Worklaw 2019 Labour Law Update

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Legislative Compliance Audit
2018 – 2019 Labour law update

Worklaw subscribers will be aware that there has been a deluge of new labour legislation over the past year – it's really difficult to keep abreast of all the changes. This summary attempts to assist subscribers with a legislative compliance audit, to check compliance with many of the new requirements.

1. The National Minimum Wage and exemption regulations

New requirements:
The NMW Act and exemption regulations came into effect on 1 January 2019.

- Schedule 1 to the Act requires a national minimum wage of **R20 per hour**, except for –
  - farm workers – R18 per hour;
  - domestic workers – R15 per hour;
  - public works programme workers – R11 per hour.
    (note: domestic workers on farms are defined as farm workers).
- '**Wage**' means the amount of money paid for ordinary hours of work, but excludes transport, equipment, tool, food or accommodation allowances, payments in kind eg board or accommodation, and gratuities eg bonuses, tips or gifts.
- **'Worker'** means '*any person who works for another and is entitled to receive payment for that work*' ie arguably extends to cover independent contractors who personally perform work / services.
- **Exclusions:** 'volunteers' *(a person who works but is not entitled to receive remuneration* – eg student getting work experience), members of the SANDF, NIA and Secret Service.

What to do:

- Check compliance with minimum wage requirements both in respect of –
  - employees
  - independent contractors doing work themselves.
- Check that persons not entitled to receive remuneration (eg students) are described in letters of appointment as 'volunteers'
- If cannot afford NMW, consider online exemption application *https://nmw.labour.gov.za*
- Exemption applications require meaningful prior consultation with every 'sufficiently representative' trade union that has members affected.
- Exemptions are limited to 10% of the applicable NMW and for not more than 12 months.

Consequence of non compliance:

- Employees or labour inspectors can process claims through the CCMA, ultimately enforced through arbitration proceedings;
- Being publicly 'named and shamed' by Dept. of Labour**;**

- Fines - s76A of the BCEA provides fines for first offence of twice the value of the underpayment; or twice the employee's monthly wage.
- Unfair labour practice – to unilaterally alter wages, hours of work or other conditions of employment, in implementing the NMW.

Government will name & shame employers who fail to respect national minimum wage

Author: Kamva Somdyala, news24 (So. Africa), Published on: 22 April 2019

"Labour department to name and shame employers who fail to comply with minimum wage", 13 April 2019.

Labour Minister Mildred Oliphant says government will name and shame employers who fail to comply with the national minimum wage. The National Minimum Wage Act came into effect at the start of this year and stipulates that employers should pay employees a minimum hourly rate of R20. For farm and forestry workers, the amount is R18 per hour, domestic workers R15 and for workers of the Extended Public Works Programme (EPWP), the amount is R11.

Speaking at an International Labour Organisation (ILO) event earlier this week, Oliphant said her department is on a national blitz to "assess levels of the National Minimum Wage Act in businesses with over 1 300 inspectors assigned to monitor compliance"...She added that her department is aware of a "new tactic that was gathering traction – that of firing workers to undermine the labour laws that seek to address unemployment, inequality and poverty". The department will stop these tactics in their tracks, Oliphant warned...She also pledged that government will look to increase budgets for the inspectorate and the Commission for Conciliation Mediation and Arbitration (CCMA)...

2. Minimum daily payments for part time workers

New requirements:
A new s9A of the BCEA provides that an employee earning below the BCEA earnings threshold and who works less than 4 hours on a day, must be paid for 4 hours on that day.

What to do:
Audit all part time working arrangements to ensure compliance.

Consequence of non compliance:
For employees earning below the BCEA earnings threshold, they or labour inspectors can process claims through the CCMA, ultimately enforced through arbitration proceedings. For employees earning above the BCEA earnings threshold, they can institute claims through the courts.

3. Applying new parental leave requirements

New requirements:
The BCEA currently provides 4 months' maternity leave for employees who become mothers, and 3 days' paid family responsibility leave for employees who become fathers. Maternity leave pay is claimed through UIF, although many employers agree to pay all or some of it, and the family leave is by law currently paid by the employer.

This new piece of legislation, that amends the BCEA and the Unemployment Insurance Act, provides parental leave in cases of birth, adoption or surrogacy in a significantly more gender neutral manner. Pay for all of this leave can be claimed through UIF at the increased rate of 66% (the law no longer requires paid family leave on the birth of an employee's child), provided that employers may still agree to pay for some or all of it. The amendments do not alter maternity leave provisions, and provide the following additional leave:

- **10 consecutive days' parental leave** when an employee's child is born.
- An employee who adopts a child younger than 2 will be entitled to **10 consecutive weeks' adoption leave**. If there are 2 adoptive parents, one of them will be entitled to the 10 weeks' adoption leave and the other to the 10 days' parental leave.
- An employee who is a commissioning parent in a surrogacy arrangement, will also be entitled to **10 consecutive weeks' leave**. Again, if there are 2 commissioning parents, one of them will be entitled to the 10 weeks' leave and the other to the 10 days' parental leave.

What to do:
Note: Contrary to public perception, whilst these amendments have been passed by Parliament, as at the date of writing in May 2019 they have not been implemented as yet. We still await their date of implementation, which is expected later this year.

So whilst employers are not yet legally required to implement these new provisions, we recommend employers do the following in anticipation of these new laws coming into effect in the near future:

- Consider the extent to which they should continue with or amend previous company polices providing for (paid) maternity and paternity leave;
- Consider the extent to which this will require further consultation and/or negotiation with employees /unions;
- Communicate to employees the forthcoming changes in legislation, and the extent to which these will impact on existing policies and practices.

Consequence of non compliance:
A failure to implement the required changes, once implemented, will be in breach of the BCEA, and can be enforced like any other contravention of the BCEA. For employees earning below the BCEA earnings threshold, they or labour inspectors can process claims through the CCMA, ultimately enforced through arbitration proceedings. For employees earning above the BCEA earnings threshold, they can institute claims through the courts.

4. **Managing collective bargaining in terms of the New Code of Good Practice on Collective Bargaining, Industrial Action and Picketing, and the new strike ballot Guidelines**

New requirements:
The new **Code of Good Practice** was gazetted in December 2018 and in summary covers the following:

- **Collective bargaining** - guidelines on good faith bargaining, training and support for negotiators, preparing for negotiations, how to submit demands and responses, how to start negotiations, the use of facilitators and disclosure of information.
- **Workplace democracy and dialogue** - guidelines to develop a culture of mutual respect and trust between those managing an organisation and those working for it, through consultation in the decision making process.
- **Industrial action: strikes and lockouts** - guidelines to 'peaceful' strikes or lockouts (free of intimidation and violence), strike notices, strike ballots and establishment of 'peace and stability' committees.
- **Picketing** – guidelines on the conduct of pickets, and on establishing agreed or default picketing rules.

The new **strike ballot Guidelines** were also gazetted in December 2018 and provide guidelines for –

- what **notice** of a ballot has to be given;
- how **ballot papers** should be framed;
- the requirements for a **voters' roll**;
- the role of **scrutineers and observers**;
- how **counting** is to take place;
- **balloting records** to be kept.

What to do:

- Employers should audit –
    - recent collective bargaining practices to assess whether these were conducted in accordance with the new requirements, and what changes would need to take place (by either or both parties) to ensure compliance;
    - existing collective bargaining / recognition agreements to assess whether any changes need to be negotiated,
- and then engage with collective bargaining partners on these issues.

Consequence of non compliance:
One of the weaknesses in the new Code is that there is no declared sanction or penalty for a breach of its provisions. There is also no legal duty to bargain in terms of SA labour law. But it is possible that a party, particularly when there may be an agreement to bargain in terms of a collective agreement, seeks a Labour Court order to compel a bargaining partner to bargain in good faith in terms of the Code.

More likely, is the consideration of any breach of the Code or the strike ballot Guidelines, in relation to secondary disputes arising out of collective bargaining – eg the fairness of strike dismissals or an application for an interdict against some form of industrial action. In these type of disputes, the question of whether or not a party has complied with the Code or strike ballot Guidelines, may be very relevant to the relief sought.

5. Managing employer liability for sexual harassment claims

Requirements:
Employer liability may arise under the law of delict. More specifically, section 60 of the Employment Equity Act is headed '**Liability of employers**' and effectively provides that employers are liable for breaches of the Act committed by their employees at work, if the employer did not –

- consult all relevant parties and take the necessary steps to eliminate the misconduct and comply with the Act, and
- do all that was reasonably practicable to ensure that the employee would not contravene the Act.

Note: This is not a new provision, but we have included it in this audit list as it is often overlooked by employers, and judgments assessing employer liability for not complying with s60 of the EEA in relation to sexual harassment cases, show how important it is.

What to do:
Ensure that systems are in place so that as soon as allegations of breaches of the EEA by employees are made, either through grievance procedures or in some other forum, management can show that it took timeous and necessary steps to ensure compliance with the Act. This is of particular importance in sexual harassment cases and cases alleging other forms of harassment.

Consequence of non compliance:
Employers may find themselves on the receiving end of punitive compensation orders granted by the courts. In a delictual claim, the Cape High Court in *Grobler v Naspers Bpk (2004) 25 ILJ 439(C)* awarded R776 814 damages. The case of *Liberty Group Limited v M (JA105/2015) [2017] ZALAC 19 (7 March 2017)* awarded R250 000 for the employer's failure to protect an employee as required in section 60 of the EEA.

Liberty Group Limited v M (JA105/2015) [2017] ZALAC 19 (7 March 2017)

An employee with 10 years' service resigned, stating that her working environment had become intolerable *"due to ongoing and continued sexual harassment"* by her manager. Subsequent to her resignation, she lodged an unfair discrimination dispute. Whilst the employer had taken steps to process her sexual harassment complaints, the Labour Court found the employer had failed to sufficiently protect the employee as required in terms of section 60 of the EEA, and awarded her damages of R250 000.

On appeal to the LAC the LC judgment was confirmed. The LAC found that an employer's liability for sexual harassment under s 60 of the EEA arise due to the employer's failure to –
(a) to consult all relevant parties,
(b) to take the necessary steps to eliminate the conduct and
(c) to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.

The LAC [clause 63] said the employer "*not only failed to have regard to the purpose and objects of the EEA but adopted precisely the response that the EEA seeks to prevent: a failure to recognise the seriousness of the conduct complained of; a lack of interest in resolving the issue in the manner required; a failure to consult and take the necessary steps to eliminate the conduct complained of; and a failure to do all that was reasonably practicable to ensure that its employee would not act in a manner contrary to the provisions of the EEA*."

6. Other forthcoming legislative requirements

Whilst we think it would be premature at this stage to take any action, Worklaw subscribers should be aware that there are other areas in which they may at some stage have to respond to legislative developments. These include –

- Processing data in accordance with **POPI**, once the Act is implemented;
- Checking employees' qualifications against the **National Qualifications Framework**, once finalised;
- Introducing policies to deal with situations in which employees who are drivers may lose their licences through the **AARTO demerit system**, once that new system is implemented.

Bruce Robertson

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THE EMPLOYMENT CONTRACT

Failing to meet a condition of continued employment:

Solidarity and Another v Armaments Corporation of South Africa (Sco) Ltd and Others (JA40/17) [2018] ZALAC 39 (27 November 2018)

Principle:
Where an employee does not have the required qualifications or certification for a particular job, this may trigger impossibility of performance, and if this incapacity is of a permanent nature, it may warrant dismissal. However in employment law the question that still remains is whether it was fair in the circumstances for the employer to exercise that election.

Facts:
Armscor's conditions of employment provide that an appointment of an employee is subject to "*obtaining and maintaining*" an applicable security clearance. Those "*who fail to qualify for any grade of security clearance as a result of a negative vetting content will be dismissed or their contract of employment terminated."* Significantly, s 37(2) of the Defence Act, 42 of 2002 provides that –

> *"A member or employee contemplated in subsection (1)(a) may not be enrolled, appointed or promoted, receive a commission or be retained as a member or employee, unless such member or employee has been issued with the appropriate or provisional grade of security clearance by the Intelligence Division.'*

Mr Joubert was employed by Armscor for more than three decades, throughout which he obtained the required security clearance certificates appropriate to his position. On 23 October 2006 he was issued with a grade "*Secret*" security clearance certificate which expired on 11 September 2011. In accordance with Armscor's Security Practice Mr Joubert submitted an application to renew his security clearance certificate to Armscor's Personnel Evaluation Division on 26 September 2011. For the period 11 September 2011 to 26 November 2012 Mr Joubert held a security clearance certificate classified as "*Confidential*". Thereafter, for reasons never explained to him or to Armscor the vetting panel of the Intelligence Division of the SANDF refused to grant him all grades of security clearance, let alone at the highest level he previously enjoyed.

His employment was terminated by letter in which he was notified of his right to appeal. This was not successful and Mr Joubert referred an unfair dismissal dispute to the CCMA. The commissioner rejected Armscor's argument that it did not dismiss Mr Joubert and that the termination of his services came about by the operation of the law, viz s37(2) of the Defence Act. He further rejected its contention that it had no discretion in the matter but to terminate Mr Joubert's services. The commissioner was of the view that Armscor could have placed Mr Joubert on suspension or considered alternative sanctions short of dismissal. He found that Armscor opted to terminate Mr Joubert's services by merely issuing a notice to that effect without providing reasons for the termination of employment as envisaged in s188 of the LRA.

The commissioner reasoned that Armscor was required to decide a fair reason for the dismissal and to act in accordance with the procedures laid down in the LRA, which it had failed to do. The commissioner concluded that Mr Joubert's dismissal was both substantively and procedurally unfair. He reinstated him retrospectively on the same terms and conditions, with back-pay of R737 280.00 (nine months' remuneration).

Armscor lodged a review application with the Labour Court to challenge the finding that the dismissal was substantively unfair and the relief awarded by the commissioner. Armscor conceded the procedural unfairness of the dismissal and consequently it did not require any determination.

The LC held that Mr Joubert's dismissal was substantively fair because it resulted from a legal prohibition on further employment brought about by s37(2) of the Defence Act and Armscor's internal policies. The Court found the injunction (that employees who fail to qualify for any grade of security clearance as a result of a negative vetting outcome will be discharged from their services) to be patently fair and reasonable. The LC found the commissioner's reinstatement order to be incompetent and unsustainable, because in law a party cannot enforce a contract that is in contravention of a statutory provision, in this case s37(2) of the Defence Act.

On appeal the LAC viewed the facts of this case from a different perspective. The LAC noted that it needed to consider whether the loss by Mr Joubert of all levels of security clearance triggered impossibility of performance: put differently, whether the termination of Mr Joubert's services by Armscor was actuated by reasons of his incapacity. If the incapacity was permanent, this would therefore warrant dismissal.

But on the facts of this case the LAC found that Armscor terminated Mr Joubert's services with immediate effect for reasons that he had been refused all grades of security clearance, before he had been given the opportunity under the Defence Act to challenge the refusal to grant him the required security clearance. The termination letter was issued before the employer had finally established that it had become permanently and objectively impossible for the employee to be retained in its service. In other words, the incapacity had not yet been determined to be of a permanent nature that warranted the employee's dismissal. The LAC accordingly held that the dismissal was substantively unfair.

The LAC agreed with the LC that the commissioner committed a reviewable irregularity by reinstating Mr Joubert, and said under the circumstances of this case he should have been awarded compensation. As his termination was effected without providing a fair reason and following due process, the maximum compensation of 12 months' salary under s194(1) of the LRA was justified.

This judgment clearly recognises that where an employee does not have the required qualifications or certification for a particular job, this may trigger impossibility of performance, and if this incapacity is of a permanent nature, it may warrant dismissal. However in employment law the question that still remains is whether it

was fair in the circumstances for the employer to exercise that election. An employer in such circumstances would be wise to follow the incapacity guidelines under the Dismissal Code of Good Practice.

Extract from the judgment:
(Phatshoane ADJP):

[22] This appeal lies, in the main, against the substantive fairness of Mr Joubert's dismissal. It remains to be considered whether the loss by Mr Joubert of all levels of security clearance triggered impossibility of performance. Put differently, whether the termination of Mr Joubert's services by Armscor was actuated by reasons of his incapacity. If the answer to the question is in the affirmative then it has to be established whether the incapacity was temporary or permanent, and therefore, warranting being visited with a sanction of dismissal.

[23] .....

[24] In his work *Workplace Law*, Mr John Grogan posits, correctly in my view, that incapacity need not arise from illness or injury. Employees may be dismissed for incapacity arising from any condition that prevents them from performing their work. In other words, incapacity may give rise to a species of impossibility of performance.

[25] The following remarks in *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* are pertinent to this case:

> 'While ordinary principles of contract permit a contracting party to terminate the contract if the other party becomes unable to perform, that is not the end of the matter in the case of employment. The question that still remains in such cases is whether it was fair in the circumstances for the employer to exercise that election. In making that assessment the fact that the employee is not at fault is clearly a consideration that might and should properly be brought to account.'

[26] In terms of s37(1) (a) of the Defence Act the Minister of Defence may prescribe different grades of security clearance to be issued by the Intelligence Division for various categories of members, the employees of Department of Defence and employees of Armscor. In terms ofs37(2) those members or employees may not be enrolled, appointed or promoted, receive a commission or *be retained as members or employees, unless they had been issued with the appropriate or provisional grade of security clearance by the Intelligence Division*. Section 37(4) provides that the Intelligence Division must, on the instruction of the Secretary for Defence, determine whether any security clearance or a specific grade of security clearance should be issued to any member or employee concerned.

[27] In the letter of termination of service, referred to earlier, Mr Joubert was informed that he had been refused all grades of security clearance by the Intelligence Division and consequently that his contract of employment was terminated with immediate effect. The argument by Armscor that the dismissal of Mr Joubert was actuated by incapacity is not new. As correctly found by the Court a quo, it was one of the issues the commissioner was enjoined to determine. As more fully appearing on the Pre-arbitration minutes amongst issues that had to be considered by the commissioner was whether: *"(T)he true reason for dismissal falls within the definition of 'incapacity' as contemplated in the LRA. Further, whether the reason for dismissal had to be "classified as being due to incapacity."*

[28] There can be no question that s37 of the Defence Act makes it a prerequisite for an employee of Armscor to be issued with an appropriate grade of security clearance in order tobe retained in its employ. The policies relied upon by Armscor, in effecting termination in this case, have the same import. They also have their genesis in s37 of the Defence Act. The argument by Ms Engelbrecht, for Solidarity and Mr Joubert, that Armscor did not rely on s37(2) of the Defence Act, as a motivation for the termination of employment but on its employment policies, is therefore unmeritorious. It is axiomatic that Mr Joubert's termination of service was based on supervening impossibility of performance. This constituted a form of incapacity to fulfil the attendant contractual obligations. As correctly found by the Court *a quo* Mr Joubert's inability to perform his services, due to the legal impediment imposed by s37 of the Defence Act and Armscor's corresponding employment policies, falls squarely within the ambit of a dismissal based on capacity. However, this is not the end of the enquiry.

Labour broking: when the client is the sole employer:

Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others [2018] ZACC 22 (26 Aug 2018)

Principle:
Section 198A(3)(b) of the LRA supports the sole employer interpretation, altering the statutory employment contract created by Section 198(2). This is not a transfer to a new employment relationship but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship. The triangular relationship then continues for as long as the commercial contract between the TES and the client remains in force and requires the TES to remunerate the workers.

Facts:
Amendments to the LRA in 2014 limited the use of temporary employment services (TES) or labour brokers as they are commonly known, through a new s198A. In 2015 Assign Services, a TES, placed 22 workers with Krost Shelving and Racking (Pty) Limited, a number of whom were members of NUMSA. The placed workers provided services to Krost for a period exceeding three months and on a full time basis. Assign Services' view was that s198A(3)(b) created a dual employer relationship involving it and the client, while NUMSA contended that the employees' sole employer was Assign Services as a result of this section.

The CCMA supported NUMSA's sole employer interpretation, but the Labour Court held that s198A(3)(b) created a dual employment relationship, in which both the TES and the client have rights and obligations in respect of the workers. In an appeal by NUMSA to the LAC, it was found that the sole employer interpretation best protected the rights of placed workers and promoted the purpose of the LRA. The LAC set aside the LC order and held that a placed worker who has worked for a period in excess of three months is no longer performing a temporary service, and the client becomes the sole employer of that worker. The matter was then referred to the Constitutional Court.

The Constitutional Court in a majority judgment held that the purpose of section 198A must be contextualised within the right to fair labour practices in section 23 of the Constitution and the purpose of the LRA as a whole. The majority found that for the first three months the TES is the employer and then subsequent to that the client becomes the sole employer. The majority found that the language used in s198A(3)(b) supports the sole employer interpretation.

Whilst the majority judgment decides the matter, in a dissenting judgment Cachalia AJ found that the dual employer interpretation was correct, as the LRA does not expressly state that the TES would cease to be the employer after three months. Cachalia AJ concluded that the dual employer interpretation provided greater protection for lower paid workers in line with the purpose of section 198A(3)(b), and for these reasons would have upheld the appeal.

Irrespective of the merits of the different views, we now have legal certainty: S198A(3)(b) of the LRA supports the sole employer interpretation, altering the employment contract between a TES and worker created by s198(2). But whilst the Constitutional Court recognised Krost as the sole employer of those employees placed by the TES, it still recognised the possible existence of a triangular relationship between the parties for as long as the commercial contract between the TES and the client remains in force and requires the TES to remunerate the workers.

This seems to mean that whilst the labour broking client becomes the employer, there is nothing to prevent that employer from continuing to contract out aspects of its employment obligations to the labour broker. On this basis it would appear that labour brokers can still make their services available to employers for this purpose. Whether it is commercially viable for employers to go this route, given the 'equal pay for equal work' provisions that will apply to those employees plus the fact that they will still have to pay the labour brokers' fees, is a matter for consideration.

Extract from the judgment:
(Dlodlo AJ):

[69] Part of this protection entails that placed employees are fully integrated into the workplace as employees of the client after the three-month period. The contractual relationship between the client and the placed employee does not come into existence through negotiated agreement or through the normal recruitment processes used by the client. The employee automatically becomes employed on the same terms and conditions of similar employees, with the same employment benefits, the same prospects of internal growth and the same job security that follows.

[70] The purpose of the section 198A amendments is clear. It exists to fill a gap in accountability between client companies and employees who are placed with them.
.....

[75] This also makes it difficult to accept Assign's argument that the sole employer interpretation forces employees into a new employment relationship, without their consent, on terms of employment to which they have not agreed. Section 198(2) gives rise to a statutory employment contract between the TES and the placed worker, which is altered in the event that section 198A(3)(b) is triggered. This is not a transfer to a new employment relationship but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship. The triangular relationship then

continues for as long as the commercial contract between the TES and the client remains in force and requires the TES to remunerate the workers.
.....

Conclusion
[83] Regard being had to the language employed in section 198A(3)(b) read with sections 198 and 198A, the following is discernible:

> (a) Section 198 deals with the general position with regard to TESs, while section 198(2) is a deeming provision creating a statutory employment contract between the TES and a temporarily placed employee.
> (b) Section 198A deals with the application of section 198 to a specific category of workers, being marginal employees employed below the BCEA threshold.
> (c) Section 198A(3)(a) provides that, when vulnerable employees are performing a temporary service as defined, they are deemed to be employees of the TES as contemplated in section 198(2).
> (d) Section 198A(3)(b)(i) provides that when vulnerable employees are not performing a temporary service as defined, they are deemed to be the employees of the client.
> (e) The deeming provisions in sections 198(2) and 198A(3)(b)(i) cannot operate at the same time.
> (f) When marginal employees are not performing a temporary service as defined, then section 198A(3)(b)(ii) replaces section 198(2) as the operative deeming clause for the purposes of determining the identity of the employer.

[84] As stated above, the language used by the Legislature in section 198A(3)(b) of the LRA is plain. And, when interpreted in context, it supports the sole employer interpretation. It certainly is also in line with the purpose of the 2014 Amendments, the primary object of the LRA, and the right to fair labour practices in section 23 of the Constitution.

Outsourcing - an alternative to labour broking:

Proctor and Gamble Manufacturing SA (Pty) Ltd and Another v Mokadi and Others (JR895/16) [2018] ZALCJHB 80 (2 February 2018)

Principle:
In the absence of a client - employment service provider relationship, section 198A does not apply. An outsourcing of services is permitted under the LRA, and is not covered by s198A.

Facts:
Sodexo Southern Africa (Pty) Ltd is a service organisation with 355 000 employees and 30 600 clients in 80 countries. Sodexo entered into a global service level agreement with Proctor and Gamble Manufacturing SA (P&G), to provide online packaging and warehouse services. Sodexo in turn entered into a sub-contractor agreement with Workforce Group (Pty) Ltd, to fulfil its obligations to P&G. Whilst Workforce's core business is providing staffing solutions through permanent and temporary placement labour broking and industrial staffing, the key issue to this dispute was the nature of the arrangements entered into on this specific occasion.

The packaging and warehouse services negotiated between Soxeo and P&G included -

- Receiving: Emptying goods from delivery vehicles and storing these goods into designated areas on P&G premises;
- Line Supply: Delivery of goods to production areas as requested by P&G;
- Line Take Away: Collection of goods at the end of the line as requested by P&G;
- Shipping: Picking of goods and loading vehicles as per P&G specifications.

In terms of the service agreement Sodexo would be paid on presentation of an invoice and would -

- have full ownership of the designated areas;
- train its own employees to the desired skill levels;
- comply with SA health and safety regulations;
- provide, maintain and own all necessary personal protective equipment;
- ensure its employees have the required licenses to operate vehicles;
- be required to provide branded products and services of superior quality, and be adequately staffed to do so.

At the CCMA, the arbitrator referred to the fact that Sodexo had chosen to provide its services through *"a recognised temporary service provider"*. Due to 4 dedicated P&G supervisors having been assigned to the Sodexo site, the arbitrator appears to have been persuaded that a temporary employment service relationship had been established between P&G (the client) and Workforce (the TES).
The arbitrator accordingly found that -

- Sodexo and Workforce were joint employers under s200B of the LRA;
- 41 employees were deemed to be employees of P&G under s198A.

On review, the LC decided that, based on the facts of this case, there was no client - TES relationship between P&G and either Sodexo or Workforce, and accordingly the deeming provision contained in s198A did not apply. The agreement between P&G and Sodexo was for the procurement of *services* through an outsourcing arrangement, which is permitted under the LRA.

The LC found that the arbitrator failed to apply his mind to the issues and facts before him, and set aside the arbitator's award. Surprisingly (having found that P&G was not the deemed employer) the LC ordered that the matter be referred back to the CCMA to be re-heard by another commissioner.

S198 of the LRA, in summary, defines a 'temporary employment service' as meaning any person who, for reward, provides and remunerates employees to perform work for a client. It is clear from the facts of this case that Sodexo, through Workforce, provided a packaging and warehouse *service* to P&G - it did not just provide a workforce.

What would be the distinguishing features that differentiate a service from just providing a workforce? The agreements between the parties would usually provide the answers to these questions: service agreements will define the output or task that the service provider will be measured against to warrant payment eg in this case the stipulated receiving, line supply, line take away and shipping functions that Sodexo had to perform through its subcontractor (Workforce). This usually requires the

service provider to supervise and manage its own workforce - not just supply labour - to achieve these objectives.

Employers wary of utilising a labour broker beyond the 3 month temporary service limit, may consider restructuring the nature of their relationship by transforming it into a service level agreement. The fact that the labour broker's core business may be providing staffing solutions does not necessarily make it a TES for the purposes of a specific contract.

Extract from the judgment:
(July AJ:)
[24] For section 198A(5) to apply, there must be a client and employment service provider relationship between the first applicant and second applicant. In the absence of such a relationship between the two, section 198A does not apply. In light of the service level agreement between the first applicant and the second respondent, on the one hand, and the subcontracting agreement between the second applicant and the second respondent, it is difficult to understand how the first applicant and the second respondent are said to be co-employers of the first respondents.

[25] The first applicants' contention at the CCMA arbitration and before this Court has been consistently that there is no such a relationship between it and the second applicant and therefore section 198A does not apply in so far as it relates to it. Having read the outsourcing agreement between the second applicant and the second respondent, I am convinced that the relationship between the two parties is not one that is intended to be subjected to regulation by section 198A. In other words, there is no client and temporary employment service relationship between the parties.
.....

[30] There is absolutely no factual basis for the fourth respondent to conclude that the main agreement was intended to procure labour. The main agreement between the first applicant and the second respondent was for the procurement of services. The reliance on section 200B is misplaced and a misconstruction on the part of the fourth respondent. The fourth respondent's findings undermine the outsourcing arrangement between the first applicant and the second respondent.

[31] There was also no basis for the fourth respondent to refer to the second respondent as a temporary employment service provider and the first applicant as the client, nor does the fourth respondent explain how section 198 applies to co-employers. It appears that the fourth respondent failed to apply his mind to the issues and facts before him, and therefore his reasoning is irrational.

Effect of ‘immediate resignation’

Naidoo and Another v Standard Bank SA Ltd and Another (J1177/19) [2019] ZALCJHB 168 (24 May 2019)

Principles:
When an employee resigns with immediate effect in breach of the employment contract, the employer may not proceed with a disciplinary hearing during the notice period without first approaching the court for an order for specific performance.

Facts:
The two employees involved in this case were employed by Standard Bank as equities traders. They were both suspended pending a disciplinary enquiry in March 2019 over a particular trade transaction they were involved in. They were charged with –

- **gross misconduct** for facilitating a trade to the value of R2.500,000,000.00 without the necessary approvals from the appropriate authorities, and for failing to report the trade within time lines stipulated by the Johannesburg Stock Exchange Rules, thereby exposing the Bank to financial and reputational risk; and
- **dishonesty**, for deliberately failing to disclose the trade at the appropriate times.

The employees resigned '*with immediate effect*' on the same day they were handed notices to attend a disciplinary hearing. Despite their immediate resignations, Standard Bank attempted to proceed with the disciplinary hearings during their notice periods, and they then lodged an urgent application in the LC to interdict the Bank from going ahead with the hearings.

The LC traced the history of how our courts have dealt with these matters, including *Kalipa Mtati v KPMG Services (Pty) Ltd* J2277/16; 18 October 2016 and *Coetzee v Zeitz Mocaa Foundation Trust and Another* (C517/2018) [2018] ZALCCT 20; (2018) 39 ILJ 2529 (LC) (14 June 2018). It seems that the judgments agree that the employer may not discipline an employee after a resignation has 'taken effect' – being no longer an employee, the employer ceases to have jurisdiction - but they don't agree on <u>when</u> the resignation 'takes effect'.

The LC highlighted that a resignation is a unilateral act that terminates the employment relationship – the employer does not have a choice whether to accept it or not. The LC accordingly found that a resignation with immediate effect terminates the relationship <u>at that time</u>, even when it is in breach of the notice period contained in the contract. The employer's remedy, if it wishes to enforce the contract, is to seek a court order for specific performance. That would then <u>reinstate</u> the terminated contract and direct performance with its terms. The LC disagreed with the view expressed in ***Coetzee v Zeitz Mocaa Trust*** that the employer may proceed with the disciplinary hearing without first approaching the court for an order for specific performance.

As Standard Bank had not sought an order for specific performance in this matter, the LC found that the employee's contracts of employment had terminated at the time they resigned with immediate effect, despite this being in breach of their contracts. From that time the Bank no longer had jurisdiction over the employees, and the LC accordingly interdicted the Bank from proceeding with the disciplinary hearings against the employees.

Given that it is the latest judgment on the matter, and it specifically canvassed the decisions in ***Kalipa Mtati*** and ***Coetzee v Zeitz Mocaa Trust***, this LC decision is binding, unless overturned at some future stage by a higher court. It seems then that the law currently is that –

- when an employee resigns on notice, the employer is entitled to implement disciplinary proceedings during the notice period, if it wishes to; but –
- when an employee resigns with immediate effect in breach of the employment contract, the employer may not proceed with a disciplinary hearing during the notice period without first approaching the court for an order for specific performance.

Whilst this judgment may have limited impact – most employers are only too happy when an employee resigns facing disciplinary charges, thereby eliminating the possibility of a potentially drawn out and costly dismissal dispute – we think it fails to find the right balance in according fairness to both employers and employees. In this case Standard Bank appeared to have good reasons for wanting to proceed with the disciplinary enquiry – a necessary step to enable the Bank to eventually list the employees' names on 'REDS', which has reputational and professional consequences for them. To do so, would then have required the Bank urgently and at great expense (all of which it would not recover, even if it won the case with a costs order) to seek a court order for specific performance before proceeding with the hearings.

Whilst the judgment may be defensible on pure contractual principles, we think it is completely impractical. Very few employers will go to the trouble and be prepared to risk the cost of an urgent court application for specific performance. The LC even acknowledged that an order for the specific performance of a contract of employment will not normally be granted, quoting no less an authority that the Constitutional Court in *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC), but then perhaps sought to reassure employers by commenting "*it does not mean it would never be granted*", quoting one case in which an airline captain was held to his contractual undertaking to give three months' notice.

We suggest this reassurance may carry little weight with employers, and the practical effect of this judgment will mean that employees, when resigning, will be able to ignore notice periods contained in their contracts for the time being at least.

Extract from the judgment:
Nkutha-Nkontwana J)

[13] The issues that must be determined by this Court are whether the applicant's immediate resignation had the effect of immediately terminating the employment relationship and whether Standard Bank has the right to hold the applicants to their notice periods and if so, whether it can proceed with the disciplinary enquiries against them despite their resignation with immediate effect.

.....

[20] It is patently clear that in this matter there is a breach of contract by the applicants, therefore, what needs to be addressed are the remedies available to Standard Bank for the breach? *Vodacom* restates the contractual principle that an employer may hold the employee to the contract by seeking an order for specific performance. This is an equitable remedy where a court issues an order requiring a party to perform per the contract. This, in the ordinary course of events, would entail an application or in instances such as the present, a counter-claim by Standard Bank, to seek an order for specific performance in order to hold the applicants to their notice periods. Unfortunately, this is not the case in this matter. There was no claim for specific performance and therefore the Court is not in a position to order such.

.....
[23] A different view was expressed in *Coetzee v Zeitz Mocca Foundation Trust and Others* and unreported case of *Mzotsho v Standard Bank South Africa Limited*. In *Coetzee*, the Court seems to suggest that *Mtati* is no longer persuasive since the correct reflection of the law is the one expounded in *Vodacom*. As stated above, *Vodacom* restates the contractual principle that an employer who is confronted with an immediate resignation in breach of the contract of employment may hold the employee to the contract by seeking an order for specific performance. Since it is accepted that the resignation terminates the contract of employment unilaterally, the order of specific performance would, in essence, reinstate the contract and direct performance with its terms.

[24] It is accepted that an order for the specific performance of a contract of employment will, in the exercise of the court's discretion, not normally be granted – see *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC). However, it does to mean it would never be granted. A typical example is to be found in *Nationwide Airlines (Pty) Ltd v Roediger and Another,* where an airline captain was held to his contractual undertaking to give three months' notice.

[25] Whilst I concur with both *Coetzee* and *Mzotsho* on contractual principles, I do however disagree with the view that the employer may proceed with the disciplinary hearing without first approaching the court for an order for specific performance. There is no legal basis for such an approach.

UNFAIR LABOUR PRACTICES

Expanding the definition of demotion:

Xoli v Commission for Conciliation, Mediation and Arbitration and Others (JR1493/16) [2018] ZALCJHB 156 (19 April 2018)

Principle:
Demotion can include the situation where an employee is engaged in a post with a particular rate of pay, but after his/her appointment is remunerated at a lower level, which amounts to an alteration of his/her actual status after appointment.

Facts:
In an unfair labour practice dispute, an employee claimed that he was unfairly demoted because he had been employed on 4 June 2010 in an operational specialist post but was remunerated at a rate one level below the rate he should have been paid. The employee only raised this alleged discrepancy in November 2015, when he claims he first became aware of it.

The arbitrator held that his position remained unchanged since his appointment and that neither his remuneration, responsibilities or status had been materially reduced during his employment. Accordingly, the applicant had neither been demoted nor did his dispute concern promotion because that would require him to have applied for a higher graded position. The arbitrator held that he did not have jurisdiction to arbitrate because the dispute was neither a demotion nor a promotion.

On review at the Labour Court the employee contended that his dispute was that, from the commencement of his appointment, he was neither given the responsibilities in accordance with the post he was employed in, nor was he paid commensurate with the responsibilities he was supposed to perform. In other words he was engaged in a post with a particular rate of pay, but after his appointment was remunerated at a lower level, which amounted to an alteration of his actual status after his appointment.

The LC did not see why such a complaint cannot be construed as a complaint about a demotion. Accordingly the Court held that the arbitrator did indeed have jurisdiction to deal with the dispute and should not have dismissed it. The LC granted the review and ruled that the matter be referred back to arbitration to be heard by another commissioner.

This case has expanded the current understanding of demotion, by saying that demotion can include the situation where an employee is engaged in a post with a particular rate of pay, but after his/her appointment is remunerated at a lower level, which amounts to an alteration of his/her actual status after appointment.

Extract from the judgment:
(Lagrange J):

[8] It is quite possible that the applicant could have simply sued on the basis of his contract of employment, and indeed the applicant appears to acknowledge that much. However, the mere fact that he might have a contractual claim to obtain similar relief does not mean he could not bring his claim within the ambit of an unfair labour practice as defined in section 186(2)(a) of the Labour Relations Act 66 of 1995. In effect, what the applicant is claiming is that he was engaged on in a post with a particular rate of pay, but after his appointment was remunerated at a lower level, which amounted to an alteration of his actual status after his appointment. This much is clear even in the absence of having sight of the contract of employment. I do not see why such a complaint cannot be construed as a complaint about a demotion, whatever other implications it might have. Accordingly, I am satisfied that the arbitrator did indeed have jurisdiction to deal with the dispute and should not have dismissed it as brusquely as he did. In reaching this conclusion, I make no finding as to what portion of the unfair labour practice claim dating back to 2010 can be pursued, given that the unfair labour practice claim appears to have only been launched in 2016.

Need for a fair procedure before suspending?

Long v South African Breweries (Pty) Ltd and Others (CCT61/18) [2019] ZACC 7 (19 February 2019)

Principle:
An employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension. A precautionary suspension is not a disciplinary measure and consequently, the requirements relating to fair disciplinary action under the LRA do not apply.

Facts:
Mr Long was employed by South African Breweries as its district manager for the Border District. He was responsible for legal compliance in respect of SAB's operations in that area, including the requirements pertaining to a fleet of vehicles. On 10 May 2013, a trailer owned by SAB was involved in a fatal accident. The vehicle, before the accident, was in a state of disrepair and unlicensed. This accident prompted an investigation by SAB into the vehicle fleet. It turned out that many of the vehicles for which Mr Long was responsible were not roadworthy and had invalid licence discs. After further investigation and a disciplinary hearing Mr Long was found guilty of dereliction of duties, gross negligence and bringing the company name into disrepute. He was dismissed on 14 October 2013. Mr Long had also been suspended from work from the time the investigations began until he was dismissed.

Two arbitrations followed in the CCMA, the first relating to Mr Long's suspension prior to dismissal and the second dealing with the fairness of his dismissal. The arbitrator held that Mr Long's suspension constituted an unfair labour practice because Mr Long had not been given a hearing before his suspension and the suspension was unreasonably long. The arbitrator awarded compensation equivalent to two months' remuneration. In the second arbitration, the arbitrator held that Mr Long had been unfairly dismissed because the illegalities regarding the vehicles did not fall within his responsibility. The arbitrator ordered that SAB reinstate Mr Long.

SAB reviewed both arbitration awards before the Labour Court. Regarding the first arbitration, the **Labour Court** held that where a suspension is precautionary and with full salary, as in this case, there is no requirement that an employee be given an opportunity to make representations. The Labour Court set aside the arbitrator's finding that the suspension was an unfair labour practice. As for the second arbitration, the Labour Court held that Mr Long had been guilty of dereliction of duty. It held that the arbitrator had come to the contrary conclusion by irrationally and improperly evaluating the evidence. The arbitrator's award was set aside and substituted with an order declaring Mr Long's dismissal to be fair. The Labour Court ordered that Mr Long pay SAB's costs in both review applications.

The **Labour Appeal Court** refused Mr Long's application for leave to appeal, and these matters wound their way to the ConCourt. In a unanimous judgment, the **ConCourt** confirmed that an employer is not required to give an employee an opportunity to make representations before a precautionary suspension. The ConCourt further held that the LC was correct in holding that the dismissal had been fair and that Mr Long should not be reinstated. The ConCourt did however find that in labour matters costs do not ordinarily follow the result, and that the LC failed to justify its adverse costs order. The costs order was therefore set aside.

Extract from the judgment:
(Theron J)
[23] This case concerns fair labour practices in terms of section 23 of the Constitution and specifically whether there is a requirement for a pre-suspension hearing in the case of a precautionary suspension. This Court's jurisdiction is engaged.

[24] In respect of the merits, the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one. This is supported by Mogale, Mashego and Gradwell. Consequently, the requirements relating to fair disciplinary action under the LRA cannot find application. Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.

[25] In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee. The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted. Generally where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court's finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound.

DISCIPLINE & DISMISSAL

Processing discipline timeously:

Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others (CCT33/18) [2019] ZACC 3 (7 February 2019)

Principle:
Delays in the resolution of labour disputes undermine the primary object of the LRA. The requirement of promptness not only extends to the institution of disciplinary proceedings, but also to their expeditious completion. If an employee is retained in employment for an extended period after the institution of disciplinary action, it may indicate that the employment relationship has not broken down. An appeal procedure is a separate facet of the disciplinary procedure and must be conducted with the same degree of alacrity for procedural fairness to be fulfilled.

Facts:
On 22 July 2010 Ms Stokwe, a Deputy Chief Education Specialist in the Uitenhage District Office, was charged with four counts of misconduct by the Eastern Cape Department of Education for awarding a service contract to her husband's company without the required approval of her employer. Ms Stokwe declared the award of the service contract to Human Resources, but she did not receive permission from the Head of Department to make the award as required. Whilst she had awarded her husband (whose company provided transport services) the temporary contract to alleviate a short term transport emergency, she also admitted she had done so due to his dire financial situation as he was unemployed. He received R300 000 in service fees from this contract.

Ms Stokwe's disciplinary hearing was scheduled for 12 August 2010 but was ultimately held on 30 March 2011. On 22 June 2011 the Department informed Ms Stokwe that she had been found guilty of two of the four charges brought against her and that she was dismissed. Ms Stokwe appealed to the Eastern Cape MEC for

Education against both the finding that she was guilty and the sanction. Because section 8(4) of Schedule 2 of the Employment of Educators Act (EEA) provides that a sanction may not be implemented pending the outcome of an appeal, Ms Stokwe was retained and remained in the employ of the Department, although she was removed from its transport programme. On several occasions Ms Stokwe requested reasons for her dismissal from the Department but received no response. Eventually she was advised that her appeal was unsuccessful. On 14 February 2014, almost 5 years after the misconduct occurred and 3 years after her disciplinary hearing, the sanction of dismissal took effect and she was dismissed.

Aggrieved, Ms Stokwe referred a dispute to the Education Labour Relations Council, challenging the substantive and procedural fairness of her dismissal. The arbitrator found that although 3 years in disposing of a labour dispute is an inordinately long delay, any prejudice that Ms Stokwe may have suffered was ameliorated by the fact that she was employed with pay throughout and that the Department had not abandoned its right to pursue disciplinary charges against her in light of section 8(4) under the EEA. The arbitrator concluded that Ms Stokwe's dismissal was substantively fair as her misconduct seriously and negatively impacted on the trust relationship with the Department.

Ms Stokwe approached the Labour Court to have the award reviewed and set aside, but was unsuccessful. The Labour Court refused leave to appeal, as did the Labour Appeal Court. Ms Stokwe then approached the Constitutional Court for relief.

The Constitutional Court granted Ms Stokwe the right of appeal and dealt with the merits of the matter. Ms Stokwe submitted that the delay was an unjustified departure from the Department's internal disciplinary procedure and was inconsistent with the requirements of procedural fairness under the LRA. She argued that the Department's conduct amounted to a waiver of its right to discipline her.

In response the Department argued that although ordinarily it should be guided by the underlying principle that disciplinary proceedings must be concluded in the shortest possible timeframe, the principle and disciplinary codes serve as a guide and are not rigid rules on how disciplinary proceedings should be conducted. The Department relied on Ms Stokwe's removal from its transport programme as indicative of a breakdown in the trust relationship.

In a unanimous judgment the Constitutional Court found that whilst Ms Stokwe's dismissal was substantively fair, it was procedurally unfair as a result of the excessive delays in the disciplinary proceedings. The Court held that both the EEA and LRA provide that the principles underlying any procedure to discipline an educator entail that discipline should be prompt and fair and that the disciplinary proceedings must be concluded in the shortest possible time frame. The Court also said that if an employee is retained for an extended period after the institution of disciplinary action, it may indicate that the employment relationship has not broken down.

The Court concluded that the excessive delay in finalising the disciplinary process and failure to provide Ms Stokwe with adequate reasons for her dismissal were not

acceptable, and that the delays rendered her dismissal procedurally unfair, even though the effect of section 8(4) meant that the Department had not waived its right to pursue disciplinary proceedings against her.

The Court accordingly granted Ms Stokwe's appeal and the Labour Court order was set aside and substituted with an order finding that Ms Stokwe's dismissal was procedurally unfair. The Court directed that the matter be remitted to the Labour Court as a specialist court, for an appropriate remedy to be determined by that court.

The Constitutional Court made it clear that delays in the resolution of labour disputes undermine the primary object of the LRA. It quoted the LC judgment in *Moroenyane v Station Commander of the SAP, Vanderbijlpark [2016] JOL 36595 (LC)* that considered the following factors in assessing whether there was an unfair delay in the context of disciplinary proceedings:

- whether the length of the delay in unreasonable;
- any explanation for the delay;
- whether the employee took steps to assert his / her right to a speedy process;
- whether the delay caused material prejudice to the employee;
- whether the nature of the offence justified a longer period of investigation, thereby causing an understandable delay in proceedings

Whether a delay would impact negatively on the fairness of disciplinary proceedings would depend on the facts of each case, taking the above basket of factors into account.

Extract from the judgment:
(Petse AJ)

[64] A dismissal should be procedurally, as well as substantively, fair. The LRA espouses speedy resolution of labour disputes. And so does the EEA which provides that the principles underlying any procedure to discipline an educator include that discipline should be prompt and fair, and that disciplinary proceedings "must be concluded in the shortest possible time frame". The applicant's misconduct occurred in August 2009. She received the final determination on appeal only in February 2014 (five months short of five years).

.....

[67] The requirement of promptness not only extends to the institution of disciplinary proceedings, but also to their expeditious completion. If an employee is retained in employment for an extended period after the institution of disciplinary action, it may indicate that the employment relationship has not broken down. An appeal procedure is a separate facet of the disciplinary procedure and must be conducted with the same degree of alacrity for procedural fairness to be fulfilled.

.....

[69] In *Toyota SA Motors* this Court observed that "[a]ny delay in the resolution of labour disputes undermines the primary object of the LRA".

Is the delay unfair?

[70] The applicant calls in aid several cases. However, the delay per se does not constitute unfairness, but rather as Sachs J put it in *Bothma*, albeit in the context of a delay in bringing a private prosecution:

> *"[T]he delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay , but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence."*

[71] This also accords with the general principles of how delay impacts the fairness of disciplinary proceedings. The question whether a delay in finalisation of disciplinary proceedings is unacceptable is a matter that can be determined on a case-by-case basis. There can be no hard and fast rules. Whether the delay would impact negatively on the fairness of disciplinary proceedings would thus depend on the facts of each case.

[72] In *Moroenyane*, the Labour Court considered factors which this Court initially propounded in *Sanderson* in the context of assessing delays in criminal prosecutions, and applied those factors to determine what constituted an unfair delay in the context of disciplinary proceedings. It held:

(a) *"The delay has to be unreasonable. In this context, firstly, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.*
(b) *The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.*
(c) *It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing.*
(d) *Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case.*
(e) *The nature of the alleged offence must be taken into account. The offence may be such that there is a particular imperative to have it decided on the merits. This requirement however does not mean that a very serious offence (such as a dishonesty offence) must be dealt with, no matter what, just because it is so serious. What it means is that the nature of the offence could in itself justify a longer period of further investigation, or a longer period in collating and preparing proper evidence, thus causing a delay that is understandable.*
(f) *All the above considerations must be applied, not individually, but holistically."*

Derivative Misconduct revisited:

Numsa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others (CCT202/18) [2019] ZACC 25 (28 June 2019)

Principles:

1. An employee's duty of disclosure on the basis of good faith can never be unilateral. The employee's duty to disclose must be accompanied by a reciprocal duty on the employer to protect the employee's individual rights. In the context of a strike, an employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or exonerate themselves.

2. Having done this, an employer would also need to be able to prove that the employee being charged with derivative misconduct -
   (a) was present when violence was committed;
   (b) would have been able to identify those who committed the violence;
   (c) would have known that the employer needed that information;
   (d) failed to disclose the information; and
   (e) did not disclose the information because they knew the perpetrators were guilty of misconduct, and not for any other innocent reason.

Facts:
On 26 September 2012 certain Dunlop companies dismissed their entire workforce, following a month long protected strike characterised by serious violence in defiance of a Labour Court interdict. The violence included arson (setting alight the homes of a manager and a foreman); damaging several vehicles belonging to staff and visitors; smashing windows; beating people with sticks and on one occasion throwing a petrol bomb; blockading entrances; throwing stones at staff and visitors; assaults and intimidation on staff; theft of a camera being used to record the violence; scrawling death threats on a billboard; and a violation of the agreed picketing rules.

The fairness of the dismissals was challenged by NUMSA and the dispute was referred to arbitration. The arbitrator found that there was no procedural unfairness. In respect of substantive fairness, the arbitrator concluded that there were three categories of dismissed employees:

- **First**, a category that had been positively identified as committing violence. Their dismissal was found to be fair.
- **Second**, a category of employees who were identified as present when violence took place but who did not physically participate. Their dismissal was fair, according to the arbitrator, on grounds of what was called “derivative misconduct”.
- A **third category** of employees dismissed for derivative misconduct but who were not positively and individually identified as being present when violence was committed. Their dismissal was found to be unfair and they were reinstated. The arbitrator held that derivative misconduct could only be triggered when the employer discharges an *onus* to show that the employees *must* have knowledge of the misconduct.

Dunlop in Dunlop Mixing and Technical Services (Pty) Ltd & Others v NUMSA obo Nganezi & Others (D345/14) [2016] ZALCD 9; (2016) 37 ILJ 2065 (LC); [2016] 10 BLLR 1024 (LC) (11 May 2016) successfully reviewed the arbitrator’s finding of substantive unfairness in the dismissal of the third category (note – Numsa never challenged the fairness of the dismissals of the second category, and as a result their dismissals are not considered in this dispute). The LC held that the arbitrator did not apply his mind to the proper inferences that could be drawn from the evidence as a whole, which included the inference that the employees in the third category were indeed present during violence. The LC found that their derivative misconduct consisted of their failure to come forward and either identify the perpetrators or exonerate themselves by explaining that they were not present and could not identify the perpetrators. They breached their duty of good faith in the employment relationship by failing both the duty to disclose and the duty to ‘self-exonerate’.

On appeal by Numsa to the LAC in *NUMSA obo Nganezi & others v Dunlop Mixing and Technical Services (Pty) Ltd & others* DA16/2016 [2018] ZALAC 19 (17 July 2018), the majority judgment agreed that the arbitrator adopted too narrow an approach to the evidence by requiring the individual identification of each employee as being present as a requirement for derivative misconduct. From the circumstances, the inference could be drawn that it was improbable that every one of them could not have acquired knowledge of the misconduct perpetrated. The case advanced on behalf of all the employees was that no violence occurred, or if it had occurred they were ignorant of it, and this version was proved to be a lie. The LAC found that the presence of the employees during the violence had been proved on a balance of probabilities. There was enough evidence that called for an explanation. The false evidence tendered through the witnesses called by the union, and the failure by the appellants to give evidence themselves in those circumstances, are factors that could, justifiably, be placed in the balance against them. The evidence supported an inference of their presence during violence. The LAC concluded that the LC was correct in setting aside the award.

There were 2 minority dissenting judgments from the LAC, which clearly the ConCourt took note of. These questioned whether an employee should be sanctioned for exercising the right to remain silent. Further, they questioned the existence of a unilateral duty on an employee to disclose information about misconduct to the employer, in the context of the employment relationship, the position of the employee and the circumstances and conditions under which employees work and live, noting the appreciable risks which may arise for an employee in speaking out and in naming perpetrators. Serious danger to the employee must be weighed against the employer's interest in extracting information.

In a unanimous judgment, the ConCourt set aside the LC and LAC judgments, which meant the arbitrator's award summarised above was reinstated. The effect of this is that the derivative misconduct dismissal of the third category of employees who were not positively and individually identified as being present when the violence was committed, was found to be unfair and they were reinstated.

The ConCourt questioned the origins of the duty of good faith imposed on employees, that appears to have been accepted by our courts to this point. The ConCourt also questioned the extent to which it was necessary to use the charge of derivative misconduct at all, pointing out that evidence of knowledge of the misconduct coupled with the intention to associate with it, was sufficient to be charged as an accessory to the misconduct.

The ConCourt was clear that a duty of disclosure on the basis of good faith can never be imposed unilaterally on employees. The duty to disclose must be accompanied by a reciprocal duty on the part of the employer to protect the employee's individual rights. In the context of a strike, an employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or exonerate themselves. On the facts of this case, the ConCourt found that Dunlop had not sufficiently done this.

Even if Dunlop had done this, it was unable to prove the required elements, namely that each of the employees charged with derivative misconduct -

(a) was present when violence was committed;
(b) would have been able to identify those who committed the violence;
(c) would have known that the employer needed that information;
(d) failed to disclose the information; and
(e) did not disclose the information because they knew the perpetrators were guilty of misconduct, and not for any other innocent reason.

Extract from the judgment:
(Froneman J)

[75] In finding this right balance between employer and employee in fair labour practice, the reciprocal duty of good faith should not, as a matter of law, be taken to imply the imposition of a unilateral fiduciary duty of disclosure on employees. In determining whether, as a matter of fact, a unilateral fiduciary duty to disclose information on the misconduct of co-employees forms part of the contractual employment relationship, caution must be taken not to use this form of indirect and separate misconduct as a means to easier dismissal rather than initially investigating the participation of individual employees in the primary misconduct. A failure to appreciate that there are many ways, direct and indirect, for employees to participate in and associate with the primary misconduct increases this risk. Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the misconduct. Presence at the scene will not necessarily be required. Even prior or subsequent knowledge of the violence and the necessary intention in relation to association with the misconduct will still be sufficient.

[76] Added to the difficulty of factually inferring a duty of disclosure is that the imposition of this kind of duty on the basis of good faith can never be unilateral. The duty to disclose must be accompanied by a reciprocal, concomitant duty on the part of the employer to protect the employee's individual rights, including the fair labour practice right to effective collective bargaining. In the context of a strike, an employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or exonerate themselves. Circumstances would truly have to be exceptional for this reciprocal duty of good faith to be jettisoned in favour of only a unilateral duty on the employee to disclose information.

Application to the facts

[77] The Labour Court and the majority of the Labour Appeal Court found that the arbitrator acted unreasonably in finding that there was no evidence that the applicants were present during violent episodes in the strike, in that he ignored the circumstantial evidence and inferential reasoning following from it. Had he done so, the most probable inference to be drawn was that they were present and thus guilty of misconduct in the form of non-disclosure of the real culprits.

[78] The arbitrator, Labour Court and Labour Appeal Court all proceeded on an acceptance that a derivative duty to disclose existed on the authority of *Hlebela.* As we have seen, this duty was sourced in the contractual duty of good faith without any reference to an employer's reciprocal good faith obligations. In accordance with the conclusion reached above, Dunlop's reciprocal duty of good faith required, at the very least, that employees' safety should have been guaranteed before expecting them to come forward and disclose information or exonerate themselves. That was not sufficiently done. The appeal must succeed for this reason.

[79] But even on the Labour Appeal Court majority's own reasoning, the chain of inferential reasoning before each of the employees may be found guilty is a long one. It must be the more probable inference that each of the employees was
(a) present at an instance during the strike where violence was committed;
(b) would have been able to identify those who committed the violent acts;
(c) would have known that Dunlop needed that information from them;
(d) with possession of that knowledge, failed to disclose the information to Dunlop; and
(e) did not disclose the information because they knew they were guilty and not for any other innocent reason.

[80] The evidence showed that there were more than 150 employees involved in the strike and that on the first day about 100 were present when violence occurred. That was the high-water mark in the numbers of those present at violent occurrences. At least three possible inferences could be drawn in relation to presence at any one of the incidents of violence:
(a) none of the applicants were present;
(b) all of the applicants were present; or
(c) some of the applicants were present.

[81] The more probable inference of these is the third, namely that some of them were present. But that is not good enough. One still does not know who they were. To dismiss all in the absence of individual identification would not be justified.

[82] So the inferential reasoning fails at the first step. And even if it passed the first step, drawing the other necessary inferences would simply become progressively more difficult. Dunlop's case also fails on these facts.

Proving misconduct is not the same as proving a crime:

Nel v Construction Education and Training Authority and Others (PA3/17) [2018] ZALAC 16 (10 July 2018)

Principle:
In misconduct hearings, one is not required to satisfy the criminal law requirements of any wrongdoing. All that is required is to establish if the employee committed misconduct, whether the misconduct was one of dishonest conduct complained of or something else, and the seriousness thereof.

Facts:
The employer (CETA) deposited R6 093.38 into Pick 'n Pay's bank account and the employee was instructed by her supervisor to collect stock at Pick 'n Pay in accordance with a pre-approved standard list of office supplies.

Instead of collecting the items, the employee loaded the funds from the employer's credit onto two gift cards. With these two cards the employee purchased goods, then returned some of them, putting the refund into a third gift card. Although she disclosed the two gift cards to her supervisor, she did not disclose the third. During the shopping the employee used her smart shopper card, a Pick 'n Pay loyalty programme used for the accumulation of points which can be converted into cash for further purchases. She also used her credit card to effect payment for some of the items purchased which CETA said was unnecessary as it had paid for its own goods.

The employee had explained to her supervisor that she had been advised by a cashier at Pick ‘n Pay to load the funds onto two gift cards. He was surprised as there was no need for this – all she had to do was collect the supplies. Video footage of the employee transacting at the store showed the employee arriving at the store on two occasions wearing different clothing and with a changed hairstyle, possibly to conceal her identity.

The employee faced charges of dishonesty, fraud, material breach of fiduciary duty, gross dereliction of duty, gross negligence, failure to exercise due care in the discharge of her duties, and contravention of CETA’s internal policies and procedures. She was found guilty on all the charges at an internal disciplinary hearing and dismissed.

At the CCMA, the commissioner concluded that her dismissal was both procedurally and substantively unfair and reinstated her retrospectively with back pay. The commissioner found that the employee’s version was reasonable: that she had been advised by Pick ‘n Pay to transfer the money onto gift cards because she needed to pick up the goods at different times, her car being too small to collect all the goods at once. She had not disclosed the third gift card because she had not completed the transactions.

On review, the Labour Court found that the employee had an opportunity to report the third gift card to her supervisor but deliberately elected not to do so. She misled him into believing that she spent all the money deposited by CETA into Pick ‘n Pay’s account. The LC drew an inference, on the basis of her non-disclosure of the third gift card, that she committed fraud. This was fortified by her buying pattern. The employee made herself guilty of serious misconduct which involved dishonesty. This destroyed the relationship of trust and justified her dismissal. It reviewed and set aside the commissioner’s award and substituted it with an order that the dismissal was substantively and procedurally fair.

On appeal to the LAC, one of the issues was whether the employer had proved all the elements of fraud. **The court held that in misconduct hearings one is not required to satisfy the criminal law requirements of any wrongdoing.** All that is required is to establish if the employee committed misconduct, whether the misconduct involved dishonesty or something else, and the seriousness thereof.

What the LAC is saying is that labels are totally irrelevant, particularly to a criminal charge that is for the criminal courts to deal with. Here the employee misled CETA into believing that all the monies had been spent on the groceries. The evidence is overwhelming that she deliberately concealed the existence of the third gift card which had a balance of R381.84, and thereby made herself guilty of dishonest conduct. The appeal was dismissed.

This case is a useful reminder that in drafting charges the emphasis should be misconduct rather than a criminal law category. The criminal law definitions of theft and fraud require proof of intention – something that is often difficult to do. Employers can create difficulties for themselves in splitting charges - here the employee was charged with “dishonesty, fraud, material breach of fiduciary duty, gross dereliction of

duty, gross negligence, failure to exercise due care in the discharge of her duties, and contravention of CETA's internal policies and procedures". Think of the extra witnesses that might be needed to properly establish all of those charges. How much simpler this case could have been if the charges were something like "you are charged with dishonest conduct in that you obtained and failed to disclose the existence of a gift card onto which the company's money was loaded".

Extract from the judgment:
(Phatshoane J):

[39] The Court *a quo* correctly concluded that the commissioner had failed to consider the pattern the appellant followed when purchasing the groceries. Having considered the evidence and the failure of the appellant to disclose the third gift card which had funds belonging to CETA, the Court *a quo* found that "*the most plausible inference to be drawn is that she had committed fraud*". Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. However, in misconduct hearings, one is not required to satisfy the criminal law requirements of any wrongdoing. All that is required is to establish if the employee committed misconduct, whether the misconduct was one of dishonest conduct complained of or something else, and the seriousness thereof. Labels are totally irrelevant, particularly to a criminal charge that is for the criminal courts to deal with. Here the appellant misled CETA into believing that all the monies had been spent on the groceries. The evidence is overwhelming that she deliberately concealed the existence of the third gift card which had a balance of R381.84 and thereby made herself guilty of dishonest conduct.

[40] CETA is a public institution listed under Schedule 3A of the Public Finance Management Act, 1 of 1999, and must account for its management of public funds. The appellant, who at the time of the arbitration had 17 years of service with CETA, occupied a position of trust and had, by her own admission, been purchasing and collecting the groceries for over a period of 15 years. Her dishonesty had a direct impact on the substratum of the employment relationship which justified her dismissal regardless of her long period of service. In *Toyota SA Motors (Pty) Ltd v Radebe and Others*, this Court pronounced:

> *'[15].....Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty. It appears to me that the commissioner did not appreciate this fundamental point.*
>
> *[16] I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.'*

[41] A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. The decision by the commissioner cannot be sustained on the facts. The Court *a quo's* conclusion that his award did not fall within the band of reasonable decision-makers cannot be faulted.

Hearsay evidence and the absent witness:

Taku v Sekhanisa and Others (JR1242/2016) [2019] ZALCJHB 13 (22 January 2019)

Principle:
Before hearsay evidence can be admitted as evidence, all the factors listed in section 3(1)(c) of the Law of Evidence Amendment Act must be assessed according to the circumstances of the case.

Facts:
The employee, a SAA customer service agent, was dismissed on three counts of misconduct, all relating to an incident involving a passenger who was travelling on a flight to Lagos. The charges were soliciting a bribe, corruption and bringing the name of the SAA into disrepute.

The passenger gave evidence at SAA's internal disciplinary hearing, but, despite SAA representing that she would be a witness, she was not present at the CCMA arbitration. SAA relied on her evidence in affidavit form, together with that of 3 witnesses, none of whom heard the employee asking for a bribe but who were told about it by the passenger. The passenger told them that she knew that she had two pieces of extra luggage and was prepared to pay for both of them, but the employee at the check-in counter has only written on the receipt that she had to pay for one piece. She told them he had said she should pay for one piece of excess luggage and to put R 200 or R 250 in her passport when she brought it back to him. The passenger sent an e-mail on the following day complaining about the incident.

The employee's explanation as to why he wrote one piece of luggage on the slip when the passenger had indicated that she had two pieces of excess luggage, was that the passenger had said she did not have enough money to pay for two pieces, and would leave one behind with someone who had accompanied her to the airport. The arbitrator found that the employee's version was improbable as the passenger ultimately paid for two pieces of luggage, which contradicted the version that she only had funds to pay for one piece.

The Labour Court was critical of the CCMA arbitrator's approach in that, whilst being aware that the evidence was hearsay evidence, looked at the evidence in its totality, finding the employee's version highly improbable compared to the probable, coherent and unambiguous of SAA's witnesses. Instead the commissioner should have strictly followed the approach required in the Law of Evidence Amendment Act. There was, in the absence of the passenger as a witness, no direct evidence at all to support the SAA's case that the employee had solicited a bribe or was involved in corruption.

The fact that the employee had the opportunity to cross-examine the passenger at the disciplinary hearing was regarded as of no consequence because the arbitration was a hearing *de novo.* This difficulty could have been overcome if the transcript of the disciplinary hearing was presented and the parties had agreed that the entire transcript should be regarded as evidence before the arbitrator, in which event the entire record could be considered and accepted as if it were evidence that was adduced before the arbitrator.

The Labour Court ordered that the arbitration award be set aside but the dispute was remitted to the CCMA for a hearing *de novo* before a different arbitrator.

This case is a reminder that before hearsay evidence can be admitted as evidence, all the factors listed in section 3(1)(c) of the Law of Evidence Amendment Act must be assessed according to the circumstances of the case. Despite s138(1) of the LRA saying that arbitrators must determine disputes fairly and quickly and with a minimum of legal formalities, this case is a further example of the courts requiring arbitrators to adhere to strict rules of evidence.

Extract from the judgment:
(Prinsloo, J):

[54] In terms of section 3(1) of the Law of Evidence Amendment Act hearsay evidence shall not be admitted as evidence unless the parties agreed to the admission thereof as evidence, or the person upon whose credibility the probative value of such evidence depends, testifies at the proceedings or where the evidence is admitted in the interest of justice, having regard to seven specified factors.

.....

[62] There was, in the absence of Ms Hughes as a witness, no evidence at all to support the SAA's case that the Applicant had solicited a bribe or was involved in corruption. Not a single witness of the SAA could testify to this issue and their versions were limited to what they were told by Ms Hughes. How the arbitrator could make the finding that the SAA proved, on a balance of probabilities, that a fair reason existed to justify the Applicant's dismissal, is astonishing.

.....

[71] The SAA's argument is that the hearsay evidence was admitted in the interest of justice. The difficulty however is that before hearsay evidence could be admitted as evidence because the interests of justice demands its admission, all the factors listed in section 3(1)(c) must be assessed according to the circumstances of the case. It is the combined assessment of all the factors that will result in a proper application of section 3(1)(c). It is evident from the arbitration award that the arbitrator had no regard to the provisions of the Law of Evidence Amendment Act, let alone an assessment of the factors listed in section 3(1)(c) and that the interest of justice was not a justification for accepting hearsay evidence, as submitted by the SAA. The arbitrator accepted hearsay evidence because he was of the view that he had to consider the totality of the evidence in order to arrive at an appropriate decision.

.....

[74] I must ascertain whether the arbitrator considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable. Viewed cumulatively, the arbitrator's failure to apply his mind to the issues and his acceptance of hearsay evidence in the manner he did, were material to the determination of the dispute

and it distorted the ultimate decision made by the arbitrator. It cannot therefore be said that the arbitrator's decision was one that a reasonable arbitrator could have reached on the full conspectus of all the facts before him.

A new take on inconsistency:

JDG Trading (Pty) Ltd t/a Supply Chain Services v Myhill NO and Others (JR958/16) [2018] ZALCJHB 287 (11 September 2018)

Principle:
An employer can act inconsistently by not enforcing a rule at a prior point in time, only to enforce it thereafter, without warning, in respect of the same employee. But the employee has to illustrate that the failure to take action has resulted in a *bona fide* belief that a policy is no longer applicable or not regarded as serious.

Facts:
An employee travelled a lot in the execution of his duties and was issued with a company credit card in order to pay for certain expenses incurred during business trips. The employee was aware that there was a credit card policy in place which regulated the use of the credit card.

On many occasions during the period June 2015 to July 2015, the employee used his company credit card to buy lunch and/or dinner when he was already at home or close to his house before lunch or dinner time, and exceeded the amounts allowed for the purpose of paying for lunch or dinner. On one occasion, the employee bought cigarettes and claimed it as breakfast. The employee said that he interpreted the provisions of the credit card policy to the effect that he was entitled to use the credit card to buy lunch and dinner on days that he travelled in excess of 150 kilometres, even if he was back home at lunch or dinner time or before. He also alleged that, apart from the buying of cigarettes, which he claimed was a mistake, he did nothing wrong in that his former managers were aware that he used the credit card in this manner and they approved his usage in this manner.

The employee was dismissed following these allegations of misappropriation of company funds, in that he used his company credit card for purchases that he was not entitled to and which led to the employer suffering a loss of R1028.40 over the period June 2015 to July 2015.

When the matter was referred to the CCMA, the commissioner held that the dismissal was unfair. This assessment was based on the evidence that while the employee had used his credit card in contravention of the policy for a significant period and time and, despite him having disclosed his use of his card to two managers, he was never reprimanded by either of them. The commissioner found that the employer had acted inconsistently and found that the dismissal of the employee was not the appropriate sanction for contravention of the credit card policy. The employer had failed to prove that it had a good reason to dismiss the employee.

On review in the Labour Court, it was recognised that whilst inconsistency is normally decided in the context of inconsistent application of discipline between *different* employees, it can take place in the context of inconsistent application of a

rule to a *single* employee. An employer acts inconsistently by not enforcing a rule at a prior point in time, only to enforce it thereafter, without warning, in respect of the same employee. In that context, the inconsistency is based on the impression that the rule or standard is no longer applicable; is not regarded as serious by the employer; that disciplinary action will not necessarily be taken for non-compliance with the rule, or that the type of behaviour is condoned by the employer. If the rule is then suddenly enforced, resulting in dismissal, the inconsistent application of the rule by the employer will be a factor which must be considered in order to determine whether the dismissal was unfair.

However the LC went on to say that the mere failure to take disciplinary action against an employee who contravenes a rule for a period of time does not automatically mean that the employee is justified in believing that the rule is no longer applicable or is no longer regarded as serious by the employer. **The employee has to illustrate that the failure by the employer to take action has resulted in a *bona fide* belief to that effect**. In this case the Court held that the employee "took chances" by contravening it and "got away" with it for a while. This can never equate with a genuine *bona fide* belief that a policy is no longer applicable or not regarded as serious based on the inconsistent application of the policy by the employer.

The Court held that the commissioner had not taken account of the fact that the employer testified that the trust relationship between the parties had broken down. He failed to appreciate that consistency is one element of a fair dismissal and not a rule unto itself. Consequently the commissioner's award was not one that a reasonable decision maker could have reached based on the evidence before him, and therefore was set aside and substituted with an order that the dismissal of the employees was substantively fair.

What this case teaches us is that it would be far better if an employer does act consistently in applying its rules. Where it for various reasons has not done so, it could reinforce its future application by advising employees that whilst this particular rule has not always been strictly applied in the past, it will be applied in future due to changed circumstances. But where this has not been clarified, the employee would still have to show that the failure to take action has resulted in a *bona fide* belief that a policy is no longer applicable or not regarded as serious.

Extract from the judgment:
(E Bester, AJ)

[17] An employer can act inconsistently by not enforcing a rule at a prior point in time, only to enforce it thereafter, without warning, in respect of the same employee. In that context, the inconsistency is based on the impression which is created that the rule or standard in no longer applicable; is not regarded as serious by the employer, that disciplinary action will not necessarily be taken for non-compliance with the rule or that the type of behaviour is condoned by the employer. If the rule is then suddenly enforced, resulting in dismissal, the inconsistent application of the rule by the employer will be a factor which must be considered in order to determine whether the dismissal was unfair.
.....

[20] The mere failure to take disciplinary action against an employee who contravenes a rule for a period of time does not automatically mean that the employee has been led to believe that the rule is no longer applicable; is not regarded as serious by the employer, that disciplinary action will not necessarily be taken for non-compliance with the rule or that the type of behaviour is condoned by the employer. The employee has to illustrate that the failure by his employer to take action has resulted in him having a *bona fide* belief to that effect.

[21] In this case, the respondent claims that the employer acted inconsistently and that the credit card policy was no longer applicable in that his managers were aware of his credit card usage in contravention with the credit card policy but did not reprimand him. On this basis alone, his dismissal was held to be unfair. The respondent did not however illustrate that the failure by his managers to reprimand him created a *bona fide* belief that the policy was no longer valid or applicable as he alleges. He merely illustrated that he used his credit card in contravention with the policy and that his credit card reconciliation statements were approved by his former two managers. He did not present any evidence to the effect that any of the two managers comprehended fully that he contravened the policy and condoned his contravention thereof knowingly and with such comprehension. He did not put this to his managers at the disciplinary hearing when he had the opportunity to do so but only presented evidence in this regard for the first time when the employer's case was already closed. He also did not call any of his former managers to give evidence hereto during the arbitration proceedings.
.....

[24] The Commissioner indeed took no account of the fact that the applicant testified that the trust relationship between the parties had broken down, or for that matter, of any other relevant factor when considering whether a dismissal is fair. He failed to appreciate that consistency is an element of a fair dismissal and not a rule onto itself. Had he taken account of other relevant factors, including the evidence of the respondent relating to the trust relationship; the fact that, instead of accepting accountability for his actions, the respondent preferred to opportunistically base his case on the failure of his managers to take action as well as the position of the respondent as risk officer, he would have held that the dismissal of the respondent was fair.

Proving incompatibility:

Edcon Limited v Padayachee and Others (J331/16) [2018] ZALCJHB 307 (20 September 2018)

Principle:
Where an employer seeks to dismiss an employee on grounds of incompatibility, this is not primarily an enquiry into poor performance or misconduct. In order to prove incompatibility, independent corroborative evidence in substantiation is required to show that an employee's intolerable conduct was primarily the cause of the disharmony.

Facts:
The employee was employed as the Group Remuneration and Benefits Manager. During 2014 the employer received several complaints from various members of staff. The complaints were around work ethic and the employee's ability to

collaboratively work within a team. These complaints were brought to the employee's attention but the employee did little to address the complaints and an action plan submitted by her addressed only one of several complaints. An attempt was made to arrive at a mutual termination of employment, but this failed. A formal investigation was conducted which resulted in a decision that the employee should be summoned to an incapacity hearing to deal with the alleged incompatibility. An incapacity enquiry was conducted, which resulted in the employee being dismissed for incompatibility.

Aggrieved by her dismissal, she referred a dispute of alleged unfair dismissal to the CCMA. In arbitration her dismissal was found to be unfair. The employer proceeded to the Labour Court to review the arbitrator's award. At the Labour Court the arbitration award was upheld. The LC found that the dismissal for incompatibility was unfair as the employer's evidence focused on poor performance and misconduct, and not on incompatibility. The Court also emphasised that internal grievance procedures should be used to resolve these type of matters, and commented that there may be instances where lethargic employees may label a results-driven manager as being incompatible.

For conduct to be regarded as incompatibility it must depart from a recognized, conventional, or established norm or pattern. There must also be a clear causal link between the disharmony and the conduct.

The lesson of this case is that where an employer seeks to dismiss an employee on grounds of incompatibility, this is not primarily an enquiry into poor performance or misconduct. In order to prove incompatibility, independent corroborative evidence in substantiation is required to show that an employee's intolerable conduct was primarily the cause of the disharmony.

Extract from the judgment:
(Moshoana, J)

[11] Failure to apply one's mind entails taking into account irrelevant considerations and ignoring the relevant ones. The focal point for the second respondent was whether the first respondent was incompatible or not. Incompatibility arises in a situation where there has been a breakdown in the employment relationship because inter-personal relationships are tense, conflictual or lacking in harmony. The golden rule is that prior to reaching a decision to dismiss, an employer must make some sensible, practical and genuine efforts to effect an improvement in interpersonal relations when dealing with a manager whose work is otherwise perfectly satisfactory.

[12] The offending employee has to be advised what conduct allegedly causes disharmony, who is upset by the conduct, and what remedial action is suggested to remove the cause of the disharmony. A reasonable period must be allowed for the employee to make amends. Dismissal may be appropriate only where the employee's eccentric behaviour is of such a gross nature that it causes consternation and disruption in the workplace. The employee must have been properly warned or counselled. The incompatibility must be one that is irremediable.

……..

[14] The leading judgment emanating from this court on the subject seem to be that of *Jabari v Telkom SA (Pty) Ltd* where this court said the following:

> *"In order to prove incompatibility, independent corroborative evidence in substantiation is required to show that an employee's intolerable conduct was primarily the cause of the disharmony…*

[15] Might I add, where necessary, an employer must invoke and or insist on the internal grievance policy. There are many instances where lethargic employees may label a results driven manager as being incompatible. The cause of disharmony in such instances would be the insistence on results and lack of shoddiness. The conduct of insisting on diligence cannot be an intolerable conduct. The conduct must be one departing from a recognized, conventional, or established norm or pattern. There must be a clear causal link between the disharmony and the departing conduct. Where there is no evidence that the conduct is the cause of the disharmony, then an employer must fail. The evidence of Samodien was nothing else but a litany of acts of misconduct and poor performance. She did not show that there was disharmony caused by the first respondent. The same goes with the evidence of Holding. Lotter's evidence was no different.

Does a threat of discipline amount to constructive dismissal?

NokengTsaTaemane Local Municipality v Louw NO and Others (JA7/16) [2018] ZALAC 37 (17 October 2018)

Principle:
A threat of civil and criminal proceedings in relation to financial misconduct cannot reasonably constitute a threat rendering continued employment intolerable.

Facts:
The employee, a manager of the income section in the finance department, was issued with a notice of suspension pending an investigation into allegations of financial misconduct by him. About six months later he was furnished with a charge sheet in respect of a disciplinary hearing. It was alleged that the employee had caused the municipality financial losses.

The employee's attorneys directed a letter to the municipality indicating that he was prepared to resign on payment of between two-three months' salary in settlement of the matter. The municipality's attorneys responded on the same day stating that the municipality was prepared to accept the employee's resignation without any financial settlement. This letter warned that the disciplinary enquiry would go ahead 'in full force', saying that criminal and civil action was being considered.

The employee's attorneys immediately replied that the threats contained in the letter left the employee with no alternative but to resign, because the trust relationship between the parties has irretrievably broken down and the threats amounted to the constructive dismissal.

The employee failed to attend the disciplinary hearing scheduled for the next day, and filed an unfair dismissal claim with the bargaining council. **The arbitrator** found that the employee had failed to show on a balance of probabilities that the municipality had made the continuation of employment intolerable. The employee then filed an application in the Labour Court to review and set aside the arbitration award.

The Labour Court construed the threat in the letter as intended to coerce the employee into resigning without compensation. It said that the mere reporting of the applicant to the police and the institution of civil proceedings would have an "extremely deleterious impact on the applicant." The LC found that a reasonable man "guilty or not" would not want to face the "dangerous" prospects of criminal and civil proceedings and thus the employee had established that he was constructively dismissed. The LC set aside the arbitration award and ordered the municipality to pay three months' remuneration as compensation and the costs of the application.

On appeal, **the LAC** set aside the Labour Court's order. The LAC held that **the threat of civil and criminal proceedings in relation to financial misconduct cannot reasonably constitute a threat rendering continued employment intolerable**. Any employee who is accused of illegal activities or financial impropriety may expect that the employer has various options, be they disciplinary, civil and/or criminal.

This LAC judgment confirms that threats by an employer to take legal or disciplinary action against an employee would not ordinarily provide a basis for constructive dismissal.

Extract from the judgment:
(Murphy AJA):

[13] The test for determining whether an employee was constructively dismissed is well-established. The *onus* rests on the employee to prove that the resignation was not voluntary, constituted a constructive dismissal and was not intended to terminate the employment relationship. The enquiry is whether the employer without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. The court must look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. The test does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.

.....

[15] The threat of civil and criminal proceedings in relation to financial misconduct cannot reasonably constitute a threat rendering continued employment intolerable. By posing the threat, the municipality aimed at avoiding what might have been a lengthy disciplinary hearing; but also quite legitimately signalled that it reserved its rights to pursue criminal or civil proceedings in the event of financial impropriety being established at the disciplinary hearing. The municipality was entitled to adopt this stance in that it potentially had a legal obligation to follow such a course. Its conduct was legitimate, appropriate and defensible and of an order that an employee might reasonably be expected to put up with it. Any employee who is accused of illegal activities or financial impropriety may ordinarily expect that the employer has various options, be they disciplinary, civil and/or criminal.

[16] The standpoint of the Labour Court that the municipality acted unreasonably in posing such a threat is hence untenable.

The legalisation of private dagga use:

Minister of Justice and Constitutional Development and Others v Prince (CCT108/17) [2018] ZACC 30 (18 September 2018)

Principle:
The prohibition of the personal use or cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy entrenched in the Constitution and is constitutionally invalid.

Facts:
In 2017, in the case of *Prince v Minister of Justice [2017] ZAWCHC 30; 2017 (4) SA 299 (WCC)*, the High Court held that both sections 4 and 5 of the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) needed to be amended to ensure that they did not apply to persons "who use small quantities of cannabis for personal consumption in the privacy of a home, as the present position unjustifiably limits the right to privacy". The High Court stated that it is Parliament that should determine the extent of what would constitute small quantities in private dwellings. The High Court suspended the order of invalidity for a period of 24 months from 31 March 2017.

Because the High Court found that parts of the Drugs Act were unconstitutional, the matter was referred to the Constitutional Court to consider an order of constitutional invalidity. **The Constitutional Court has now decriminalised the possession and cultivation of cannabis in private by adults for personal private consumption.** The Court relied on the right to privacy to reach this result. Although the order was suspended until Parliament can fix the defects in the current law, the Court provided interim relief that will make it unlawful for the police to arrest adults who privately cultivate, possess or use relatively small amounts of cannabis. The effect of this is that an adult person may use or be in possession of cannabis in private for his or her personal consumption in private.

This ruling does not extend to the use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult persons. The ruling also does not extend to the cultivation or possession of cannabis with the intention of selling it. This means that it is still a criminal offence to grow dagga commercially or to deal in dagga.

We do not think this judgment, which decriminalises the possession and cultivation of cannabis in private by adults for personal private consumption, directly affects employer's policies regarding drugs at the workplace. Just as an employee can drink in the privacy of her/his home (which is also not a criminal offence) and still be disciplined if they arrive at work under the influence of alcohol, so too will workplace prohibition on drug use still apply. The General Safety Regulations made in terms of the Occupational Health and Safety Act (OHSA) state that an employer may not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs to enter or remain at the workplace.

Extract from the judgment:
(Zondo ACJ:)

[59] I am of the view that the prohibition of the performance of any activity in connection with the cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy entrenched in the Constitution and is constitutionally invalid. The reasons for this conclusion are the same as those given in this judgment as to why the prohibition of the use or possession of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy and, therefore, invalid. Therefore, to that extent, section 5(b) read with the definition of the phrase "deal in" in section 1 of the Drugs Act is constitutionally invalid.

.....

[100] It seems to me that, indeed, there was no persuasive reason why the High Court confined its declaration of invalidity to the use or possession or cultivation of cannabis at a home or in a private dwelling. In my view, as long as the use or possession of cannabis is in private and not in public and the use or possession of cannabis is for the personal consumption of an adult, it is protected. Therefore, provided the use or possession of cannabis is by an adult person in private for his or her personal consumption, it is protected by the right to privacy entrenched in section 14 of our Constitution.

.....

[109] The effect of the above reading-in is the following:

a. an adult person may, use or be in possession of cannabis in private for his or her personal consumption in private.
b. the use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult persons is not permitted.
c. the use or possession of cannabis in private other than by an adult for his or her personal consumption is not permitted.
d. The cultivation of cannabis by an adult in a private place for his or her personal consumption in private is no longer a criminal offence.

[110] In determining whether or not a person is in possession of cannabis for a purpose other than for personal consumption, an important factor to be taken into account will be the amount of cannabis found in his or her possession. The greater the amount of cannabis of which a person is in possession, the greater the possibility is that it is possessed for a purpose other than for personal consumption. Where a person is charged with possession of cannabis, the State will bear the onus to prove beyond a reasonable doubt that the purpose of the possession was not personal consumption.

UNFAIR DISCRIMINATION

Discrimination and the normal retirement age:

Joffe t/a J Air v Commission for Conciliation Mediation and Arbitration and Others (JA84/2017) [2018] ZALAC 44; [2019] 1 BLLR 1 (LAC) (7 June 2018)

Principle:

Where official regulations set conditions affecting continued employment for those over the age of 60, they do not automatically impose a ‘normal retirement age’ justifying dismissal. They simply set conditions which must be met affecting continued employment.

Facts:
A commercial air transport operator, employed only two pilots who both turned 60 in the same year. The employment of both pilots was governed by the Civil Aviation Regulations, which prohibit pilots over the age of 60 years from piloting international air transport operations except as a member of a multi-pilot crew, the remaining members of whom are under 60.

This dilemma resulted in the employer informing one employee, H, that he had employed another pilot and that his services would not be required after three months. H referred a dispute to the **CCMA** claiming that he had been unfairly dismissed for operational requirements. The commissioner ruled the dismissal substantively and procedurally unfair and ordered the employer to pay H compensation equal to three months' salary plus severance pay.

At the **Labour Court** the employer's application for review of the award was dismissed. The employer contended that H's employment had terminated because he had reached the normal retirement age for a co-pilot.

The LAC noted that the LRA provides that a dismissal based on age is fair if the employee has reached an agreed or normal retirement age for persons employed in the same capacity. The employer did not have an agreed retirement age for its pilots; it relied exclusively on the regulations. The regulations do not prohibit a pilot who has attained the age of 60 from flying on international commercial flights; they merely attach conditions to them doing so. The regulations even make provision of pilots who have turned 65 to fly under certain conditions. The argument that the regulations set a normal retirement age for co-pilots was regarded by the court as absurd.

The LAC held further that the employer had not consulted over alternatives suggested by H that might have saved his job. His dismissal was both substantively and procedurally unfair. The appeal was dismissed with costs.

Extract from the judgment:
(Musi JA):

[16] Section 187(2)(b) of the Act reads as follows:

> '(2) Despite subsection (1) (f) –
>
> (a) a dismissal may be fair in the reason for dismissal is based on an inherent requirement of the particular job;
>
> (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.'

[17] It is common cause that the parties did not agree on a retirement age. The appellant also did not have a normal retirement age for its pilots. The appellant only relies on the provisions of the regulation for his contention that 60 years was the normal retirement age. What is a normal retirement age?

……

[20] In order to properly grasp what the regulations regulate, one must discern what it says in order to understand what it does not say. It says, firstly, that a pilot who has attained the age of 60 years may act as a pilot of an aircraft engaged in international commercial air transport operations if he or she is a member of a multi-pilot crew and is the only member of the multi-pilot crew who has attained the age of 60. Secondly,

a pilot who has attained the age of 60 may act as a pilot of an aircraft engaged in international commercial air transport operations, where the relevant authority of a foreign state has given permission for that pilot to be a member of the aircraft flight crew notwithstanding his or her age.

[21] The regulations do not prohibit a pilot who has attained the age of 60 to fly an aircraft engaged in international commercial transport operations. It permits such pilot to be a member of a multi-pilot crew if certain conditions are met. The conditions are, firstly, that the other pilot must be younger than 60 years of age and, secondly, irrespective of the age of the second pilot, the pilot who is above the age of 60 may be part of a multi-pilot flight crew if the relevant authority of a foreign state has given permission for the pilot to be a crew member. Foreign authority is defined, in the regulations, as "the authority of a foreign State that issues the air operator certificate and oversees the operations of its air operators."

[22] The regulations expressly prohibit a pilot who has attained the age of 65 years to be a pilot-in-command of an aircraft engaged in international commercial air transport operations. There is, however, no prohibition against a 65-year old co-pilot being a member of a multi-pilot crew if the other pilot is younger than 60 years. The regulation therefore determines the normal retirement age for a PIC of an aircraft engaged in international commercial air transport operations. It contains no such provision for a co-pilot.

[23] The argument that the normal retirement age for a co-pilot is, in terms of the regulations, 60 years is absurd. This is so because it would mean that a PIC who has more responsibilities and is responsible for the safe conduct of a flight may retire at 65 whereas a co-pilot who generally has lesser responsibilities should retire at the age of 60 years. In my view, the regulations do not contain a normal retirement age for a co-pilot. At best it sets conditions for a co-pilot to meet before such pilot may be engaged in international commercial air transport operations. I hasten to mention that the conditions only apply to a co-pilot who is engaged in international commercial air transport operations and not to a pilot who is engaged in local commercial air transport operations.

[24] The appellant's reliance on section 187(2)(b) of the Act is therefore misplaced. It is glaringly ironic that the appellant allowed Harrison to fly with Pratt after the former had attained the age of 60. That on its own belies the fact that the appellant genuinely thought that the normal retirement age for a co-pilot engaged in international commercial air transport operations is 60 years. It is not in dispute that Harrison's employment was terminated. It is also not in dispute that no alternatives to the termination of Harrison's employment were explored. Harrison made concrete proposals, which, if implemented would have saved his job. Those were not considered.

Racism in the workplace:

Legal Aid South Africa v Mayisela and Others (CA9/17) [2019] ZALAC 1 (5 February 2019)

Principle:
Employees who allege tacit racism should do so only on the basis of persuasive objective information leading to a compelling and legitimate inference, and in accordance with grievance procedures established for that purpose.

Facts:
The employee, M, was employed as the Justice Centre Executive managing the Kimberley Justice Centre. He reported to the Regional Operations Executive for the Western and Northern Cape, Ms R.

During the course of 2013, the relationship between M and R deteriorated resulting in M being charged with numerous disciplinary infractions. After a disciplinary enquiry, he was found guilty of 17 charges and dismissed. M referred the matter to the CCMA which issued an arbitration award finding that the dismissal was substantively and procedurally fair. The Labour Court set aside that award and remitted the matter to the CCMA for reconsideration.

The matter then proceeded to arbitration before a different commissioner. The commissioner concluded that M was guilty on all the counts and that the dismissal was substantively fair. The commissioner also rejected all M's contentions alleging procedural impropriety and held that the dismissal was procedurally fair.

The Labour Court, on review, upheld the procedural fairness of the dismissal, but on the basis that the commissioner had erred in his findings on six of the nine counts of misconduct, held that the dismissal was substantively unfair.

On appeal to the LAC, the employer submitted that the findings of the commissioner on substantive fairness were reasonable and ought not to have been set aside on review. While the LAC considered several charges, one in particular concerning racist accusations was important. **The court held that unjustified allegations of racism against a superior in the workplace can have very serious and deleterious consequences.** Employees who allege tacit racism should do so only on the basis of persuasive objective information leading to a compelling and legitimate inference, and in accordance with grievance procedures established for that purpose. Unfounded allegations of racism against a superior by a subordinate subjected to disciplinary action or performance assessment, referred to colloquially as "playing the race card", can illegitimately undermine the authority of the superior and damage harmonious relations in the workplace.

The LAC held that it was clear from the arbitration award that the commissioner properly applied his mind with reference to relevant considerations when determining the issue of whether dismissal was an appropriate sanction. He accepted R's evidence that the extent and repetition of the insubordinate and insolent conduct on the part of a senior manager had broken the trust relationship irretrievably. His conclusion that the dismissal was substantively fair was reasonable and is not susceptible to review. The appeal against the decision of the Labour Court was upheld.

Extract from the judgment:
(Murphy AJA:)
[44] The e-mail clearly implies that Robertson (a coloured person) was racist in that she was allegedly vilifying and prejudicing African because they were Africans. The accusation was undoubtedly levelled at Robertson given that the e-mail was

addressed to her and the complaint was about the region for which she was responsible.

[45] Mayisela stood by his allegation, pointing to the fact that six of the seven African managers in the Northern Cape region received negative performance assessments.

[46] The commissioner felt that the allegations were unjustified in that there was insufficient evidence to substantiate them, and that the statistics could be interpreted in different ways. He opined that the issue was not "to dissect the politics of the employer's region" but whether it was appropriate for Mayisela to have made the accusation to his superior in the manner he did. He concluded that the conduct constituted an unjustified personal attack on Robertson's dignity and that it would have been more appropriate for Mayisela to have raised any legitimate concern about discrimination in a different forum and in a different way. Hence, the commissioner found Mayisela guilty on this charge.

[47] The Labour Court was sympathetic to Mayisela. It took the view that Mayisela was entitled to raise the matter and even take it to the Parliamentary Portfolio Committee. His mere announcing of the complaint, in its view, did not amount to misconduct and the commissioner's finding that the accusation was made inappropriately constituted a failure to conduct a proper enquiry into the allegation, resulting in an unreasonable finding. It professed that Mayisela should never have been charged with this offence.

[48] The Labour Court's conclusions, with respect, miss the mark in an important respect. Although one naturally may be sympathetic to a colleague who has subjectively experienced a negative performance assessment as racial discrimination, unjustified allegations of racism against a superior in the workplace can have very serious and deleterious consequences. Employees who allege tacit racism should do so only on the basis of persuasive objective information leading to a compelling and legitimate inference, and in accordance with grievance procedures established for that purpose. Unfounded allegations of racism against a superior by a subordinate subjected to disciplinary action or performance assessment, referred to colloquially as "playing the race card", can illegitimately undermine the authority of the superior and damage harmonious relations in the workplace.

[49] Moreover, false accusations of racism are demeaning, insulting and an attack on dignity, more so when the person attacked, by reason of a previously disadvantaged background, probably has suffered personally the pernicious effects of institutional and systemic racism. As the Labour Court rightly said in *SACWUand Another v NCP Chlorchem (Pty) Ltd and Others*:

> *'I can hardly conceive of any place or circumstance or country where, if a person is told that he is racist, it will not be experienced by such person as him or her being insulted and abused.'*

Rustenburg Platinum Mine v SAEWA obo Bester and Others (CCT127/17) [2018] ZACC 13 (17 May 2018)

Principles:

1. Racism in the workplace cannot be tolerated. Employees may not act in a manner designed to destroy harmonious relations at work.
2. In judging whether words used are racist, the context within which the comments were made is crucial. The test for assessing the impact of these words is whether

a reasonable, objective and informed person would perceive the comment to be derogatory.
3. An indication of remorse and the willingness to change, may be significant in deciding on the sanction to be imposed in cases linked to racism and other attitudinal offences.
4. An adjudicator (be that a chairperson of a hearing, an arbitrator or a judge) can't invent a defence which is not substantiated by the evidence led at the hearing.

Facts:
The employee, a senior training officer with 5 years' service, was allocated a parking bay by the chief safety officer in accordance with the Company's systems. An adjacent parking bay was allocated to a black employee of a sub contractor at the mine who he did not know. During April 2013 the employee found a large 4x4 vehicle, similar in size to his own vehicle, parked in the adjacent bay. Though parking in the limited space was possible, it was difficult to reverse and the employee was concerned that the vehicles would be damaged in the process. The employee made repeated efforts to raise the issue with the chief safety officer, which included phoning and e-mailing him, but without success.

On 24 April an incident occurred in the chief safety officer's office, the details of which are disputed. Management's witnesses claimed that the senior training officer stormed into a safety meeting attended by the chief safety officer and 5 other employees, pointed his finger at the chief safety officer and said in a loud and aggressive manner, that he must "*verwyder daardie swart man se voertuig*" ("remove that black man's vehicle"), otherwise the matter would be taken up with management.

The training officer denied that he had referred to the safety officer as a "swart man". His version was that there was no meeting in progress, just a social conversation taking place, and when he raised his parking difficulties once they had finished chatting, the safety officer said "*jy wil nie langs 'n swart man stop nie...dit is jou probleem"* ("you do not want to park next to a black man…this is your problem"). The training officer said he told the safety officer not to turn the matter into a racial issue and that he would take the matter up with senior management.

Arising from this incident, the training officer was dismissed for insubordination for disrupting a safety meeting and for making racial remarks by referring to a fellow employee as a "swart man". The Company had, shortly before this incident, issued a memorandum to all employees warning against the use of derogatory or abusive language, and that disciplinary action would result from any such conduct.

The CCMA held that the employee's dismissal was unfair. The commissioner, whilst finding that the employee did refer to the other employee as a "swart man", could not see how a phrase referring to a physical attribute in order to identify a person he did not know, could be classified as a racial remark. The employee was reinstated and awarded R191 834 backpay.

The Labour Court overturned the arbitrator's award, finding on the facts that there was no conceivable reason why race might justifiably serve as an identifier in this case. The LC said the dismissal was fair.

The matter journeyed on to the **Labour Appeal Court**, which in turn disagreed with the LC. The LAC held that the LC erroneously adopted a subjective test in determining the effect of the words "swart man" on the persons present at the meeting – the proper test was to ask was whether, in the opinion of a reasonable person possessed of all facts, the use of the word(s) 'swart man' in this context was derogatory and racist. The LAC said that the term "swart man" is prima facie a neutral phrase that requires context to acquire a derogatory meaning. The case accordingly turned on whether the context in this instance transformed a neutral term into a derogatory one.

The LAC took the view that the training officer did not know the owner of the other vehicle and had no reason to denigrate him. The LAC felt it could not be concluded from the proven facts that the training officer had used these words in a derogatory and racist manner – it was equally plausible that the words has been used in a descriptive context, merely to describe the person he was referring to.

The ConCourt adopted an approach that had not been considered by the lower courts: it highlighted that the employee's defence at the internal hearing and at arbitration had been that he never uttered the words in question, and not that they were intended in a neutral, descriptive context to describe the person he was referring to. Accordingly, the arbitrator (and in turn the LAC) **could not 'invent' a defence** that had not been used by the employee. The ConCourt pointed to the fact that no evidence had been led to support the view that the words were used in a neutral, descriptive context - this defence, on which the commissioner hinged the entire reasoning for his finding, was not based on any evidence before him.

The ConCourt was clear that racism in the workplace cannot be tolerated, and that the employee had shown no remorse for his actions. His defence had continued to be a complete denial of ever having uttered the words in question. The ConCourt overturned the LAC's decision, which meant that the LC order confirming the fairness of the employee's dismissal was confirmed.

It is clear from the ConCourt's decision that in judging whether words used are racist, ***the context*** within which the comments were made is crucial. And the test for assessing the impact of these words is an objective one – whether a reasonable, objective and informed person would on the correct facts perceive the comment to be derogatory.

This case highlights the significance of **remorse** and the **willingness to change**, in deciding on the sanction to be imposed in cases linked to racism and perhaps other attitudinal offences. The fact that an employee who is guilty of racist conduct apologised, admitted wrongdoing and demonstrated a willingness to take part in programmes aimed at attitudinal change, may be a relevant factor in determining whether dismissal was an appropriate sanction.

Linked to the employee's apparent unwillingness to change, the ConCourt felt that the employee's persistence in sticking to a dishonest defence (that he never used the words in question), weighed heavily against him when considering sanction.

This judgment again makes it absolutely clear that racism in the workplace cannot be tolerated. Employees may not act in a manner designed to destroy harmonious working relations with their employer or colleagues. They owe a duty of good faith to their employers, which includes the obligation to further their employer's business interests. In making racist comments, the actions of the employee may negatively affect the employer's business and relationships at the workplace.

Extract from the judgment:
(Theron J):

[38] It was accepted by both parties (the applicant and first respondent) that the use of the words "swart man", per se, is not racist and that the context within which the words were used would dictate whether they were used in a racist or derogatory manner. It was also accepted that the test to determine whether the use of the words is racist is objective – whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist or derogatory. This is in accordance with the test for whether a statement is defamatory, as enunciated in *Sindani*:

> "The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply."

.....

[46] The Labour Appeal Court unfortunately misdirected itself by finding in favour of Mr Bester, on the basis of an unarticulated defence not supported by the evidence. It was never Mr Bester's defence that he used the words "swart man" as a descriptor or that he did not mean to "demean" any person. He denied using the words and conceded that if he had done so, it could be a dismissible offence. There was no evidence in the record justifying a finding for Mr Bester on the basis that the Labour Appeal Court did.

[47] In applying the test, namely, whether a reasonable, objective and informed person would, on the *correct facts* perceive it to be racist or derogatory, the Labour Appeal Court made a fundamental error, like the commissioner, as it failed to identify the correct facts and relied on evidence that had not been placed before it. The Labour Appeal Court erred by relying on a defence which was not raised by Mr Bester.

[48] The Labour Appeal Court's starting point that phrases are presumptively neutral fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past – of what is neutral, normal and acceptable – might be used as the starting point in the objective enquiry without recognising that the root of this view skews such enquiry. It cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary. In this sense, the Labour Appeal Court's decision sanitised the context in which the phrase "swart man" was used, assuming that it would be neutral without considering how, as a starting point, one may consider the use of racial descriptors in a post-apartheid South Africa.

[49] The Labour Appeal Court, by sanitising the context in which the words were used, incorrectly applied the test to determine whether the words used are derogatory, in the context of this matter, to the facts in this matter. The Labour Appeal Court, as well as the commissioner, failed to approach the dispute in an impartial manner taking into account the "totality of circumstances". Not only was "swart man" as used here racially loaded, and hence derogatorily subordinating, but it was unreasonable to conclude otherwise. It was unreasonable for the commissioner, within this context, to find that using "swart man" was racially innocuous.
.....

[56] We are dealing here with racism in the workplace. Our courts have made it clear, and rightly so, that racism in the workplace cannot be tolerated. Employees may not act in a manner designed to destroy harmonious working relations with their employer or colleagues. They owe a duty of good faith to their employers which duty includes the obligation to further their employer's business interests. In making racist comments in the public domain, the actions of the employee may foreseeably negatively affect the business of his employer or the working relationship between him and his employer or colleagues. The chairperson of the disciplinary hearing was alive to this. This is evident from his statement that "[d]ismissal will be imposed for a first offence if the circumstances so warrant it and the employee's behaviour destroy[s] the employment relationship".
.....

[59] Mr Bester has demonstrated an absolute lack of remorse for his actions and persisted with a defence of a complete denial. He did not acknowledge that his conduct was racist and inappropriate. He made no attempt to apologise. This Court has previously stated that the fact that an employee who is guilty of racist conduct apologised, admitted wrongdoing and demonstrated a willingness "to take part in whatever programme could be designed to help him embrace the values of our Constitution, especially equality, non-racialism and human dignity" may be a relevant factor in determining whether dismissal was an appropriate sanction. As mentioned, Mr Bester failed to demonstrate a willingness to change. Instead, he resorted to a vicious attack on the witnesses who testified on behalf of the applicant during the disciplinary hearing.....
.....

[61] The fact that Mr Bester was dishonest in denying making the statement weighs heavily against him when considering sanction. In *Sidumo*, this Court stated that "[t]he absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal".....

[62] Mr Bester has not learnt to conduct himself in a manner that respects the dignity of his black co-workers. By his actions he has shown that he has not made a break with the apartheid past and embraced the new democratic order where the principles of equality, justice and non-racialism reign supreme.

[63] This Court is satisfied that dismissal was an appropriate sanction under the circumstances.

Duncanmec (Pty) Limited v Gaylard NO and Others (CCT284/17) [2018] ZACC 29 (13 September 2018)

Principles:

1. Racism and racially offensive behaviour are directly opposed to our Constitution, and it is the duty of the courts to uphold and enforce the Constitution whenever it is violated;
2. The term 'boer', referring to 'farmer' or 'white person' is in itself not an offensive racist term: but the context within which it is used may render it racist;
3. There is no principle in SA law that requires dismissal to follow automatically in all cases of racism – what is required is that arbitrators and the courts should deal with racism firmly and yet treat the perpetrator fairly;
4. Regarding the test for review, if the arbitrator's reasons advanced rationally support the outcome arrived at, interference with the award on the basis of unreasonableness would not be justified.

Facts:

Between 30 April and 2 May 2013 a number of Duncanmec employees participated in an unprotected strike. While some of them only protested by refusing to work, nine employees were filmed dancing and singing songs. One of these songs was a well-known struggle song with lyrics that translate to "*climb on the rooftop and shout that my mother is rejoicing when we hit the boers*".

Disciplinary action was taken against these employees. They were found guilty of: (1) participating in unlawful strike action; and (2) singing a racially offensive song. They were given final warnings for the first offence and dismissed for the second. Duncanmec considered their conduct to have been so severe that it had irreparably eroded the trust relationship between them and the employer.

At the Bargaining Council the dismissals were found to be unfair. The arbitrator found that although the singing of the song was inappropriate, it did not constitute racism. While the song could be offensive and cause hurt, there was a need to differentiate between singing a 'struggle song' that had a history to it, during a strike that was short-lived and not violent, and referring to someone in racist language. She found that this conduct had not caused the employment relationship to have broken down irretrievably. She ordered the reinstatement of the dismissed workers, but to show her disapproval for their conduct, limited their compensation to 3 months' salary.

The award was taken on review in the Labour Court. The LC held that in the context of a strike which ordinarily involves the singing of struggle songs in support of workers' demands, it cannot be said that the arbitrator's award was unreasonable. The LC endorsed the arbitrator's approach to the matter, especially to paying appropriate attention to the relevant context and the peaceful nature of the strike. There had been no threat to management. The Labour Court agreed with the distinction that the arbitrator drew between other racist cases and the scenario in this case.

The ConCourt dismissed the employer's appeal. **It held that the use of the word 'boer', meaning 'farmer' or 'white person' was not an offensive, racist term.** But

it recognised that the context within which words were used was relevant, and agreed that the word used in that context was inappropriate and offensive.

In assessing the test for review, the ConCourt reaffirmed that if the arbitrator's stated reasons rationally support the outcome arrived at, interference with the award on the basis of unreasonableness would not be justified, even if the Court did not agree with the reasons. The ConCourt concluded that the unreasonableness requirement to grant the review had not been met.

The ConCourt again made it explicitly clear that racism and racially offensive behaviour are directly opposed to our Constitution, and that it is the duty of the courts to uphold and enforce the Constitution whenever it is violated. But the ConCourt also emphasized the need for fairness: there is no principle in SA law that requires dismissal to follow automatically in all cases of racism – what is required is that arbitrators and the courts should deal with racism firmly and yet treat the perpetrator fairly.

Somewhat surprisingly, the ConCourt in its judgment did not refer to its decision in *Rustenburg Platinum Mine v SAEWA obo Bester and Others* (CCT127/17) [2018] ZACC 13 (17 May 2018) given 4 months previously, in which it found that a white employee saying to another employee "*remove that black man's vehicle*" constituted racism in the context of that case that justified dismissal.

Extract from the judgment:
(Jafta J):

[6] Regrettably, so far the Constitution has had a limited impact in eliminating racism in our country. Its shortcomings flow from the fact that it does not have the capacity to change human behaviour. There are people who would persist in their racist behaviour regardless of what the Constitution says. It is therefore the duty of the courts to uphold and enforce the Constitution whenever its violation is established.

[7] The increasing number of complaints of racism at the workplace which come before our courts is a matter of concern. The approach adopted by the Labour Appeal Court in *Crown Chickens* must be followed if we hope to succeed in stemming the tide against racism in the workplace. In that case Zondo JP declared:

> *"[T]he courts are enjoined to play a particularly critical role in, among others, the fight against racism, racial discrimination and the racial abuse of one race by another. They must play that role fairly but firmly so as to ensure the elimination of racism in our country and the promotion of human rights. This court is alive to this role and will seek to play it fully, fairly but firmly."*

.....

[37] At the outset it is important to note that the word to which Duncanmec objected is not an offensive racist term. It became clear during the hearing that the only word that referred to race was "boer". Depending on the context, this word may mean "farmer" or a "white person". None of these meanings is racially offensive. This much was conceded by Duncanmec's legal representative during the hearing. However, he argued that it was the context in which the word in question was uttered which rendered the singing a racist act.

[38] Crucial to this enquiry are the arbitrator's findings which appear in the impugned award. Notably the arbitrator did not hold that the song contained racist words. Instead, she concluded that the song was inappropriate and that "it can be offensive and cause hurt to

those who hear it". More importantly, the arbitrator drew a distinction "between singing the song and referring to someone with a racist term". These factual findings were accepted as correct by Duncanmec in the affidavit filed in the Labour Court in support of the review.

[39] NUMSA did not take issue with the finding that the singing of the song at the workplace was inappropriate and offensive in the circumstances. Therefore, I am willing to approach the matter on the footing that the employees were guilty of a racially offensive conduct. The question that arises is whether the award issued by the arbitrator was vitiated by unreasonableness.
.....

[47] Duncanmec also accused the arbitrator of having gone soft on racism and argued that dismissal was the only sanction appropriate for such misconduct. The argument lacks merit and rests on a mistaken premise. The arbitrator's award does not say that the employees were guilty of racism. Instead, the arbitrator held that the song was inappropriate and could be offensive; hence a distinction was drawn between the singing and the use of racist terms.

[48] But even if the singing had amounted to uttering racist words, dismissal of the employees could not follow as a matter of course. There is no principle in our law that requires dismissal to follow automatically in the case of racism. What is required is that arbitrators and courts should deal with racism firmly and yet treat the perpetrator fairly. Thus in *South African Revenue Service* this Court said:

> "*None of this should lead to the mistaken belief that the use of very strong derogatory language like kaffir would always militate against the reinstatement of an offending employee*. *Crown Chickens* does not purport to lay that down or articulate it as an inflexible principle. On the contrary, the Court underlined the particularly crucial role that courts have to play of ensuring that racism or racial abuse is eliminated. And that they must fulfil that duty fairly, fully and firmly. *The notion that the use of the word kaffir in the workplace will be visited with a dismissal regardless of the circumstances of a particular case, is irreconcilable with fairness*. It is conceivable that exceptional circumstances might well demonstrate that the relationship is tolerable."

Sexual harassment:

Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others (JR641/2016) [2018] ZALCJHB 72; (2018) 39 ILJ 1330 (LC) (27 February 2018)

Principles:

1. Both the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace and the 2005 Amended Code are relevant codes of good practice to guide commissioners in dealing with sexual harassment cases.
2. There is nothing in the Codes that says all elements of sexual harassment must be established. There is no requirement for the recipient to say 'no' in unambiguous terms – silence in the face of harassment can never be a sign of agreement.
3. It is not correct that an employer must always lead evidence to establish a breakdown in the trust relationship for a sanction of dismissal to be appropriate - it may be implied from the gravity of the misconduct that the trust relationship has broken down and that dismissal is appropriate.

Facts:
The employee was employed by the Company in 2004, and at the date of his dismissal, held a senior position of engineering specialist. In 2015, the Company had cause to investigate allegations of sexual harassment made against him by a female boiler-maker.

The engineering specialist was subsequently dismissed for acts of sexual harassment toward the boiler-maker over a 7 year period. It was found at a disciplinary enquiry that he -

- suggested that he go and stay with her to help her with her expenses, and
- proposed (on several occasions) to her that they should sleep together/have sex, while she found these proposals unwelcome and uninvited.

The engineering specialist, assisted by his union, lodged an unfair dismissal dispute with the CCMA. The boiler-maker gave evidence at the arbitration of the continual sexual advances that the engineering specialist made towards her over a 7 year period, suggesting to her at least twice a month that they should sleep together. On more than one occasion he indicated he could assist her with promotion if she slept with him. Whilst she declined his advances and told him to stop, she did not for various reasons report him - she felt it would not assist her, that his wife was a good person, and that his life would be ruined. She did however inform her husband and some of her colleagues / friends about his conduct. She ultimately reported the matter at a time when misconduct charges were being laid against her, because she could no longer bear it and as it was turning into victimisation. Her version was to a significant extent supported by other witnesses who were called to give evidence.

Whilst the engineering specialist denied the sexual harassment allegations, the arbitrator found that he had made sexual advances towards the boiler-maker. However, the arbitrator further found that *"he was encouraged to continue doing so by the docile conduct of the victim, and consequently such conduct did not amount to unwanted sexual harassment'.* The arbitrator found the employee's dismissal to have been unfair, and the Company was ordered to retrospectively reinstate the dismissed employee with back-pay of R575 770.

The Company took this award on review to the Labour Court. The LC made it absolutely clear what it thought of the approach adopted by the arbitrator in deciding whether the sexual advances constituted sexual harassment, labelling it *"misogynistic, patriarchal and insensitive"*. The LC called for specialised training for CCMA commissioners, in order to sensitize them to deal with the "*scourge of sexual harassment at the workplace*".

The LC made it clear that **both** the 1998 Sexual Harassment Code of Good Practice and the 2005 Amended Code are relevant to guide commissioners in dealing with sexual harassment cases. It was apparent that the arbitrator had only considered the 1998 Code, and had placed undue emphasis on the stated requirement that the accused employee must have been aware that the conduct was unwanted. **There was nothing in the Codes that says all elements of sexual harassment must be established.** The 2005 Code requires unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the

workplace, taking into account a variety of factors - there is no requirement that the accused employee must have been aware or should have reasonably been aware that the conduct was unwanted, or that the victim must have made it clear that the behaviour was offensive.

The LC expressed *"shock and horror"* at the arbitrator equating the engineering specialist's advances to a "*love proposal*" and finding that a problem only arises when the recipient communicates that the proposal is unwelcome and the proposer nevertheless persists with that conduct. The LC made it clear that there is no requirement for the recipient to say 'no' in unambiguous terms – **silence in the face of harassment can never be a sign of agreement.**

The LC noted that there are different ways with which a complainant may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator. In this case, the arbitrator had failed to appreciate that in the 7 years that the sexual advances had persisted, not once had the complainant reciprocated his advances, and how that non-reaction could have been interpreted as being docile and inviting was to the LC "*beyond comprehension*".

The arbitrator had drawn an adverse inference over the victim's failure to report the harassment over a 7 year period, suggesting that a victim ought to act within a reasonable period. The LC noted that the lessons coming out of global anti-sexual harassment movements that the victims of sexual harassment react to their own ordeals and circumstances differently, and in most instances, long after the fact. This may be caused by –

- being 'frozen', disbelieving what is happening, not having the human tools to respond immediately;
- fearing a backlash if you complain;
- fear of causing a fuss or disharmony in the workplace;
- fear of consequential and negative labelling once an incident is reported - eg being perceived to have 'asked for it';
- feeling pity for the harasser for whatever reason;
- enduring the ordeal, hoping that it will go away, or that it was a 'once off' incident;
- fear of publicity and having to substantiate the allegations in public proceedings.

The LC said that the arbitrator, in concluding that the engineering specialist had made sexual advances towards the boiler-maker, had failed to consider the above factors and effectively failed to appreciate that the conduct complained of was unwelcome. The LC criticised the arbitrator, in particular, for concluding that the failure to report the incident timeously was an indication that the complainant had encouraged and '*inspired'* him to conclude that she was not averse to his conduct, and to accordingly keep alive his hopes that she would eventually agree to sleep with him. The LC summarised its views as follows [para 58]:

> *"Silence, no matter how prolonged it may be, as the Commissioner ought to have known, does not amount to consent. A 'docile' response to sustained sexual harassment cannot be equated with an invitation."*

Whilst no evidence had been led by the employer to substantiate that the employment relationship had irretrievably broken down, the LC referred to the LAC's judgment in *Impala Platinum Ltd v Jansen and others* (2017) 26 LAC 1.11.4 also reported at [2017] 4 BLLR 325 (LAC) which found that **it may be implied from the gravity of the misconduct that the trust relationship has broken down and that dismissal is an appropriate sanction.**

The LC overturned the arbitrator's award and concluded that the sexual harassment in this matter justified dismissal, and even went to the extent of making a costs order against the engineering specialist's union for having defended this matter on his behalf.

Extract from the judgment:
(Tlhotlhalemaje J:)
[25] The starting point therefore in a determination of sexual harassment disputes is the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, as well as the 2005 Amended Code. Savage AJA in *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* confirmed that despite the 2005 Code being termed the "Amended" Code, it did not replace or supersede the 1998 Code. The result is that in terms of section 203(3) of the LRA, both Codes are "relevant codes of good practice" to guide commissioners in the interpretation and application of the LRA.
.....

[32] The significance of the 1998 and 2005 Codes is that they essentially spoon-feed Commissioners in terms of what they must look for in determining such disputes, and it is in this regard that the Commissioner in this case was found lacking. His starting point was to refer to John Grogan's exposition of the 'Code of Good Practice on Sexual Harassment' and 'case law and the elements of the offence'. It is apparent that the Commissioner only looked at the 1998 Code in this regard. The Commissioner then found that the implications of the elements identified was that should any of them be 'lacking', then no sexual harassment would have occurred, with special emphasis being placed on whether the accused employee must have been aware or should have reasonably been aware that his or her conduct was unwanted by and deemed offensive to the complainant.

[33] As shall be more evident in the reasoning of the Commissioner, he had placed too much emphasis on the provisions of Item 2(a), (b) and (c) of the 1998 Code to the exclusion of the test set out in Item 4 of the 2005 Code. This was the first material error of law committed by the Commissioner. There is nothing in both the Codes that states that all elements of sexual harassment *must* be established. Sexual harassment, as per the test formulated in the 2005 Code requires unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account a variety of factors. On the plain reading of Item 4 of the 2005 Code, there is no requirement that the accused employee must have been aware or should have reasonably been aware that his or her conduct was unwanted, or that the recipient must have made it clear that the behaviour is considered offensive.....
.....

[44] The Commissioner proceeded to take issue with the fact that the complainant did not clearly and unambiguously say no to Pietersen. Had the Commissioner bothered to have regard to the provisions of *5.4 (Impact of the conduct)* of the 2005 Code, he would have appreciated that the conduct complained of constituted an impairment of the complainant's dignity, taking into account her circumstances and her junior position *vis-à-vis* Pietersen, and that in the absence of reciprocation, there was no requirement for the complainant to say no

in unambiguous terms as suggested. Despite what appears to be the Commissioner's strict interpretation of Item 2 of the 1998 Code that the recipient must have made it clear that the behaviour is considered offensive, and/or that the perpetrator should have known that the behaviour was regarded as unacceptable, silence in the face of harassment as shall further be illustrated in this judgment, can never be a hint for acquiescence.

[45] Had the Commissioner further looked at the provisions of Item 5.2.1 of the 2005 Code, he would have also acknowledged that there are different ways with which a complainant may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator. In this case, the Commissioner failed to appreciate that in the seven years that the sexual advances had persisted, not once had the complainant reciprocated Pietersen's advances, and how that reaction or non-reaction could have been interpreted as being docile and inviting is beyond comprehension.

[46] Nothing can be clearer and unambiguous than the complainant's responses to the advances in this case. She had said no to Pietersen on countless occasions the advances were made, and I am uncertain whether it was expected of her, other than to report the matter, to stand and shout from the top of the applicant's mine dump to express her displeasure at Pietersen's conduct.

Accommodating religious beliefs:

TFD Network Africa (Pty) Ltd v Faris (CA 4/17) [2018] ZALAC 30 (5 November 2018)

Principle:
Where an employee, for religious reasons, refuses to perform part of her/his contractual duties, the employer bears the burden of proving that it could not accommodate the employee. The employer has a duty to reasonably accommodate an employee's religious freedom unless it is impossible to do so without causing itself undue hardship. It is not enough that it may have a legitimate commercial rationale that it seeks to protect.

Facts:
The employer, TFD Network Africa, conducts business as a logistics and transport service provider and offers a warehousing and distribution service. The warehouse normally holds substantial amounts of customer stock and stock-taking is required over weekends on a monthly basis.

The dismissal of the employee arose from her refusal to work overtime on Saturdays to do stock-taking, on account of her being a Seventh Day Adventist, a religion in which Saturday, the seventh day, is the holy Sabbath. Although the employee claimed that she made disclosure of her faith, TFD maintained that during the interview she was told that she would be required to perform weekend work, to which she indicated she had no problem. TFD claimed it would not have employed her if it had been aware that she could not work on weekends, as it was an operational requirement of the job that she participate in stock-taking on Saturdays. The employee signed a written contract of employment in which she agreed to perform 'such overtime duties as may be reasonably required of you from time to time, provided this does not exceed the limitations laid down in relevant legislation.'

After missing several monthly stock-takes, incapacity proceedings were initiated and after a hearing the employee was dismissed for incapacity. She declared a dispute concerning "an alleged unfair discrimination based on religious grounds". The Labour Court held that her dismissal was procedurally and substantively unfair, automatically unfair and that she was unfairly discriminated against by TFD on the basis of her religion and belief.

On appeal, the LAC upheld the LC's decision and found that TFD did not reasonably accommodate the employee. TFD failed to discharge the evidentiary burden necessary to sustain the defences of fair discrimination under section 187(2)(a) of the LRA, with the result that the dismissal was automatically unfair as contemplated in section 187(1)(f) of the LRA. There was no evidence that the employer suffered any hardship at all by her being absent. She did not attend stock takes for 12 months and there is no indication that her absence impacted on the TFD's ability to get the stock takes done. The LAC found that her presence was not reasonably necessary for the accomplishment of the operational requirements.

Extract from the judgment:
(Murphy JA):

[24] Section 187(1)(f) of the LRA renders a dismissal automatically unfair if:

> *'… the reason for the dismissal is that the employer … unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.'*

[25] The automatically unfair dismissal claim, in this case, is founded on Faris' religion. She carries the evidentiary burden to show that her religion was the true or real or dominant reason for her dismissal and that a sufficient nexus exists between her dismissal and her religion.....
.....

[27] Section 187 of the LRA imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove the contrary by producing evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187 for constituting an automatically unfair dismissal.

[28] TFD submits that the most dominant reason for the dismissal of the respondent was not her religion, but her refusal to work on Saturdays. It has always required all its managers, no matter who they were or what their background was, to attend stock takes once a month from Friday to Saturday. Moreover, the contract of employment specifically makes provision for such overtime work, which Faris agreed to when commencing employment, despite her religion. Thus, it argued, religion was not the *sine qua non*. The refusal to do the stock take was the dominant reason for the dismissal, and not Faris' personal convictions that underlay it. Her religion, therefore, TFD contends, played no role in the motivation to dismiss her.
.....

[31] TFD's contentions are not sustainable. Firstly, the dismissal would not have occurred if Faris had not been an Adventist. Had she not been an Adventist she would have

willingly worked on a Saturday. The evidence suggests that her work performance was exemplary in all other respects. It is disingenuous to argue that her non-availability on Saturdays was the reason for her dismissal without having regard to the underlying reason for her non-availability. But for her religion, she could have worked on a Saturday and would not have been dismissed. Her religion was the dominant and proximate reason for her dismissal.
….....

[35] In conclusion then, there is no doubt that Faris was dismissed and discriminated against for complying with and practising the tenets of her religion. The decisive enquiry in this appeal is whether the discrimination is fair, rationally connected to a legitimate purpose and does not unduly impair or impact on Faris' dignity. In the context of the LRA, the fairness enquiry coincides in most respects with the determination of whether the discriminatory job requirement falls within the exemption in section 187(2)(a) of the LRA, which provides specifically that, despite section 187(1)(f), a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the particular job. Relevant considerations in regard to fairness and the inherent requirements of the job include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which rights or interests of the victim of the discrimination have been affected, whether the discrimination has impaired the human dignity of the victim, and whether less restrictive means are available to achieve the purpose of the discrimination.

[36] TFD submits that it is an inherent requirement of the job to require a manager to do a stock take once a month over a weekend, where a stock take is essential to its operations.....

[37] The test for whether a requirement is inherent or inescapable in the performance of the job is essentially a proportionality enquiry. Considering the exceptional nature of the defence, the requirement must be strictly construed. A mere legitimate commercial rationale will not be enough. In general, the requirement must be rationally connected to the performance of the job. This means that the requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose and must be reasonably necessary to the accomplishment of that purpose.

[38] However, even if that is shown, the enquiry does not end there. In addition, the employer bears the burden of proving that it is impossible to accommodate the individual employee without imposing undue hardship or insurmountable operational difficulty.....
.....

[43] Although it is undeniable that the overtime requirement pursued a legitimate commercial rationale adopted in a genuine belief that it was necessary for the fulfilment of a legitimate work-related purpose, TFD's justification ultimately does not withstand scrutiny. In particular, I am not persuaded that it was impossible to achieve the object of the stock takes without reasonably accommodating Faris. Her situation was very different to that of the Muslim employees in the *Rainbow Chickens* case. In that case, had the affected employees all been allowed to take leave, the factory would have closed and the employer would have suffered undue hardship. By contrast, there is no evidence that the employer suffered any hardship at all by Faris being absent. She did not attend stock takes for 12 months and there is no indication

at all that her absence impacted on the TFD's ability to get the stock takes done. Her presence was not reasonably necessary for the accomplishment of the main purpose.

[44] The real rationale for insisting on Faris' attendance at stock takes appears most clearly from Smith's testimony. He had a rigid policy from which he did not want to depart by making an exception. If he accommodated Faris, he feared he would be expected to accommodate others. But his apprehension is not valid - the only persons likely to require accommodation on the grounds of observing the Sabbath on a Saturday would be Adventists and Orthodox Jews. The evidence reveals that Faris was the only employee at TFD who required accommodation on such grounds. The floodgates argument, in the circumstances of this case, is misplaced, unfounded and lacking in a rational basis.

[45] Likewise, the submission that the requirement did not impact upon the dignity of Faris fails to comprehend the intrinsic link between the tolerant observance of religious freedom and dignity. These values are not mutually exclusive but enhance and reinforce each other. As stated earlier, some adherents to a religious creed observe a certain practice because they feel it is central to their identity to do so. TFD seems indifferent to or not to understand that important precept of our constitutional dispensation. Without question, an employment practice that penalises an employee for practising her religion is a palpable invasion of her dignity in that it supposes that her religion is not worthy of protection or respect. It is a form of intolerant compulsion to yield to an instruction at odds with sincerely held beliefs on pain of losing employment. The employee is forced to make an unenviable choice between conscience and livelihood. In such a situation, the dictates of fairness and our constitutional values oblige the employer to exert considerable effort in seeking reasonable accommodation.

[46] The only possible legitimate rationale justifying the non-accommodation of Faris is that her attendance was an essential part of her managerial training. She needed to gain hands-on experience in the stock take process in order to work as a manager. The question then is whether it was not possible to reasonably accommodate her in this respect without imposing undue hardship on TFD.

[47] The record shows that Faris made various suggestions about how she could be accommodated. She offered to work on Saturdays after sunset; she was willing to work on Sundays; and she was available to work night-shift or early shifts or longer hours on the Thursday before the stock take and in the first part of the stock taking process commencing on the Friday in order to assist prepare for the Saturday. Some of these proposals were not practical solutions as the stock take needed to finish on the Saturday evening. However, there is no clear evidence of any meaningful engagement about possible alternative means of Faris acquiring the know-how and insight into the stock taking process sufficient for her to carry out her managerial functions. She clearly believed she could acquire the supervisory know how even if she was not in attendance throughout the monthly stock take.

.....

[50] In the premises, I am persuaded that TFD did not reasonably accommodate Faris. It follows that TFD failed to discharged the evidentiary burden necessary to sustain the defences of fair discrimination or that under section 187(2)(a) of the LRA with the result that the dismissal was automatically unfair as contemplated in section 187(1)(f) of the LRA.

INDUSTRIAL ACTION & TRADE UNIONS

Identifying who is on strike:

National Union of Metal Workers of South Africa (NUMSA) and Others v Transnet National Ports Authority (DA8/17) [2018] ZALAC 41 (29 November 2018)

Principle:
Where a strike by one part of the workforce impacts on the ability of other employees to perform their jobs, an employer will have to prove that the affected employees are also striking.

Facts:
The Marine Services Department of Transnet manages and administers the South African ports. Durban Harbour, with about 59 berths (parking bays), has between 15 and 45 ship movements in a 24 hour period. A ship entering or leaving the harbour is serviced by a tug (with its crew) and the land-based/quayside berthing staff. The employees in this case were part of the land-based/quayside berthing staff, employed as marine shore hands. They performed their duties at the berths where they would await the arrival of a vessel, brought in by the tugs, and would secure it once it is alongside the quay by tying it with ropes to stabilise it. When a vessel departs from the harbour they would untie the robes and a tug would help it move off the berth.

On the day of the unprotected strike Transnet had planned to have 17 ships moving between 06h00 and 18h00 during the day shift, but only 4 ships were moved. The unprotected strike endured for almost 10 hours and ended around 16h00 when it was already late for the employees to resume their duties that day. The shore hands said they did not participate in any form of industrial action and attributed the unprotected strike to the tug crews who had withdrawn their labour. It was therefore not possible for land-based berthing crews to execute their tasks if the tugs did not perform their duties.

Transnet issued a notice headed "notice of disciplinary action for collective misconduct" which informed the employees that they would receive a final written warning for the alleged misconduct and that those who were already on final written warning would be dismissed. The affected employees in this case fell into the latter category and were dismissed with immediate effect as a consequence of their alleged participation in the unprotected strike. According to Transnet the sanction of dismissal was motivated by the serious consequences of the unprotected strike, the employees' untrue denial that they were on strike, the fact that the strike was unprotected and had not been preceded by any dispute resolution process, and that it persisted for a period of approximately 10 hours.

The Labour Court rejected the employees' version and concluded that all of them participated in the unprotected strike. The LC determined that failure to issue an ultimatum did not amount to procedural unfairness, because it was not an invariable requirement. Transnet had expended considerable effort throughout the strike to

negotiate with the employees and convince them to return to work, and the employees disregarded the informal 'ultimatum'. The LC also found that there was no obligation to subject the individual employees to a formal disciplinary hearing. They had chosen to deliberately and collectively deny that there had been an unprotected strike, and Transnet complied with the *audi* principle when it issued a notice and thereafter acted against them.

On appeal the Labour Appeal Court set aside the LC's order. It found that there was insufficient evidence that the berth-side employees were part of the tug crew on strike. It also held that the employer could not have expected these employees to carry out their duties in an environment that was unsafe as a result of the illegal strike. The LAC did however uphold the LC's finding that there was no procedural unfairness in not issuing an official ultimatum, and in handling the disciplinary process through collective representations.

Extract from the judgment:
(Phatshoane ADJP):

[17] The individual appellant's main argument is that they did not participate in or associate themselves with the work stoppage of 24 April 2015 and therefore the court a *quo* erred in its finding to the contrary. The unprotected strike was fuelled by other employees of TNPA. It was further contended that the individual appellants did not refuse to carry out any instruction during the work stoppage and that the Labour Court was incorrect in holding otherwise.

….....

[23] .....There is an obligation on the employer to provide a safe working environment for its employees particularly in the circumstances where there appears to have been tumultuous engagement between TNPA and its tug crews over the latter's demands. In my view, TNPA could not have expected the appellants to carry out their duties in an environment that was unsafe as a result of the illegal strike.

.....

[27] It bears repeating that the individuals appellants could not have executed their part of the work in the absence of the tug crews. On the basis of the aforegoing analysis, I am of the view that TNPA failed to demonstrate that the individual appellants refused to work (or obstructed work for approximately 10 hours on 24April 2015. The Court *a quo* erred in concluding that the dismissal was substantively fair. The opposite prevails, the dismissal was substantively unfair.

[28] In light of my conclusion that the individual appellants did not participate in the strike, it is not necessary to traverse the aspect whether TNPA's numerous verbal ultimate were sufficient in persuading them to resume their duties. By parity of reasoning, this also applies to NUMSA's contention that TNPA ought to have sought its intervention during the April 2015 unprotected strike.

[29] It is common cause that TNPA did not hold a disciplinary enquiry against the individual appellants in accordance with the procedure laid down in its own disciplinary code. It is trite that the purpose of a disciplinary inquiry is to determine guilt and the appropriate sanction to be meted out to an employee. I hasten to state that nothing bars an employer in case of alleged collective misconduct to deal with the employees involved as part of a collective as opposed to individuals. Relying on *Avril Elizabeth Home for the mentally handicapped v CCMA and Others,* Mr Todd, for TNPA, correctly contended that there is no obligation in law

to conduct a formal tribunal-style hearing, as the appellants sought to suggest. There is no reason why the employer cannot comply with the *audi* rule by calling for collective representations why the strikers should not be dismissed. I am satisfied that the Court *a quo* cannot be faulted in concluding that the procedure followed by TNPA, leading up to the dismissal of the 17 individual appellants, was fair.

Fairness and treating different groups of strikers differently:

County Fair Foods (Epping), a division of Astral Operations Ltd v Food and Allied Workers' Union and Others (CA02/2017) [2018] ZALAC 9 (11 May 2018)

Principle:
There may exist valid grounds in a particular case to distinguish the conduct of one striking employee from another, even though they have engaged in similar misconduct.

Facts:
County Fair informed staff that annual discretionary bonuses would not be paid due to its financial position. In response, on 15 December 2010, more than 200 employees embarked on an unprotected strike. Three ultimatums were issued to employees. 64 employees returned to work on 15 December and 58 employees returned on 17 December. All signed a 'comeback' document, which included an undertaking that they would desist from such action in future, and received a final written warning for their conduct.

A group of employees (the second respondents) failed to comply with the final ultimatum to return to work on 17 December, despite it being extended to provide additional time for them to do so. County Fair then instituted a lock out. The second respondents returned to work on Monday 20 December, signed the comeback document but were suspended from duty pending disciplinary hearings at which they were found to have committed misconduct and were dismissed.

The Labour Court found the dismissals unfair on the basis that the sanction was harsh, since the employees had only remained on strike for an extra 1½ days. County Fair was ordered to reinstate the respondents on a final warning with 6 months' back pay.

On appeal to the LAC it was held that the group of employees' failure to adhere to the final ultimatum distinguished them from their fellow employees who had returned to work in response to the ultimatum. In such circumstances, the dismissal of the respondent employees was fair.

The LAC said that our courts have repeatedly stated that fairness generally requires that like cases should be treated alike and that disciplinary consistency is the hallmark of progressive labour relations. While discipline should be neither capricious nor selective, this applies within reasonable bounds and subject to the proper and diligent exercise of discretion in each individual case, with fairness remaining a value judgment. There may exist valid grounds in a particular case to distinguish the conduct of one employee from another, even though they have engaged in similar conduct.

The LAC held that the Labour Court did not have appropriate regard to the fact that-
- the unprotected strike action was embarked upon in a critical business period;
- the final ultimatum had been issued calling on the respondent employees to return to work;
- the final ultimatum had been extended to provide the respondent employees with additional time within which to comply with it;
- the final ultimatum was ignored by the respondent employees with no *bona fide* reason given to explain why this was so;
- no remorse was shown for this conduct by the respondent employees;
- and to the conduct of the respondent employees at the disciplinary hearing.

Treating employees differently is a precarious task - in many cases inconsistency has resulted in a finding of unfairness. But this case reminds us that there may be valid grounds in a particular case to distinguish the conduct of one employee from another, even though they have engaged in similar misconduct.

Extract from the judgment:
(Savage AJA:)
[22] It has repeatedly been stated by our courts that engaging in an illegal strike constitutes serious and unacceptable misconduct by workers in respect of which an employer is entitled to take disciplinary action. Dismissal has been found to be an appropriate sanction where an unprotected strike was planned to create maximum pressure and undermine the authority of the employer; and where there has not been compliance with an ultimatum given to return to work, even when the ultimatum was not one in a conventional sense and where the strike has been of a short duration.

[23] In this matter the unprotected strike was embarked upon deliberately during the peak end of the year production season with no attempt made to comply with the LRA. It was not in response to unjustified conduct by the appellant and less disruptive methods were clearly available to the employees to resolve their dissatisfaction with the bonus issue.

[24] The conduct of the respondent employees in failing to adhere to the terms of the final ultimatum given to them, distinguished them from their fellow employees who returned to work. Consequently, their conduct could on the facts clearly be differentiated from that of other striking employees, in the same manner as it was in *NUMSA and Others v CBI Electric Cables.*

[25] Our courts have repeatedly stated that fairness generally requires that like cases should be treated alike and that disciplinary consistency is the hallmark of progressive labour relations. While discipline should be neither capricious nor selective, this applies within reasonable bounds and subject to the proper and diligent exercise of discretion in each individual case with fairness remaining a value judgment. There may exist valid grounds in a particular case to distinguish the conduct of one employee from another, albeit that they have engaged in the similar conduct, having regard to the material facts applicable.

[26] The appellant was neither capricious nor selective in its approach to the misconduct committed by the respondent employees. The collective activity of the respondents could, unlike in *CEPPWAWU v Metrofile*, be legitimately differentiated from the employees who complied with the final and earlier ultimata. The striking workers were, therefore, not all on the same footing given the respondent employees' failure to comply with the final ultimatum given to them. As much was not in dispute. This constituted a material distinguishing feature

between the different groups of strikers which provided a legitimate factual basis which permitted the appellant to differentiate between the conduct of the respondent employees and that of those striking workers who had complied with the ultimata issued.

When political parties take over the role of a trade union:

Calgan Lounge (Pty) Ltd v National Union of Furniture and Allied Workers Union of South Africa (NUFAWSA) and Others (J2648/18) [2018] ZALCJHB 334 (9 October 2018)

Principle:
The deliberate and specific design of the LRA is to designate the task of dealing with workplace disputes and grievances to trade unions. There is no place in this structure for the involvement of political parties.

Facts:
Representatives from the EFF arrived at the employer's premises, without any prior notification. A meeting with several employees was held during lunch time, in the street outside the employer's premises. This meeting resulted in a letter from the EFF to the employer. The letter, written on an EFF letterhead, recorded that the EFF had been 'mandated' by the employees to intervene and that a memorandum containing a 'barrage' of demands and grievances would be presented later.

The employer addressed this issue directly with all its employees, placing a notice on the company notice boards, urging employees to follow the prescribed procedures and approach the relevant institutions established by the LRA, should they have difficulties. The employer's workplace was in fact organized, with NUFAWASA being the recognized and majority representative trade union, and with whom the employer had an established collective bargaining relationship.

The 9 page memorandum which was subsequently presented was typed on an EFF letterhead and accused the employer of exploiting and victimizing the employees, and subjecting them to 'appalling and unethical' working conditions. It claimed the EFF would 'unashamedly' take up the plight of the employees. The memorandum then recorded a number of actual demands, including an issue about resolving the wage gap / living wage and equal pay for equal work, permanent positions, 'discontinuation' of the relationship with the union, compliance with the BCEA, reimbursement of money deducted from employees' salaries, reinstatement of employees that had been dismissed, development of skills programs, and terminating exploitative and unjust policies. The employer was given 7 days by the EFF to comply, with a warning that defiance of the memorandum would result in intensifying mass protest action.

The employer instructed its attorneys to respond to this memorandum. In the response it was specifically stated that the EFF was not a registered trade union and lacked the necessary legal status and entitlement to engage with the employer on workplace related issues. The attention of the EFF was also drawn to the fact that there was a majority, recognized trade union, with whom workplace disputes were effectively resolved.

What followed was an unprotected strike with damage to company property and intimidation. The employees' refusal to work persisted, which caused the employer to apply for an interdict in the Labour Court. The employer cited the union, the employees, the EFF and 2 named EFF representatives as the respondents in the application. When the case was heard, 2 EFF representatives addressed the Court but did not file any Court papers. They indicated that no matter what, the employees would continue to refuse to resume their duties irrespective of what the Court might order. They were warned by the Court that their failure to comply with its orders would result in contempt of court with severe penalties.

The LC granted an interim interdict, calling upon the respondents to show cause why a final order should not be granted declaring the strike action to be an unprotected strike, interdicting the EFF representatives and the employees from continuing to participate in the strike and from obstructing the employer's business, and interdicting the EFF and its representatives from unlawfully interfering with the employment relationship between the employer and its employees. The employer also sought a costs order against the respondents.

On the return date, the LC confirmed the interdict, even though employees had by then been dismissed. The LC was very clear about the intervention of political parties. It confirmed that the deliberate and specific design of the LRA is to designate the task of dealing with workplace disputes and grievances to trade unions. There is no place in this structure for the involvement of political parties. What the EFF did in this case was to undermine orderly collective bargaining and dispute resolution, which are cornerstones of the LRA. As an employer, the applicant was entitled to expect it employees to comply with the LRA when seeking to resolve any disputes they might have with the employer.

Extract from the judgment:
(Snyman AJ)

[37] When regard is had to the demands themselves, there are all the kind of demands that simply cannot legitimately form the subject matter of protected strike action. All of the demands relate to issues that are capable of being determined and/or resolved by way of adjudication or arbitration, either in terms of the LRA, or in terms of a number of other available employment statutes. Also, some of the demands are simply unlawful. It is trite that to simply demand the removal of a member of management without proper cause and fair process is an unlawful demand, and certainly to demand from an employer to simply in effect expel a majority recognized trade union flies in the face of the right of freedom of association and chapter III of the LRA. This kind of demand relating to the first respondent can only be seen as anti-union activity which is expressly prohibited by the LRA.

[38] Because the strike action is clearly unprotected, and as stated above still persists, the applicant has demonstrated a clear right to the relief sought, insofar as it concerns the work stoppage / strike itself.

[39] This then only leaves the issue of the unlawful conduct of the employees, the EFF, the employees, Mashala and Matshevha, which is part of the relief afforded to the applicant in the *Rule Nisi*. I am equally satisfied that the applicant has demonstrated a clear right to the relief sought in this regard. Where it comes to the conduct of employees when committing acts of intimidation, obstruction and blockading of

premises, and damage to company property, the situation is not controversial because this Court has made it clear that such conduct is simply not acceptable and has no place in our employment law dispensation.

[40] But it is where it comes to the involvement of the EFF and its two representatives, Mashala and Matshevha, there are several issues that need to be addressed. There can be no doubt, on the evidence, that these respondents were directly involved in, if not the instigators of, all the events that followed giving rise to this matter. All the correspondence to the applicant were written on EFF letterheads, and it was made clear that it was the EFF that was championing the cause of the employees, so to speak. Fortunately, and in this case, the applicant was sufficiently prudent in actually joining these parties as respondents to the proceedings, and seeking relief against them directly.

[41] The first question that must be asked is what was the EFF doing getting involved in workplace issues in the first place, especially considering that the applicant's workplace is organized with the first respondent as majority representative and recognized trade union? The simple answer has to be that the EFF has no business in doing so. It is not a registered trade union. The deliberate and specific design of the LRA is to designate the task of dealing with workplace disputes and grievances to employers' organisations, trade unions and workplace forums. There is no place in this structure for the involvement of political parties. In fact, it is my view that the practicing of any form of politics, be it under the guise of protecting employee rights or other socio-economic aspirations, in the workplace, is an untenable proposition. The workplace should be free of these kind of influences.....

[42] What is clear from the memorandum of grievances submitted by the EFF to the applicant, is that it reads more like a political manifesto than a genuine grievance designed to resolve workplace grievances and disputes. It even takes issue with the legitimacy of the LRA as a regulatory measure. The approach adopted by the EFF is that the Constitution entitles the EFF to conduct itself as it did in this case. It is sadly mistaken in this respect. It is by now trite law that direct reliance on the Constitution is not permissible where there is a specific stature regulating the constitutional right. In this case, the rights under section 23 of the Constitution are regulated by the LRA and other related employment law statutes, and it is incumbent and prescribed that all the provisions of these statutes must be complied with in pursuit of these rights. The Constitution thus lends no support for the EFF to have become involved in this matter in the first place. .....

[43] Trade unions must be registered under the LRA, for good reason. It ensures that such institutions fulfil the duties as prescribed by the LRA, and gives effect to its primary objectives. Registration places trade unions under a number of regulatory provisions and placed them trade under the supervision of the Registrar of Labour. The penalty for non-compliance could be deregistration in the case of serious contravention. It also places such institutions under the supervision of this Court. By seeking to assume this role which is reserved for trade unions under the LRA, the EFF in effect bypasses all these regulatory provisions that trade unions must comply with. This can never be what the legislature had intended when seeking to regulate the rights under section 23 of the Constitution by way of the LRA…

[44] What the EFF did in this case was to undermine orderly collective bargaining and dispute resolution, which are cornerstones of the LRA. As an employer, the applicant is entitled to expect it employees to comply with these objectives of the LRA when seeking to resolve any disputes they may have with the applicant as employer. And

> for the EFF to simply negate all of this based on some misguided view of what the Constitution allows it to do, is simply unacceptable, and cannot be permitted.....

Union and political T-Shirts in the Workplace:

National Union of Metalworkers of South Africa obo Its Members in the employ of the Respondent v Transnet SOC Ltd (JS427/15) [2018] ZALCJHB 352 (31 October 2018)

Principle:
The wearing of union T-shirts at work constitutes a lawful activity as contemplated by s 5(2)(c)(iii) of the LRA, and the imposition of the union T-shirt ban constitutes a form of prejudice prohibited by that provision. But the exercise of the right to freedom of association by wearing a union T-shirt in the workplace is not unlimited, and there could be a justification to limit this for various reasons.

Facts:
Transnet adopted a corporate and protective clothing policy which, amongst other things, prohibited the wearing of '*political party clothing or non-recognised union regalia*' during working hours. NUMSA was not then a recognised trade union and so the prohibition impacted directly on its members. Later the policy was changed to prohibit the wearing of all union clothing and regalia in Transnet's workplaces, regardless of whether the union concerned was recognised for collective bargaining or other purposes.

In this case the main issue was whether the workplace rule banning employees from wearing '*clothing or any other regalia of any sort of any political party or trade union …during working hours*' is constitutional, lawful, reasonable and valid. Did Transnet infringe the protections accorded by the right to freedom of association enshrined in Chapter II of the LRA?

The court started with constitutional principles: It said that the Constitution affords everyone the right of freedom of expression (s 16(1)). Section 18 affords the right of freedom of association. In the labour context, this right is affirmed in s 23 (2), which affords every worker the right to form and join a trade union, to participate in its activities and programmes, and to strike. Section 23 (4) confers on every trade union and employers' organisation the right to determine its own administration, programmes and activities and to organise.

Turning to the LRA, the LC focused on sections 4 and 5, which prohibit an employer from prejudicing an employee for participating in the lawful activities of a trade union. After considering the constitutional and labour rights involved, **the LC held that the wearing of union t-shirts constitutes a lawful activity as contemplated by s 5 (2)(c)(iii) of the LRA.** The imposition of the union t-shirt ban, with its underlying threat of disciplinary action for an infringement of the band, constitutes a form of prejudice prohibited by that provision. The LC said "the wearing of a t-shirt is an associative act and s 4 specifically protects an employee's right to freedom of association by joining trade unions and participating in its lawful activities".

The LC did qualify this by saying that the exercise of the right to freedom of association by wearing a union t-shirt in the workplace is not unlimited, and there could be a justification to limit this for various reasons. The judgment did not fully spell out what the limitations could be, apart from hinting at the following:

- Where it impacts on safety: for example, employees engaged in work on tracks could be prohibited from wearing red clothing, on account of signals being the same colour and the potential for confusion that may arise.

- In appropriate circumstances, inter-union rivalry and any associated violence in the workplace may justify intervention by an employer in the form of a limitation on the wearing of t-shirts and union insignia.

Extract from the judgment:
(Van Niekerk J):

[27] An earlier judgment by the Constitutional Court that gives meaning to the range of activities contemplated by the phrase 'lawful activities ' is *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), where the Constitutional Court, in a case that concerns the rights of the minority union to embark on a protected strike action to persuade the employer to recognise it's shop stewards, conform to the important principle of freedom of association enshrined in Article 2 of the Convention on Freedom of Association and Protection of the Right to Organise which states:

> 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of the choosing without previous authorisation' (see paragraph 31 of the judgment).

Further, the Constitutional Court acknowledged that the ILO jurisprudence extends to the principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances. In other words, the statutory right to freedom of association extends to majority and minority unions, the right to recruit new members and the right to organise those members (at paragraph 34 of the judgment).

[28] In the present instance, the wearing of trade union t-shirts in the workplace would be encompassed by each of the above activities. Trade union members would wear their t-shirts in the workplace as a form of promotion, aimed at recruiting new members. Unions would manufacture and distribute t-shirts as a component of their organising activities. Minority unions would wear a t-shirt as a component of their efforts to challenge majority unions by seeking to persuade members to associate with the minority union, with a view to it ultimately attaining majority.

[29] In those circumstances, and having regard to the interpretation of s 5 (2) (c) (iii) adopted by the Constitutional Court, in my view, the wearing of union t-shirts constitutes a lawful activity as contemplated by s 5 (2) (c) (iii). The imposition of the union t-shirt ban, with its underlying threat of disciplinary action for an infringement of the band, constitutes a form of prejudice proscribed by that provision. In short, the t-shirt ban is unlawful and invalid with reference to s 5 (2) (c) (iii).

[30] To the extent that s 5 (2)(c)(vi) proscribes an employer from prejudicing an employee on account of the exercise of any rights conferred by the LRA, the wearing of a union

t-shirt constitutes a lawful activity under the LRA. This is particularly so in so far as the wearing of a t-shirt is an associative act and s 4 specifically protects an employee's right to freedom of association by joining trade unions and participating in its lawful activities. On this basis, the union t-shirt ban is also an infringement of s 5 (2) (c) (vi) and is invalid.
….....

[33] This is not to say that the exercise of the right to freedom of association by wearing a union t-shirt in the workplace is unlimited. One can imagine a justification on the basis of a significant threat to safety, and a number of other reasons. Indeed, Matlou gave the example in his evidence of employees engaged in work on tracks being prohibited from wearing red clothing, on account of signals being the same colour and the potential for confusion that may arise. .....I have no doubt that in appropriate circumstances, inter-union rivalry and any associated violence in the workplace may justify intervention by an employer in the form of a limitation on the wearing of t-shirts and union insignia (or even its prohibition in extreme cases), but that is not the case made in the present instance.

Minority union rights affirmed:

POPCRU v SACOSWU & Others (CCT152/17) [2018] ZACC 24 (23 August 2018)

Principles:

(1) The principle of majoritarianism embraced by our labour law is not incompatible with the principle of freedom of association which finds expression in the right to form and join a union of one's choice. Any statutory provision that prevents a trade union from bargaining on behalf of its members or representing them in disciplinary and grievance proceedings would limit rights in the Bill of Rights. Forcing workers who belong to one trade union to be represented by a rival union at disciplinary hearings seriously undermines their right to freedom of association.

(2) Neither section 18 nor section 23 precludes the conclusion of a collective agreement between an employer and a minority union where a section 18 agreement between the same employer and a majority union exists.

Facts:

The judgment deals with a dispute between two rival unions over the right of a minority union to acquire organisational rights from an employer, where the majority union has a pre-existing collective agreement with the employer setting a threshold of representativeness for admission to a Departmental Bargaining Council, which the minority union does not meet.

The Department of Correctional Services concluded a collective agreement with the Police and Prisons Civil Rights Union (POPCRU), the majority union in the Departmental Bargaining Council, under s18(1) of the LRA. S18(1) provides for an employer and a majority union to establish thresholds of representativeness in order to acquire organisational rights under sections 12 (workplace access), 13 (stop orders) and 15 (union leave). S18(2) provides that any such threshold agreement is only binding if it is applied equally to any union seeking such organisational rights at that workplace.

The collective agreement between the Department and POPCRU fixed 9 000 union members in the Department as the threshold that every union had to meet before it could acquire the relevant organisational rights provided for in the LRA. Notwithstanding this, the Department concluded a collective agreement with the South African Correctional Services Workers Union (SACOSWU), in terms of which it granted SACOSWU certain organisational rights despite the fact that that SACOSWU did not meet the threshold fixed in the s18(1) collective agreement between the Department and POPCRU.

As a result, POPCRU disputed whether the Department was entitled to conclude this collective agreement. POPCRU argued that its threshold collective agreement was binding on SACOSWU under s23(1)(d), which provides that a collective agreement with a majority union is binding on all employees in the workplace, including non members of the majority union. In response, SACOSWU argued that the employer was entitled to grant it organisational rights, in light of s20 which states that "*nothing in this Part (of the Act) precludes the conclusion of a collective agreement that regulates organisational rights*".

The dispute journeyed through the dispute mechanisms under the LRA. The **arbitrator** concluded that the Department and SACOSWU were entitled to conclude the collective agreement providing SACOSWU organisational rights, notwithstanding the threshold agreement between the Department and POPCRU. POPCRU was successful in having this award set aside on review in the **Labour Court**, but on appeal the **Labour Appeal Court** concluded that the Department and SACOSWU were entitled to conclude the collective agreement.

The **Constitutional Court** disconcertingly gave 3 judgments in this matter - 2 minority judgments and the judgment agreed by the majority of the judges. The presence of the minority judgments owed much to a debate over whether the subject matter of the dispute was 'moot' and needed to be decided, due to the fact that the collective agreement with POPCRU was no longer in force at the time the dispute was referred to the Labour Court. Nevertheless, the majority judgment decided it was in the interests of justice and the public interest for the ConCourt to decide the matter. Our focus is on the majority judgment.

Although disagreeing with some of the reasoning adopted by the LAC, the ConCourt dismissed the appeal against the LAC judgment and agreed that the Department and SACOSWU were entitled to conclude their collective agreement. The ConCourt found that **neither s18 nor s23 precludes the conclusion of a collective agreement between an employer and a minority union, where a section 18 threshold agreement between the same employer and a majority union exists.**

The ConCourt pointed out that a minority union may access organisational rights in sections 12, 13 and 15 in a number of ways:

- First, it may acquire those rights if it meets the threshold set in the collective agreement between the majority union and the employer;
- Second, it may bargain and conclude a collective agreement with an employer, in terms of which it would be permitted to exercise the relevant rights; and

- Third, a minority union may refer the question as to whether it can exercise those rights to arbitration in terms of section 21(8C) of the LRA. If the union meets the conditions stipulated in that section, the arbitrator may grant it organisational rights in the relevant provisions.

The ConCourt pointed out that the interpretation of s18 advanced by POPCRU would effectively deny minority unions the right to engage in collective bargaining, which is a right conferred on every trade union by the Constitution, regardless of whether the union has a majority or minority status.

We think this ConCourt judgment shows clearly that the **LRA should not be interpreted in a manner that denies minority unions the right to engage in their Constitutional right to collective bargaining, whilst recognising that an employer may not necessarily be obliged to grant that minority union the rights it seeks.** But where an employer, for whatever reason, agrees to grant a minority union certain organisational rights or enter into collective bargaining with that minority union, the LRA should not be interpreted to prevent this. Whilst that minority union may not have been entitled to enforce those rights through the statutory provisions of the LRA, the LRA should not be interpreted to prevent an employer from agreeing to grant those rights.

The ConCourt emphasised that the principle of majoritarianism embraced by our labour law is not incompatible with the principle of freedom of association, which finds expression in the right to form and join a union of one's choice. Forcing workers who belong to one union to be represented by a rival union at disciplinary hearings would seriously undermine their right to freedom of association.

Extract from the judgment:
(Jafta J:)
[90] Significantly, it emerges from this statement that the principle of majoritarianism which is embraced by our labour law is not incompatible with the principle of freedom of association which finds expression in the right to form and join a union of one's choice. Workers form and join trade unions for protecting their rights and advancing their interests at the workplace. Any statutory provision that prevents a trade union from bargaining on behalf of its members or forbidding it from representing them in disciplinary and grievance proceedings would limit rights in the Bill of Rights. Forcing workers who belong to one trade union to be represented by a rival union at disciplinary hearings seriously undermines their right to freedom of association described earlier.
.....

[95] The text of the section limits its content and scope to the right to determine a threshold in terms of a collective agreement. Section 18 does not authorise the employer and a majority union to determine which constitutional rights other unions that are not parties to the collective agreement, may exercise. The section does not refer at all to the right to engage in collective bargaining. Nor does it mention freedom of association, which enables every worker to form or join a trade union of their own choice.

[96] It is not surprising that section 18 does not prohibit collective bargaining between an employer and a minority union where there is a collective agreement between that employer and the majority trade union. Such a prohibition would be inconsistent with the Constitution and international law. Over and above that, the prohibition if it were to exist, would be

meaningless. This is because section 20 declares that nothing in Part A of Chapter III, where section 18 is located, precludes the conclusion of a collective agreement that regulates organisational rights.
.....

[98] It is important to note that this Court rejected the proposition that minority unions were precluded from concluding collective agreements on organisational rights where there was an existing agreement between the employer and a majority union. The Court preferred a wider reading of section 20, which was supported by the text and was also consonant with the LRA's commitment to freedom of association and the promotion of orderly collective bargaining. It was held, in addition, that the wider reading was in line with "the internationally recognised rights of minority unions to seek to gain access to the workplace . . . through the techniques of collective bargaining".
.....

[101] Therefore, neither section 18 nor section 23 precludes the conclusion of a collective agreement between an employer and a minority union where a section 18 agreement between the same employer and a majority union exists.

[102] When properly construed Chapter III of the LRA reveals that a minority union may access organisational rights in sections 12, 13 and 15 in a number of ways. First, it may acquire those rights if it meets the threshold set in the collective agreement between the majority union and the employer. In that event, a minority union does not have to bargain before exercising the rights in question. Second, such union may bargain and conclude a collective agreement with an employer, in terms of which it would be permitted to exercise the relevant rights. Third, a minority union may refer the question whether it should exercise those rights to arbitration in terms of section 21(8C) of the LRA. If the union meets the conditions stipulated in that section, the arbitrator may grant it organisational rights in the relevant provisions.

[103] The interpretation of section 18 advanced by POPCRU here is not supported by the text of the provision. But not only that. POPCRU's construction would effectively deny minority unions the right to engage in collective bargaining. This right is conferred on every trade union by the Constitution, regardless of whether the union has a majority or minority status.

DISABILITY & INCAPACITY

Incapacity arising from persistent intermittent absence from work:

General Motors South Africa (Pty) Ltd v National Union of Metalworkers of South Africa and Others (PR206/2016) [2018] ZALCPE 10 (30 January 2018)

Principle:
The substantive fairness of an incapacity (ill health/injury) dismissal depends on whether the employer can fairly be expected to continue the employment relationship bearing in mind the interests of the employee and the employer and the equities of the case. Relevant factors would include the nature of the incapacity; the cause of incapacity; the likelihood of recovery, improvement or recurrence; the period of absence and its effect on the employer's operations; the effect of the employee's disability on other employees; and the employee's work record and length of service.

Facts:
Each of the employees in this case had exceeded the 30-day statutory sick leave limit, and all of them took further sick leave. As a result incapacity enquiries were convened in respect of each of them. This was done in accordance with a collective agreement on sick leave. The notices issued to the employees stated that they would be consulted on their capacity to fulfil their job functions and render services in the manner agreed upon in their contracts of employment. The employees were further invited to submit any additional evidence related to the medical conditions which they considered relevant to the enquiry.

In each case, the respective chairpersons found that the employees did not have the capacity to meet their contractual obligations on account of excessive sick absence and in each case, decided that the sick absence trend was not likely to improve, and that the employer could not fairly be expected to continue with the employment relationship. The employment of each of the employees was terminated.

The employees disputed the fairness of the dismissals and referred disputes to the CCMA. These disputes were consolidated for the purposes of the arbitration proceedings under review. The arbitrator found that the dismissals were procedurally and substantively unfair. The basis for this was that: (1) the inquiries that the individual respondents all faced were not incapacity inquiries as envisaged by the Code; they were inquiries into a failure to comply with contractual obligations. (2) Inquiries of this nature were inappropriate; the applicant ought to have conducted ill-health incapacity inquiries. (3) Absence from work is not in itself indicative of any incapacity to work; the individual respondents could do their work when they were at work.

The arbitrator found that the employer had therefore failed to establish incapacity on the part of any of the individual respondents and its failure to follow the prescribed procedure for conducting incapacity hearings rendered their dismissals substantively and procedurally unfair.

On review the Labour Court did not agree with the arbitrator's views, and the dismissals were found to be procedurally and substantively fair. The employer, having accepted the authenticity of the medical certificates, was entitled to rely on the employees' incapacity. Significantly, the Court held that **arbitrators are obliged to recognise a category of incapacity arising from persistent intermittent absence from work**, and the arbitrator's failure to do so constituted an error of law.

The LC held that the case against the individual respondents was not that they had breached their employment contracts or that they had breached any workplace rule. The fact that they were unable on grounds of incapacity to attend at work with a frequency that their contracts of employment required, did not have the effect of migrating the issue from capacity to conduct - the employer was fully entitled to treat the matter as it did, as a case of incapacity that resulted in a failure to meet acknowledged contractual obligations relating to attendance at work.

The substantive fairness of an incapacity (ill health/injury) dismissal depends on whether the employer can fairly be expected to continue the employment relationship, bearing in mind the interests of the employee and the employer and the equities of the case. Relevant factors would include the nature of the incapacity; the cause of incapacity; the likelihood of recovery, improvement or recurrence; the period of absence and its effect on the employer's operations; the effect of the employee's disability on other employees; and the employees work record and length of service.

Extract from the judgment:
(van Niekerk J:)
[14] In my view, by declining to recognise a category of incapacity arising from persistent intermittent absence from work, the arbitrator committed a material misdirection that amounts to an error of law. The passage from *AECI Explosives (Zommerveld) v Mambalu* referred to above makes clear that the LAC has accepted that persistent absence from work because of genuine ill-health is a legitimate ground on which to terminate employment, and one that relates to the capacity and not the conduct of the employee. The passage from *Hendricks v Mercantile General Reinsurance Company (quoted with approval in Mambalu)* is also authority for the proposition that substantive fairness in these circumstances requires an assessment of whether the employer can fairly be excepted to continue the employment relationship given the nature of the incapacity, its cause, the prospect of recovery, improvement or recurrence, the period of absence and its effect on the employer's operations and on other employees, and the employee's work record and length of service. These authorities were binding on the arbitrator (as they are on this court) and it was not open to him to ignore them

[15] The arbitrator's reference to John Grogan's 'Workplace Law' in paragraph [23] of his award is entirely misplaced. Reading the passage on which the arbitrator relied in context, it suggests no more than that the employee's incapacity must arise from illness or injury and not some form of 'operational incapacity', in the case referred to, occasioned by the employee's detention in custody on suspicion of a crime. Indeed, the author goes on specifically to recognise and confirm that repeated absence for short periods constitutes an exception to the general rule that dismissal is generally considered inappropriate if the employee's absence is likely to be of a short duration. In the former instance, the author confirms, with reference to the AECI judgment, that dismissal is in principle permissible in a case of habitual absenteeism, even if for medical reasons.

[16] In short, the arbitrator's refusal or failure to recognise a category of dismissal that permits an employer to dismiss an employee for persistent or habitual intermittent absence on account of ill-health constitutes an error of law and renders his award reviewable.....

REVIEW OF ARBITRATION AWARDS

When can an arbitration award be reviewed?

Moses Kotane Local Municipality v Mokonyama N.O. and Another (JR2324/15) [2018] ZALCJHB 51; (2018) 39 ILJ 1130 (LC); [2018] 6 BLLR 614 (LC) (8 February 2018)

Principles:

1. SA law recognises 3 standards of proof:
    a. the '*balance of probabilities*' test, ie which is the more probable version, which in mathematical terms equates to the 51% standard;
    b. the criminal test of '*beyond reasonable doubt*', which has often been equated to a 90% probability;
    c. an intermediate standard lying midway between these, which the USA courts have referred to as the '*clear and convincing standard*', equating mathematically to proof in the region of 70-75%.
2. Factual findings should not be set aside on review unless clearly wrong – a clearly wrong factual finding falls squarely within the ambit of the 'clear and convincing' standard of proof.

Facts:

The employee in this case, the Head of the Supply Chain Management Unit at Moses Kotane Local Municipality, was in charge of managing the tender process for the Municipality. She instructed a subordinate to copy some of the tender documents for a particular bid evaluation and adjudication process relating to the supply of motor vehicles. When challenged on her reasons for doing so, she claimed she needed the copies for record and backup purposes. These reasons were not accepted by her employer, and she was charged with gross misconduct relating to the Municipal Finance Management Act (MFMA).

The chairperson of the disciplinary hearing came to the conclusion that, whilst the employee had made a mistake and had contravened the MFMA, the employer had not proved that the employee "*had an intention to damage or tamper with the documents*" and that her explanations for making the copies made "*reasonable sense*". The chairperson imposed a final warning for her mistake.

The employer took the somewhat unusual decision to take the outcome of the disciplinary hearing on review in terms of s158(1)(h) of the LRA. This section provides for a review to the Labour Court of "*any decision taken by the State in its capacity as employer*".

The Labour Court was not impressed by the employee's reasons for copying certain documents, and found there was "*clear and convincing*" circumstantial evidence to prove that the employee's instruction to copy certain bid documents was not bona fide and was for dishonest purposes. She had no logical and rational reason for her actions, and her actions demonstrated a clear intention to tamper with the documents. **The Labour Court found her guilty of dishonest conduct and**

concluded that dismissal was the only appropriate sanction. The Court set aside the outcome of the hearing and replaced it with a sanction of summary dismissal.

The judgment went into detail in considering the standard of proof required for a review, providing guidance for parties who have to decide whether to initiate such a process. The judgment stated that SA law recognises 3 standards of proof:

- the '***balance of probabilities***' test, ie which is the more probable version, which in mathematical terms equates to the 51% standard;
- the criminal test of '***beyond reasonable doubt***', which has often been equated to a 90% probability;
- an intermediate standard lying midway between these, which the USA courts have referred to as the '***clear and convincing standard***', equating mathematically to proof in the region of 70-75% (the judgment expresses a preference to equate this to a 70% probability, being the mid-point between 50% and 90%).

This judgment is helpful to potential applicants in review proceedings on *issues of fact* - ie where parties think the arbitrator assessed the evidence and interpreted the facts wrongly. What this judgment is effectively saying is that if a party correctly believes that it is highly likely or probable – ie that there is 'clear and convincing' evidence (mathematically equating to a 70-75% probability) – that the arbitrator's interpretation is wrong, only then is it worthwhile proceeding with a review. If the Court believes that the arbitrator was only 'probably' wrong, but the award is nevertheless reasonable, the review is unlikely to succeed.

Extract from the judgment:
(Hutchinson AJ:)

Standards of Proof

[18] South African law recognises three standards of proof (also referred to as standards of review). The preponderance and criminal standards are well known. To date our courts have not deemed it necessary to assign either a name or a label to the third standard of proof. This is an intermediate standard that lies at some point between the preponderance and criminal standard. For many decades USA courts have referred to this as the *"clear and convincing standard."*
……

[20] The clear and convincing standard is distinguishable from the preponderance standard (more likely than not) and the criminal standard of beyond reasonable doubt. To meet the clear and convincing standard, the probabilities must be highly likely or highly probable. There is no dispute that the mathematical percentage probability for the preponderance standard is set at 50% plus X where X is greater than zero. For present purposes, I will refer to this as the 51% standard.

[21] Valiant attempts have been made in the USA to assign a percentage probability for the other two standards of proof. USA studies amongst judges and jurors have revealed that many of them equated the clear and convincing standard of proof with a probability of 75%.....

[22] In mathematical terms, the criminal standard has often been equated with a 90% probability. My preference is to associate the clear and convincing standard with a 70% probability which is the mid-point between the preponderance standard of 50%

and the criminal standard of roughly 90%. Kevin M. Clermont in his article *Procedure's Magical Number Three: Psychological Bases for Standards of Decision* maintains that the criminal standard rarely prevails outside criminal law. In light of Section 33(1) of the Constitution of the Republic of South Africa, 1996 which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, there is no place for the application of the criminal standard in administrative law.

[23] The test propounded in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* is whether the decision reached by the Commissioner is one that a reasonable decision-maker could not reach. This test does not spell out the standard of proof that must be applied to successfully challenge factual findings of statutory arbitrators…….

……..

Appeals Involving Questions of Law and Fact

[25] The preponderance standard applies to an appeal on an issue of law. The enquiry is a *de novo* one and no deference is shown to the trial judge's legal conclusions. An appeal on an issue of fact requires a more deferent intermediate standard of proof. …….

[26] Factual findings shall not be set aside unless clearly wrong. ……. …….

[28] Therefore, if an appeal court is satisfied that there is a 51% probability that the trial court erred in its assessment of a factual issue, it will not brand the finding as being *"clearly wrong."* It will simply disagree with it. If on the other hand, the court finds that the appellant's evidence was highly likely as contemplated in the clear and convincing standard of proof, it ought to interfere with the decision. A clearly wrong or obviously wrong factual finding falls squarely within the ambit of the clear and convincing standard of proof. If the evidence was clear and convincing in respect of proposition A, a finding in favour of proposition B must be *"obviously wrong."*

RETRENCHMENT & OPERATIONAL REQUIREMENT DISMISSALS

A check on restructuring?

South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited (CCT275/17) [2018] ZACC 44 (6 November 2018)

Principles:

1. Section 189A(19)(b) of the LRA requires retrenchments to be operationally justifiable on rational grounds.
2. The fact that a significant period might have lapsed from the date of dismissal to the date of the judgment is not a bar to reinstatement. An employee whose dismissal is substantially unfair should not be disadvantaged by delays of litigation she/he has not caused.
3. The term "not reasonably practicable" as a reason not to order reinstatement as the primary remedy for unfair dismissal under s193(2)(c) of the LRA, means more

than mere inconvenience and requires evidence of a compelling operational burden. An employer must lead evidence why reinstatement is not reasonably practicable, and the onus is on the employer to demonstrate that.

Facts:
Until 2002, Woolworths employed its employees on a full-time basis. These employees ("the full-timers") worked fixed hours totalling 45 hours per week. In 2002, Woolworths decided that in future it would only employ workers on a flexible working hour basis. These workers (flexi-timers) would work 40 hours per week. By 2012, Woolworths's workforce consisted of 16 400 flexi-timers and 590 full-timers. Full-timers earned superior wage rates and benefits. The remuneration package of some full-timers exceeded the wages and benefits applicable to flexi-timers by 50%, even though full-time workers and flexi-timers do the same work.

Woolworths decided that in order to cater for the current market, it needed to operate with an entire workforce consisting of flexi-timers. It decided to convert the full-timers to flexi-timers on the terms and conditions of employment applicable to flexi-timers. In order to do this, Woolworths first invited full timers to voluntarily convert to flexi-timers. It did not invite the Union to participate in this phase. Certain inducements were offered to the full-timers for the conversion. All of the full-timers save for 144 employees opted for early retirement, voluntary severance or agreed to convert to flexi-timers.

During the course of consultation some of the full-timers accepted the voluntary option, leaving 92 full-timers who opposed conversion and did not accept any of the voluntary options. Later SACCAWU and 44 members appreciated the need to work flexi-time and accepted that full-timers should be converted to flexi-timers. SACCAWU initially suggested that the full-timers retain their existing full time wages and benefits, but towards the end of the consultation process, SACCAWU varied its stance. It proposed that the workers would work flexi-time for 40 hours and be paid only for those hours and at lower rates. Woolworths however did not understand this to be a different proposal (a factor later found by the LAC to be pivotal to the outcome of this case), and rejected it.

Woolworths gave notice to terminate contracts of employment and retrenched 92 full-timers. SACCAWU, on behalf of 44 of these full-timers, launched an application in the Labour Court terms of s189A(13) of the LRA to challenge the fairness of the retrenchment procedure adopted by Woolworths. It also launched another application under s191(11), challenging whether there was a fair reason for retrenchment. These applications were later consolidated into one case.

The LC in *SACCAWU and Others v Woolworths (Pty) Ltd (J3159/12, JS1177/12) [2016] ZALCJHB 126 (5 March 2016)* was faced with the employer's argument that the restructuring was necessary so that all employees were to be treated the same. The Court held that employers ought to deal with pay inequity issues in accordance with chapter III of the EEA, rather than through dismissals for operational requirements for employees who refuse to agree changes to terms and conditions of employment that are designed to achieve equal pay. The LC found the

retrenchments to be substantively and procedurally unfair, and ordered that the 44 employees be reinstated retrospectively from their date of dismissal.

On appeal, the LAC in *Woolworths (Pty) Ltd v SACCAWU and Others* (JA56/2016) [2017] ZALAC 54 (19 September 2017**)** upheld only part of the LC's conclusions and orders. The LAC agreed that the dismissals were substantively unfair, but changed the remedy from reinstatement to an award of compensation equal to 12 months' remuneration because it found that the full time posts were redundant. The LAC also set aside the LC's finding that the dismissals were procedurally unfair.

The LAC said the employer had failed to show that it properly considered the alternatives to retrenchment, given that it had misconstrued that the Union's last proposal was no different to its previous one. Had Woolworths properly understood the Union's last proposal, the LAC believed it would have realised that the retrenchment of at least some of the employees could have been avoided.

The Union and the employees challenged in the Constitutional Court the LAC's substitution of compensation for reinstatement as the remedy for the unfair dismissal, as well as challenging the LAC's finding that the retrenchments were not procedurally unfair. They argued that the dismissals were substantively and procedurally unfair.

The ConCourt agreed with the LC's views. It found that the dismissals were both substantively and procedurally unfair, and that the retrenched employees should be reinstated retrospectively to their date of dismissal rather than receive compensation.

Regarding the question of substantive unfairness, the ConCourt highlighted the fact that Woolworths had stated during the consultation process that the fundamental reason for the retrenchments was to be able to employ employees on a flexi-time basis, and yet SACCAWU, at a late stage in the consultation process, had varied its stance and had agreed that employees would work flexi-time. Thus, in the ConCourt's view, the retrenchments were no longer operationally justifiable. Had Woolworths properly considered the alternatives presented by the Union, it may have realised that the retrenchments were no longer necessary. **The ConCourt felt that Woolworths had also not proved that it had properly considered all possible alternatives, before deciding to retrench**. For all these reasons, the ConCourt found that the retrenchments were substantively unfair.

The ConCourt emphasised that the fact that a significant period may have elapsed from the date of dismissal to the date a matter is finalised in court, should not be a bar to reinstatement. The ConCourt considered Woolworths' argument that reinstatement was not 'reasonably practicable' under s193(2) of the LRA, due to the fact that their previous permanent positions no longer existed, but countered this by saying the employees had already indicated they were prepared to work flexi-time under certain conditions. Furthermore, the *positions* (cashiers mostly) they previously occupied, even if not on a full time basis, continued to exist.

The ConCourt accordingly reinstated them retrospectively back into their previous full time positions, these being the conditions under which they were employed at the

time of their dismissal, but directed the parties to resume the consultation process between them to reach an agreement on working flexi-time.

Extract from the judgment:
(Khampepe J:)
Operationally justifiable
[32] Section 189A(19)(b) of the LRA requires the dismissals to be operationally justifiable on rational grounds. The Labour Court found that this requirement was not met. As I have already stated, for the purposes of this judgment it is not necessary for this Court to revisit the decision in *Black Mountain Mining*. That is because, even on the lower standard of rationality set out in *Discreto*, Woolworths has failed to show the retrenchments were operationally justifiable on rational grounds. The sole reason advanced by Woolworths for the dismissal is as contained in the section 189(3) notice, namely that "the company needs to be in a position to employ employees who are able to be used on a flexible basis". This stated purpose was achieved when the individual applicants, represented by SACCAWU, agreed to work the flexible hours and days required. It therefore follows that there was no longer a need for the retrenchments.
.....

Proper consideration of alternatives
[34] During the consultation process SACCAWU proposed, as an alternative to retrenchments, that the employees would convert to the flexi-time model but maintain their same remuneration and benefits. In a letter of 30 October 2012, SACCAWU amended this proposal to the effect that the full-time workers would accept an 11% decrease in their remuneration. Woolworths has argued that it did not understand SACCAWU's proposal in its letter of 30 October 2012 to be any different from the other proposals which it had made and therefore did not consider same. This alleged misunderstanding does not save Woolworths from its failure to have properly considered this as an alternative to the retrenchments, but instead it evidences that this alternative was not properly explored.

[35] The applicants also allege that Woolworths did not properly consider the offered alternatives to retrenchment such as natural attrition and / or wage freezes for the full-time employees. Additionally, the Labour Appeal Court found that Woolworths did not consider the possibility of ring-fencing as an alternative.

[36] Given that Woolworths had been phasing out the full-timers for more than a decade, since 2002, it is inconceivable why this same model could not have continued, particularly as the number of full-timers since 2002 had significantly decreased. A wage freeze would also have sped up the rate of natural attrition.

[37] None of the above alternatives were considered or attempted by Woolworths. Woolworths has also offered no tenable reasons for this failure, when it bears the onus to show that it had considered all possible alternatives in this regard. On the evidence before us, Woolworths has not shown that it properly considered these alternatives. This constitutes a breach of section 189A(19)(c) of the LRA.

[38] It therefore follows that the dismissal of the individual applicants was substantively unfair because Woolworths has failed to prove that it complied with section 189A(19)(b) or (c). In other words, Woolworths failed to prove that the retrenchments were operationally justifiable on rational grounds or that it properly considered alternatives to retrenchments.
.....

[46] Reinstatement must be ordered when a dismissal is found to be substantively unfair unless one of the exceptions set out in section 193(2) applies, namely that the affected employees do not wish to continue working for the employer; the employment relationship has deteriorated to such a degree that continued employment is rendered intolerable; it is no longer reasonably practicable for the employees to return to the position that they previously filled; or the dismissal is found to be procedurally unfair only.

[47] As affirmed by this Court previously, the fact that a significant period might have lapsed from the date of dismissal to the date of the judgment is not a bar to reinstatement. An employee whose dismissal is substantially unfair should not be disadvantaged by the delays of litigation where she or he has not unduly delayed in pursuing the litigation.

[48] At this stage, I deem it appropriate to focus particularly on the exception provided for in section 193(2)(c), namely instances wherein reinstatement is not "reasonably practicable".

[49] The LRA does not define the term "reasonably practicable". However, guidance can be sought from various authoritative court decisions. The Labour Appeal Court in *Xstrata* held:

> *"The object of [section] 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the job no longer exists, or the employer is facing liquidation or relocation or the like. The term 'not reasonably practicable' in [section] 193(2)(c) does not equate with term 'practical', as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile."*

It is thus evident that the term "not reasonably practicable" means more than mere inconvenience and requires evidence of a compelling operational burden.

[50] An employer must lead evidence as to why reinstatement is not reasonably practicable and the onus is on that employer to demonstrate to the court that reinstatement is not reasonably practicable.....

[52] Counsel for Woolworths contended that the positions in this instance were no longer available and had ceased to exist upon the dismissal of the employees. He therefore submitted that the applicants' employment contracts could not be revived as full-time employment contracts. I do not agree that the positions in which the applicants were employed no longer exist. They were employed as cashiers and there has been no suggestion that the number of cashiers has decreased. It is the conditions of employment that have changed and not the positions themselves. Cashier positions do still exist within various Woolworths stores, and have not become redundant nor have they ceased to exist. If this was the position, Woolworths would not be able to be fully functional and operational as it is. As this Court said in *Equity Aviation*, reinstating an employee means restoring the employee to the position in which he or she was employed immediately before dismissal. This means reviving the employee's contract of employment that had been terminated previously.
.....

[56] Although the respondent knows now that it had misunderstood the applicants' last proposal, there is nothing on record that suggests that it has, in the meantime, accepted that proposal as it was. They may have wanted to discuss it further with the applicants. Accordingly, we do not know what agreement the two sides could have ultimately agreed upon. That means that we do not know the terms and conditions under which the applicants

would have continued to work for the respondent if they had never been dismissed. In these circumstances it seems to me that we should revive the contracts of employment which existed between the applicants and the respondent at the time of dismissal on the basis that as soon as possible after this judgment has been handed down the parties may resume the consultation process which ended when the dismissal took place and the applicants may then revive their proposal or make another proposal aimed at the parties reaching an agreement on the issue of them working flexi-time. Accordingly, Woolworths has not shown that reinstatement is not reasonably practicable.

Selection criteria for retrenchment:

National Union of Metalworkers of South Africa and Others v Lectropower (Pty) Ltd (JS1151/2014) [2018] ZALCJHB 266 (6 July 2018)

Principle:
Selection criteria must be agreed to by the consulting parties, and if no criteria have been agreed, criteria must be fair and objective. The onus is upon the employer to demonstrate that the criteria it chose in the face of a disagreement is indeed fair and objective.

Facts:
Cases have confirmed that the duty to show that the selection criteria used for retrenchment were both objective and fair rests on the employer. The employer must prove:

i. that it selected the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties, or failing that, criteria that are fair and objective; and
ii. that the manner in which the criteria were applied was objectively justifiable.

Cases illustrate that employers need to be able to justify both the criteria and the application of those criteria. In this case, the Labour Court found the employer was able to justify the choice of criteria as well as their implementation. It was accepted that a proper consultation process in terms of section 189 of the LRA was followed by the employer, and further that there was indeed a need to retrench. The only issue in dispute was whether the selection criteria used by the employer to select the individual applicants was fair or not. Although the applicants initially contended that there was an agreement that only LIFO would be used, the union later conceded that the employer was correct that there was agreement that LIFO was to be used in certain instances, whilst in others, strategic/operational needs determined the selection. The issue became whether the selection criteria had been applied fairly and objectively.

The court was satisfied that based on the facts (the employer led clear evidence on each stage of the decision making) there was no reason to doubt the fairness of the employer's decision to dismiss those chosen for retrenchment using the criteria of skills, experience and its strategic/operational requirements rather than purely on the basis of LIFO. The chosen criteria did not lack transparency, fairness or objectivity.

The court found that it could not be doubted that due to the nature of the employer's client requirements and the products produced or serviced, **it made sense to retain**

employees with the necessary skills, technical know-how, qualifications and experience. The court evaluated the manner in which the employer weighed up the skills and experience of various employees and held that the employer could justify the decisions it made.

A sobering aspect of this case was the costs order against the union. The employer asked for a punitive cost order against NUMSA, as it was of the firm view that this claim was frivolous and vexatious. Finding that the union's case had no merit and should never have been before the Court, the judge said *"I accept that there is an on-going relationship between NUMSA and the respondent. I have however always held the view that such a relationship is not a bar to a cost order, especially in circumstances where a party should have had serious introspection prior to pursuing a claim such as in this case. In the circumstances, the requirements of law and fairness dictate that NUMSA should be burdened with the costs of this claim."*

Contrasting this judgment is the case of Kenco Engineering CC v National Union of Metalworkers of South Africa (NUMSA) obo Members (JA/29/16) [2017] (LAC) (1 August 2017) where the LAC found the employer's application of the selection criteria to lack objectivity. In that case the employer proposed that the following be applied as selection criteria:

a. skills,
b. work performance,
c. attendance and
d. safety records

NUMSA challenged the procedural and substantive fairness of the retrenchments. The LAC confirmed that the employer was required to place sufficient evidence before the court to enable it to assess whether or not it used and applied skills, work performance, attendance records and safety records in a fair and objective manner, thereby discharging the onus to prove this. But it did not do so. The selection criteria used by the employer were simply not demonstrated to have been fairly and objectively applied.

Despite the outcome in the *Kenco Engineering CC judgment*, **the LAC nevertheless recognised that LIFO is not the only possible criteria for retrenchment**. But the judgment is also a reminder that the onus is on the employer to prove the fairness of any selection criteria used and that they were applied in a fair and objective manner. This will inevitably require detailed evidence from the management team that applied the criteria and selected the employees to be retrenched. Cases will be won or lost on the strength of this evidence. A different outcome might have been achieved if clear evidence had been led of how the criteria were applied.

Extract from the judgment:
(Tlhotlhalemaje,J:)

[25] In terms of section 189(2)(b) of the Labour Relations Act (LRA), the employer and other consulting parties must engage in a meaningful joint consensus seeking process and attempt to reach consensus on the method for selecting the employees to be dismissed. Under section 189 (7) of the LRA, the employer must select the employees to be dismissed according to selection criteria(a) that have been agreed to by the consulting parties, and (b) if no criteria have been agreed, criteria that are fair and objective. The onus is upon the

employer to demonstrate that the criteria it chose in the face of a disagreement is indeed fair and objective.
.....

[29] The respondent's contention was that LIFO was one of the criteria used, together with strategic/operational requirements. In respect of the boiler-making section, it cannot be doubted that due to the nature of the respondent's clients' requirements and the products produced or to be serviced, it made sense to retain employees with the necessary skills, technical know-how, qualifications and experience.
.....

[33] I am therefore satisfied that based on the facts, and comparisons between Kirton and Orme on the one hand, and Segabutle and Sekgathume on the other, there is no reason to believe that the respondent's decision to dismiss the latter two upon a consideration of skills, experience and its strategic/operational requirements rather than purely on the basis of LIFO, cannot be said to be lacking in transparency, fairness or objectivity.

36. In the light of the above conclusions, I am satisfied that the respondent had discharged the onus placed on it to demonstrate that the selection criteria adopted in dismissing the individual applicants was fair and objective. In considering an award of costs, the court takes into account the requirements of law and fairness. The respondent sought a punitive cost order against NUMSA as it was of the firm view that this claim was frivolous and vexatious.

37. Having had regard to the basis of the applicants' claim, I am satisfied that it had no merit from the beginning and should never have been before the Court. I accept that there is an on-going relationship between NUMSA and the respondent. I have however always held the view that such a relationship is not a bar to a cost order, especially in circumstances where a party should have had serious introspection prior to pursuing a claim such as in this case. In the circumstances, the requirements of law and fairness dictate that NUMSA should be burdened with the costs of this claim.

PROTECTED DISCLOSURES

When is a grievance a protected disclosure?

Kabe v Nedbank Ltd (JS633/13) [2018] ZALCJHB 173 (8 May 2018)

Principles:

1. The Protected Disclosures Act is not intended to deal with personal feelings but with criminal and irregular conduct. An employee seeking the protection of the Act bears the onus of showing both that a workplace grievance amounts to a disclosure as defined by the PDA and that there is credible evidence that the employer is in violation of the law.
2. If the evidence is overwhelming that a case is frivolous the scale must tip in favour of making an order as to costs against that litigant.

Facts:
The employee, employed as an Assistant Relationship Governance and Compliance Officer at Nedbank, responded to criticism of her performance by filing 5 grievances against her manager in the course of 11 months, as well as referring three disputes to the CCMA in the same period. She is a qualified attorney who previously had unsuccessfully litigated against the principal in her law firm and had failed to pay the legal costs.

She was eventually charged with poor performance and dismissed. She initially referred an unfair dismissal claim to the CCMA but after the matter had proceeded to arbitration she suddenly referred an automatically unfair dismissal dispute to the Labour Court. The basis of the claim was that the grievances filed against her manager were protected disclosures under the PDA.

During the court proceedings she engaged in behaviour that the court later assessed as vexatious and frivolous.

- She subpoenaed another judge who 8 years previously had worked at Nedbank. She did this, the judge said, to intimidate her employer.
- She canvassed issues of a case she consciously abandoned at the CCMA. She read back her statement of case. She was argumentative and did not present facts that supported her case.
- Without reason or counter-demand she publically rejected an offer of settlement of R200 000 because it was not R204 000.
- The transcript of the disciplinary hearing revealed that she and her legal representative at the hearing conceded that the employer had a legitimate cause for concern about her performance.

The Labour Court considered whether the grievances could be regarded as protected disclosures. It held that the Protected Disclosures Act is not intended to deal with personal feelings but with criminal and irregular conduct. An employee seeking the protection of the PDA bears the onus of showing both that a workplace grievance amounts to a disclosure as defined by the PDA and that there is credible evidence that the employer is in violation of the law.

As regards costs, the court acknowledged that the default position in the Labour Court was not to award costs against a party. But it held that if the evidence is overwhelming that a case is frivolous the scale must tip in favour of making an order as to costs against that litigant. The LC found that the employee had not proved her case and awarded costs against her.

Extract from the judgment:
(Moshoana J)
[9] The applicant's case is that she was subjected to an automatically unfair dismissal principally because the real reason for her dismissal was that she had made a protected disclosure in terms of the PDA. In the alternative her case is that the reason for her dismissal is that she had referred an unfair labour practice dispute to the CCMA. She attempted to bolster this alternative claim, from the bar of course, by suggesting that when she lodged the grievances she was exercising her rights conferred by the Act.
.....

Are the grievances disclosures?

[11] Section 187 (1)(h) is clear. It refers to disclosures as defined in the PDA. Therefore, the starting block is the definition section of the PDA. Section 1 of the PDA provides thus:

> 'Disclosure means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
> (c) That a miscarriage of justice has occurred, is occurring or is likely to occur;
> (d) That the health or safety of an individual has been, is being or is likely to be endangered;
> (e) That the environment has been, is being or is likely to be damaged;
> (f) Unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000; or
> (g) That any matter referred to in paragraphs (a)-(f) has been, is being or is likely to be deliberately concealed.

[12] The grievances by the applicant do not meet the definition set out above. At a workplace, it is awaited that employees would be aggrieved now and then. It is for that reason that a good practice dictates that an employer should have in place a dedicated procedure to deal with employees' grievances. Some grievances have merit whilst others do not. Regard being had to the preamble of the PDA, it was not enacted to allow employees to disparage their employers. Ordinarily, grievances are more about personal feelings of employees. The PDA is not intended to deal with personal feelings but with criminal and irregular conduct. It is largely concerned with more serious breaches of legal obligations.