IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

JA92/20

In the matter between:

RIAAN GERBER **Appellant**

and

STANLIB ASSET MANAGEMENT (PTY) LTD **Respondent**

Heard: **21 September 2021**

Delivered: **13 December 2021**

Coram: Waglay JP, Davis JA and Kubushi AJA

JUDGMENT

KUBUSHI AJA

[1] The appeal with leave of the court *a quo* is against part of the judgment and order of that court, which provides that:

> 'The respondent's jurisdictional point in respect of claims B and D is upheld and the proceedings are stayed in respect of those claims, which are referred to arbitration in terms of section 158(2)(a) of the LRA,[1] the arbitration to be conducted in terms of the respondent's compulsory private arbitration policy.'

[2] Before the commencement of argument, the appellant applied for and was granted condonation for the late delivery of his heads of argument and power of attorney.

[3] The appellant had referred three disputes to the court *a quo* comprising of claims A, B, C and D. Only claims B and D are relevant for purposes of this

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[1] Labour Relations Act 66 of 1995.

appeal. Claim B pertains to a dispute in terms of section 187 (1) of the Labour Relations Act 66 of 1995 (LRA), referred by the appellant to the court *a quo* on the basis that his dismissal was automatically unfair. Claim D, on the other hand, was pleaded in the alternative to the other claims, and pertains to the dispute that the dismissal was both substantively and/or procedurally unfair.

[4] The issue that came for adjudication, amongst others, before the court *a quo,* was whether that court has the requisite jurisdiction to entertain claims B and D, when the appellant is contractually obliged to refer the disputes to compulsory private arbitration.

[5] The genesis of the issue before the court *a quo*, was as a result of one of the *in limine* points raised by the respondent in his statement of response in answer to the claims raised by the appellant in his statement of claim. The respondent supported the points *in limine* by a separate interlocutory application with a founding affidavit. The appellant delivered an answering affidavit in answer to the interlocutory application raising various defences to which the respondent replied. The matter was, thus, adjudicated by the court *a quo* based on a substantive application.

[6] The *in limine* point concerned the question of jurisdiction in that it was contended that the court *a quo* was non-suited to entertain the disputes which ought to have been referred to compulsory private arbitration as required by the terms and conditions of employment contained in the employment contract of the appellant. The said terms and conditions of employment are averred to have been incorporated by reference in the letter of employment which the respondent issued to and was accepted by the appellant by attaching his signature thereto.

[7] When opposing the respondent's point *in limine* before the court *a quo,* the appellant, in the main, disputed that he was bound by the handbook which required dismissal disputes to be referred to compulsory private arbitration. He, further, proffered various other defences, for instance: that compulsory private arbitration was not discussed with him at the time of his employment, he was not advised subsequently about any changes to the terms and conditions of employment, the relations handbook was not incorporated into his contract of

employment, the respondent misrepresented certain facts to him, the doctrine of election, and the disputes concerning dismissal for reasons that are automatically unfair are not contemplated by the contractual provision on which the respondent relied.

[8] In upholding the respondent's point *in limine* on jurisdiction, the court *a quo* reasoned as follows:

> '[13] First, in general terms, it should be recalled that the LRA encourages private dispute resolution. If the parties to a contract of employment agree that any disputes that arise between them will be privately arbitrated, the principle *pacta sunt servanda* applies. . . Indeed, the provisions of clause 12.1.1 of the respondent's Handbook have been subject of at least two judgments by this court, both of which uphold the principle of compulsory arbitration introduced by this provision. . . There can be no objection in principle therefore to the requirement that the applicant refers any dispute concerning the fairness of his dismissal to arbitration in terms of the compulsory arbitration process established by the applicant's contract of employment. Insofar as the applicant claims ignorance of the relevant provisions, the fact remains that by signing his letter of appointment, he accepted that his appointment was in terms of the respondent's terms and conditions of employment, and specifically the disciplinary code and procedure, as published in the internet, which he was urged to read. The applicant's letter of appointment specifically required him to familiarise himself with the contents of and functions of both the employee relations handbook and the employee handbook and to abide by the provisions. Insofar as the applicant contends that the employee relations handbook was created in 2010 and thus post-dated his appointment, it is clear that the handbook is regularly amended and updated and the document to which the applicant refers (which refers to a date in 2010) is simply an updated version of the handbook. It is not in dispute that the compulsory private arbitration procedure has been in effect since 2002 and that it has been the subject of the employee relations handbook since the applicant's letter of employment describes the employee relations handbook in specific and particular terms for it to be validly incorporated by reference. The employee relations handbook, which contains the disciplinary code and procedure, is not presented in any terms that entitle the applicant to rely on the *caveat subscriptor* rule, or to claim that there was a misrepresentation as to the contents of the respondent's

policies and procedures by the respondent when the applicant was offered employment on the terms reflected in his letter of appointment. Insofar as the applicant contends that the respondent waived its rights to enforce compliance with the compulsory private arbitration provision, but it is correct that the applicant's unfair dismissal disputes were referred for conciliation and that the respondent attended the conciliation meeting, this is not in itself evidence of a waiver of any right that the respondent may have enjoyed. Clause 19.2 of the applicant's letter of appointment contains a standard non-variation clause which requires any variation to the contract to be in writing and signed, and provides that any failure by the respondent to enforce any of its rights under the agreement at any time shall not be deemed to be a waiver. That notwithstanding, the respondent was entitled to raise the obligation to refer disputed dismissals to compulsory arbitration at any time. The point is a jurisdictional point, not subject to waiver and which a party (and even the court acting *mero motu*) is entitled to raise at any time. Finally, the applicant contends that the compulsory private arbitration procedure does not apply because at least claim A, his claim is one of automatically unfair dismissal, a matter that ought to be dealt by the court. This submission cannot be sustained by the plain wording of the employee relations Handbook. Clause 8.5.2 records that a disciplinary enquiry will be held if 'termination of services is possible due to misconduct'. If the employee is dismissed and the employee is not satisfied with the outcome, the employee can refer the matter to private arbitration with 30 days of the date of termination. Considered as a whole and given its proper context, the provision requires any dispute regarding a dismissal for misconduct to be referred to private arbitration. If an employee chooses to characterise the dispute as a dismissal for a reason that is automatically unfair, that is a matter that must be determined at the arbitration process. The present instance, there is no dispute that the applicant was dismissed by the respondent for misconduct, after an informal disciplinary enquiry. The dispute is one that accordingly falls within the ambit of the private arbitration agreement.'

[9] The appellant's point of departure, as far as the appeal is concerned, is that the court *a quo* erred in that firstly, it did not correctly consider the factual question of whether there was a contract between the parties that bound them to compulsory private arbitration in the circumstances of their relationship. Secondly, if the court *a quo* had found that there was such an agreement

between the parties, as it did, the court *a quo* did not exercise a discretion on whether to refer the dispute before it to arbitration, judicially; hence the core issue for adjudication by this court is whether the court *a quo* erred in making a finding that there is a valid enforceable private arbitration agreement between the parties; and if so, whether the court *a quo* judicially exercised its discretion to stay the proceedings in respect of claims B and D and to refer same to compulsory private arbitration.

[10] In essence, the appeal turns on the narrow issue of whether the court *a quo* had the requisite jurisdiction to entertain the aforesaid claims when the appellant is contractually bound to compulsory private arbitration. If it is found to be so, then the second part of the enquiry, that of the court *a quo*'s decision to stay the proceedings and refer the dispute to compulsory private arbitration, kicks in, and if it is not so, then that is the end of the enquiry.

[11] I deal, hereunder, with the two issues in turn.

Whether there is a validly enforceable compulsory private arbitration between the parties

[12] In trying to overturn the court *a quo*'s judgment and order on this point, the appellant raised the same argument and defences that were raised before the court *a quo*.[2] What he puts at issue is whether the compulsory private arbitration clause, on which the respondent relies for its *in limine* point, formed part of the terms and conditions of his employment with the respondent.

[13] And, in deciding this question, the court *a quo* had found that the letter of appointment which incorporated the terms of the Disciplinary Code and Grievance Procedures by reference, eventually integrated the compulsory private arbitration clause into the appellant's terms and conditions of employment. As such, the court *a quo* concluded that the appellant was required to refer any dispute concerning the fairness of his dismissal to arbitration in terms of the compulsory private arbitration process established by his contract.

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[2] See paragraph [7] of this judgment.

[14] It became patently clear that the crux of the dispute is the construction of the letter of employment signed by the appellant on 1 August 2005, and whether such letter, by reference, incorporated the compulsory private arbitration agreement between the parties in the appellant's employment contract.

[15] It was argued on behalf of the appellant that the court *a quo* did not correctly consider the factual question of whether the compulsory private arbitration clause formed part of the terms and conditions of the employment contract of the appellant as set out in the letter of appointment. According to the appellant, at the time of signing the letter of employment, the compulsory private arbitration clause was not contained in the Disciplinary Code and Grievance Procedures that were incorporated by reference into the terms and conditions of employment of the appellant. It was contained secretly in a separate document that was not referred to in the letter of appointment which document was created in 2010 when the appellant had already signed the employment contract. The appellant, was, further, not informed about the compulsory private arbitration clause, nor was he informed when the terms and conditions of his employment contract were changed, as such, he did not know about it.

[16] The appellant's submissions that: when the appellant signed the letter of employment dated 29 July 2005, the compulsory private arbitration clause did not form part of the Disciplinary Code and Grievance Procedures that were incorporated by reference in the letter of employment; and that the appellant did not know about the compulsory private arbitration agreement, is of no merit.

[17] The salient terms and conditions in the letter of employment are contained in clauses 11 and 17, the wording thereof which, in my view, is clear and unambiguous and requires no interpretation, state as follows:

> '11. **Discipline and Grievances**
>
> The Company's Disciplinary Code and Grievance Procedure are incorporated herein by reference and form an integral part of this contract of employment. Copies of the aforesaid Disciplinary Code and Grievance Procedure are available from the Human Resource Department. The Company requires of you to forthwith acquaint yourself of the contents and functions of the said

Disciplinary Code and Grievance Procedure and to abide by the provisions thereof.'

and

'17. **Compulsory Policies and Procedures**

You are required to comply with the Company's policies and procedures, disciplinary and grievance procedures, security regulations or any other rules and regulations of the Company as contained in the policies and other documents, including health and safety rules.

Copies of such rules, regulations and procedures are available for perusal at the offices of the Human Resources Department. It is expected of you to acquaint yourself with the contents of this documents and you may request the Human Resources Department to assist you in this regard and to explain any provisions which are not clear to you. A short summary of some of the policies, procedures, rules and regulations is attached for your perusal.

Detailed copies of all the policies and procedures will be available on the STANLIB intranet or in paper format from your reporting line executive.

In order for STANLIB to attain the status of a world class company, flexibility will be regarded as a core requirement. The Company hereby wishes to record that it may thus be required to change such rules, regulations and policies from time to time. You will, however, be advised of such changes should this be the case.'

[18] From the reading of these clauses, it is clear that the respondent's Disciplinary Code and Grievance Procedures were incorporated by reference into the terms and conditions of the appellant's employment contract. There can be no dispute about that.

[19] The appellant's case is based on the argument that the compulsory private arbitration clause was not encompassed in the Disciplinary Code and Grievance Procedures, and as a result, it could not have been integrated into the terms and conditions of the appellant's employment contract. This, however, cannot be correct. When considering the terms of the employment contract, the appellant, fails to take into account the various relevant prescripts of the respondent, relating to the respondent's employees. For example, firstly,

the appellant failed to take into account that together with the letter of employment he was handed a summary of the respondent's conditions of employment. He further fails to take note that it was stated in the conditions of employment, amongst others, that –

> 'This summary of conditions of employment must be read in conjunction with the detailed STANLIB handbook which is available on the STANLIB intranet.'

and

> '20. **OTHER BASIC CONDITIONS OF EMPLOYMENT**
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> General terms and conditions of employment, other than those specified in this contract and including, but not limited to disciplinary, grievance, health and safety, non-smoking, non-discrimination and employment equity, are governed by certain standard policies, procedures and practices of the company (except where such policies/procedures are stated to be guidelines). These form part of your conditions of employment and should be interpreted in the light of actual practice and interpretation of these Procedures. Copies of these documents are available either of STANLIB intranet or Human Resources.'

Secondly, the STANLIB Employee Handbook referred to in the summary of conditions of employment, stipulates, amongst others, the following:

> '**FOREWORD**
>
> The purpose of this handbook is to provide a brief summary of the various conditions and regulations governing employment within STANLIB and its subsidiary companies. It should be read in conjunction with your letter of appointment, which sets out the terms and conditions on which you were employed.
>
> Such conditions, terms, regulations and guidelines may change from time to time and the management of STANLIB reserves the right to amend the Employee Handbook at its discretion and to advise you accordingly.'

And

'**INDUSTRIAL RELATIONS**

The Industrial Relations Policies and Procedures Guide deals at length with the procedures to be followed when dealing with industrial relations issues. The guide consists of three sections:

- Section One Disciplinary Procedure
- Section Two Grievance Procedure
- Section Three Poor Performance

To obtain copies of the guide, or discuss any aspect of the contents or related matters, please contact the STANLIB Human Resources Department.

A copy of the Industrial Relations Policies and Procedures Guide will be available on the STANLIB intranet site.'

Thirdly, the ER Handbook that contains the Disciplinary Procedure Code and Grievance Procedures stipulates in Clause 2 thereof, under the heading "**Scope of Application**", that:

'The Disciplinary Code and Procedure shall apply to all Employees (including management, permanent and temporary Employees) of the Liberty Group, in respect of disciplinary misconduct in the workplace.'

Furthermore, and under the same heading the ER Handbook states:

'However, this Disciplinary Code and Procedure will also apply to all companies within the Liberty Group and all its/their subsidiaries and affiliates as per the contract of employment. Currently these subsidiaries and affiliates include STANLIB Limited, STANLIB Asset Management Limited, STANLIB Wealth Management, STANLIB Collective Investments, STANLIB Multi Manager, STANLIB Africa, Liberty Africa, Liberty Group Properties (Pty) Ltd, Liberty Group Properties Development (Pty) Ltd, Liberty Group Properties Management (Pty) Ltd.'

And again, it is stated in another clause under the same heading that:

'Insofar as Compulsory Private Arbitration is concerned, it must be noted that this procedure will remain compulsory and binding on the Company and all the Employees employed by the Company.'

And at clause 8.5.2 the ER Handbook provides that:

> 'Possible dismissal due to misconduct Employees will in terms of their conditions of employment be subjected to a disciplinary or formal/informal inquiry if termination of services is possible due to misconduct. If the inquiry outcome leads to a dismissal, and the Employee is not satisfied with this outcome, the employee can refer the matter to Compulsory Private Arbitration within 30 days from the date of termination.
>
> The Compulsory Private Arbitration is compulsory if the dismissed Employee wishes to challenge his/her dismissal. This means that if the dismissed Employee wishes to challenge his/her dismissal he/she can do so by referring the dismissal dispute only to Compulsory Private Arbitration. The Compulsory Private Arbitration is a term and condition of employment and thus substitutes the dismissed employee's right in terms of his/her conditions of employment to refer an unfair dismissal dispute to the CCMA (Commission of Conciliation, Meditation and Arbitration).'

Clause 12 thereof, on the other hand, stipulates that:

> '12. **COMPULSORY PRIVATE ARBITRATION**
>
> 12.1 Referral of a dispute to Compulsory Private Arbitration
>
> 12.1.1 If the disciplinary enquiry outcome leads to a dismissal, and the dismissed Employee is not satisfied with the outcome, the dismissed Employee may refer the matter to Compulsory Private with 30 days from the date of termination. A referral to Compulsory Arbitration must be in accordance with the prescribed form and must be submitted to the Employee's Relations Department.'

[20] From a reading of these clauses, which are clear and unambiguous, it is evident that the Disciplinary Code and Grievance Procedures referred to in the letter of employment forms part of the ER Handbook which the appellant's counsel referred to as a separate document that was not referred to in the letter of employment. The salient provisions of the relevant prescripts set out above, when read together, reinforce the notion that there is a connection between the provisions of the compulsory private arbitration clause that is found in the ER Handbook and the Disciplinary Code and Grievance Procedures referred to in the letter of employment. Consequently, the court *a quo* was correct to have

concluded in its judgment that the appellant's letter of employment describes the employee relationship handbook in specific and particular terms for it to be validly incorporated by reference into the employment contract.

[21] Counsel for the appellant, eventually ended up conceding in oral argument that the Disciplinary Code and Grievance Procedures referred to in the letter of employment were the same as those contained in the ER Handbook. She, however, submitted that as the Disciplinary Code and Grievance Procedures regulate the employment relationship between the parties, they do not intend nor could they be understood to include anything that relates to a process post the employment relationship; and no reasonable person would read into them an agreement that regulates the relationship between the parties, post-employment, like the arbitration process, which is something completely unrelated to the disciplinary process. According to counsel, what was sought to be incorporated in the appellant's terms of employment was something that regulates discipline and grievances in the workplace and should not be extended to include something else that regulates the parties' relationship post the employment and limited their rights to the statutory dispute resolution forum they might have chosen.

[22] Counsel, further, conceded that the Disciplinary Code and Grievance Procedures included the compulsory private arbitration clause, but that, the compulsory private arbitration clause was not binding on the appellant as it does not deal with internal discipline. The clause should not have been there and, thus, it is invalid, so she argued.

[23] It is my view that the appellant's argument that the disciplinary code and grievance procedures should include only what regulates discipline in the workplace and cannot include private arbitration because private arbitration regulates the relationship post-employment, is fundamentally flawed. The disciplinary process and the arbitration process are all part of the same process. Although the arbitration process happens after dismissal, both processes are included in the disciplinary code and grievance procedures, because the arbitration clause serves to inform the employees what process to follow after dismissal.

[24] Counsel sought support for her submission that, on a proper construction, the letter of appointment cannot be construed to incorporate the provisions of the compulsory private arbitration clause, in the judgment in *Stocks Civil Engineering* case.[3] However, the judgment provides no authority for the argument raised by the appellant, in that this case did not deal with the question of whether a letter of appointment can incorporate a compulsory arbitration clause In addition, reference was made to the judgment in the *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v The Government of the United Kingdom,*[4] where the court dealt with a telefaxed quotation that referred to further terms and conditions that were on the overleaf of the said telefax but the overleaf was not transmitted. The issue to be decided was whether the terms and conditions on the overleaf formed part of the quotation. The court held that by omitting to send the reverse side of the quotation to the respondents, the appellant must be held not to have intended to conclude a contract on the basis of the terms and conditions therein. The court further concluded that the words that referred to the conditions embodied on the reverse side of the quotation, without the said terms having been made available, to be meaningless and to be considered as *non pro scripto*. The *Cape Group Construction* case is manifestly different from the matter before this court where, unlike the present dispute, documents were sent by fax, reference is made to terms stated on the back, which were not stated or otherwise communicated. Since what was described as being on the back was not sent, it was held that these terms were not intended to apply. In the present case the letter of appointment was provided to the appellant in full and as indicated, the terms thereof were clear and ambiguous.

[25] In the matter before this court, the Disciplinary Code and Grievance Procedures were expressly incorporated by reference in the contract of employment. The appellant was, as well, expressly informed that the said documents were available for inspection at the Human Resource Department as well as on the respondent's intranet. He was, further, enjoined to acquaint himself with the contents and functions of the said documents.

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[3] *Stocks Civil Engineering (Pty) Ltd v Rip NO* (JA52/00) [2002] ZALAC 1 (01 February 2002).
[4] 2003 (5) SA 180 (SCA); (99/2002) [2003] ZASCA 51 at [4] – [16].

[26] In light of the above findings, the appellant's submission that there are several documents which do not necessarily follow conveniently from the incorporation clause and that even if he had familiarised himself with those clauses he would not have necessarily anticipated it and it would not have been factually linked to the Disciplinary Code and Grievance Procedures in the workplace, is similarly without merit.

[27] The argument that the handbook in which the compulsory private arbitration clause is contained was not in place at the time of signing of the employment letter and thus post-dated his employment, cannot be justified on this record. There is undisputed evidence that the compulsory private arbitration clause has always been a term and condition of employment for the employees in all the companies within the Liberty Group and all its/their subsidiaries and affiliates as *per* the contract of employment, since 2002. And has been the subject of the employee relations handbook since then. It is not disputed that the respondent is a subsidiary of the Liberty Group.

[29] In addition, the Labour Court has upheld the principle of compulsory private arbitration introduced by the provisions of clause 12.1.1 of the respondent's employee handbook. This is confirmed by the respondent in its papers before the court *a quo* when it fortified its contention that the compulsory private arbitration clause had been in effect since 2002 by presenting unchallenged evidence based on the pleadings from the Commission for Conciliation Mediation and Arbitration ("CCMA"), in the matter between *Scott and STANLIB* dated December 2003 and the 2003 CCMA Ruling, thereof.

[30] I find the appellant's further contention that the contract was secretly amended later to unilaterally incorporate the compulsory private arbitration clause, untenable. Although the ER Handbook relied on by the respondent is dated 2010, it is evident from the extracts referred to in paragraph 19 of this judgment that the respondent's employee handbook has always been susceptible to amendments. As the court *a quo* also found, the ER Handbook referred to is simply an updated version of the handbook.

[31] Having accepted that the respondent's Disciplinary Code and Grievance Procedures form part of the ER Handbook, it goes without saying that the

compulsory private arbitration clause was ultimately incorporated by reference in the letter of appointment and forms an integral part of the appellant's employment contract.

[32] Should the appellant have taken time to read the documents that he was provided with when he signed the letter of employment, which documents further referred him to documents in the respondent's intranet and Human Resources Department, he would have noted that the compulsory private arbitration clause formed part of his terms and conditions of employment.

[33] Like at the hearing before the court *a quo*, the appellant has, in this court raised various other defences similar to those stated in paragraph 7 of this judgment. It is my view that, the appellant having failed to succeed on the main point in this appeal, all the other defences he has raised are of no relevance. Besides, the court *a quo* has in a well-reasoned judgment, rightly dismissed these defences as having no merit.

[34] The court *a quo* correctly so, in my view, found that the letter of appointment incorporated the terms of the disciplinary code and the employee handbook which the appellant was encouraged to read and acquaint himself with. The handbook was, at all times material hereto, published on the respondent's intranet and copies thereof readily available from the Human Resources Department. All that the appellant needed to do was to obtain same on the intranet, better still, to simply approach the Human Resources Department and ask for a hard copy thereof and to read and acquaint himself with the contents thereof. If he had done so, he would have realised that his terms of employment incorporate a compulsory private arbitration agreement between him and the respondent.

Whether the court *a quo* exercised its discretion in terms of section 158(2) of the LRA, judicially

[35] Having made a finding that the court *a quo* correctly decided the issue of jurisdiction, I now have to deal with the second issue relating to the court *a quo's* decision to stay the proceedings and to refer the disputes to compulsory private arbitration.

[36] As alluded earlier in this judgment, the respondent supported his points *in limine* by filing an interlocutory application. The jurisdiction *in limine* point, which is the subject of this appeal, was applied for in terms of section 158(2)(a) of the LRA,[5] wherein the respondent sought a stay of the proceedings in respect of the disputes in claims B and D and for the court *a quo* to refer the disputes to private arbitration. It is common cause that in this matter the court *a quo* having found that it had no jurisdiction to hear the disputes in claims B and D, decided to stay the proceedings in respect of those disputes and referred them to arbitration.

[37] The reasoning of the court *a quo* when it made the above decision, is stated as follows in its judgment:

> '[14] . . . The recent amendments to s 158 (2) of the LRA provides that if it becomes apparent during the course of proceedings that a dispute referred to the court ought to have been referred to arbitration, the court may, if it is expedient to do so, continue with the proceedings. This is not an invitation to refer matters to this court which ought ordinarily to be the subject of arbitration under the auspices of the CCMA or a bargaining council with jurisdiction. The applicant has not made out a case in the pleadings as to why it is expedient for this court to hear the matter that in the normal course ought to be referred to the CCMA for arbitration, nor is any basis laid for any submission to the effect. For the above reasons, claims B and D stand to be stayed and referred to arbitration in terms of the employee relations handbook.'

[38] The appellant's main ground of appeal on this aspect, is for this court to interfere with this decision of the court *a quo* on the basis that the court *a quo* failed to judicially exercise its discretion in terms of section 158(2) of the LRA and, further, calls upon this court to exercise such discretion afresh.

[39] The gravamen of the appellant's case is that the court *a quo* erred when it stayed the proceedings and referred the disputes to arbitration. The submission is that, when the court *a quo* found that the disputes in question ought to have been referred to arbitration, it should have exercised its discretion in favour of

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[5] Section 158 (2) "If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may –
(a) Stay the proceedings and refer the dispute to arbitration.
(b) If it is expedient to do so, continue with the proceedings in which case the Court may make any order that a commissioner or arbitrator would have been entitled to make. . ."

the appellant and instead of staying the proceedings and referring the disputes to arbitration, it ought to have continued with the proceedings after considering whether it was expedient to do so, which it failed to do.

[40] In terms of section 158(2) of the LRA, the Labour Court is enjoined, where it becomes apparent that the dispute ought to have been referred to arbitration, to stay the proceedings and refer the dispute to arbitration. If it is expedient to do so, continue with the proceedings in which case the court may make any order that a commissioner or arbitrator would have been entitled to make. This is a discretion in the strict sense.[6]

[41] It is trite that a court of appeal is not entitled to set aside the decision of a lower court merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion. The court of appeal may only interfere when it appears that the lower court had not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[7]

[42] It is trite that a party resisting a stay of court proceedings based on a private arbitration clause bears the *onus* of convincing the court that, owing to exceptional circumstances, the stay should be refused. A court will enforce an agreement to arbitrate unless there are compelling reasons to order otherwise.[8]

[43] Whilst dealing with the enforceability of the arbitration clause in relation to the old section 158 of the LRA, the court *in Steiler Properties CC v Shaik Prop Holdings (Pty) Ltd,*[9] at paras 49 – 54 thereof, emphasised the following:

> '[49] The contract provides for arbitration in clause 16. The current dispute falls within the scope of the arbitration clause. Arbitration clauses are governed by the *Arbitration Act* 42 of 1965 (The Act).

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[6] *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC) (JA11/06) [2009] ZALAC 8.
[7] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 CC para 11.
[8] See *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd* [2015] 1 All SA 513 (GJ) paras 49 - 54.
[9] [2015] 1 All SA 513 (GJ).

[50] When parties, exercising their contractual autonomy, make provision as, in the present dispute, for the private resolution of their disputes, the Courts are enjoined to respect the parties' choice of method for resolving their disputes. The Courts' deference, to the parties' choice to arbitrate their disputes, does not amount to an abdication of jurisdiction. Arbitration clauses do not oust the Courts' jurisdiction. Under the Act, the Courts retain the powers to assist, supervise and intervene in the dispute and the arbitration before, during and after the arbitration.

[51] Due to the binding nature of the arbitration clause, neither party to this dispute, may, unilaterally initiate Court proceedings. The Act, stipulates that, if either party, unilaterally, initiates Court proceedings, as the applicant (purchaser) has done, the other party, in the position of first respondent (seller), may apply to Court for an order, staying proceedings.

[52] Unless it is specifically provided in the contract, neither party to an arbitration contract may terminate the contract without the consent of the other parties to the contract. However, the Court on application and on good cause shown, as to why the matter should not be referred to arbitration in accordance with the contract, may hear it.

[53] No argument has been made before me or on papers, to show 'good cause', why the current dispute, should not be referred to arbitration, in accordance with the parties' choice, to resolve their disputes privately. It is the practice of our law that *pacta sunt servanda*. As Cameron J observed, in *Brisley v Drotsky [2002 (4) SA 1 SCA p 34 – 35]* Courts, are required to respect the parties' contractual autonomy, as it informs, *inter alia*, the constitutional values of dignity and equality.

[54] Absent any special circumstance why the parties' choice of arbitration, as a dispute resolution mechanism, should not be respected, it is my view, that this application was brought prematurely. This dispute, should first, have been referred to arbitration. Consequently, first respondent's (seller's) application, for stay of proceedings, is granted. However, I do not consider it fair, to order costs against the applicant (purchaser).'

[44] Although the case was decided before the amendment of section 158(2) of the LRA, the principles enunciated in the above passages still finds application.

Therefore, in light of the said principles, for the appellant to succeed on this aspect, he must show that there is a basis for this court to interfere with the discretion exercised by the court *a quo* to stay the proceedings and that there were exceptional circumstances present for the court a quo not to have enforced the arbitration clause.

[45] The enquiry in this matter is, in essence, whether the court *a quo*'s discretion to stay the proceedings, in respect of the two claims, was exercised judicially. If it is found that the discretion was not exercised judicially the question that follows would be whether this court should exercise the discretion afresh not to stay the proceedings due to special circumstances or to continue with the proceedings because it is expedient to do so.

[46] Consequently, for the appellant to succeed in his appeal, he must first show that there is a basis for this court to interfere with the discretion exercised by the court *a quo* to stay the proceedings, that is, that the discretion was not exercised judicially. If he crosses this hurdle, he must then establish that there are exceptional circumstances present for the court not to enforce the arbitration clause.

[47] Furthermore, when dealing with the application of section 158(2) of the LRA, this court in *Parliament of the Republic of SA v Charlton*,[10] at paras 34 – 35 thereof, held that:

> '[34] . . . Therefore, once it is apparent to the court that the dispute is one that ought to have been referred to arbitration, the court may stay the proceedings and refer the dispute to arbitration or it may, [with the consent of the parties,] and if it is expedient to do so, continue with the proceedings [sitting as an arbitrator]. It cannot deal with the dispute outside the ambit of these provisions. Accordingly, it [the court] has no power to proceed to adjudicate the dispute on the merits simply because it is already seized with the matter. To do so would be in conflict with the provisions of s 157(5) and s 158(2) of the LRA.
>
> [35] In resolving labour disputes a clear line must be drawn between the different fora that have been set up by the LRA.'

[10] (2010) 31 ILJ 2353 (LAC).

[48] This case, as well, was decided before subsection 158(2) of the LRA was amended, but the principle as to how to exercise the discretion still finds application to the amended subsection.

[49] It has, also, been held that by virtue of the use of the word 'may' in the provisions of section 158(2) of the LRA, the Labour Court does not have to automatically assume jurisdiction over the dispute. The subsection gives the court the discretion to act under subsection (a) or (b), that is, it may stay the proceedings and refer the dispute to arbitration or if it is expedient, continue with the proceedings. This is a two stage enquiry. The court must first determine whether the proceedings should be stayed, and to refer the dispute to arbitration if it is so, or it must determine whether it is expedient to continue with the proceedings.

[50] In support of the appellant's ground of appeal, it was submitted on behalf of the appellant that this court should interfere with the court *a quo*'s decision on the basis that in the first place, there are sufficient reasons not to stay the unfair dismissal dispute and refer it to arbitration. Secondly, the court *a quo* failed to consider whether it was expedient for the court *a quo* to continue with the proceedings.

[51] In support of his submission that there are sufficient reasons not to stay the unfair dismissal dispute and refer it to arbitration, the appellant contends that the court *a quo* exercised the discretion to stay the proceedings on a material misdirection that a private arbitration agreement ousts the ordinary jurisdiction of the court, and that the court *a quo* failed to enquire whether there was sufficient reason not to refer the dispute to arbitration.

[52] The appellant's proposition that the court *a quo* exercised the discretion to stay the proceedings on a material misdirection that a private arbitration agreement ousts the court's ordinary jurisdiction can no longer be maintained due to my finding that the court *a quo*'s decision on the jurisdiction point ought to be upheld. It is not for a court to disregard, replace or override contractual terms agreed to by the parties.

[53] More importantly, as was held in *Parliament of the Republic of SA v Charlton,*[11] that section 157(5) of the LRA specifically oust the jurisdiction of the Labour Court to deal with a dispute that must be resolved through arbitration.

[54] It is my view that when the court *a quo* upheld the *in limine* point of the respondent it at the same time exercised the discretion whether or not to stay the proceedings. The reason why it stayed the proceedings, as already indicated earlier in this judgment, was due to the fact that it did not have the requisite jurisdiction to hear a matter that should ordinarily be referred to arbitration.

[55] A further reason is that the court *a quo*, referred the disputes to arbitration as a way of emphasising the provisions of the LRA which encourages private dispute resolution. In this regard, it reinforced its reasoning by relying on the principle of *pacta sunt servanda*. It is trite that if parties agree in a contract of employment that any disputes arising between them will be privately arbitrated then, absent evidence to the contrary the principles of *pacta sunt servanda* must apply.[12]

[56] Furthermore, in support of his contention that the court *a quo* failed to consider whether it was expedient for it to continue with the proceedings, it is the appellant's argument that firstly, the court *a quo* materially misdirected itself on the jurisdiction of the court in respect of the unfair dismissal dispute for an automatically unfair reason; and secondly, because the appellant did not address the issue of expediency in his papers.

[57] According to the appellant's counsel, even if the appellant did not address the question of expediency in his papers, the court *a quo* was enjoined by section 158(2)(b) of the LRA to have *mero motu* considered it, but it failed to do so. Counsel further argued that it would have been expedient for the court *a quo* and the parties that the disputes be heard together as the disputes in question formed part of the four claims that were before the court *a quo*, and, although the claims are different in terms of what is claimed, they, however, rely on the same questions of law and fact. This, according to counsel, would have helped

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[11] Para 34, thereof.
[12] *NBCRFI v Carlbank Mining Contracts* [2012] 11 BLLR 1110 (LAC) at para 4.

to avoid potential conflicting judgments if the claims were to be adjudicated by different forums.

[58] The submission by the appellant's counsel that the court *a quo* did not consider whether it was expedient for it to hear the matter, is again without merit. It is evident from reading paragraphs 13 and 14 of the court *a quo*'s judgment cited above that the court *a quo* considered whether it was expedient to continue with the proceedings and, also, supplied various reasons as to why the dispute is to be referred to arbitration and made the determination that it was not expedient for it to deal with the matter.

[59] That the appellant did not make out a case in the pleadings as to why it was expedient for the court *a quo* to hear the matter, is not the only basis upon which appellant's submissions was rejected. The court *a quo* stayed the proceedings because it found that it did not have the jurisdiction to entertain the disputes in claims B and D; secondly, it referred the disputes to private arbitration on the ground that section 158(2)(b) of the LRA is not an invitation to refer matters to the Labour Court which ought ordinarily to be subject to arbitration.

[60] Furthermore, the court *a quo* was correct in not continuing with the proceedings for it would not have been expedient to hear all the claims together as the appellant sought to suggest. The appellant's argument that the disputes in claims A and C are intricately linked with the disputes in claims B and D, is not correct. The disputes in claims A and C are separate claims and do not fall within the dismissal claims (claims B and D) which are misconduct cases, and the court *a quo* had no jurisdiction to entertain them because of the arbitration clause.

[61] The, further, submission that there would be a multiplicity of claims, stands to be rejected. The unfair dismissal disputes (claims B and D), are in substance similar claims; whereas the others are Employment Equity Act disputes (claims A and C). They fall under a different statute that gives rise to a separate cause of action. These claims should be separated since the relief sought in claims A and C and the cause of action are different to claims B and D.

[62] The oral submission by counsel for the appellant in this court, that it was wrong for the court *a quo*, to have not given reasons why the automatically unfair

dismissal dispute must go to arbitration, but instead gave reasons only in respect of the substantively and procedurally unfair dismissal which is an alternative to the automatically unfair dismissal dispute, does not take the appellant's case any further. This argument was correctly dealt with by the court *a quo* in its judgment when it stated the following:

> 'Finally, the applicant contends that the compulsory private arbitration procedure does not apply because at least claim A, his claim is one of automatically unfair dismissal, a matter that ought to be dealt by the court. This submission cannot be sustained by the plain wording of the employee relations Handbook. Clause 8.5.2 records that a disciplinary enquiry will be held if 'termination of services is possible due to misconduct'. If the employee is dismissed and the employee is not satisfied with the outcome, the employee can refer the matter to private arbitration with 30 days of the date of termination. Considered as a whole and given its proper context, the provision requires any dispute regarding a dismissal for misconduct to be referred to private arbitration. If an employee chooses to characterise the dispute as a dismissal for a reason that is automatically unfair, that is a matter that must be determined at the arbitration process. The present instance, there is no dispute that the applicant was dismissed by the respondent for misconduct, after an informal disciplinary enquiry. The dispute is one that accordingly falls within the ambit of the private arbitration agreement.'

[63] As is clear from the passage, the arbitration clause requires any dispute regarding a dismissal for misconduct to be referred to arbitration, irrespective of the format in which such a dismissal is couched. In short, the appellant was dismissed for a misconduct which the appellant opted to refer to as an automatically unfair dismissal in terms of the employment contract that binds them.

[64] There was, however, no need for the court *a quo* to decide whether there was an automatically unfair dismissal or not, before the court *a quo* can refer the disputes to arbitration, as the court *a quo*, correctly found. The court a quo explains itself as follows in its judgment:

> 'If an employee chooses to characterise the dispute as a dismissal for reason that it is automatically unfair, that is a matter that must be determined at the arbitration process. The present instance, there is no dispute that the applicant

> was dismissed by the respondent for misconduct, after an informal disciplinary enquiry. The dispute is one that accordingly falls within the ambit of the private arbitration agreement.'[13]

[65] In the circumstances, it is my view that when the court *a quo* took a decision to stay the proceedings and refer the disputes in respect thereof to arbitration, it exercised a discretion. And, for the reasons provided above, that discretion was exercised judicially.

[66] As regards costs, both parties argued for costs in the event of being successful. As is trite, costs in labour proceedings do not ordinarily follow the successful party. Neither of the parties has made out a case for this court to grant costs against this trite principle. I make no order as to costs.

[67] Consequently, the appeal is dismissed and no order of costs is made.

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Kubushi AJA

Waglay JP and Davis JA concur.

APPEARANCES:

FOR THE APPELLANT:	S LANCASTER
	Instructed by Daan Beukes Attorneys
FOR THE RESPONDENT:	F A BODA
	Instructed by Salijee Govendor Van der Merwe Attorneys

[13] See Paragraph 13 of the judgment of the court *a quo*.