to apply the case law pertaining to consistency set out in Sibanye Gold Ltd v Commission for Conciliation, Mediation & Arbitration & others.¹²
50. There was no evidence about any other headmaster who committed the same or similar misconduct who the employer was required to charge but who it had declined or failed to charge or who had been found guilty but given a lesser sanction. The employee was not simply dismissed for participating in a campaign supported by other principals surrounding the reopening of schools but for the way in which he misconducted himself in the context of that campaign.
51. Mr. Schreuder also testified that he did not charge principals for having a voice or a "protest voice" unless they contravened specific rules or instructions. This

¹² (2025) 46 ILJ 1400 (LC). The applicable legal principles may be summarised as follows: (1) in general employees must be measured against the same standards; (2) the court must consider whether the chairperson (of the disciplinary enquiry) conscientiously and honestly determined the sanction; (3) the decision by the employer not to dismiss other employees for the same or similar misconduct must not be arbitrary, capricious or induced by improper motives; (4) inconsistency is not dispositive of the issue of an appropriate sanction and all relevant factors must be considered; (5) a value judgment must be exercised. The onus lies with the employer to prove that there was no inconsistent application of discipline.

evidence was not contested.

52. The Court also found that there was a strained relationship between Mr Schreuder and Mr Neumann (paragraph 90). This was relevant to the finding that Mr Neumann had been picked out for discipline. There was no evidence of this, and Mr Schreuder (corroborated by Ms Hammond) testified that he had never even met Mr Neumann face-to-face prior to the pandemic and did not recognize him when he eventually did - Ms Hammond had to point him out.

7. Mr Schreuder's instruction was not reasonable or fair.

53. Mr Neumann's main case was that the instruction was unlawful based on his reading of the Gazette. The arbitrator found against him on this point. He raised it on review and the Court agreed with the arbitrator. However, as part of a generalised shotgun approach he also argued that Mr Schreuder had not been able to identify the relevant regulation when cross-examined. His inability to do so was not at all material to the real challenge which was to the lawfulness of the decision.
54. In the context of this side issue the Court incorrectly held that Mr Schreuder had conceded that he could not identify the legal basis for compulsory attendance of grade 12 learners (paragraphs 67 and 70).
55. While Mr Schreuder had not immediately been able to identify the regulation when asked about it on 21 April 2023, the following day he referred to: (a) the National Policy on Learner Attendance (2010), citing paragraph 16 which explicitly

references Grade 12 learners, who are legally recognized as enrolled learners subject to attendance requirements, regardless of being over the age of 15; and (b) a departmental circular that accompanied this policy, which expected principals to acknowledge receipt and implementation of these attendance definitions in their schools. In other words, once a learner is enrolled at a school, it becomes compulsory for that learner to attend daily.

8. The Court incorrectly found that the Department did not lead any evidence on the issue of reinstatement not being an appropriate remedy.

56. Mr Schreuder testified that the employment relationship had reached a point of "irretrievable" and "irreparable breakdown". He stated that he did not see how there could be any "restoration of a trust relationship" between Mr Neumann and the WCED.

57. Mr Schreuder's evidence that Mr Neumann should not return was the following:

57.1. He testified that Mr Neumann's written correspondence, particularly the email of 26 July 2020, showed a refusal to submit to the authority of the employer or carry out lawful instructions.

57.2. Mr Schreuder viewed Mr Neumann's decision to copy "all media houses" on his insolent response as a reprehensible action that "rubbished" the reputation of the Head of Education and management.

57.3. A critical point for Mr Schreuder was that no apology was ever forthcoming,

and he noted that Mr Neumann's post-dismissal social media activity demonstrated he would "do it again" if faced with the same situation.

57.4. He noted that Mr Neumann participated in a protest where a poster displayed a photograph of Mr Schreuder with a Hitler moustache and the caption "SON OF A BITCH," and that Neumann failed to distance himself from or apologize for this.

57.5. Mr Schreuder said that Mr Neumann had distanced himself from the Department and undermined the system by directing his rhetoric not just at the HOD personally, but against the WCED as a whole.

57.6. When it was put to Mr Schreuder that Mr Neumann's immediate superiors, Mr Stander and Ms du Plessis, testified that they could still work with him, Mr Schreuder dismissed this by stating they did not have the "overall picture of the interaction and integration" and emphasized that "they are not the decision makers" in the matter. He maintained that for a restoration of trust to occur, there had to be genuine remorse, which he felt was entirely absent.

58. Contrary to the Court's finding in paragraph 139 Mr Stander did not state that he did not support the dismissal of Mr Neumann. Instead, his testimony was more nuanced namely that while there was "nothing personal" between them he could understand why there was an issue between Mr. Neumann and the Department. In other words, Mr Neumann's conduct was not that which was required of a principal.

9. The Decision made by the Court to reinstate

59. The parties were not asked by the Court to present argument on the question of reinstatement in the event of the Court deciding to review and also deciding not to remit but instead deciding to substitute not merely with an unfair dismissal decision coupled with compensation, but with a decision requiring the employee's reinstatement into a post of significant responsibility at the beginning of a new school year almost 4 years after his dismissal.
60. The Court accepted that when it came to the calculation of back pay the employee should be entitled to adduce evidence on Neumann's possible earnings between the date of dismissal and the date of reinstatement and that the employee should be accordingly afforded the opportunity to apply for determination of any amounts to be deducted in respect of income earned by the employee during the period of dismissal (paragraph 152).
61. The employer was however not afforded the opportunity to make representations in respect of reinstatement.
62. Unless a court indicates that it is even considering this as a possibility and invites representations it can hardly be expected that any evidence would have been placed before this Court about conditions and events at the school between the date of dismissal and the date of the court's decision.
63. The Court also failed to deal with the employer's argument that Mr Neumann had not sought substitution in its notice of motion.

64. In Booyesen v Safety & Security Sectoral Bargaining Council & others¹³ the Labour Appeal Court found that even where an employer leads no evidence, the Labour Court or arbitrator is obliged to consider any factor relevant in determining if a continued employment relationship would be intolerable or if it would not be reasonably practicable to reinstate an employee. Accordingly, the employee's conduct is a relevant factor that the Labour Court or arbitrator should take into account in this determination.
65. The Court was accordingly not permitted to decide to reinstate merely because the employer had allegedly failed to lead any evidence before the arbitrator in order to support the conclusion that reinstatement would be appropriate and to moreover decide that it bore a legal burden to prove intolerability or impracticality. (Paragraph 148)
66. The Court was permitted and required to take into account factors other than the findings on misconduct which would have made reinstatement inappropriate or not reasonably practicable. This would especially be so in a case decided almost 4 years after the dismissal where, had the employer been asked, evidence would have been led about current conditions at the school, the views of the various school stakeholder, including the current SGB, on reinstatement, the abilities or otherwise of the new principal to run the school and the unsuccessful litigation brought in the High Court by Mr Neumann's supporters to attempt to interdict the

¹³ (2021) 42 ILJ 1192 (LAC)

appointment of a new principal.

67. The Court also did not consider or apply Golden Arrow Bus Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others¹⁴ at paragraph 25.

“ It has previously been found that, where unwarranted and unfounded, or serious and scandalous allegations have been made by an employee against management, despite no finding of misconduct, a continued working relationship is intolerable. An acrimonious approach to review proceedings in First National Bank—A Division of First Bank Ltd v Language & others, in which the employee alleged that the employer had falsified documents, stolen money, been unscrupulous and lacked bona fides, has similarly been found to make reinstatement inappropriate.”

68. Even on the Courts own finding of insolence, which was based on serious and scandalous unfounded allegations made by Mr Neumann, the Court was required to consider whether reinstatement was appropriate. The Court also wrongly found that the offended party in this case was not the employer as a body but only Mr Schreuder who was now retired.

69. The Court was also required to take into account that Mr Neumann’s refusal to apologise - even in the hearing - to his employer and his refusal thereafter to accept demotion which indicated that he would in all probability continue to be a defiant employee if reinstated.

70. Importantly, Mr Neumann had breached his central or core constitutional and contractual obligation to provide teaching and learning to children. He did so in

¹⁴ (2025) 46 ILJ 2093 (LAC)

pursuance of what he perceived to be a powerplay between himself and the education authorities as a leading spokesperson in the public domain of a campaign to keep the schools closed. It was falsely presented as a just cause - as if the 'Neumann camp' occupied a higher moral ground than the education authorities. The so called just cause was framed as if the principal beneficiaries of the campaign would be children, whereas the principal victims of continuing school closures in this case would be the children who needed to return to school. Mr Neumann demonstrated that he will disobey instructions and mobilise parents and learners to rise up when in his view he was allegedly speaking truth to power. This explained his refusal to apologise even when facing dismissal and provides a very strong indication that he will again adopt the same stance and defy his employers at the expense of schoolchildren if in his view the circumstances require it. There is thus no evidence that the relationship of trust has been restored. The evidence is quite to the contrary.

71. The Court held that the offer of demotion was logically incompatible with the assertions that continued employment was intolerable. It furthermore held that the offer reflected the employer's actual belief at the time that the employee could still be trusted within the education system. Prior to the making of the finding on appeal the MEC noted that Mr Neumann had expressed limited contrition and she would accordingly like to afford him another opportunity to put his career back on track "but only if he is prepared to accept that opportunity" (paragraph 272.5 of the then-MEC's Appeal finding). She added:

"I am concerned that he still does not understand his role as a principal and his role in relation to the SGB, but in the demoted post with less onerous responsibilities he will have the space to prove his worth and demonstrate a changed attitude." (paragraph 273 of the Appeal finding)

10. Failure to apply the review standard properly or at all

72. In an appeal the question is whether the decision taken by the arbitrator is correct or incorrect. No appeal lies against the decision of the bargaining council arbitrator or the CCMA in an unfair dismissal case. The Court (in paragraphs 23 – 29) cites all the correct judgements, including the test of whether the arbitrator's decision was one that another decision-maker could reasonably have arrived at based on the evidence. The Court also quoted case law which points out that an irregularity or error in relation to factual issues by an arbitrator may or may not lead to an unreasonable outcome. In our opinion, however, the Court failed to correctly apply the law that was quoted.
73. The LAC in Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others¹⁵ restated the review test in the following terms:

"Is the decision reached by the arbitrator one that a reasonable decision maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute

¹⁵ [2021] 5 BLLR 475 (LAC)

and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justifications for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator."

74. A review court is not permitted to nitpick through the evidence in order to conclude that the errors cumulatively show that the award seen in its totality constitutes an unreasonable outcome. Thus, and or for example, this Court agreed that Mr Neumann was guilty of insolence and the facts which justified that finding are not in dispute. Equally reasonable people can disagree on a conclusion. Deciding that those facts alone resulted in a fair decision to dismiss hardly can be found to be "entirely disconnected with the evidence, unsupported by any evidence and [involving] speculation by the arbitrator." The Court should have found, irrespective of whether the correct charge was insubordination or insolence, even if the arbitrator was mistaken in attaching the insubordination label, the arbitration result of a fair dismissal, was quite capable of being justified for reasons other than those given by the arbitrator. In this context the use of discriminatory language - that is racist insult and insolence - was obviously an aggravating factor making the insolence far more serious than less severe forms of insulting behaviour.
75. It can also hardly be argued that even if the learned Acting Judge disagrees with the conclusion that the misconduct was also discriminatory, this conclusion should fit into the category where a court would say that although it disagrees with this conclusion it accepts and understands why a reasonable decision-maker came to

this conclusion, and the decision therefore is not reviewable.

76. Paragraph 30 of the judgement incorrectly conflates the employee's actual argument with what is sometimes referred to as the consistency principle (which has no relevance whatsoever to the test on review). The argument was simply to the effect that if 3 other senior lawyers had all concluded that the decision to dismiss was well-founded and fair it should be difficult to decide that all the other decision-makers (also senior lawyers) making decisions in this process were all incapable of making a decision that fell within 'the band of reasonableness'.

11. Failure of justice grounds - the duty of proper consideration

77. Vodacom (Pty) Ltd v Makate and Another¹⁶ created a new standard by holding as follows:

"The Constitutional Court cautioned that unsatisfactory, or even incorrect, reasoning and defects in a judgment do not necessarily equate to a failure by a court to discharge its duty of proper consideration. The duty of proper consideration is about the substance of a judgment viewed holistically. In short, a court fails in its constitutional duty of proper consideration and to give reasons for its decision if a court's judgment does not contain adequate reasons evidencing such proper consideration. Therefore, flaws in the assessment during the adjudicative process that are so fundamental and pervasive as to vitiate the court's judgment constitute a failure of justice and, thus, a breach of the rule of law and the fair hearing right guaranteed in section 34 of the Constitution.

¹⁶ (CCT 51/24) [2025] ZACC 13; 2025 (10) BCLR 1174 (CC); [2025] 11 BLLR 1105 (CC); 2025 (6) SA 352 (CC) (31 July 2025)

The Constitutional Court then considered whether the Supreme Court of Appeal's judgment breached the duty of proper consideration, as assessed through the duty to provide adequate reasons. On an assessment of the Supreme Court of Appeal's judgment, and identifying certain key examples in it, the Court held that the Supreme Court of Appeal: (a) failed to provide adequate reasons for its judgment; (b) disregarded or was unaware of certain material facts and issues before it; (c) at times, merely highlighted the parties' arguments in respect of central issues but did not engage with those arguments in any meaningful way; (d) failed to assess evidence that was adduced by the parties, which it ought to have assessed; and (e) readily accepted whatever Mr Makate proffered without explaining why it did so. The judgment gives full substantiation on all these.

Based on these holdings, the Constitutional Court concluded that the Supreme Court of Appeal failed to discharge the duty of proper consideration. The Court held that this failure violated the rule of law and Vodacom's constitutional right to a fair hearing."¹⁷

78. The transcript in this matter was in excess of 1400 pages. Together with the other affidavits and documents the record which the Court was required to read came to approximately 2000 pages. The learned Acting Judge advised the parties before the hearing that he had not been given the papers in sufficient time to read the record but that he would nevertheless hear the matter.
79. The legal team for the employer was informed by the registrar that the Court had been under continuous pressure to set this matter down because the employee had been waiting so long for a court date.

¹⁷ Quoted from the CC's summary of a finding.

80. The learned acting judge should have declined to hear the matter if he felt that he had not had sufficient time to digest the record. At the hearing no questions were asked of the employer's representative about any passage in the record. At the very least, and to the extent that questions would arise in his mind (as they should) on reading the record the parties should have been afforded the opportunity to present argument to a judge who had indeed read the record (usually preferably before the hearing commences) but if this is impossible then at least after the judge has been given enough time to digest the record. The failure to do so constitutes a failure to engage the parties on critical disputes.
81. The employer's heads of argument complained on multiple occasions that the employee's recitation of the facts was not supported by the record and references are made throughout the employer's heads to page numbers and portions of evidence which it submitted refuted allegations made by Mr Neumann.
82. Moreover, the employer was not even asked to address the Court on issues such as whether the conduct complained of fell into the category of insolence or insubordination (and the relevance of this distinction to the outcome) or whether the view now taken by the Court in the judgement on whether the language was discriminatory stood up to scrutiny. It was also not asked to address the Court on whether in the event of the Court finding that the conduct complained of was only insolence, not insubordination, this finding in itself did not on the Court's own reasoning support the conclusion that the ultimate decision of the arbitrator was still reasonable.

83. The employer's representatives were also not asked to make submissions on whether the reviewing court was well-placed to substitute its finding in the place of that of the arbitrator. (And if it had not studied the record, it could hardly have been in as good a place as the arbitrator had been to make a decision.)

DATED AT CAPE TOWN THIS 23rd DAY OF JANUARY 2026.



STATE ATTORNEY
Applicant's Attorneys

Per:

C Bailey

STATE ATTORNEY

4th Floor, Liberty Life Centre,
22 Long Street
CAPE TOWN

TO: THE REGISTRAR
LABOUR COURT

AND TO : FIRST RESPONDENT
LIONEL CAY ATTORNEYS
Vernonseymour1@yahoo.com