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Worklaw's 2020 Labour Law Update

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Covid-19: unilateral wage cuts

The Covid-19 pandemic has caused economic devastation, with many organisations implementing drastic measures to stay afloat such as unilateral pay cuts. With the focus on survival, employers have sometimes paid little regard to the legality of some of these measures. In many cases these have not been challenged, with employees not wanting to 'rock the boat' and being only too happy to ensure they keep their jobs.

Burt what if employees / their union did challenge their employer? Would the employer's actions stand up to scrutiny? We attempt below to provide some guidance on these issues, drawing on two recent court decisions.

Firstly, we need to distinguish between situations in which pay cuts were implemented in situations where employees were legally barred from working due to the lockdown restrictions imposed through the Disaster Management Regulations in response to the Covid-19 pandemic, and those situations where employees were able to work but pay cuts were nevertheless imposed as a result of the economic devastation their employer was experiencing as a result of the pandemic.

We also need to emphasise that the focus of this article is on the validity of unilateral pay cuts imposed by management without the consent of employees – ie a unilateral change to terms and conditions of employment. As we shall note, the situation becomes very different if pay cuts are imposed by agreement, perhaps as an alternative to other more drastic measures being considered.

Pay cuts for employees legally barred from working

If an employer was unable to operate due to the lockdown measures, it can be argued that the principle of impossibility of performance or 'force majeure' applies, nullifying a party's obligations to perform contractual obligations – in this case, the employer's obligation to pay wages.

This was recognised in the Labour Court judgment we discuss below in *Macsteel Service Centres SA (Pty) Ltd v Numsa and Others* (J483/20) [2020] ZALCJHB 129 (3 June 2020). In that case, the employer unilaterally implemented a 20% pay cut for employees who were not able to work at all due to the lockdown. The Court, whilst commending the employer for having done so, noted that it could have implemented a '*no work no pay*' rule in respect of these employees

For an employer to use the 'impossibility of performance' justification for a pay cut or for not paying at all, it is important to note that performance should be objectively impossible and not merely difficult, more burdensome or economically onerous (hardship is not the same as impossibility of performance). This point was emphasised in the High Court judgment in *Matshazi Mhlonipheni and Others v Mezepoli Melrose Arch (Pty) Ltd and Another (2020/10556; 2020/10555; 2020/10955; 2020/10956) [2020] ZAGPJHC 135 (3 June 2020)*, where the Court had this to say (clause 40.5):

> *"The respondent companies are not excused from its obligations to its employees because it has decided not to trade in circumstances where it is able to do so, but has elected not to, in anticipation that such trading will not be profitable. Trading may be more burdensome or economically onerous, but economic hardship is not categorised as being a force majeure event; it does not render performance objectively and totally impossible."*

This High Court judgment was about whether certain businesses should be placed under business rescue in terms of the Companies Act. In dealing with this issue, the Court noted that some trading by the employers was possible at the different Covid - 19 Lockdown Levels and that therefore 'impossibility of performance' did not apply in this case.

Pay cuts for employees <u>not</u> legally barred from working

Let's consider this in light of the facts in the *Macsteel Service Centres v Numsa and Others* judgment referred to above.

During the initial Covid-19 total lockdown period in March and April 2020, Macsteel placed all its employees on special leave and paid them their full salaries and benefits, despite the fact that they did not work. When the lockdown was extended, the Company advised its employees and Numsa that due to the devastating impact of the lockdown, all employees would be required to take a 20% salary deduction for May, June and July 2020, which would be reviewed on an on-going basis. It was made clear that these extreme measures aimed to preserve jobs, and that the unprecedented times required everyone to make sacrifices that would ensure the sustainability of the Company and the protection of livelihoods.

Whilst the Company was able to resume operations during the Level 4 Alert with effect from 1 May 2020, its operations could only be scaled up to 50%. This meant that approximately 1 458 employees could not return to work until such a time as the lockdown was eased further. Numsa's members rejected the proposed 20% salary deduction, saying it was unlawful, but the Company nevertheless implemented it for May, June and July 2020.

Rather than not paying employees who were unable to return to work due to the Company only operating at 50% capacity, the Company treated all employees the same and applied the 20% salary deduction to all employees, notwithstanding that some were not working at all. The Company also gave an undertaking that it would apply for Covid-19 TERS benefits in respect of employees' reduced earnings, and that any relief money would be transferred directly to the employees as soon as it was received.

Numsa referred a "*unilateral change to terms and conditions of employment*" dispute to the MEIBC under section 64(4) of the LRA, seeking the *status quo* to remain in respect of all conditions of employment. Numsa gave notice that if it did not receive the required written undertaking to restore the relevant terms and conditions of employment, its members would embark on a strike in support of their demand that the Company refrain from unilaterally changing their conditions of service.

When the strike commenced on 29 May 2020, the Company brought an urgent application to the Labour Court to declare the strike unprotected due to non compliance with s64(1). It argued that it had applied for TERS benefits to cover the payment shortfall, and as such there was no change to employees' conditions, but rather a temporary re-arrangement of how they were to be paid.

The Union disputed this, saying the Company could not guarantee that employees who worked on a full time basis during May - July 2020 would receive their full salaries. TERS was designed to remunerate employees unable to work during the national state of disaster, and it does not make provision for employees who are entitled to work. It was therefore unlikely that the Company would receive any monies for those employees.

The Labour Court commended the Company for paying employees their full remuneration during the initial total lockdown period in March and April 2020, when they rendered no services and for which period 'no work no pay' could have been applied. And even when the country moved to Alert Level 4 from 1 May 2020, the Company continued to pay all employees, including those still not able to work due to the Company only being allowed to operate at 50% capacity, albeit subject to the 20% salary reduction implemented.

The LC however confirmed that any variation to an employee's salary, irrespective of whether it is increased or decreased, amounts to a change in terms and conditions of employment and cannot be effected unilaterally. Neither Numsa nor any of the employees had agreed to the change. On this basis, the Court found that the 20% across the board reduction in employees' salaries constituted a unilateral change to terms and conditions of employment, and dismissed the Company's attempts to declare the strike unprotected.

It is clear from this judgment that unilaterally imposed pay cuts without employees' consent, under circumstances in which employees are not legally barred from working, will be judged as a unilateral change to terms and conditions of employment.

Unilateral changes to terms and conditions of employment: what the LRA says

Surprisingly, the LRA does not provide a clear dispute resolution path for disputes about unilateral changes to terms and conditions of employment in the same manner as for example unfair dismissal, discrimination or unfair labour practice disputes.

Where they are dealt with, is under the strike and lockout section of the Act. Section 64(4) enables employees / a union, having referred a dispute about a unilateral change to terms and conditions of employment to the CCMA or a bargaining council, to require the employer not to unilaterally implement the changes during the 30 day period provided for conciliation. If the employer fails to comply with this, the provisions of section 64(1) that would otherwise require the employees / union to wait until the end of conciliation before striking and to give 48 hours' notice of its commencement, do not apply. This paves the way for an immediate protected strike over the issue.

Parties seeking an order to compel an employer not to unilaterally change terms and conditions of employment, would have to fall back onto the jurisdiction and general powers granted to the Labour Court under sections 157 and 158 of the LRA. In terms thereof, the Labour Court could order an employer to undo unilateral changes to employees' terms and conditions of employment

What can employers learn from all of this?

In a time of crisis, which is clearly what the Covid-19 pandemic has been for many employers, clear thinking is required. Faced with potentially crippling long term damage, employers should engage with their employees and their representatives, to seek agreed solutions that could ensure the survival of the organisation and also protect jobs. Under these circumstances, it may be possible to agree wage freezes or wage cuts as an alternative to more drastic measures such as retrenchment.

Apart from the obvious benefits of a mutually agreed turnaround strategy, these measures may avoid costly and unnecessary litigation.

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Emerging themes in Discipline and Dismissal

Section 185 of the LRA sets out an employee's right not to be unfairly dismissed. Section 188 requires the employer to prove that there is a fair reason for dismissal based on misconduct, incapacity or operational requirements, and that the dismissal was effected in terms of a fair procedure. Codes of Good Practice then flesh out guidelines on what constitutes fairness under these various headings.

All of this leads to a fairly settled jurisprudence on the law of unfair dismissal, and yet new issues continue to arise from the judgments. The purpose of this article is to provide an overview of the judgments affecting the law of unfair dismissal from 2019 and 2020 to date.

1. **Procedural fairness**

1.1 How specific should disciplinary charges be?

Problems can arise if insufficient attention is given to how disciplinary charges are described, taking into account the nature of the misconduct identified.

In the case of *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA4/18) [2019] ZALAC 57 (15 August 2019)* charges were laid against the employee that included theft, fraud and dishonesty. At the disciplinary hearing, the employee was found to have committed the offences although it was not established that he had acted intentionally. He was then dismissed for "gross negligence". The **CCMA arbitrator** found his dismissal to be substantively unfair, because he had not been charged with gross negligence.

The **Labour Court** dismissed the employer's application for review, pointing out that the employee was charged with dishonesty and had failed to prove the misconduct alleged. On appeal, the **Labour Appeal Court** did however adopt a different approach, saying the specific categorisation by the employer of the alleged misconduct is less important than whether the charges were specific enough for the employee to be able to answer them. The LAC recognised that employers, not being skilled legal practitioners, sometimes define alleged misconduct too narrowly or incorrectly, citing the example of an employee being charged with theft, only for the evidence to establish unauthorised possession of company property.

The LAC confirmed that the dismissal was fair, taking into account the nature of the offence, the seniority and role of the employee, and his short period of service.

Learnings from this case:

(i) We recommend that employers refer to the offences from their disciplinary code in drafting disciplinary charges, and use plain simple language – not criminal law descriptions – to describe the alleged misconduct.

(ii) If a chairperson contemplates finding an employee guilty on a different but related charge, he/she should allow the employee/ employee's representative to make representations on whether it would be appropriate to do so, before making a decision.

(iii) If the employee has not had a fair opportunity to state a case in response to the allegations, the hearing could be adjourned to allow for amended charges and for the employee to prepare an appropriate response.

1.2 Having a 'second shot' in another court

SA labour laws carefully delineate most disputes and provide clear systems and procedures for how each of those disputes should be processed. Whilst this is usually extremely helpful, it can have its downsides, with what is essentially the same dispute arising out of the same set of facts being processed differently through different forums.

Take the example of *Archer v Public School-Pinelands High School and Others (CA12/18) [2019] ZALAC 70 (25 November 2019)*. The employee referred an unfair dismissal dispute to the CCMA. When he lost, he then instituted civil proceedings in the Labour Court claiming breach of contract. The LC dismissed the employee's claim on the basis of a lack of jurisdiction, having already pursued his claim at the CCMA.

On appeal however the Labour Appeal Court overturned the LC decision. The LAC held that the employee had both an unfair dismissal claim and a contractual claim arising from the termination of his employment contract, and that he could pursue both of these independently as the cause of action was different in each case. The LAC ordered that the matter be referred back to the LC to deal with the merits of the alleged breach of contract claim.

Contrast this with the case of *Feni v CCMA and Others (JA30/2019) [2020] ZALAC 24; (2020) 41 ILJ 1899 (LAC) (28 May 2020)*. Here the employee referred two dismissal disputes to the CCMA, the one alleging the dismissal was automatically unfair in terms of s187 of the LRA, the other a 'standard' unfair dismissal dispute under s188. The LAC confirmed the CCMA did not have jurisdiction to deal with the second referral, having already dealt with an unfair dismissal dispute under the first referral. It held that the same *cause of action* existed in both disputes, which was not allowed.

Learnings from these cases:

(i) The courts will not allow the same cause of action to be processed in more than one dispute. If this happens, parties' should object on the basis of a lack of jurisdiction in the subsequent referrals.

(ii) But the same facts could result in different disputes having more than 1 cause of action – eg an unfair dismissal dispute under the LRA and an unfair discrimination dispute under the EEA. If this happens, it should be argued that any relief (such as compensation) awarded in one case should be taken into account in the other case, to prevent 'double dipping'.

1.3 Effect of 'immediate resignation' on subsequent disciplinary proceedings

We receive several Worklaw helpline requests from subscribers asking what they can do when an employee resigns '*with immediate effect*' when faced with disciplinary charges, notwithstanding a notice period contained in the contract of employment. Whilst in most cases the employer is happy to accept the resignation,

as it solves the problem and prevents the possibility of an unfair dismissal dispute arising, there are sometimes circumstances in which the employer may want to push ahead with the disciplinary action. Can the employer regard the employee as still in employment during the notice period, and proceed with the disciplinary action during this period?

There have been conflicting judgments dealing with this issue - see discussion on these in Worklaw's *November 2016 subscriber newsletter* and *August 2019 newsflash*. The latest judgment that we are aware of is Naidoo and Another v Standard Bank SA Ltd and Another (J1177/19) [2019] ZALCJHB 168 (24 May 2019). In this case the LC found 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 at that time, even when it is in breach of the notice period contained in the contract.

The LC said the employer's remedy, if it wishes to enforce the contract, is to seek a court order for specific performance. That would then reinstate the terminated contract and direct performance with its terms. 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 interdicted the Bank from proceeding with the disciplinary hearings against the employees.

Learnings from this case:
We suggest this judgment is completely impractical, requiring an employer to go to the trouble and expense of attempting to obtain an order for specific performance compelling the employee to comply with the notice period requirements in the contract of employment. Courts may also be very reluctant to grant such orders. Nevertheless as far as we know this is the latest judgment on this issue, so parties are obliged to recognise it. We understood this matter was being taken on appeal, but at the time of writing have not heard of the outcome of any appeal.

2. Substantive fairness

2.1 Proving that the trust relationship has broken down

The Dismissal Code of Good Practice makes mention that dismissal would be justified if the misconduct was so serious that "*it makes a continued employment relationship intolerable*" (item 4). The SCA in a 2009 judgment in *Edcon v Pillemer (191/2008) [2009] ZA SCA 135 (5 October 2009)* found that despite serious dishonesty committed by the employee, the employer had not led evidence that the working relationship had broken down. That was enough, the SCA said, to make the dismissal unfair. Since then employers have felt obliged to produce a witness to give evidence that a continued employment relationship is intolerable as the trust relationship has broken down, despite questioning whether this is really necessary.

Courts have subsequently not always followed the approach adopted by the SCA in *Edcon v Pillemer.* The LAC for example in both *Woolworths (Pty) Ltd v Mabija and Others (PA3/14) [2016] ZALAC 5 (19 February 2016)* and *Impala Platinum Ltd v*

Jansen and others (2017) 26 LAC 1.11.4 also reported at [2017] 4 BLLR 325 (LAC) found that where an employee is found guilty of gross misconduct it may not be necessary to lead evidence pertaining to a breakdown in the trust relationship, in that in some cases the extreme bad conduct of the employee would warrant an inference that the trust relationship has been destroyed.

The issue again arose in *Autozone v Dispute Resolution Centre of Motor Industry and Others* (JA52/2015) [2019] ZALAC 46; [2019] 6 BLLR 551 (LAC); (2019) 40 ILJ 1501 (LAC) (13 February 2019). An employee was dismissed on grounds of dishonesty (theft, misappropriation of company funds), which was found to be fair by a CCMA arbitrator. On review, the Labour Court held that as no evidence had been led to show that the trust relationship between the parties had broken down, the dismissal was unfair.

On appeal, the Labour Appeal Court held that the evidence as a whole established that the employee deliberately and falsely misrepresented certain facts and pocketed company money for his own benefit. The LAC said that it was not necessary for the employer in such circumstances to produce evidence to show that the employment relationship had been irreparably destroyed. The nature of the offence supported this conclusion. The LAC overturned the LC order and said the dismissal was fair.

Similar issues arose in *Khambule v National Union of Mine Workers and Others* (JA89/17) [2019] ZALAC 61 (24 July 2019), when the CCMA arbitrator was not satisfied that the relationship between the employer and employee had broken down to the extent that dismissal was the only appropriate sanction. In dealing with this case, the LAC confirmed the following principles:

(a) An employer is <u>not</u> obliged to lead evidence to prove that the trust relationship has broken down, if the facts speak for themselves;
(b) But if the employer specifically seeks dismissal on the basis of a breakdown in the trust relationship, then it <u>must</u> lead evidence to prove the breakdown;
(c) Even if evidence is led of a breakdown in the relationship, it is the commissioner who must determine whether dismissal is the appropriate sanction.

Learnings from these cases:

We think the line of cases above is sufficient to argue that the approach adopted in *Edcon v Pillemer* does not have to be followed. However, we suggest it would still be safer for an employer to lead evidence from a witness that there has been a breakdown in the trust relationship, particularly when there is a need to counter an employee's version that the trust relationship has <u>not</u> broken down.

2.2 What circumstances would make reinstatement / re-employment inappropriate unfair dismissal remedies?

Section 193(2) of the LRA makes reinstatement or re-employment the default remedies for unfair dismissal, saying this is required <u>unless</u> –

(a) the employee does not want this;
(b) the circumstances would make a continued employment relationship '*intolerable*';
(c) it is not '*reasonably practicable*' for the employer to do so;
(d) the dismissal is unfair only because the employer did not follow a fair procedure.

A good illustration of circumstances surrounding a dismissal that would make '*a continued employment relationship intolerable*' arose in a recent LAC case of *AFGEN (Pty) Ltd v Ziqubu* (JA34/18) [2019] ZALAC 40 (13 June 2019). At the CCMA there was unchallenged evidence that the employee seldom if at all reported back to her superior as required; did not take her seriously and bypassed her; did not respect her as her superior; did not adhere to instructions; was generally rude; did not have a good working relationship with her; did not respond to her emails; allowed her work to fall behind in an unacceptable manner; and had received a number of verbal warnings and reprimands for her behaviour which she simply ignored.

Despite this background, there was unsatisfactory evidence on the actual disciplinary charges. The CCMA commissioner found her dismissal to be substantively unfair but refused reinstatement and awarded her 3 months' salary as compensation. On review, the **Labour Court** substituted the award with an order that the employer reinstates the employee and compensates her with 24 months' salary.

On appeal, **Labour Appeal Court** overturned the LC judgment. The LAC accepted that because the employee's dismissal was found to be substantively unfair, there has to be an extraordinary reason to deviate from the standard remedies of reinstatement or re-employment under s193(1), and the conduct of the employee plays a crucial role in this regard. The LAC found that the employment relationship in this case was dependent on the employee and her superior working closely together. As there was clear evidence that they would be unable to do so, to reinstate the employee into her position would be totally inappropriate. The LAC agreed with the CCMA commissioner's decision that it was inappropriate to reinstate her.

Learnings from this case:
The conduct of the employee and the close working relationship required by a position will play a crucial role in determining whether a continued employment relationship would be intolerable, thereby making reinstatement or re-employment inappropriate.

2.3 Dismissal for ill-health: The reciprocal duties of employer and employee

The Code of Good Practice: Dismissal (in Items 10 & 11) imposes clear obligations on an employer in an incapacity situation. An employer must consider several steps before contemplating dismissal for ill health or injury:

- the extent of the injuries / ill health;
- all possible alternatives short of dismissal;
- alternative employment or adapting the employee's duties;
- counselling and rehabilitation in cases of alcohol or drug abuse; and
- take greater steps to accommodate incapacity arising from the work situation.

There is no explicit mention in the Code of any *employee* obligations, particularly in establishing the nature and extent of the incapacity. This arose in the recent LAC judgment in *Parexel International (Pty) Ltd v Chakane, T N.O and Others* (JA39/2018) [2019] ZALAC 50 (27 June 2019).

In this case, within 4 months of starting work as a clinical research nurse, the employee fainted and hit her head as a result of a work related incident. She lost consciousness and required medical help. 3 medical reports were submitted to the

employer - with varying descriptions of the cause and the consequences. She was off work for almost 6 months, using up her full sick leave entitlement and also took annual leave and special leave. The employer stopped paying her salary but continued contributions to medical aid, provident fund and life cover.

A psychiatrist reported that the employee's main medical problem was a mood disorder not related to the injury on duty. The psychiatrist reported that the employee's condition was manageable and should not lead to permanent disability, although severe enough to cause *"severe functional limitations*".

During her time off work, the employee provided medical certificates indicating different reasons for her absence. In light of this, the employer informed her that she was to submit a medical report containing the nature of the illness, prospect of recovery, and whether she would be able to resume normal duties, but no report was received. The employer made several attempts to hold incapacity hearings, but could not proceed either because the employee could not attend or a medical certificate was presented. After being off work for over 9 months, she was dismissed at an incapacity hearing that she did not attend.

The employee challenged her dismissal at the CCMA. The commissioner found that the employer had failed to prove that the employee was incapable of performing her duties and she was reinstated retrospectively with 10 months' back pay. The Labour Court dismissed the employer's review application with costs.

On appeal, the Labour Appeal Court confirmed that our courts have recognised that an employer is not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health. The LAC noted that the employee was off work for over 9 months, and did not provide the medical report requested by the employer. The LAC found that, in failing to provide this, the employee frustrated a proper consideration of the reasons for her extended absence.

The LAC said the arbitrator failed to take into account that the employee was incapable of returning to work. The LAC overturned the LC judgment and found the employee's dismissal to have been procedurally and substantively fair.

Learnings from this case:
An employer is not required to hold an incapacitated employee's position open indefinitely. This case makes it clear that the incapacity investigation involves reciprocal duties, and an employee must assist the employer to assess the extent of the incapacity by providing the necessary medical information required.

2.4 Assessing performance during probation

The LAC judgment in *Ubuntu Education Fund v Paulsen N.O and Others* (PA12/17) [2019] ZALAC 56 (15 August 2019), whilst recognising that an employee on probation is still entitled to substantive and procedural fairness, illustrates how the lower standard of substantive fairness required by the Dismissal Code of Good Practice should be applied.

Item 8(1)(j) of the Code provides as follows:

> *Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period* ***ought to accept reasons for dismissal that may be less compelling*** *than would be the case in dismissals effected after the completion of the probationary period.*

The language of the above section may be somewhat clumsy, but its intention becomes clear from this LAC judgment.

Having a look briefly at the facts of this case, the employee was employed as a supply chain co-ordinator subject to an initial 6 month probationary period. At least 8 performance meetings and appraisals were subsequently held with her, at which she was consistently made aware that her performance was not up to standard despite being given guidance and assistance to improve.

A poor work performance hearing was held, at which it was concluded that she lacked the understanding and ability to carry out her assigned tasks, despite having been given assistance and a reasonable opportunity to improve. She was dismissed for poor work performance. The person subsequently appointed in her place achieved the required performance standards within 2 weeks.

The employee referred an unfair dismissal dispute to the CCMA. The arbitrator found her dismissal to have been substantively unfair. He rejected the performance appraisal evidence on the basis that there was no evidence before him of how the allocation of points was done. He believed that she should have been re-trained and certain responsibilities removed from her job description. She was reinstated retrospectively to the date of her dismissal.

The LAC commented that the purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job. It also serves the purpose of ascertaining whether the employee is a suitable employee in a wider sense. This allows consideration of matters of “fit” – aspects of demeanour, diligence, compatibility and character. Whilst an employee on probation is still entitled to substantive and procedural fairness, it is clear from item 8(1)(j) of the Dismissal Code that arbitrators should hesitate to interfere with employer’s decisions on whether probationary employees have attained the required performance standard, or with the standards themselves.

The LAC set aside the arbitrator’s award and said the employee’s dismissal was fair.

Learnings from this case:

(i) Whilst a probationary employee is entitled to substantive and procedural fairness, arbitrators should hesitate to interfere with employer’s decisions on whether probationary employees have attained the required performance standard, or with the standards themselves.
(ii) The purpose of probation is not only to assess if the employee has the skills or ability to do the job, it’s also to assess the employee’s suitability in a wider sense on matters of “fit”- such as demeanour, diligence, compatibility and character.

(iii) An employer is entitled to extend a probationary period in order to complete a performance appraisal.
(iv) An employer cannot generally be expected to amend the requirements of an advertised position to accommodate the limitations of a probationary employee.

3. Specific forms of misconduct

3.1 Refusing to submit to a polygraph test

Uncertainty continues to exist over whether an employer can require employees to undergo a polygraph test, which we think may have been made worse by the recent Labour Court decision in *Crossroads Distribution (Pty) Ltd t/a Skynet Worldwide Express v National Bargaining Council for the Road Freight and Logistics Industry and Others* (JR1335/14) [2020] ZALCJHB 78 (12 May 2020).

In this case employees' contracts of employment required them to submit to polygraph testing, with a refusal to do so being regarded as a serious breach of contract which may lead to disciplinary action and possible dismissal. A situation arose where high-value goods were changed to low-value goods. An investigation took place during which all of the employees were requested to undergo a polygraph test in terms of their employment contracts. All employees consented except for four who refused. After attempts to persuade them to do so failed, they were ultimately dismissed for failing to co-operate with the company in conducting its investigation.

Two of the employees referred an unfair dismissal dispute to the CCMA. The arbitrator held that the dismissals were substantively unfair. On review the Labour Court held that the arbitrator did not take into account the employer's evidence about the seriousness of the incident, and that the purpose of the polygraph testing was not to establish guilt but to narrow the investigation to assist in identifying the perpetrators. The LC set aside the arbitrator's award and found the dismissals of the two employees to be procedurally and substantively fair.

We think it is unfortunate that the LC did not refer to two relevant previous judgments in coming to its decision. In *Nyathi v Special Investigating Unit [2011] ZALCJHB 66;J1334/11 (22 July 2011)* the Labour Court held that where it is a material term of the contract to submit to a polygraph test and the employee refuses to do so, this may be a breach of contract but it would be a separate enquiry as to whether or not a dismissal would be fair.

This should be read with the LAC decision in *Gemalto South Africa (Pty) Ltd v Ceppwawu obo Louw and Others (JA 54/14) [2015] ZALAC 36 (27 August 2015)* that held even where employees are in breach of their employment contract which permits polygraph testing, **the enforcement of the term is fair only where there is reason to suspect those employees of involvement in wrongdoing.** The implication of the LAC decision is that other evidence is required first before the right to test by polygraph is triggered. On this basis, it may be unfair to dismiss where the purpose of testing of an entire workforce is to narrow down the investigation, as in the *Crossroads* case discussed above.

Learnings from this case:
We recommend that the *Crossroads* judgment be read in the context of the LAC's *Gemalto's* decision. Employers should only attempt to enforce an employee's contractual undertaking to submit to a polygraph test, when other evidence already exists that create a reason to suspect the employee's involvement in wrongdoing.

3.2 Theft and 'possession'

Many employers use the phrase 'unauthorised possession' or removal of company property in their disciplinary codes to avoid the difficulties of proving the intention to steal. But what if the possession was authorised? At what stage does an unreturned item become theft of that item? The LAC's decision in *Aquarius Platinum (SA)(Pty) Ltd v CCMA and Others (JA96/2018) [2020] ZALAC 23 (18 May 2020)* provides some useful guidelines in this regard.

A shaft engineer obtained permission to remove metal scaffolding poles from the workplace to mount a TV aerial at home, although he did not follow the correct procedures to document this. The poles, which had an estimated value of R1000 if sold as scrap, were never returned. No acceptable evidence was given by the employee to explain why the poles were not returned. The employee was dismissed on several charges including "*failure to comply with company rules and procedure*", and "*theft / unauthorised removal of company property*".

The CCMA arbitrator found him guilty of not complying with the waybill procedure but that this misconduct was "not grave and wilful", concluding that that there was no dishonesty by the employee. The arbitrator found the dismissal to be unfair and ordered the employee's reinstatement. On review the Labour Court was also not persuaded that there was any dishonesty, saying the employee could be found guilty of taking company property and not returning it, but not theft. The LC confirmed the arbitrator's finding that the dismissal was unfair.

On appeal the Labour Appeal Court took a different view. The LAC said that the crime of theft takes place when a person deliberately deprives another person of the latter's property permanently. The deliberate retaining of property which an employee is not entitled to retain is not distinguishable, conceptually, from theft. The fact that the employee removed the property openly after getting permission to borrow it, does not mean that theft could not occur. An inference can be drawn that there is theft where an employee who borrows the employer's property does not return it and, in the absence of other evidence, the probabilities lend weight to such an inference. The LAC found the employee's dismissal to be fair.

Learnings from this case:
Whilst this judgment provides some useful guidelines in dealing with theft cases, it is important to note that most cases will be decided on the specific facts in question, as to whether removal or possession of property has become theft.

3.3 Derivative misconduct revisited

Over the past few years Worklaw has reported on several cases about a 'derivative misconduct', which arises from an employee's refusal or unwillingness to give the employer information that would assist the employer in identifying who was

responsible for misconduct. This is a controversial form of misconduct: keeping silent about what you know about other employees' misconduct. It is seen as flowing from the duty of good faith that an employee owes the employer.

For the first time, the Constitutional Court has grappled with derivative misconduct in *Numsa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others (CCT202/18) [2019] ZACC 25 (28 June 2019)*. We reported in Worklaw's *August 2018 subscriber newsletter* that the LAC in 2 minority judgments dealing with these same facts, had expressed strong reservations about the application of derivative misconduct, and it appears the ConCourt has taken note of these concerns.

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.

Whilst some employees were positively identified as committing violence and were dismissed for this, other employees were dismissed for derivative misconduct – failing to give the employer information about who was responsible for the misconduct. The ConCourt found that the dismissal for derivative misconduct of employees who were not identified as being present when the violence was committed, was unfair and they were reinstated some 7 years after being dismissed.

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 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.

Learnings from this case:
This ConCourt judgment will, at a practical level, make it much harder for employers in future to bring derivative misconduct cases. Employers will have to recognise the reciprocal good faith obligations imposed on them and take steps to guarantee the safety of employees (an almost impossible task), before expecting them to come forward with information about perpetrators of violence during a strike.

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.

As can be seen from the above, it will be no easy task for employers in future to prove derivative misconduct.

3.4 Age discrimination

Almost all litigation over age discrimination has been about the retirement age. Section 188(2)(b) of the LRA tries to prevent disputes by providing "*a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity*". The gap in that provision is that it does not cover the situation where there is no normal or agreed retirement age.

In *BMW (South Africa) (Pty) Ltd v National Union of Metalworkers of South Africa and Another* (JA 86/18) [2020] ZALAC 22 (18 May 2020) the employer tried to change the retirement age from 65 to 60, which the employee did not accept. The Labour Appeal Court held that when BMW dismissed the employee on reaching age 60, his dismissal was not based on his agreed age of retirement but rather on an imposed age of retirement without his consent. The employee's dismissal was automatically unfair in terms of s 187(1)(f) of the LRA, as BMW had discriminated against him on the grounds of age. His dismissal also constituted unfair discrimination on the same grounds in terms of s 6(1) of the EEA.

Learnings from this case:
An attempt to change an agreed retirement age and force an employee to retire at a younger age against his / her will, is likely to be found to be an automatically unfair dismissal and to constitute unfair discrimination.

3.5 Social media behaviour

There have been a number of cases in which employees have been dismissed for their comments on social media. These have often been judged as bringing their employer into disrepute.

The case of *Onelogix (Pty) Ltd v Meyer and Others* (PR184/2018) [2019] ZALCPE 26 (3 December 2019) is interesting because it involved an employee being dismissed for sending a 'meme' image in a whatsapp message to other employees, which was perceived to be racist and offensive in the context in which the words were used. The meme depicted a young white child, holding a can of beer and smoking a cigar, with a caption that read – "*Growing up in the 80's before all you pussies took over – may as well die young*".

The Labour Court found that the employee's dismissal was fair. The LC rejected the argument that found that the meme's theme was 'generational' and not racist, and failed to take into account the South African context. Given South Africa's history and the notion that prevailed in the 1980s that some were inherently superior to others, the LC found that the reasonable reader would read a racial undertone into the meme. The words had a clear connotation of a comparison between the era of apartheid and the advent of the era of democracy in 1994, with the suggestion that

those who assumed power in 1994, i.e. black people, are ‘pussies’ (a derogatory term whatever meaning was ascribed to it).

In *Edcon Ltd v Cantamessa and Others (JR30/17) [2019] ZALCJHB 273 (11 October 2019)* an employee was dismissed for posting a racist comment on facebook whilst on annual leave, after watching a Carte Blanch episode about President Zuma having replaced Finance Minister Nhlanhla Nene with Minister Des van Rooyen in December 2015. Her Facebook profile stated that she was employed by Edcon as a Fashion Buyer. From the day after her Facebook post, Twitter users started to mention her post. Several Twitter users demanded answers from Edcon and in some instances, threatened not to do business with Edcon. On 22 January 2016, the Sowetan Newspaper published an article about the employee’s post entitled *“Racist Monkey slur strikes again”.*

A CCMA commissioner found her dismissal to be unfair due to her having made the post whilst on annual leave and not at work, and the post having made no mention of Edcon. The Labour Court set aside the CCMA award and held that the dismissal was fair. Whilst the LC confirmed the general rule is that an employer has no jurisdiction or competency to discipline an employee for conduct that is not work related, which occurs after working hours and away from the workplace, an employer can exercise discipline over an employee in those circumstances provided it establishes the necessary connection between the misconduct and its business. In this case, the fact that the employee was on leave turned out to be irrelevant because of the direct and immediate impact of the Facebook post on the employer’s business.

Learnings from these cases:
Employees should be extremely careful about what they say on social media. Not only are these platforms likely to be inspected when they apply for jobs or promotion, but posts that may be interpreted as offensive could lead to strong disciplinary action being taken against them. A quick comment or post, made without thinking about its consequences or how it could be construed, could have lifelong consequences.

3.6 Speaking your mind in the workplace - what are the limits?

SA’s Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters. The approach of our courts is to balance freedom of expression against other countervailing rights or interests, such as the rights to reputation, privacy, equality or the values of the administration of justice or national security.

Within the context of the workplace, the rule that an employee may not 'bring the employer's name into disrepute' is often resorted to in situations of management / employee conflict. This is illustrated in the case of *Ndzimande and Others v Didben N.O and Others* (JR 1404/14) [2019] ZALCJHB 73 (2 April 2019). Employees were interviewed by the media in the course of a protest march, and were subsequently dismissed for false comments that brought the company into disrepute. The employees had said that the company had undertaken to pay them for overtime, but had refused to do so. They also said that the company’s head office in Australia gave employees ‘2.6 billion’ to share, which the company was withholding and had instead offered them profit sharing.

The company's Code on Communications provided that no employee was permitted to communicate with the public media without permission from the Chief Operations Officer (COO). The Code further provided that the authority to communicate with the media was vested in the COO, and that employees were to decline to comment on internal matters when approach by the media.

The Labour Court said that ordinarily there is nothing wrong when employees raise legitimate grievances and threaten to exercise their constitutional right to strike. There is however everything wrong when in the course of raising those grievances, employees make false and defamatory statements, which may have serious repercussions for the employer. This is even more so, when those employees had been warned to desist from such conduct in the Code on Communications. The LC confirmed that the employees' dismissals were fair.

Learnings from this case:
Employees should be extremely careful about making any statements to the media about their employer, particularly when governed by a media policy that limits their ability to do so.

3.7 Misconduct caused by employee depression

In *Legal Aid South Africa v Jansen (CA3/2019) [2020] ZALAC 37 (21 July 2020)* a Legal Aid paralegal was dismissed at a misconduct enquiry for 17 days' unauthorised absenteeism, insolence, and a refusal to obey a lawful instruction. He referred to the Labour Court both an automatically unfair dismissal claim under s187(1)(f) of the LRA and an unfair discrimination claim under s6 of the EEA. In both disputes, the employee claimed that the employer unfairly discriminated against him on the ground of his disability of reactive / manic depression.

The employee did not deny the misconduct with which he was charged. He admitted his absence from work for the 17day period and that he failed to inform his manager of his absence from work. He admitted to acting insolently and refusing to obey a lawful and reasonable instruction. The employee's explanation was that all this misconduct, committed over a period of time, was caused by his depression. He said that his depression prevented his ability to appreciate the wrongfulness of his misconduct and that he had no self-control. Had he not been depressed, he argued, he would not have misconducted himself in this way.

The LAC said depression must be looked at as a form of ill health. As such, an incapacitating depression may be a legitimate reason for terminating the employment relationship, provided it is done fairly in terms of Items 10 and 11 of the Code of Good Practice: Dismissal. If an employee is temporarily unable to work for a sustained period due to depression, the employer must investigate and consider alternatives short of dismissal before resorting to dismissal. If the depression is likely to impair performance permanently, the employer must attempt first to reasonably accommodate the employee's disability. Dismissal of a depressed employee for incapacity without due regard and application of these principles will be substantively and/or procedurally unfair.

The LAC also recognised that depression play a role in an employee's misconduct, even negating an employee's capacity for wrongdoing. Where severe depression impacts on the employee's state of mind (**cognitive ability**) and will (**conative ability**) to the extent that the employee is unable to appreciate the wrongfulness of the conduct, dismissal for misconduct would be inappropriate and substantively unfair, and the employer would need to approach the difficulty from an incapacity or operational requirements perspective.

The LAC held that the employee had failed to produce evidence, whether medical or otherwise, showing that his acts of misconduct were caused by his depression or that he was dismissed for being depressed. As a consequence the employer had a legitimate basis for imposing discipline. The proximate reason for disciplining the employee was his misconduct and not the fact that he was depressed. He was relatively capable and knowingly conducted himself in contravention of the rules of the workplace. Under the circumstances discipline was justifiably called for.

For these reasons the LAC overturned the LC's findings of unfair discrimination and automatically unfair dismissal.

Learnings from this case:
This case highlights factors to be considered in deciding whether an employee's depression and behaviour should be treated as misconduct or incapacity. This is often very difficult to determine, as behaviour does not always neatly fit into one or other category.

4. Dismissals for Operational requirements

4.1 Obligation to consult minority unions over retrenchments

The Constitutional Court judgment in *Amcu and Others v Royal Bafokeng Platinum Limited and Others* [2020] ZACC 1 has significant implications for employers' obligations to consult minority unions over retrenchments and other collective issues. In this case AMCU challenged whether the provisions of the LRA that provide for limited consultation prior to retrenchment, and those that allow majority parties to extend their collective agreements to cover all affected employees, complied with the constitutional right to fair labour practice.

In September 2015 Royal Bafokeng Platinum retrenched 103 employees, some of whom were AMCU members. No prior consultation had taken place with AMCU, which represented approximately 11% of employees, or with the employees themselves. This was due to a retrenchment agreement concluded between the employer and 2 other unions at the mine, NUM the majority union with 75% membership, and UASA another minority union. The agreement was extended to cover all employees and contained a "full and final settlement clause", whereby all those party to the agreement waived their rights to challenge the lawfulness or fairness of their retrenchment.

S189(1) of the LRA says that when an employer contemplates retrenchments, it must consult–
(a) any person it is required to consult in terms of a collective agreement; failing which -
(b) a workplace forum, if one exists, and any registered union whose members are likely to be affected; failing which -

(c) the employees likely to be affected or their representatives nominated for that purpose.

The above effectively creates a "*cascading hierarchy of consultation*": if the employer is required to consult in terms of a collective agreement, the obligation to consult other minority unions or a workplace forum does not arise. And the employees likely to be affected only have to be consulted when neither (a) nor (b) above apply.

The concept of 'majoritarianism' – a consistent theme under the LRA – is entrenched through s23(1) of the LRA, that provides that an employer and a majority union can extend the binding nature of a collective agreement (eg a retrenchment agreement) to cover all employees within a bargaining unit, including members of another minority union.

The ConCourt's minority judgment would have found s189(1) of the LRA to be unconstitutional and invalid, by failing to impose a legal duty on an employer to consult with all those affected by a retrenchment. It suggests the interesting possibility that concluding a collective agreement on retrenchment with a majority union, which may be extended to cover non parties, and prior consultation with a minority union, are not necessarily mutually exclusive. Consultation and collective bargaining serve different purposes and vindicate different rights, and the outcomes from consultation (even with different groups) can then be taken into account by parties in concluding a subsequent collective agreement.

Notwithstanding the views expressed above, the ConCourt's majority judgment did not agree that s189(1) of the LRA is constitutionally invalid, and also dismissed the challenge to s23(1)(d) of the LRA that provides for the extension of collective agreements with a majority union to cover all employees within a bargaining unit.

The majority judgment found that the consultation process prescribed under s189 is procedurally fair and accords with international standards. It noted that since the introduction of the LRA, our jurisprudence has consistently interpreted s189 to exclude any requirement of individual or parallel consultation in the retrenchment process outside the confines of the hierarchy created in s189(1).

Learnings from this case:

(i) The ConCourt's majority judgment confirms the "*hierarchy of consultation*" as prescribed in s189(1) of the LRA and the majoritarian principles embodied in s23(1).
(ii) Whilst the ConCourt's majority judgment confirms it may not be necessary to consult minority unions under s189(1), it also states there is nothing to prevent employers from agreeing to do so. If minority unions have a strong presence, employers may be wise to consider doing so in the interests of workplace stability, even when a collective agreement is subsequently concluded with a majority union that is extended to cover all employees.

4.2 Reason for retrenchment constituting an automatically unfair dismissal?

There is a potential contradiction in the LRA: sections 188 and 189 accept that there can be fair dismissals based on an employer's operational requirements, defined as the "*economic, technological, structural or similar needs of the employer*", and yet

section 187(1)(c) says that a dismissal is automatically unfair if the reason for the dismissal is "*a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer*". What happens then if employees are dismissed for refusing to accept changed working conditions arising out of a restructuring exercise?

This was the crux of the issue in *Numsa and Another v Aveng Trident Steel (A Division of Aveng Africa Proprietary Limited) and Others* (JA25/18) [2019] ZALAC 36 (13 June 2019). With the steel industry in decline and a 20% fall in its sales volumes and profitability in 2014, Aveng had to reduce costs and decided it needed to restructure. The company initiated a consultation process with Numsa in terms of section 189A of the LRA, and the discussions included the restructuring the company's grading system.

After a year of consultations that did not result in an agreement, Aveng informed Numsa that the consultation process had now been exhausted and gave notice that it would implement the new structure as per the redesigned job descriptions. When employees refused to accept offers of employment in terms of the redesigned job descriptions, they were dismissed for operational reasons.

Numsa argued that the reason for the dismissal was the employees' refusal to accept Aveng's demands in respect of the altered job descriptions and grade structure, and was accordingly automatically unfair in terms of section 187(1)(c). Aveng denied that the dismissal was automatically unfair and maintained that the reason for dismissal was a fair reason based on its operational requirements.

The Labour Appeal Court said that the fact that a proposed change is refused and is followed by a dismissal does not mean that the reason for the dismissal is necessarily the refusal to accept the proposed change. The fundamental question is to determine what the true reason for the dismissals was**,** and whether the refusal was the main or dominant cause of the dismissals. The LAC concluded that the dominant reason for the dismissals in this case was Aveng's operational requirements which had underpinned the entire consultation process, and accordingly did not constitute an automatically unfair dismissal.

Learnings from this case:

(i) Whilst this might seem like playing with words, what we learn from this LAC judgment is that the key question is to determine whether **the main or more dominant cause of the dismissal** was (a) the employees' refusal to accept operational changes or (b) the operational requirements of the employer.

(ii) The LAC also recognised that the LRA does not distinguish between dismissals for operational reasons intended to save a business from failure and those intended simply to increase profitability. However, it noted that employers do not have *carte blanche* – the connection between the dismissal and the employer's operational needs must still pass the test of fairness. The real question remains: will it be fair in the given circumstances to dismiss employees in order to increase profit or efficiency?

4.3 Can you use a retrenchment process to resolve incompatibility issues?

Faced with serious incompatibility issues between two managers, Avis resorted to an operational requirements process to resolve the issues. Avis consolidated the posts of the two incompatible managers and invited each to apply for the new post. Was this the correct process to follow under these circumstances?

The Labour Appeal Court in *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk* (2020) 29 LAC 1.11.26 also reported at [2020] 6 BLLR 549 (LAC) did not think it was and said the process was unfair, as incompatibility is a species of incapacity impacting on work performance.

The LAC said that if an employee is unable to maintain an appropriate standard of relationship with peers, subordinates and superiors, this may constitute a substantively fair reason for dismissal. Procedural fairness in incompatibility cases requires the employer to inform the employee of the conduct causing the disharmony, to identify the relationship affected by it and to propose remedial action to remove the incompatibility. The employee should be given a reasonable opportunity to consider the allegations and proposed action, to reply thereto and if appropriate to remove the cause for disharmony. The employer must then establish whether the employee is responsible for or has contributed substantially to irresolvable disharmony to the extent that the relationship of trust and confidence can no longer be maintained.

The LAC found the employee's dismissal to be unfair and taking account of *ex gratia* payments made by Avis to her over and above her statutory and contractual entitlements, awarded her 7 months' remuneration as compensation.

Learnings from this case:

(i) The LAC provides clear procedural fairness guidelines for dealing with incompatibility cases as a form of incapacity.

(ii) This case also confirms that compensation for procedural unfairness is not based on an employee's actual (financial) loss, and is a '*solatium*' (redress) for the loss of a right. Key factors in determining compensation for procedural unfairness are as follows:
   a. the extent of the deviation from a fair procedure;
   b. the employee's conduct;
   c. the employee's length of service; and
   d. the anxiety and hurt caused to the employee as a consequence of the employer not following a fair procedure.

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October 2020

www.worklaw.co.za

Landmark 2019 – 2020 judgments

COVID -19: UNILATERAL WAGE CUTS

***Matshazi Mhlonipheni v Mezepoli Melrose Arch (Pty) Ltd and Others; Lwazi v MezepoliNicolway (Pty) Ltd and Another; Moto v Plaka Eastgate Restaurant CC and Another; Mohsen and Another v Brand Kitchen Hospitality (Pty) Ltd and Another (2020/10556; 2020/10555; 2020/10955; 2020/10956;) [2020] ZAGPJHC 136 (3 June 2020*)**

Principles:
Impossibility of performance brought about by vis major or casus fortuitus will generally excuse performance of a contract. But in each case it is necessary to look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked, to see whether the general rule ought to be applied.

If the impossibility is self-created or if the impossibility is due to the employer's fault, the rule will not apply. There is not impossibility simply because there is a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable. Economic hardship is not categorised as being a force majeure event; it does not render performance objectively and totally impossible. A company is not excused from its obligations to its employees because it has decided not to trade in circumstances where it is able to do so, but has elected not to, in anticipation that such trading will not be profitable.

Facts:
The applicants in each of the four applications sought orders placing the first respondent in each application under supervision and commencing business rescue proceedings under s 131(4)(a) of the Companies Act 71 of 2008. The applications were supported by various employees and creditors of each respondent company.
The businesses of the respondent companies slowed from 16 March 2020 and they had not traded at all since 26 March 2020. The 158 employees of the respondent companies were last paid their salaries on 28 March 2020. It was not disputed that this has had a devastating impact on them and their families.

None of the respondent companies traded since the national lockdown was implemented in response to the COVID-19 pandemic on 27 March 2020. They did not trade in food products (which was designated an essential service) during level 5 of the lockdown, and the directors of the respondent companies took a decision not to trade on a 'delivery only' or delivery/collection basis under level 4 and level 3 of the national lockdown. They stated that the restaurants would only resume operations 'once the lockdown is lifted'.

Prior to the issue of these applications, during April and May 2000, memoranda were sent by the respondent companies to the employees of the respondent companies. These contained the following information: The restaurants are small businesses which are in distress. Applications were being made to various entities (the landlords, the Department of Small Business Development, the Small Enterprise Development Agency, the UIF's Temporary Employee Relief Scheme).

On 28 April 2020, the day on which staff salaries were to be paid, a memo (the '28 April memo') was sent, stating that: - 'the company will not be paying you for the

month of April 2020 as a direct result of the down-trading and continued losses incurred during the recent months exhausting any historic profits there may have been.'‘ The company will remain closed for the duration of the lockdown – we will not be opening for deliveries only at this stage.'

After assessing the financial circumstances of the companies, the **High Court (Gauteng Local Division, Johannesburg**) ordered all 4 companies to be placed under supervision and business rescue proceedings under section 131(4)(a) of the Companies Act, 2008. The court set out the legal principles governing force majeure and impossibility of performance which played a central role in the court's assessment of the companies' decision not to pay wages.

Extract from the judgment:
(Weiner J)

[27] The employees of the respondent companies have at all times tendered their services, and the respondent companies at all times expected them to remain available to return to work. Their employment contracts were not suspended; the respondent companies took a decision not to operate on any basis during the lockdown and thus did not require their employees to attend to their ordinary functions.

[28] Even if it is accepted that the employment contracts somehow became 'suspended', the effect of that suspension would not impact on the standing of the applicants, as the contracts did not terminate, and they remain employees of the respondent companies. This is clear from the various memoranda sent to the employees. In addition, the trust companies could only apply for UIF/TERS on behalf of employees.

.....

Impossibility of performance

[29] If provision is not made contractually by way of a force majeure clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement.

.....

[39] The obligation which the trust companies owed to their employees, to pay them their salaries, has always been capable of performance and was at no time rendered impossible. It is trite that the duty to pay, and the commensurate right to remuneration, arises not from the actual performance of work, but from the tendering of service. The Regulations which were in force during level 5 of the National Lockdown make it clear that employers are not excused from their obligation to pay their employees' salaries, because it includes in the list as an essential service the 'Implementation of payroll systems to the extent that such arrangement has not been made for the lockdown, to ensure timeous payments to workers.'

[40] The applicants contended that the trust companies have also been permitted to trade in some form throughout the entire lockdown.

40.1. During level 5 of the National Lockdown, from 27 March 2020 to 30 April 2020, they were permitted to conduct limited trade (the sale of cold foods, of which there are many on the restaurants' menus).

40.2. The restaurants also operate a deli, which does not sell hot cooked food and was thus permitted to trade throughout the level 5 lockdown period.

40.3. Under level 4, the respondent companies were entitled to trade in any foods on a 'delivery only' basis.

40.4. Under level 3, which came into force on 1 June, the respondent companies will be permitted to sell all food for collection or delivery.

40.5. The respondent companies are not excused from its obligations to its employees because it has decided not to trade in circumstances where it is able to do so, but has elected not to, in anticipation that such trading will not be profitable. Trading may be more burdensome or economically onerous, but

economic hardship is not categorised as being a force majeure event; it does not render performance objectively and totally impossible.

[41] In my view, force majeure cannot be relied upon by the respondent companies as a defence to their obligations owed to their employees.....

[42] Once it is accepted that the defence of force majeure is not available to the respondent companies, it follows that, in failing to pay their employees their salaries on 28 April 2020, the respondent companies failed to pay over an amount in terms of an obligation under a contract, with respect to employment related matters.

[43] .....

[44] The fact that UIF payments were made to some of the employees does not excuse the respondent companies of their obligations to pay employee salaries, particularly in circumstances when, on the respondent companies' own version, cash reserves and other forms of funding are available.

***Macsteel Service Centres SA (Pty) Ltd v National Union of Metal Workers of South Africa and Others (J483/20) [2020] ZALCJHB 129 (3 June 2020*)**

Principle:

Any variation to an employee's salary, irrespective of whether it is increased or decreased, amounts to a change in terms and conditions of employment and cannot be effected unilaterally.

Facts

During the initial Covid-19 total lockdown period in March and April 2020, Macsteel placed all its employees on special leave and paid them their full salaries and benefits, despite the fact that they did not work. Employees were not required to use their annual leave.

When the lockdown was extended, the Company sent a communication to its employees and Numsa, advising that due to the devastating impact of the lockdown, all employees would be required to take a 20% salary deduction for May, June and July 2020, which would be reviewed on an on-going basis. It was made clear that these extreme measures aimed to preserve jobs, and that the unprecedented times required everyone to make sacrifices that would ensure the sustainability of the Company and the protection of livelihoods.

Whilst the Company was able to resume operations during the Level 4 Alert with effect from 1 May 2020, its operations could only be scaled up to 50%. This meant that approximately 1 458 employees could not return to work until such a time as the lockdown was eased further. Numsa's members rejected the proposed 20% salary deduction, saying it was unlawful, but the Company nevertheless implemented it for May, June and July 2020.

Rather than not paying employees who were unable to return to work due to the Company only operating at 50% capacity, the Company treated all employees the same and applied the 20% salary deduction to all employees, notwithstanding that some were not working at all. The Company also gave an undertaking that it would apply for Covid-19 TERS benefits in respect of employees' reduced earnings, and that any relief money would be transferred directly to the employees as soon as it was received.

Numsa referred a “unilateral change to terms and conditions of employment” dispute to the MEIBC, seeking the status quo to remain in respect of all conditions of employment. Numsa gave notice that if it did not receive the required written undertaking to restore the relevant terms and conditions of employment, its members would embark on a strike in support of their demand that the Company refrain from unilaterally changing their conditions of service.

When the strike commenced on 29 May 2020, the Company brought an urgent application to the Labour Court to declare the strike unprotected due to non compliance with s64(1). It argued that it had applied for TERS benefits to cover the payment shortfall, and as such there was no change to employees’ conditions, but rather a temporary re-arrangement of how they were to be paid.

The Union disputed this, saying the company could not guarantee that employees who worked on a full time basis during May - July 2020 would receive their full salaries. TERS benefits were designed to remunerate employees unable to work during the national state of disaster and it does not make provision for employees who do work on a full time basis. It was therefore unlikely that the Company would receive any monies for those employees.

The Labour Court commended the Company for paying employees their full remuneration during the initial total lockdown period in March and April 2020, when they rendered no services and for which period ‘no work no pay’ could have been applied. And even when the country moved to Alert Level 4 from 1 May 2020, the Company continued to pay all employees, including those still not able to work due to the Company only being allowed to operate at 50% capacity, albeit subject to the 20% salary reduction implemented.

The LC however confirmed that any variation to an employee’s salary, irrespective of whether it is increased or decreased, amounts to a change in terms and conditions of employment and cannot be effected unilaterally. Neither Numsa nor any of the employees had agreed to the change. On this basis, the Court found that the 20% across the board reduction in employees’ salaries constituted a unilateral change to terms and conditions of employment, and dismissed the Company’s attempts to declare the strike unprotected.

Extract from the judgment:
(Prinsloo J)

[69] In my view the question is whether the 20% salary reduction for May, June and July 2020 implemented by the applicant constitutes a unilateral change in terms and conditions of employment or whether that is simply an issue of potential short payment of salary.

[70] In Staff Association of the Motor and Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd the Court held that section 64(4) and (5) of the LRA is aimed at limiting the managerial prerogative to vary terms and conditions of employment and/or policies unilaterally and found that:

> “To be successful under s 64(4) the employee has to show firstly unilateral changes were effected to the terms and conditions of the employment contract and secondly that there was no consent to the unilateral changes.”

[71] As to what forms part of the terms and conditions of employment, the Court held that any variation to an employee’s salary, irrespective of whether it is increased or decreased, amounts to a change in terms and conditions of employment and cannot

be effected unilaterally. Salary is a quid pro quo for work rendered and any change that has the effect of affecting an employee's salary or remuneration package, constitutes a change to terms and conditions of employment.

[72] In casu, the applicant announced and implemented a 20% reduction in the salaries of its employees. It is undisputed that NUMSA did not agree to this reduction.

[73] I cannot but find that the 20% reduction in the salaries of its employees across the board constitutes a unilateral change to terms and conditions of employment.

[74] I do not believe that it is for the urgent Court to engage in an investigation or to make a finding as to the reasons why the reduction in the employees' salaries was implemented. The reasons may be well founded and completely reasonable but those would be best aired during conciliation, as the dispute has been referred to the bargaining council and is still pending.

.....

[81] Another factor central to the respondents' case which cannot be ignored, is the fact that the applicant failed to distinguish between employees who are working and those who are not in applying the salary reduction to all its employees. The respondent submitted that the employees who are working on a full time basis during May, June and July 2020 are entitled to their full salaries. The salary reduction should have been applied only to the employees who are not working.

[82] In my view, there is merit in this issue. Notwithstanding the applicant's best intentions not to prejudice any of its employees and to treat them the same, the reality is that they are not in the same position. The reality in law is that the employees who rendered no service, albeit to no fault of their own or due to circumstances outside their employer's control, like the global Covid-19 pandemic and national state of disaster, are not entitled to remuneration and the applicant could have implemented the principle of "no work no pay".

[83] The converse is however also true. Where employees rendered their full time services, they are entitled to their full salaries and any reduction in their salaries, even for a sound reason to protect the greater good of all employees, would constitute a unilateral change in terms and conditions.

[84] Insofar as the applicant is not prepared to guarantee that the employees who worked full time would receive their full salaries, regardless of the outcome of the application for the TERS benefits, the applicant has not restored the terms and conditions of employment, as contemplated in section 64(4) of the LRA.

[85] Had the applicant provided an undertaking that it would pay its employees 80% of their salaries on the due date and that it would top up the shortfall as soon as the TERS monies were received from the Department, but in the event that the TERS monies did not cover the entire salary, the applicant would cover that shortfall to ensure that employees who worked during the relevant periods, will be paid their full salaries, the outcome of this application would in all probability be different.

EMERGING THEMES IN DISCIPLINE AND DISMISSAL

1. PROCEDURAL FAIRNESS

1.1 How specific should disciplinary charges be?

EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA4/18) [2019] ZALAC 57 (15 August 2019)

Principle:
Charges must be specific enough for the employee to be able to ascertain what act of misconduct is alleged. The categorisation by the employer of the alleged misconduct is of less importance. Provided no significant prejudice flowed from an incorrect characterisation, an appropriate disciplinary sanction may be imposed.

Facts:
An employee was the team leader for Microsoft server administrators. His girlfriend asked him to assist with the installation of Microsoft Office software on her mother's personal computer. He sent two 'beta keys' and a volume licence key to her mother, which he had privately downloaded. This email was picked up by internal forensic investigators. When confronted, he checked with the desktop support personnel who confirmed that the key he had downloaded was, in fact, the volume licence key. He testified that he had not picked this up because the volume licence key did not appear on the KMS server where he had checked. After learning that he had sent a volume key, he informed the investigators of this.

Charges were laid against the employee covering theft, fraud, dishonesty, the unauthorised removal of material, being in breach of confidentiality agreements, divulging confidential information, and disregarding or breaching the bank's code of ethics. **At the disciplinary hearing**, the employee was found to have committed the offences although it was not established that he had acted intentionally. He was however dismissed for "gross negligence"

The employee referred a dispute to the CCMA. The commissioner found the dismissal was procedurally fair but substantively unfair because the employee had been found guilty of the offence of gross negligence - with which he had not been charged. Given that he had been charged with dishonesty, negligence was not a competent verdict. The commissioner did not canvass whether dismissal was an appropriate sanction for the negligence in question.

The Labour Court dismissed the employer's application for review, pointing out that the employee was charged with dishonesty. That was the allegation he prepared to meet and that was the allegation that the employer did not prove. The LC said that the arbitrator correctly found that the employer did not discharge the onus of proving intent, and thus could not prove the misconduct that it had alleged, making the dismissal unfair.

On appeal to the Labour Appeal Court it was held that the commissioner's finding that it was not competent to sanction the employee for negligence was a material error of law and unreasonable, and the Labour Court erred in upholding

it. The LAC said that the charges must be specific enough for the employee to be able to answer them. It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance. The LAC recognised that employers, not being skilled legal practitioners, sometimes define or restrict alleged misconduct too narrowly or incorrectly, citing the example of an employee being charged with theft and for the evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property.

The LAC held that the evidence established that employee was at least negligent. Given the nature of the offence, the seniority and role of the employee and his short period of service in the employ of the employer (less than one year), the employer justifiably lost trust in the continuation of an employment relationship. Dismissal was an appropriate sanction in the circumstances.

The lesson of this case is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of applicable rules or standards.

Extract from the judgment:
(Murphy AJA)

[15] One of the key elements of fairness is that an employee must be made aware of the charges against him. It is always best for the charges to be precisely formulated and given to the employee in advance of the hearing in order to afford a fair opportunity for preparation. The charges must be specific enough for the employee to be able to answer them. The employer ordinarily cannot change the charge, or add new charges, after the commencement of the hearing where it would be prejudicial to do so. However, by the same token, courts and arbitrators must not adopt too formalistic or technical an approach. It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance.

[16] Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. For example, it is not uncommon for an employee to be charged with theft and for the evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property. The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of applicable rules or standards.

[17] In short, there is no requirement that competent verdicts on disciplinary charges should be mentioned in the charge sheet - subject though to the general principle that the employee should not be prejudiced. Prejudice normally will only arise where the employee has been denied knowledge of the case he had to meet. Prejudice is absent if the record shows that had the employee been alerted to the

possibility of a competent verdict on a disciplinary charge he would not have conducted his defence any differently or would not have had any other defence.

[18] The finding of the commissioner that it was not competent to sanction Danney for negligence was accordingly a material error of law and unreasonable, and the Labour Court erred in upholding it.

1.2 Having 'a second shot' in another court

***Archer v Public School-Pinelands High School and Others (CA12/18) [2019] ZALAC 70 (25 November 2019*)**

Principle:
Where an employee has two claims which do not have the same cause of action, s/he is at liberty to pursue the claims in separate forums.

Facts:
This case illustrates that it is possible to have two causes of action arising out of what seem to be the same facts. The employee referred an unfair dismissal dispute to the **CCMA** in which he claimed that his dismissal by Pinelands High School was procedurally and substantively unfair and that he should be reinstated or compensated.

At arbitration, the School contended that the employee had failed to join the School Governing Body in the proceedings, and the arbitrator directed that the Governing Body be joined as a respondent in the arbitration. Nevertheless, at the conclusion of the hearing the arbitrator found that the employee's dismissal was both procedurally and substantively fair.

The employee did not institute review proceedings against the arbitrator's award. Instead he instituted **civil proceedings in the Labour Court** against the School and the Governing Body. He claimed that the School was his employer and that he was removed from his employment by the Governing Body, which was unlawful and unauthorised. He claimed that the School's failure to reinstate him and/or to remedy the Governing Body's unlawful actions constituted an unlawful breach of his contract of employment.

The Labour Court dismissed the employee's claim due to a lack of jurisdiction. It held that, after pursuing a case in the CCMA based on an alleged unfair dismissal, he could not now approach the Labour Court on the basis of an unlawful breach of contract.

On appeal, the Labour Appeal Court overturned the LC's decision. The LAC held that the employee had both an unfair dismissal claim and a contractual claim arising from the termination of his employment contract. This entitled him to pursue a claim in the CCMA and an independent contractual claim in either the High Court or the Labour Court, which have concurrent jurisdiction to determine a contractual claim in terms of section 77 of the BCEA.

Despite the adverse finding in the CCMA, the LAC held the employee was entitled to pursue his contractual claim in the Labour Court as it had a different cause of action from his unfair dismissal claim under the LRA. Because of this, it was immaterial that

the CCMA dismissed the employee's unfair dismissal claim or that the award was not taken on review to the Labour Court.

The employee was not precluded from pursuing his two claims in different forums by the principle of res judicata (which means that a matter that has been adjudicated by a competent court / body may not be pursued further by the same parties). This is because the claim that was before the Labour Court and the one that was pursued in the CCMA were not the same claims. The one was for payment of damages arising from an alleged breach of contract, and the other was for compensation arising from an unfair dismissal under the LRA. They do not have the same cause of action.

Having found that the LC did have jurisdiction to hear the matter, the LAC ordered that it be referred back to the LC to deal with the merits of the alleged breach of contract claim.

Extract from the judgment:
(Kathree-Setiloane AJA)

[10] The question for determination on appeal is whether the Labour Court was correct in finding that it lacked jurisdiction to determine the contractual dispute before it.

[11] The appellant contends that the Labour Court erred in concluding that it lacked jurisdiction to determine his contractual claim as jurisdiction is to be determined from the pleadings, and his pleaded case was clearly based on breach of his contract of employment which, in terms of section 77 of the Basic Conditions of Employment Act, ("BCEA") the Labour Court has jurisdiction over.

[12] To the contrary, the first and second respondents submit that the Labour Court was correct in dismissing the appellant's claim for want of jurisdiction as it constituted forum shopping which must be prevented. They argue that the true nature of the appellant's claim is one of unfair dismissal which he pursued against the first respondent in the CCMA claiming reinstatement, alternatively maximum compensation. And since his claim in the CCMA is essentially the same as that in the Labour Court, the latter is precluded by the principle of res judicata. In addition, they contend that having made an election to pursue his unfair dismissal claim in the CCMA, the appellant is bound by that election and cannot approach a civil court or the Labour Court based on an allegation that his purported termination was unlawful. Lastly, they argue that the Labour Court was correct on the principle established in Gcaba that once a litigant has chosen a particular cause of action and system of remedies provided for by the LRA, it is impermissible to abandon that cause when a negative decision or event is encountered. They accordingly ask that the appeal be upheld.

[13] The question for determination is not a novel one. In 2009, the Supreme Court of Appeal ("SCA") dealt with a similar question in Makhanya v University of Zululand…
…..

[15] The SCA held in Makhanya that a dismissed employee has various alternative remedies. An employee may lodge a claim to enforce or claim a breach of an employment contract and, in addition, lodge a claim under the LRA for unfair dismissal. In other words, an employee has both a common law contractual right to challenge a dismissal in the Labour Court as well as an independent right under the LRA…

[16] On application of these principles to the decision on appeal, the appellant has both an unfair dismissal claim and a contractual claim arising from the termination of his employment contract. This entitled him to pursue a claim in the CCMA and an independent contractual claim in either the High Court or the Labour Court which have concurrent jurisdiction to determine a contractual claim in terms of section 77 of the BCEA which provides that the "Labour Court has concurrent jurisdiction with the

civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract." The appellant elected to pursue his contractual claim in the Labour Court…

[17] Despite the adverse finding in the CCMA, the appellant was entitled to pursue his contractual claim in the Labour Court as it has a different cause of action from his unfair dismissal claim under the LRA. .....

Feni v Commission for Conciliation, Mediation and Arbitration and Others (JA30/2019) [2020] ZALAC 24; (2020) 41 ILJ 1899 (LAC)

Principle:
Where there is one dispute then there should be one set of proceedings. It is not the reasons for a dismissal which are referred to conciliation but the unfairness of the dismissal.

Facts:
The employer issued a notice to the employee in which it called for representations as to why his services should not be terminated on the grounds of incompatibility. The letter set out a series of grounds 'on which I hold the preliminary view that your services should be terminated on grounds of incompatibility.' The employee did not make any representations following the receipt of this letter. The employer then wrote a further letter to the employee dismissing the employee with immediate effect on the grounds of incompatibility.

Following receipt of this letter, the employee referred **an alleged automatic unfair dismissal dispute to the CCMA**, summarising the facts of the dispute as "dismissal for making protected disclosures and for exercising my rights". A certificate of the outcome of the dispute which had been referred to conciliation was issued which certified that, as the dispute had remained unresolved, it could now be referred to the Labour Court because it involved an alleged automatic unfair dismissal flowing from a protected disclosure.

A day later the employee completed and served **a further CCMA LRA 7.11 referral form referring to the nature of the dispute as "dismissal"**. In this referral, the type of dismissal was described as "for unknown reasons". The facts of the dispute were summarised as 'dismissed when there was no hearing, no charges referred and no fault of my own'. The date of the dismissal was exactly the same date which had been inserted in the first LRA 7.11 referral form. In short, there was no dispute that one act of dismissal had prompted the employee to generate two referrals.

This second referral was set down for conciliation. At these proceedings the employer raised a point in limine in which it alleged two unfair dismissal disputes had been referred by the employee pertaining to the very same dismissal. As the CCMA had already considered the dispute previously and had issued a certificate of outcome certifying that the dispute had remained unresolved and could be referred to the Labour Court as it pertained to an alleged automatically unfair dismissal based on an alleged protected disclosures, it was contended that the CCMA did not have jurisdiction to hear the matter.

The point in limine was upheld by the Commissioner because the two disputes are the same in nature as it relates to the employee's dismissal. The matter was already

referred to the Labour Court for adjudication and therefore the CCMA lacked jurisdiction to arbitrate the matter.

The employee then approached the **Labour Court** contending that the CCMA did indeed have jurisdiction to hear this second referral. In dismissing this application, the Labour Court noted that this was not a case where there were two causes of action but rather one where the employee sought two separate hearings for the same dismissal which was impermissible in law.

The employee appealed to the **Labour Appeal Court**. The LAC confirmed the judgment of the Labour Court. It held that there was only one dismissal. If a dispute concerning a single act of dismissal was being heard in the Labour Court, it would be possible for the employee to make an application to amplify his case so as to include as a second ground his allegation of unfair dismissal. The court could then decide to sit as an arbitrator in respect of this component of the case. Such a cause of action is sanctioned by s158 (2) of the LRA.

The principle emerging from this case is clear: Where there is one dispute, then there should be one set of proceedings. It is not reasons for a dismissal that are referred to conciliation but the unfairness of the dismissal.

Extract from the judgment:
(Davis JA)
[10] The crisp questions for determination are whether the CCMA has jurisdiction to conciliate and arbitrate the second dismissal which was lodged on 26 July 2016 and, if it did not, on what basis can it be found that it did not have such jurisdiction. In particular, the question arises as to whether either of the doctrines of res judicata or lis pendens is applicable in this case.
.....
[24] In the present case, as I have emphasised, there was only one dismissal. That dismissal was referred to conciliation and then to the Labour Court ... As the Constitutional Court said in the AMCU case, it is not reasons for a dismissal which must be referred to conciliation but the unfairness of the dismissal' (para 21), because the Constitutional Court considered that there were two separate dismissals, the approach adopted by the Court is distinguishable from the present dispute. Indeed, the emphasis placed by the Court on difference between the reasons for the dismissal and the dismissal itself is fatal to the appellant's case in the present dispute.
[25] Were appellant's argument to succeed, it would create significant obstacles to one of the essential objections of LRA with regard to dismissals, namely their expeditious resolution thereof. A party could, as in this case proceed with a referral of an alleged unfair dismissal dispute to the CCMA, which would fail to resolve it. Because the case was one based on an unfair dismissal where, as in this case, it was alleged that the dismissal was based on an alleged protected disclosure and therefore constituted an automatically unfair dismissal, the matter would proceed to the Labour Court. However, the disgruntled employee could then raise a battery of further reasons for the very same dismissal and, while the first argument was pending resolution before the Labour Court, he could revert to the CCMA on the grounds that he had a series of further reasons as to why he had been dismissed. If that argument succeeded the CCMA would be engaged either with a conciliation process or possibly an arbitration thereafter at the same time as the fairness of the same dismissal was to be heard before the Labour Court or possibly on appeal by the Labour Appeal Court.
[25] This set of consequences would be entirely incongruent with the policy of the LRA, being expedition of the resolution of a single act of dismissal.

1.3 Effect of 'immediate resignation' on subsequent disciplinary proceedings

***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 when 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 at that time, 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 reinstate 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 <u>not</u> 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.

Conflicting authorities of this Court

[21] The applicants hinged their case on Mtati v KPMG Services (Pty) Ltd, where the Court, confronted with similar facts, found as follows:

> *[24] In my view, the second letter of resignation of the applicant changed the status of the employee from that of being an employee, in the ordinary sense of the word, to that of being the erstwhile employee of the respondent. This means that the termination of the employment contract with immediate effect took away the right of the first respondent to proceed with the disciplinary hearing against her. The powers of the employer to discipline an employee post the resignation is well illustrated by what is said in the decision of the Labour Appeal Court of Lesotho in the case of Mahamo v Nedbank Lesotho Limited, where it is held that:*
>
> > *"Resignation is a unilateral act which brings about termination of the employment relationship without requiring acceptance...Whilst the Respondent took every effort to ensure that the disciplinary hearing was procedurally fair, its efforts were unnecessary because the employment contract had already been terminated by the Applicant himself on 20th October 2000. . ."*

[22] Even though Mtati was appealed successfully, the Labour Appeal Court (LAC) only dealt with the grounds of mootness of the application. The ratio decidendi in Matati was endorsed in unreported decision in Chiloane v Standard Bank of South Africa Ltd, where the Court emphasised that the employer's power to discipline the employee ceased when she tendered an unequivocal resignation with immediate effect but that the employer could avail itself to common law remedies. I agree.

[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.

2. PROCEDURAL FAIRNESS

2.1 Proving that the trust relationship has been broken

***Autozone v Dispute Resolution Centre of Motor Industry and Others (JA52/2015) [2019] ZALAC 46; [2019] 6 BLLR 551 (LAC); (2019) 40 ILJ 1501 (LAC) (13 February 2019*)**

Principle:
An employer relying on irreparable damage to the employment relationship to justify a dismissal would be prudent normally to lead evidence in that regard, unless the conclusion that the relationship has broken down is apparent from the nature of the offence and/or the circumstances of the dismissal. Where the offence in question reveals a stratagem of dishonesty or deceit, it can be accepted that the employer probably will lose trust in the employee, who by reason of the misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the relationship intolerable or unfeasible.

Facts:
The employer's Regional Operations Manager instructed the employee to employ casual labour to clean up waste and rubble at the back of the store. The employee then recruited three casual labourers. In the presence of the employee, the Regional Operations Manager informed the three casuals that they would each be paid R50 for the task. When the task was completed, the Regional Operations Manager, in the presence of the branch manager, instructed the employee to obtain R150 from the cashier. Despite this instruction, the employee approached the cashier and requested R180.

Later the three casuals approached the branch manager and complained that the R50 payment to each of them was too little for the work done. When the branch manager was informed by the cashier that she had in fact handed R180 to the employee, he confronted the employee and asked why he had requested R180 and only paid over R150. The employee responded by taking the R30 out of his pocket and later explained that he had acted on his own initiative to pay the casuals more and had withheld the R30 balance until the work was complete. The employee was dismissed on grounds of dishonesty (theft, misappropriation of company funds or attempted theft or misappropriation).

At arbitration, the arbitrator concluded that the employer had proved that the dismissal was for a fair reason and held that the dismissal was substantively fair. **On review, the Labour Court** held that there was no evidence that showed how the misconduct impacted on the trust relationship between the parties. In the absence of such evidence, the arbitrator ought to have found that the dismissal unfair because there was no proof that the trust relationship between the parties had broken down.

On appeal, the Labour Appeal Court held that the evidence as a whole established that the employee deliberately and falsely represented that the amount to be paid to the casuals was R180 instead of R150, and that he intended to pocket the difference for his own benefit. The LAC said that it was not necessary for the employer in such circumstances to have produced evidence to show that the employment relationship had been irreparably destroyed. The nature of the offence and the manner of its

commission support a conclusion that the continuation of the relationship had become intolerable. The LAC upheld the appeal and overturned the LC order, the effect of which was to confirm the arbitrator's award that the dismissal was fair.

The LAC did say, in line with the judgment in Woolworths (Pty) Ltd v Mabija and Others (PA3/14) [2016] ZALAC 5 (19 February 2016), that an employer relying on irreparable damage to the employment relationship to justify a dismissal, would be prudent normally to lead evidence about that, unless the conclusion that the relationship has broken down is apparent from the nature of the offence and/or the circumstances of the dismissal. Where the offence in question reveals dishonesty or deceit, the LAC accepted that the employer probably will lose trust in the employee due to the untrustworthy behaviour, rendering a continued relationship intolerable.

Extract from the judgment:
(Murphy AJA)

[11] Consequently, the only issue on appeal is whether Sikhakhane's conduct breached the trust relationship so as to render the continuation of the employment relationship intolerable.

[12] Undeniably, the evidence on the issue is somewhat thin. An employer relying on irreparable damage to the employment relationship to justify a dismissal would be prudent normally to lead evidence in that regard, unless the conclusion that the relationship has broken down is apparent from the nature of the offence and/or the circumstances of the dismissal. Where the offence in question reveals a stratagem of dishonesty or deceit, it can be accepted that the employer probably will lose trust in the employee, who by reason of the misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the relationship intolerable or unfeasible.

[13] Dishonest conduct, deceitfully and consciously engaged in against the interests of the employer, inevitably poses an operational difficulty. The employer thereafter will be hard pressed to place trust in such an employee. It will be difficult going forward for any task involving a measure of discretion or reliance to be entrusted to the deceitful employee. The operational requirements of the employer alone, therefore, may very well justify the dismissal. An employer is entitled to have a driver it can rely on to act in good faith to advance and protect its interests. Sikhakhane's conduct shows that he is not such a driver. It was not necessary for Autozone in such circumstances to have produced evidence to show that the employment relationship had been irreparably destroyed. The nature of the offence and the manner of its commission support a conclusion that the continuation of the relationship had become intolerable. The employer cannot reasonably be expected to retain Sikhakhane in its employ. Hence, the finding to that effect by the arbitrator is one that a reasonable decision-maker could reach. There was accordingly no basis for the Labour Court to set aside the award.

***Khambule v National Union of Mine Workers and Others (JA89/17) [2019] ZALAC 61 (24 July 2019*)**

Principles:

1. An employer is not obliged to lead evidence to satisfy a commissioner that the relationship has broken down - the facts should speak for themselves.
2. If the employer specifically seeks dismissal on the basis of a breakdown in the relationship then it must lead evidence to prove the breakdown.

3. Even if evidence is led of a breakdown in the relationship, it is the commissioner who must determine whether dismissal in the circumstances of the matter before him is the appropriate sanction.

Facts:
An employee was employed as a senior process operator at a mining refinery which produced platinum group metals (PGM). These metals are of a very high value and susceptible to theft. The employer has a well-known rule that any PGM found at or around the refinery must be reported immediately to security or management and must not be moved, touched or picked up.

Steenkamp, the employee's superior, was working with the employee in a cab of a tanker, and discovered hidden under the "foot-pedal" a crudely sealed black bag. Steenkamp showed the bag to the employee who told Steenkamp not to report the bag to the security but to throw it away. Steenkamp ignored this and promptly reported both the bag and the statement made to him by the employee to security.

An investigation established that the bag contained just over 3.25 kg of PGM worth over R450 000.00. It was never clarified how the bag got to be where it was found, who was responsible for placing it there and for what purpose.

Some six months later, the employee was charged for gross misconduct. The misconduct was the statement he had made to his supervisor that he should throw away the bag. In the six months preceding the disciplinary hearing, both the employee and Steenkamp took their annual leave and, when not on leave, they worked together. A hearing could not take place for about two of the six months, but in the time that both men were not on leave, they continued to work together without problems.

At the hearing and subsequently at the CCMA arbitration, it was found that the employee had uttered the words ascribed to him by Steenkamp. At the hearing he was found guilty of gross misconduct for violating an essential and fundamental rule at the workplace by asking Steenkamp to discard the bag, and was dismissed.

The employee was reinstated by the CCMA arbitrator who found that the dismissal was too harsh a penalty and was substantively unfair. The arbitrator was not satisfied that the relationship between the employer and employee had broken down to the extent that dismissal was the only appropriate sanction. The arbitrator financially penalised the employee by only awarding two months' back-pay and the reinstatement was not backdated to the date of his dismissal.

The employer reviewed the CCMA's award. **The Labour Court** set aside the award and substituted it with an order that the dismissal was substantively fair but procedurally unfair, and ordered the employer to pay the employee five months' salary as compensation.

On appeal by the employee to the LAC, the court was satisfied, after considering the evidence, that the CCMA award should be interfered with. The commissioner had found the employee had committed the misconduct complained of and had decided that a severe financial penalty was more appropriate than the employee's dismissal. On the facts of the case the LAC found that the award could not be said to

be unreasonable and as such, the LC erred in interfering with it. The LAC granted the employee's appeal.

In coming to its conclusions, the LAC confirmed the following principles:

(d) An employer is not obliged to lead evidence to prove that the trust relationship has broken down, if the facts speak for themselves;
(e) But if the employer specifically seeks dismissal on the basis of a breakdown in the trust relationship, then it must lead evidence to prove the breakdown;
(f) Even if evidence is led of a breakdown in the relationship, it is the commissioner who must determine whether dismissal in the circumstances of the matter before him is the appropriate sanction.

We have some concerns about the practicality of the above principles expressed by the LAC - the distinction between paras 1 and 2 above seems somewhat artificial. Whether or not the charges put to the employee specifically include the allegation of a breakdown in the trust relationship, it would seem to us that every allegation of misconduct inevitably involves a consideration of its effect on the trust relationship. Item 3(4) of the Dismissal Code of Good Practice confirms this by stating the test for the fairness of a dismissal is when the misconduct makes "a continued employment relationship intolerable". Further, the LAC in this case concerned itself with the facts of the specific supervisor / employee relationship in question, whereas to us it seems that a broader consideration of whether the employer, objectively speaking, would be justified on the facts of the case to conclude that a continued employment relationship has become intolerable, would be more relevant.

Where does this LAC judgment leave employers? We would suggest employers should –

1. draft charges that describe the nature of the misconduct rather than alleging 'a breakdown in the trust relationship': argue that this is the aggravating consequence of the misconduct, rather than the misconduct itself.
2. continue to lead evidence where possible to substantiate a breakdown in the trust relationship, and in addition argue that the facts may 'speak for themselves' on this issue, due to the seriousness of the misconduct;
3. be aware that a continued employment relationship between the offender and superiors after the misconduct was committed may well be used to argue that a continued employment relationship has not become intolerable: give consideration to the need for paid suspension followed by a relatively quick disciplinary process.

Extract from the Judgment:
(Waglay JP)
[13] It is correct that the commissioner stated that there was unconvincing evidence that the relationship between the employer and the employee had broken down. Two comments need to be made in this respect: firstly, an employer is not obliged to lead evidence to satisfy a commissioner that the relationship has indeed broken down, the facts should speak for themselves (see for instance the matter of Impala Platinum Ltd v Jansen and Others (Jansen)), or if the employer specifically seeks dismissal on the basis of a breakdown in the relationship as was the case in Edcon Limited v Pillemer NO and Others, where the charge against the employee was that her action had destroyed the employer/employee relationship then it must lead evidence to prove the breakdown; secondly, even if evidence is led of a breakdown in the relationship, it is the commissioner who must determine whether dismissal

in the circumstances of the matter before him is the appropriate sanction as a number of factors may play a role in coming to this conclusion and the same factors may apply differently to different category of employees. See in this regard the matter of Glencore Holdings (Pty) Ltd and Another v Gagi Joseph Sibeko and Others (Glencore) where the Court properly accepted that functional relationship between an employee and his superior may play a part in determining whether abominable behaviour displayed by an employee against his superior was an obstacle to the continued employment relationship. Even extreme inappropriate behaviour may in an exceptional case not lead to a dismissal if there is no proximity between the employee and the supervisor who he may have undermined.

2.2 What circumstances would make reinstatement / re-employment inappropriate unfair dismissal remedies?

***AFGEN (Pty) Ltd v Ziqubu (JA34/18) [2019] ZALAC 40 (13 June 2019*)**

Principle:
The conduct of the employee and the close working relationship required by the position in question, play a crucial role in determining whether a continued employment relationship would be intolerable in terms of section 193(2)(b) of the LRA, thereby making reinstatement or re-employment inappropriate.

Facts:
At the CCMA there was unchallenged evidence that the employee seldom if at all reported back to her superior as she was required to do; did not take her seriously and bypassed her totally; did not respect her as her superior; did not adhere to instructions given to her; was generally rude; did not have a good working relationship with her; did not respond to her emails; allowed her work to fall behind in an unacceptable manner; and had received a number of verbal warnings and reprimands for her behaviour, yet this did not improve things at all in that the employee simply ignored these.

Despite this background, there was unsatisfactory evidence on the actual disciplinary charges and the CCMA Commissioner found the dismissal of an employee substantively unfair but refused reinstatement and awarded the employee 3 months' salary as compensation.

On review, the Labour Court substituted the award with an order that the employer reinstates the employee and compensates her with 24 months' salary.

On appeal, Labour Appeal Court overturned the LC judgment. The LAC accepted that because the employee's dismissal was found to be substantively unfair, there has to be extraordinary reason to deviate from the standard remedies of reinstatement or re-employment under s193 (1), and the conduct of the employee plays a crucial role in this regard. The LAC found that the employment relationship in this case was dependent on the employee and her superior working closely together. As there was clear evidence that they would be unable to work together, to reinstate the employee into her position would be totally inappropriate. The LAC concluded that the Commissioner's decision that it was inappropriate to reinstate the employee could not be faulted.

Dealing with the employer's appeal against the increase in compensation by the LC for 3 months to 24 months, the LAC held that while it was correct that the employee

was only employed for over 12 months, it cannot be said that she was not entitled to the maximum compensation that the law permits. Section 194 of the LRA provides for compensation up to a maximum of 12 months' salary to be awarded and the LAC saw no reason why this should not be awarded to the employee. The LAC failed to understand the rationale behind the Commissioner only granting the employee 3 months' compensation.

Extract from the judgment:
(Waglay JP)

[22] Having found that the dismissal of the respondent was substantively unfair, the Commissioner was mindful that the primary remedy he was required to award the respondent was that of reinstatement because that is what she sought. This was what section 193 of the Labour Relations Act 66 of 1995 obliges a Commissioner to do unless the exceptions contained in section 193 subsections 2(b) and (c) come into play. S193 (2) (b) and (c) provides:

> '2) The Labour Court or the arbitrator **must** require the employer to reinstate or re-employ the employee unless –
> (a)…
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee;' [emphasis added]

[23] The Commissioner took the view that the unchallenged evidence of the respondent clearly demonstrated that the relationships between the respondent and the appellant was so broken that reinstating the respondent would not be appropriate. In coming to this conclusion, the Commissioner made mention of the evidence of Ms Wostmann the respondent's immediate superior and also the final written warning.

[24] In my view, there was no reason to take into account the final written warning which was issued almost at the same time as the respondent was dismissed.

[25] The primary issue is that because the respondent's dismissal was found to be substantively unfair she was entitled, in terms of s193(1)(a), to reinstatement or to re-employment in terms of 193 (1)(b). There has to be extraordinary reason to deviate from such relief and only so if s193(2) comes into play. The conduct of the employee plays a crucial role where reinstatement or re-employment is refused notwithstanding there being no grounds for dismissal. Thus for example in the matter of Edwin Maepe v CCMA and Another although the employee's dismissal was found to be unfair, this Court refused to reinstate him because it found it was impracticable for the employee to reinstate or re-employ Mr. Maepe who given false testimony under oath. Mr. Maepe was employed as a Commissioner at the CCMA and was required to arbitrate disputes and consider evidence presented to him under oath; having displayed total disregard for truthful testimony he could, this Court held, not be fit to continue as a Commissioner of the CCMA.

[26] The other relevant matter is that of Glencore Holdings (Pty) Ltd and Another v Gagi Joseph Sibeko and Others (Glencore) where the Court properly accepted that an employee's behaviour can be taken into account to determine if reinstatement or re-employment must be awarded, more particularly where an employee behaved offensively against the employer. Whether the bad behaviour was pre- or post dismissal is irrelevant. This Court in Glencore stated that an employee's behaviour no matter how abominable, cannot automatically deny her/him an award of reinstatement or re-employment. Consideration should be given to the degree of relationship contact between the employee and his superior. The lack of a "functional role" performed by the employee in Glencore including the lack of "functional rapport with the superiors" meant that they could

be no real obstacle in the continued employment of the employee by Glencore notwithstanding the employee's abominable behaviour.

[27] .....

[28] .....

[29] This is not a case where there is a distant relationship between the employee and those in authority over her. In fact, the relationship is dependent on the respondent and her superior working closely together and in the absence of this relationship to reinstate the respondent into her position would be totally inappropriate and this is compounded by the fact that the respondent was in fact only in appellant's employ for a period of just over a year.

[30] In the circumstances, I am satisfied that the Commissioner's decision that it was inappropriate to reinstate the employee cannot be faulted.

2.3 Dismissal for ill-health: The reciprocal duties of employer and employee

***Parexel International (Pty) Ltd v Chakane, T N.O and Others (JA39/2018) [2019] ZALAC 50 (27 June 2019*)**

Principle:

An employer is not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health, and may exercise an election to end the employment relationship. An employer is not required to hold an incapacitated employee's position open indefinitely when there is a failure to provide the reasons for, and anticipated extent of, continued absence. In these circumstances an employer's failure to consider alternatives short of dismissal is not unfair.

Facts:

Within 4 months of starting work as a clinical research nurse, the employee fainted and hit her head as a result of a work related incident. She lost consciousness and required medical help. 3 medical reports were submitted to the employer - with varying descriptions of the cause and the consequences. From July 2010 the employee was on special leave and permitted to take her full sick leave entitlement and annual leave. By December 2010, she had been off work for almost six months. The employer stopped paying her salary but continued contributions to medical aid, provident fund and life cover.

Early in 2011, a psychiatrist reported that the employee's main medical problem was a mood disorder that was not related to the injury on duty but was severe enough to cause "severe functional limitations". This psychiatrist reported that the employee's condition was manageable and should not lead to permanent disability.

The employer made several attempts to hold an incapacity hearing, but it could not proceed either because the employee could not attend or a medical report had not been presented. At the end of March the employee indicated that she could not comment on her prospects of recovery as this was subject to the advice of a medical practitioner and that she did not know when she would be able to work again.

The employer informed the employee that if she could not prove that she was incapacitated or sick, she had to return to work on 1 April 2011. She reported for duty for 3 days but then her husband reported she had back pain and a headache and could not work. The employer informed her that she was to submit a medical

report containing the nature of the illness, prospect of recovery, and whether she would be able to resume normal duties. No report was received.

An incapacity enquiry was convened, but the employee's husband informed the employer she would not attend and accepted that the enquiry could continue in her absence. The employer terminated her services with immediate effect due to her ill-health, and the reason provided was that she was incapable of performing the work for which she had been employed.

The dismissal was referred to arbitration where the commissioner found that the employer had failed to discharge the onus to prove that the employee was incapable of performing her duties. The commissioner also concluded that the employee was not provided with an opportunity to participate fully in the process and that the dismissal was procedurally unfair. She was reinstated retrospectively with 10 months' back pay.

On review, the Labour Court found that the arbitrator could not be faulted for finding that the employer had failed to enquire into the extent to which she was able to perform her work, and to explore all other possible alternatives short of dismissal. The LC dismissed the review application with costs.

On appeal, the Labour Appeal Court confirmed that our courts have recognised that an employer is not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health, and may exercise an election to end the employment relationship. The LAC noted that the employee was off work for over 9 months, during which time she provided medical certificates indicating different reasons for her absence. Given this, the employer requested her to provide a medical report indicating the reason for her extended absence, the prognosis for her recovery and if she was to recover, the period within such recovery could be anticipated. Yet in spite of offers of assistance from the employer, she provided no such medical report. The LAC found that, in failing to provide this, the employee frustrated a proper consideration of the reasons for her extended absence.

The LAC held that that the arbitrator's finding that the employer did not explore alternatives to accommodate the employee, failed to take into account that the employee was incapable of returning to work and had accepted as much. The commissioner had also disregarded the evidence regarding the reasons for and the extent of the employee's absence from work. The LAC granted the appeal and found the employee's dismissal to have been procedurally and substantively fair.

It is clear from this case that an employer is not required to hold an incapacitated employee's position open indefinitely when there is a failure to provide the reasons for, and anticipated extent of, continued absence. In these circumstances an employer's failure to consider alternatives short of dismissal is not unfair. An incapacity investigation involves reciprocal duties, and an employee must assist the employer to assess the extent of the incapacity by providing the necessary medical information required.

Extract from the judgment:
(Savage AJA)

[15] It has been recognised by our courts that "an employer is not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health. And it may, if it be fair in the circumstances, exercise an election to end the employment relationship". Item 10(1) of Schedule 8 to the Labour Relations Act 66 of 1995 (the LRA) provides that if an employee is absent for an unreasonably long period, the employer should investigate all possible alternatives short of dismissal.

[16] .....

[17] The appellant proceeded by way of an incapacity enquiry to determine whether the employee's absence from work had been unreasonably long or not. Implicit in such a determination was a consideration of the reasons advanced by the employee for her absence and the extent of such absence. Since very distinct reasons had been provided by different doctors for the employee's absence, the appellant requested the employee to provide it with a medical report indicating the reason for her extended absence, the prognosis for her recovery and if she was to recover, the period within such recovery could be anticipated. Yet, in spite of offers of assistance made by the appellant to the employee, no such medical report was provided by her.

[18] Although Mr Khang suggested in argument that the employee's condition was all related to the injury on duty, there was no evidence placed before the commissioner to support such a contention. The fact remained that in failing to provide a report as to the reasons for her absence and an assessment as to when her recovery could be expected, the employee frustrated a proper consideration as to the basis for her extended absence.

[19] The appellant was not required to hold the employee's position open for her indefinitely when she had failed to provide any clear basis as to the reasons for and anticipated extent of her continued absence. The employee herself asserted that she could not return to work and could after nine months give no indication when she would be able to do so. The ensuing incapacity enquiry, which proceeded by agreement, found that she been absent for an unreasonably long period and that she could not perform the work for which she had been employed.

[20] It is self-evident that whether an employee is willing and able to work and when she may be in a position to do so are material considerations to which regard must be had when considering an employee's incapacity, whether she has been absent from work for an unreasonably long period of time and whether alternatives to dismissal exist. The employee's extended absence from work was not explained by way of a properly detailed medical report. The different medical certificates provided to the appellant did not explain why her extended absence from work had been necessary or why her continued absence was justified. On her own version, the employee was unable to return to work and was unable to indicate when she may be able to do so. There was no dispute that the employee's position had already been kept open for her for more than nine months. Given these facts, the appellant's failure to consider alternatives short of dismissal was not unfair. A proper assessment was made by the appellant having regard to the facts of this matter as to whether the situation warranted dismissal and dismissal was shown by the appellant to have been fair.

[21] In finding that the appellant had failed to explore alternatives to accommodate the employee, the commissioner failed to have regard to the conspectus of the material before him with due regard to items 10 and 11 of Schedule 8. The clear evidence was that the employee was incapable of returning to work and the employee accepted as much. By finding that the appellant had failed to consider alternatives to dismissal, the commissioner disregarded the evidence regarding the reasons for and the extent of the employee's absence from work, as well as the lack of any medical evidence to indicate why such an extended absence had been justified and when she could return. By so doing the commissioner adopted an erroneous approach to the matter, while ignoring the undisputed evidence before him.

2.4 Assessing performance during probation

***Ubuntu Education Fund v Paulsen N.O and Others (PA12/17) [2019] ZALAC 56 (15 August 2019*)**

Principles:

1. Whilst a probationary employee is still entitled to substantive and procedural fairness, Item 8(1)(j) of the Dismissal Code of Good Practice means that arbitrators should hesitate to interfere with employer's decisions on whether probationary employees have attained the required performance standard, or with the standards themselves.
2. The purpose of probation is not only to assess whether the employee has the technical skills or ability to do the job, and also serves to assess the suitability of the employee in a wider sense on matters of "fit" – aspects of demeanour, diligence, compatibility and character.
3. An employer is entitled to extend a probationary period in order to complete a performance appraisal.
4. An employer cannot generally be expected to amend the requirements of an advertised position to accommodate the limitations of a probationary employee who proves unsuitable.

Facts

Ms Sonyaya was employed as a supply chain co-ordinator by the Naidoo Ubuntu Education Fund from 18 August 2014. The Fund is a non-profit organisation engaged in various programs to assist children, with the long term goal of eradicating poverty. Her position involved managing the procurement function, and her appointment was subject to an initial 6 month probationary period.

Ms Sonyana was appointed to achieve 4 primary key performance areas (KPA's). When she couldn't achieve these, they were reduced from 4 to 1 performance area in October 2014 as a temporary arrangement, to allow her to find her feet and concentrate on the administrative tasks of the job. A temporary administrator was employed to do the procurement, while she familiarised herself with the administration systems. At least 8 performance meetings and appraisals were subsequently held with her between December and March 2015, at which she was consistently made aware that her performance was not up to standard. She scored below 50% in five performance appraisals conducted during this period, despite being given guidance and assistance to improve.

A poor work performance hearing was held, at which it was concluded that Ms Sonyaya lacked the understanding and ability to carry out her assigned tasks, despite having been given assistance and a reasonable opportunity to improve. She was dismissed for poor work performance on 13 March 2015. The person subsequently appointed in her place as supply chain co-ordinator achieved the required performance standards within 2 weeks.

Aggrieved by her dismissal, Ms Sonyana referred a dispute to the CCMA. The arbitrator found her dismissal to have been substantively unfair. He found that as Ms Sonyaya had been kept on in employment beyond the expiry date of her 6 month probationary period, she had become a permanent employee when her probation ended on 18 February 2015, and that this amounted to an indication that her

employer was satisfied with her performance and that she had satisfactorily completed her probation period. He rejected the performance appraisal evidence on the basis that there was no evidence before him of how the allocation of points was done.

The arbitrator concluded by questioning why Ms Sonyaya had been made permanent if the appellant was dissatisfied with her performance, and held that the appellant had not properly considered sanctions or remedies other than dismissal. He believed that she should have been re-trained and her driving responsibilities removed from her job description. Ms Sonyana was reinstated retrospectively to the date of her dismissal.

The Labour Court refused to set aside the award on the grounds of unreasonableness. It accepted that Ms Sonyaya was no longer a probationary employee and that the commissioner had dealt properly with the evidence.

The LAC reflected that the purpose of the probationary period was to provide the employer time to evaluate whether Ms Sonyaya was suitable for permanent employment. The original intention was that the probation period would end on 18 February 2015, six months after the commencement of employment. However, it was clear from the evidence that when the probation period came to an end, Ms Sonyana was still engaged in an ongoing review and evaluation process that continued until 6 March. The LAC concluded that it may reasonably be inferred that the employer intended to extend the probation period until this process was completed, and that the arbitrator and the LC erred in finding that Ms Sonyana was automatically confirmed as a permanent employee simply by remaining in employment after 18 February 2015. Item 8 of the Dismissal Code makes it clear that an employer is entitled to extend a probationary period in order to complete any performance appraisal.

The LAC said the arbitrator's finding that Ms Sonyaya's continued employment after 18 February 2015 indicated that her performance was considered to be satisfactory, was irrational in that it completely ignored the undisputed evidence of the ongoing difficulties she was having in meeting her KPA's. The evidence in its totality had revealed a performance problem that sufficiently justified the employer's decision, after extensive evaluation, counselling and guidance, not to confirm Ms Sonyaya's suitability for permanent appointment.

Whilst it was argued that the employer should have considered alternative employment for Ms Sonyaya as dismissal is a last resort, the LAC found that the employer cannot be expected to amend the requirements of an advertised position to accommodate the limitations of a probationary employee who proves unsuitable, and that the arbitrator erred in assuming he was entitled to require this.

The LAC commented that the purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job. It also serves the purpose of ascertaining whether the employee is a suitable employee in a wider sense. This allows consideration of matters of "fit" – aspects of demeanour, diligence, compatibility and character.

The LAC found that whilst an employee on probation is still entitled to substantive and procedural fairness, it is clear from item 8(1)(j) of the Dismissal Code of Good Practice (which states that a person deciding on the fairness of a dismissal of a probationary employee for poor work performance should accept ***"less compelling reasons"*** than would be the case in dismissals after probation), that arbitrators should hesitate to interfere with employer's decisions on whether probationary employees have attained the required performance standard, or with the standards themselves.

The LAC set aside the arbitrator's award and found Ms Sonyaya's dismissal to have been substantively and procedurally fair.

Extract from the judgment:
(Murphy AJA)
[29] Item 8 of the *Code of Good Practice: Dismissal* entitles employers to require new employees to serve a probationary period "before the appointment of the employee is confirmed". In terms item 8(1)(e), the employer must use the period of probation to assess performance and give the employee reasonable assistance, training and guidance. It envisages that the appointment normally will only be confirmed after the employee had completed the probationary period, and not before then. Items 8(1)(f), read with items 8(1)(g) – (h), makes it clear that an employer is entitled to extend the probationary period in order to complete any performance appraisal.
.....
[33] It is trite that the purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job. It also serves the purpose of ascertaining whether the employee is a suitable employee in a wider sense. This allows consideration of matters of "fit" – aspects of demeanour, diligence, compatibility and character. Nevertheless, an employee on probation is still entitled to substantive and procedural fairness. However, Item 8(1)(j) of the *Code of Good Practice: Dismissal* permits a lower standard of substantive fairness. It provides:

> *'Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.*

[34] The provision is a clear indicator that arbitrators should hesitate to interfere with employer's decisions on whether probationary employees have attained the required performance standard, or with the standards themselves.

3 SPECIFIC FORMS OF MISCONDUCT

3.1 <u>Refusing to submit to a polygraph test</u>

***Crossroads Distribution (Pty) Ltd t/a Skynet Worldwide Express v National Bargaining Council for the Road Freight and Logistics Industry and Others (JR1335/14) [2020] ZALCJHB 78 (12 May 2020*)**

Principle:
A point-blank refusal to undertake a polygraph test when it is required in the conditions of employment may be serious and dismissible misconduct.

Facts:
On commencing employment, employees were required to enter into contracts of employment which contained the following clause dealing with polygraph testing:

> "*You hereby agree to submit to polygraph testing. The decision as to whether or not to conduct these tests rests solely with the employer, provided that testing will be conducted by competent, qualified persons and only tests recognised as reliable will be used.*
>
> *Refusal to submit to polygraph tests in the circumstances set out above will be regarded as a serious breach of this contract, which may lead to disciplinary action and possible termination of the contract*."

A situation arose where high-value goods were changed to low-value goods which resulted in no tax being payable by the particular client, to the detriment of the South African Revenue Services. An investigation took place during which all of the employees at the bond store were requested to undergo a polygraph test in terms of their employment contracts. All employees consented to undergoing the polygraph test except for four who refused.

Meetings were held with the employees to explain the purpose of undergoing the polygraph test in order to aid the investigation. Four joint meetings and individual meetings were held with the employees, in an attempt to convince them to undergo the polygraph tests in terms of their employment contracts, and the consequences of a failure to do so were pointed out to them.

Despite these attempts the four employees refused to take the polygraph tests, resulting in charges being levelled against them and disciplinary enquiries held. All four of the employees were found guilty and dismissed for failing to co-operate with the company in conducting its investigation.

Two of the employees referred an unfair dismissal dispute to the **CCMA**. The arbitrator held that the dismissals were substantively unfair.

On review at **the Labour Court**, it was held that the arbitrator's award did not take into account the employer's evidence that the sanction of dismissal was warranted because of the seriousness of the incident, which may have led to SARS revoking the employer's licence. If this had occurred numerous employees would have lost their jobs. The Court seemed to accept that the conduct of the employees had a negative impact on both the business and the employment relationship. The Court also held that the arbitrator had failed to take into account the evidence that the purpose of the polygraph testing was not to establish guilt but was to narrow the investigation to assist in identifying the perpetrators.

The LC set aside the arbitrator's award and found the dismissals of the two employees to be procedurally and substantively fair. Unfortunately the LC did not refer to two relevant previous judgments in coming to its decision.

In ***Nyathi v Special Investigating Unit [2011] ZALCJHB 66;J1334/11 (22 July 2011)*** the Labour Court held that where it is a material term of the contract to submit to a polygraph test and the employee, by refusing to do so, repudiates this material term of the contract, the employer is entitled to lawfully terminate the contract. But it would be a separate enquiry as to whether or not the dismissal will be fair.

A later decision of the LAC in ***Gemalto South Africa (Pty) Ltd v Ceppwawu obo***

Louw and Others (JA 54/14) [2015] ZALAC 36 (27 August 2015) held that even where employees are in breach of their employment contract which permits polygraph testing, **the enforcement of the term is fair only where there is reason to suspect those employees of involvement in wrongdoing.** The implication of the LAC decision is that other evidence is required first before the right to test by polygraph is triggered. On this basis, it may be unfair to dismiss where the purpose of testing of an entire workforce is to narrow down the investigation, as in the Crossroads case discussed above.

Although the principle emerging from the Crossroads judgment is that a refusal to undertake a polygraph test when it is required in conditions of employment, may be serious and dismissable misconduct, we recommend that this be read in the context of the earlier Gemalto LAC judgment mentioned above.

Extract from the judgment:
(Ramdaw AJ)

[40] The Second Respondent has failed to consider Mr Walker's testimony as to the purpose of conducting the polygraph tests. The purpose, as alluded to earlier, is to narrow the investigation to assist in identifying the perpetrator. Evidence was tendered by Mr Walker to this extent. The Second Respondent failed to consider this in deciding that the polygraph tests were not used to pursue possible perpetrators. It is evident that such tests were one of the steps employed to identify and pursue possible perpetrators, which the Applicant was entitled to do in terms of the employees' contracts of employment.

[41] The Second Respondent failed to consider how accessible the system is to the vast majority of the employees at the bond store. This further substantiating the need to conduct the polygraph tests to narrow the search. This was not considered by the Second respondent and contributed to the unreasonable decision reached by him.

[42] The conclusion reached by the Second respondent is not one a reasonable decision maker would have reached upon proper consideration of the material before him. The Second Respondent thus failed to properly apply his mind to the material properly put before him and took into account irrelevant evidence to come to his conclusion.

…..

[46] Both the employees Mazibuko and Makabela represented by the Third Respondent herein were under a contractual obligation to take a polygraph test and they refused to do so despite numerous requests. Disciplinary action was taken against four employees who refused to take the polygraph test including these two. All four were found guilty and were dismissed whilst only the two represented by the Third Respondent lodged a referral to the First Respondent's Bargaining Council.

[47] The Second Respondent misdirected the nature of the enquiry given the evidence that the requirement to undergo polygraph testing was part of an ongoing investigation involving fraud in the bond store. Both the employees could have contributed to this investigation and assisted the Applicant in its investigation whilst they simply refused to co-operate.

[48] In OHL Supply Chain (Pty) Ltd v De Beer NO and Others the Labour Appeal Court upheld an award in which the Commissioner found the dismissal of employees based on their having "failed' a polygraph test remains an important tool at the workplace to detect deception provided that it is properly administered. A point blank refusal to undertake one when it is part of the disciplinary code and/or conditions of employment is cause for concern.

3.2 Theft and 'possession'

Aquarius Platinum (SA)(Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA96/2018) [2020] ZALAC 23 (18 May 2020)

Principles:
The crime of theft takes place when a person deliberately deprives another person of the latter's property permanently. The deliberate retaining of property which an employee is not entitled to retain is not distinguishable, conceptually, from theft. An inference can be drawn that there is theft where an employee who borrows the employer's property does not return it and, in the absence of other evidence, the probabilities lend weight to such an inference.

Facts:
A senior employee, a shaft engineer, needed metal scaffolding poles to mount a TV aerial at home. He was aware that there were metal scaffolding poles in the discard yard at the shaft. He telephoned the mine manager who, at that time, was on leave. He said he wanted to borrow the poles. The mine manager's answer was that if he did so, he should comply with the waybill procedure which required the removal of any company property to be documented and authorised. A practice existed in terms of which company equipment could be borrowed by employees from time to time.

The employee then instructed an artisan to cut 600mm lengths from the metal poles taken from the discard yard. These lengths were then loaded onto his bakkie and removed by him. This exercise interrupted other duties that the artisan was busy on.

The employee authorised himself to remove the material in an 'internal waybill'. He did not prepare an 'external waybill' to take the material off the mine.

The material was never returned. It was estimated to have a value of R1000 if sold as scrap. No acceptable evidence was given by the employee to explain why at any time after the removal had occurred, the poles were not returned, or could not be returned, as was his logical obligation in terms of the borrowing of the equipment.

The employee was charged with several charges including "Misappropriation of company assets", "Damage to company property", "Failure to comply with company rules and procedure", "Theft / Unauthorised removal of company property". He was dismissed.

The matter was referred to **arbitration**. He was found guilty of not complying with the waybill procedure but that this misconduct was "not grave and wilful". The arbitrator concluded that there was no dishonesty by the employee. The arbitrator also relied on inconsistent application of discipline by the employer. The arbitrator found the dismissal to be unfair and ordered the employee's reinstatement.

On review the **Labour Court**, approved the finding of guilt on the abuse of managerial authority, and on the failure to follow waybill procedure. On the other charges, the Labour Court was not persuaded that there was any dishonesty. The court said that the employee could not be found guilty of theft, but he could be guilty of some misconduct, of taking company property and not returning it. There was no evidence that suggested that this was an act of dishonesty. The court said that he

was not acting secretly nor was he acting to the prejudice of the company, and confirmed the arbitrator's finding that the dismissal was unfair.

On appeal the **Labour Appeal Court** strongly rejected the Labour Court's views. The LAC said that the crime of theft takes place when a person deliberately deprives another person of the latter's property permanently. The deliberate retaining of property which an employee is not entitled to retain is not distinguishable, conceptually, from theft. The fact that the employee removed the property openly after getting permission to borrow it, does not mean that theft could not occur. An inference can be drawn that there is theft where an employee who borrows the employer's property does not return it and, in the absence of other evidence, the probabilities lend weight to such an inference.

The LAC granted the appeal and found the employee's dismissal to be fair.

Extract from the judgment:
Sutherland JA:

[17] I disagree with this perspective of the conduct of Ngorima as articulated by the Labour Court and it cannot be endorsed. The idea that theft or dishonesty requires furtiveness or concealment is misplaced. It is true that, often, to either conceal the fact of the theft or to conceal the identity of the thief, the deed is done clandestinely. However, that is not an element of the crime. The crime of theft is based on the common sense of the ages: all that is required is that a person deliberately deprives another person of the latter's property permanently. In industrial relations parlance, theft is frequently described as misappropriation of the employer's property. Conceptually there is no useful distinction. The frequent resort to the lesser offence of being in 'unauthorised possession' of the employer's property, an act of misconduct listed in many disciplinary codes, caters for cases where a thieving intention is suspected and requires of employees to ensure that they do not place themselves under suspicion, relieving an employer from having to prove a specific intent.

[18] To articulate the notion of a misappropriation of property that is free of dishonesty is a contradiction in terms. In my view, to describe the deliberate retaining of property which the employee is not entitled to retain is not distinguishable, conceptually, from theft. Naturally, a proper appreciation of the dimension of the requisite intention in regard to misappropriation is not wholly free from difficulty. It is conceivable that a person, bona fide, intends to return an item at the time of borrowing but later changes that intention. If circumstances, where the probabilities are equally poised that at the outset, the "borrower" had an intention to return the item, how is the existence of the fact of a change of intention to be determined? Self-evidently, except in rare cases, that change of intention would have to inferred from the evidence. In such a case, the explanation proffered by the borrower would be of central importance. Where a borrower gives no explanation, can the inference indeed be drawn that the intention not to return the goods be made? In my view, such an inference can be drawn if, in the absence of other evidence, the probabilities lend weight to such an inference. This does not result from any onus on an employee to prove the absence of guilt; rather, it is a straightforward example of inferential reasoning to determine the probabilities on the available evidence.

[19] Moreover, to return to the idea that furtiveness is a necessary attribute of theft or dishonesty, such a perspective overlooks that sometimes theft takes place quite brazenly. One example where this is common is where senior employees, often managers, abuse their standing and authority to take possession of company property for private use. The workforce looks on impotent to intervene. The facts of this case illustrate exactly that scenario.

3.3 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 -
   (f) was present when violence was committed;
   (g) would have been able to identify those who committed the violence;
   (h) would have known that the employer needed that information;
   (i) failed to disclose the information; and
   (j) 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.

<u>Application to the facts</u>

[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.

3.4 Age discrimination

BMW (South Africa) (Pty) Ltd v National Union of Metalworkers of South Africa and Another (JA 86/18) [2020] ZALAC 22 (18 May 2020)

Principle:
If an employee's dismissal is not based on an agreed retirement age but on a retirement age imposed without the employee's consent, this may constitute an automatically unfair dismissal in terms of s187(1)(f) of the LRA as well as unfair age discrimination in terms of s 6 of the EEA.

Facts:
Section 188(2)(b) of the LRA provides that "*a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity*".

When the employee commenced employment with BMW, his retirement age was 65 years. He was a member of the BMW Pension Fund and at the time of joining the Pension Fund, the retirement age stipulated in its rules was 65 years. The employee submitted a survey document in which he chose to retire at age 65.

After being in the job for 11 years, BMW issued an inter-office memorandum confirming that the official Company Retirement Age had been changed to 60. The memo added "Those of you [regardless of age at the time] who indicated that you would like to remain at retirement age 65 will be able to do so."

The employee received this document but believed that because he had expressed his will in the survey document, the change referred to in the inter-office memorandum did not apply to him. But when BMW compiled a list of employees above the age of 50, and a separate list of employees below 50 who elected in 1995 to retire at 65 and forwarded it to Alexander Forbes, the administrator of the Pension Fund, the employee's name did not appear on this list.

When the employee's pension benefit statement subsequently recorded his retirement age as 60, the employee assumed it was a "mistake" and not that his age of retirement had actually been changed. The employee then tried on 6 occasions to get the error corrected. The failure by BMW to change the record led to litigation because when BMW required him to retire, the employee regarded this as a dismissal.

The **Labour Court** found that the employee's dismissal by BMW was automatically unfair in terms of s 187(1)(f) of the LRA, as BMW had discriminated against him on the grounds of age. It also held that his dismissal constituted unfair discrimination on the same grounds in terms of s 6(1) of the EEA.

At the **Labour Appeal Court** it was held that when BMW dismissed the employee on reaching age 60, his dismissal was not based on his agreed age of retirement but rather on an imposed age of retirement without his consent. As a result, BMW had failed to discharge the onus to prove that the dismissal did not constitute an automatically unfair dismissal in terms of s 187(1)(f). In addition, because BMW did not show that its actions were "rational and not unfair or is otherwise justifiable" the LAC found that the dismissal also constituted unfair discrimination on the grounds of age in terms of s 6(1) of the EEA.

The LAC judgment includes much discussion on what damages or compensation BMW was liable to pay. It decided that BMW was liable for the employee's proven damages (called patrimonial damages) for discriminating against him on the grounds of age. The determination of the amount of compensation and damages was postponed until a later date.

Extract from the judgment:
(Kathree-Setiloane AJA)

[32] The central issue for determination is whether Mr Deppe retired at his normal retirement age of 60 on 31 October 2015 or whether he was discriminated against by BMW by being dismissed on the grounds of his age thereby constituting an automatically unfair dismissal as envisaged in section 187(1)(f) of the LRA and unfair discrimination under section 6(1) of the EEA.

…….

[42] Mr Deppe's conduct subsequent to 2002 is not indicative of an employee who sat back and did nothing to resolve his issue, but rather of one who was met with closed doors at every attempt. His conduct is distinguishable from that of an employee who, believing that it is permissible, accepts the change to his age of retirement. In this case, Mr Deppe objected but knew that without proof of an election, he would be

unable to persuade his employer. Being defeated is different from agreeing to a change. Mr Deppe felt defeated.

[43] I am, accordingly, of the view that Mr Deppe did not acquiesce to the change of his retirement age from 65 to 60. Van der Bank is, therefore, clearly distinguishable. That being so, BMW's contention that the appeal should succeed based on this Court's decision in Van der Bank is without foundation.

…….

[49] Mr Deppe contends that his dismissal was automatically unfair in terms of section 187(1)(f) of the LRA as the reason for the dismissal is that BMW unfairly discriminated against him on the grounds of his age by forcing him to retire at 60 years of age, when his agreed retirement age was 65.

[50] Mr Deppe's contract of employment provided for an agreed retirement age of 65. It, nevertheless, permitted BMW to amend its policy on the retirement age from 65 to 60. However, prior to doing so, BMW chose to provide its employees with an election to retire at 65 or 60.

[51] BMW did not provide Mr Deppe with an election/option form which it gave to Provident Fund members in 1997 to make an election between retiring at age 65 or 60. The undisputed evidence, however, indicates that Mr Deppe did, in fact, elect to resign at age 65 in the survey/opinion document which he completed in 1994. This notwithstanding, BMW changed his retirement age from 65 to 60 without his consent.

[52] Consequently, but for reaching the age of 60 BMW would not have dismissed Mr Deppe. In the circumstances, Mr Deppe has succeeded in making out a prima facie case that his dismissal is automatically unfair as envisaged in section 187(1)(f) of the LRA, as BMW unfairly discriminated against him on the grounds of age.

[53] BMW bears the onus to demonstrate that the reason for Mr Deppe's dismissal does not constitute unfair discrimination on the grounds of age. In an attempt to do so, BMW invokes the provisions of s187(2)(b) of the LRA arguing that it did not dismiss Mr Deppe because of age, but rather because he reached the normal retirement age of employees in the industry.

[54] The provisions of section 187(2)(b) of the LRA relating to the normal retirement age only apply to the case where there is no agreed retirement age between the employer and the employee. In this case, Mr Deppe was dismissed before reaching his contractually agreed age of retirement which was 65. Therefore, the provisions of section 187(2)(b) of the LRA relating to the question of a normal retirement age have no application.

[55] Accordingly, when BMW dismissed Mr Deppe on reaching age 60, his dismissal was not based on his agreed age of retirement but rather on an imposed age of retirement without his consent. As a result, BMW has failed to discharge the onus to prove that Mr Deppe's dismissal did not constitute an automatically unfair dismissal in terms of section 187(1)(f) of the LRA.

Unfair Discrimination in terms of the EEA

[56] Mr Deppe contends that on dismissing him when he turned 60, BMW discriminated against him on a ground listed in section 6(1) of the EEA, namely age.

[57] In terms of section 11 (1) (a) and (b) of the EEA, BMW is required to prove on a balance of probabilities that it had not unfairly discriminated against Mr Deppe as alleged; or that such discrimination is rational and not unfair or is otherwise justifiable. BMW has, however, failed to do so. Consequently, Mr Deppe's dismissal also constitutes unfair discrimination on the grounds of age in terms of section 6(1) of the EEA.

3.5 Social media behaviour

***Onelogix (Pty) Ltd v Meyer and Others (PR184/2018) [2019] ZALCPE 26 (3 December 2019*)**

Principles:
Communications that on the face of it appear neutral or innocuous are not always so. Neutrality, divorced from the context in which it takes place, should not be the starting point in the analysis of any communication that is the subject of scrutiny for racist or other derogatory content. The totality of all the circumstances must be taken into account to determine whether a communication that, on the face of it appears neutral, is in fact derogatory.

Facts
The employee was a long distance truck driver for a company that operated a vehicle delivery service. In October 2017, he shared a whatsapp message with some of his friends containing a meme that depicted a young (white) child, holding a can of beer, and smoking a cigar. The meme's caption read – "Growing up in the 80's before all you pussies took over – may as well die young".

Apparently in error, the employee's direct supervisor was included in the group to whom the message was sent. The supervisor (a black person) took offence, perceiving the message as racist and derogatory towards women, and initiated disciplinary proceedings against him. The employee was subsequently dismissed for forwarding a racially derogatory whatsapp communication with an offensive and racial undertone. 2 weeks before this incident the employee was issued with a final written warning for using the "K" word whilst driving, directed at another road user. The fact that the employee used the word in the driver's cab when he was alone (it was recorded on a webcam monitoring device installed in the cab), served as a mitigating factor preventing him from being dismissed.

The employee challenged his dismissal in the CCMA. The arbitrator, noting that the meme originated from the USA and that its meaning should be viewed in that context, interpreted the meme to depict a 'generational' comparison between a tough 80's generation and the current (younger) weaker generation. The arbitrator found that the employee was not guilty of the offence and that his dismissal was unfair, awarding him 10 months' remuneration as compensation. The employer took this award on review.

The Labour Court found that arbitrator's conclusion that the meme was 'generational', was based on his own interpretation and the employee had not used this defence at his disciplinary hearing. The arbitrator failed to take into account the South African context in which the meme was used. Given South Africa's history and the notion that prevailed in the 1980s that some are inherently superior to others, the LC found that the reasonable reader would read a racial undertone into the meme. The words "growing up in the 1980s before all you pussies took over" have a clear connotation of a comparison between the era of apartheid and the advent of the era of democracy in 1994, and also a suggestion both that the era of apartheid was a heyday and that those who assumed power in 1994, i.e. black people, are 'pussies' (a derogatory term whatever meaning was ascribed to it).

The LC dismissed the employee's defence that he had not meant to send the message to his supervisor, as he was unable to offer a plausible explanation for how it came to be sent. But even if he had, this would not have exonerated the employee - even if he had no specific intention of sending it to his supervisor, the fact of the matter was that he did. In doing so, he violated a workplace rule that required him to respect the values of dignity and equality that underpinned the employer's value system and its rules of conduct.

The LC concluded that the meme had a racial undertone and was offensive, and that the employee's dismissal was fair, taking into account the previous final warning given to him. The employee's representative had conceded that if the meme was found to be racist, his dismissal was justified.

The LC found that the arbitrator had made material errors of law and that the award was unreasonable, referring to the Constitutional Court judgment in *Rustenburg Platinum Mine v SAEWA obo Bester and Others (CCT127/17) [2018] ZACC 13 (17 May 2018).* In that case the ConCourt confirmed the dismissal of an employee for referring to someone as a 'swart man', given the context in which this was said. The ConCourt said that whilst these words were in themselves not racist, caution should be exercised in applying a presumption of neutrality and without considering the context in which they were used. Applying these principles to the facts in this case, the LC noted that the context was one in which the employee a few days beforehand had been given a final warning for racist language. The LC set aside the arbitrator's award and found the employee's dismissal to have been fair.

This is another case in which an employee has been dismissed for using words that in themselves are not racist, but which may be considered racist due to the context in which they are used. Employees should be extremely careful about what they say on social media. Not only are these platforms likely to be inspected when they apply for jobs or promotion, but posts that may be interpreted as offensive could lead to strong disciplinary action being taken against them. A quick comment or post, made without thinking about its consequences or how it could be construed, could have lifelong consequences.

Extract from the judgment:
(Van Niekerk J)

[16] ..... communications that on the face of it appear neutral or innocuous are not always so, and neutrality should not be the starting point in the analysis of any communication that is the subject of scrutiny for racist or other derogatory content. In his analysis of the evidence, the arbitrator clearly applied a presumption of neutrality, and then proceeded to accord a meaning to the meme divorced from context, and informed by his own insights.....

[17] In my view, the arbitrator committed an error of law by applying a presumption of neutrality. In doing so, he ignored the caution expressed in *Bester* that it cannot be correct to ignore the reality of our past and our racially-charged present and to proceed from a presumption of neutrality. Put another way, as the Constitutional Court observed, the context in which words or communications are uttered should not be sanitised by a presumption of neutrality - the totality of all the circumstances must necessarily be taken into account to determine whether a communication that on the face of it appears neutral is in fact derogatory.

[18] In the present instance, the context is one in which the employee had been found guilty, only five days prior to the incident that gave rise to his dismissal, of using racist and derogatory language. The meme that he sent may have been inadvertently

sent to Skweyiya, but that does not impact on the nature of the meme or any derogatory connotation that it might have. The fact remains that the meme was sent by the employee to Skweyiya, who took great offence at its content. This is not to say that Skweyiya's subjective reading of the meme as racially derogatory is determinative – but the fact remains that the context in which the meme was sent is one of a past of institutionally entrenched racism and in which an employer had taken steps to ensure, as Van Rensburg put it in his evidence, a workplace in which the values of respect, dignity and equity were present. The arbitrator compounded the error of a presumption of neutrality in his exposition of the meaning of the meme. In doing so, he afforded the employee an unarticulated defence, which until the arbitration hearing, had not been one of a benign meaning that he attached to the meme. It should be recalled that Heyns's uncontroverted evidence was that at the disciplinary hearing, no mention was made by the employee of any 'generational' interpretation of the meme – this defence emerged only at the arbitration hearing.

[19] The arbitrator's conclusion that the meme depicted a representation of a 'tough' generation being compared to the current (younger) generation that is weak in comparison, is an exegesis of his own. It may have some validity in the United States of America (where the meme originated and where the arbitrator's explication is rooted), but that is not the context in which the meme was either sent or received. In a South African context, given this country's history and the notion that prevailed in the 1980s that some are inherently superior to others, the reasonable reader would read a racial undertone into the meme. The words '*growing up in the 1980s before all you pussies took over*' have a clear connotation of a comparison between the era of apartheid and the advent of the era of democracy in 1994, and also a suggestion both that the era of apartheid was a heyday and that those who assumed power in 1994, i.e. black people, are 'pussies' (a derogatory term whatever its etymology). This was the meaning attributed by Heyns to the meme when he decided that the employee should be dismissed and in the context, it is a conclusion to which any reasonable, informed and objective South African would come. In my judgment, and in relation to the charge of misconduct against him, the meme sent by the employee had a racial undertone and was offensive.

***EDCON Limited v Cantamessa and Others (JR30/17) [2019] ZALCJHB 273 (11 October 2019*)**

Principle:
The general rule is that an employer has no jurisdiction or competency to discipline an employee for conduct that is not work related which occurs after working hours and away from the workplace. But an employer can exercise discipline over an employee provided it establishes the necessary connection between the misconduct and its business.

Facts:
The employee was employed by Edcon as a Specialist Buyerand occupied a senior position though she was not part of management.

During December 2015, then President Zuma replaced Finance Minister Nhlanhla Nene with Minister Des van Rooyen. Public media estimated that this cabinet reshuffling caused a loss of between R250 to R500 billion to the South African economy. This caught the attention of public media, including television programs such as Carte Blanche, which on 20 December 2015 aired a program on the reshuffling. On 20 December 2015 at 19h16, while on annual leave, the employee published the following post onto her Facebook account:

> "*Watching Carte Blanch and listening to these f***ing stupid monkeys running our country and how everyone makes excuses for that stupid man we have to call a president... President my f***ing ass!! #zumamustfall. This makes me crazy ass mad*."

At the time that the employee published her post, her Facebook profile stated that she was employed by Edcon as a Fashion Buyer. From the day after her Facebook post, Twitter users started to mention her Facebook post and 351 Tweets mentioned the post between 14h00 on 21 January and 13h00 on 22 January 2016. Comments on that social media platform included:

> "*@EdgarsSA what are your thoughts on the degrading racist remarks made by one of your buyers?? we demand answers #MsTeresaCantamessa" and "Another one!! #Ms TeresaCantamessa #RacismMustFall*"

On 22 January 2016, the Sowetan Newspaper published an article about the employee's post entitled "*Racist Monkey slur strikes again*". Several Twitter users demanded answers from Edcon and in some instances, threatened not to do business with Edcon.

Edcon dismissed the employee after holding a disciplinary enquiry. Aggrieved, the employee **referred an unfair dismissal dispute to the CCMA**. The commissioner concluded that the dismissal was substantively unfair and awarded her maximum compensation of 12 month's salary. The Commissioner's decision was based on his framing the issue as whether Edcon was entitled to act against the employee, given that she published her Facebook post while she was on annual leave and not at work, and the post having made no mention of Edcon.

Edcon took this award **on review to the Labour Court**. The LC set aside the CCMA award and held that the dismissal was fair. Whilst the LC confirmed the general rule is that an employer has no jurisdiction or competency to discipline an employee for conduct that is not work related, which occurs after working hours and away from the workplace, an employer can exercise discipline over an employee in those circumstances provided it establishes the necessary connection between the misconduct and its business.

In this case the "necessary connection" was established because once the usually anonymous identities of employees are exposed to the general public, it must only be in a positive and not negative environment or circumstance. In other words, an employee has to avoid being a controversial employee in the public eyes where s/he can be associated with the employer. The employee's Facebook message was held to be a highly offensive remark, in respect of which Edcon was entitled to take disciplinary measures lest its name be put into disrepute for tolerating racism.

The fact that the employee was on leave turned out to be irrelevant because of the direct and immediate impact of the Facebook post on the employer's business. This meant that the general rule which respects an employee's out-of-work privacy was not a complete barrier to Edcon's right to discipline the employee. It was able to establish the necessary connection between the misconduct and its business.

The case is further evidence that if employees choose to express racist and other

unacceptable views in the public domain, even when not at work, they run the clear risk of disciplinary action being taken against them by their employer.

Extract from the judgment:
(Cele J)

[12] It remained common cause throughout the dismissal dispute that Ms Cantamessa made an entry on her Facebook page during her leave, using her computer and her data. The comment made had nothing to do with her duties as an employee. Her Facebook page indicated though that she was employed by Edcon. It had therefore firstly to be determined whether her conduct put her within the disciplinary reach of her employer. The general rule is that an employer has no jurisdiction or competency to discipline an employee for conduct that is not work related which occurs after working hours and away from the workplace. The findings by the commissioner, that none of Edcon's disciplinary policies were applicable to Ms Cantamessa's alleged misconduct, constitute no defect as outlined in section 145 of the LRA and are therefore not reviewable. However, where misconduct does not fall within the express terms of a disciplinary code, such misconduct may still be of such a nature that the employer may nonetheless, be entitled to discipline its employee. Likewise, the fact that the misconduct complained of occurred away from the workplace would not necessarily preclude the employer from disciplining its employee in respect thereof…

[13] ….....

[14] In Custance v SA Local Government Bargaining Council and Others this court, per Pillay J, found the following:

> *"...the derogatory terms used manifest a deep-rooted racism which has no place in a democratic society. Whether the word was uttered on or off duty was immaterial as it is the attitude that persists which, when on duty, affects the employment relationship*."

[15] In Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others the employee alleged that he had not specifically been told that he could not use racist epithets. It made no difference that the misconduct was not set out in a policy. The Code of Good Practice on Dismissal provides that employees may be disciplined if they break rules regulating conduct in or of relevance to the workplace. Misconduct can vary from dishonesty, assault, sexual harassment, fraud etc. Thus, the main principle is to determine the connection between the misconduct and the employer's business. Thereafter, the employer has to prove to which extent it has affected the employment trust relationship.

[16] In principle therefore, Edcon could exercise discipline over Ms Cantamessa provided it established the necessary connection between the misconduct, if any, and its business. The comments made by Ms Cantamessa did not in and of themselves relate to the employer - employee relationship. The only source for the connection lies in that her Facebook page indicated that she worked for Edcon. However, Edcon is a merchandiser of its various products in a competitive industry. Ms Cantamessa as a Specialist Buyer played a pivotal role in the acquisition of such products, including ladies trending styles and fashion for Edcon. The success of its business depends also largely on how it markets itself to the general public. Therefore, having a good name is an essential asset or quality of Edcon to the general public. In as much as Buyers of Edcon can and often remain anonymous to the general public, once their identities are exposed to the general public, it must only be in a positive and not negative environment or circumstance, otherwise such disclosure imposes a risk that the name of Edcon may be brought into disrepute. Therein lay the connection between the conduct of Ms Cantamessa with the relationship she had with her employer. She had to avoid being a controversial employee in the public eyes where she could be associated with Edcon.

[17] South Africa is undoubtedly constituted largely by Black citizens. It is not surprising

therefore that Edcon operated in areas where the Black citizens are likely to be the main or majority source of its past, present and future customers. Since 1994 the South African Government is run by the majority of Black citizens due to the advent of democratic elections. Before the advent of democracy, the South African government was notorious for its legislated racism. Some White minority citizens were known to refer to Black citizens by various derogatory expressions, including the monkey slur. The usage of the monkey slur by Ms Cantamessa should therefore never be seen in isolation as though such usage had no history. Put differently, to fully understand what Ms Cantamessa was saying, it is of importance that the history behind the monkey slur be considered. It is an emotive expression of our sad past where racial discrimination in South Africa, and in the workplace in particular, was the order of the day. No doubt, Ms Cantamessa having lived in South Africa for more than 20 years knew about it. She said that she was angry when she took to Facebook and did something she had never done before. In her opening remarks, at arbitration, she conceded that certain South Africans were offended by her Facebook post and that certain South Africans perceived the said post as racist.

3.6 Freedom of expression

***Ndzimande and Others v Didben N.O and Others (JR 1404/14) [2019] ZALCJHB 73 (2 April 2019*)**

Principles:

1. In the course of raising grievances in public, it is gross misconduct where employees make false and defamatory statements which may have serious repercussions for the employer. Employees' freedom of expression is not unfettered and they cannot make false statements against the employer without consequences.
2. Long service on its own is not sufficient to save an employee's job especially in circumstances where the conduct complained of was gross.

Facts:

The employer's code on communications provided that no employee was permitted to communicate with the public media without permission from the Chief Operations Officer (COO). The code further provided that the authority to communicate with the media was vested in the COO and that employees were to decline to comment on internal matters when approach by the media.

Employees were interviewed by the media in the course of a protest march and the company later disciplined and dismissed them for comments that brought the company into disrepute – and that were not true. Three employees had said that Xstrata had undertaken to pay them for overtime, but had refused to do so. They also said that if their demands were not met, a strike would take place. They were further heard saying Xstrata's head office in Australia gave employees 2.6 billion (currency unspecified) to share, which Xstrata was withholding and had instead offered to give them profit sharing. The Commissioner in his arbitration award came to the conclusion that the dismissal of the individual applicants was fair.

At the Labour Court the judge said that ordinarily, there is nothing wrong when employees raise legitimate grievances and threaten to exercise their constitutional right to strike. There is however everything wrong when in the course of raising those grievances, employees make false and defamatory statements, which may have

serious repercussions for the employer. This is particularly even more so, where those employees had been warned to desist from such conduct.

The court found that in the light of documentary proof that all the employees' grievances had been attended to and resolved, nothing was presented before the Commissioner by the individual applicants that this was not the case. It followed that there was no cause for them to make the false allegations against Xstrata. The individual applicants had not presented anything before the Commissioner to demonstrate any semblance of truth in their statements made to the media. The court held that "*the statements made by the individual applicants to the public media were patently false, malicious and damaging to Xstrata's reputation*."

Another significant feature of the case was that the Freedom of Expression Institute (FXI) became involved because it contended that disciplining the employees infringed free speech. The court however said that employees' freedom of expression is not unfettered. They cannot embark on a march and make false statements against the employer without consequences.

Extract from the judgment:
(Tlhotlhalemaje, J)

[26] Ordinarily, there is nothing wrong when employees raise legitimate grievances and threaten to exercise their constitutional right to strike. There is however everything wrong when in the course of raising those grievances, employees make false and defamatory statements, which may have serious repercussions for the employer. This is particularly even more so, where those employees had been warned to desist from such conduct.

[27] It can further be accepted that the nature of our labour relations is such that it is adversarial. One of the primary objectives of the LRA is to create rules of engagement by promoting and facilitating collective bargaining at the workplace, and to provide a framework within which employees and their trade unions can collectively bargain with their employers on a variety of issues, with the aim of promoting effective resolution of labour dispute.

[28] It follows from the above that ordinarily, where there are recognised union structures at a workplace, it would be the union leadership that speaks on behalf of the employees and articulates whatever grievances they may have. Where however employees disassociates themselves from their own union which had been engaged with the employer on their grievances, and thereafter act on a frolic of their own outside of the rules of engagement, and further make public statements against the employer or anyone for that matter that are false and defamatory, they must be visited with the consequences thereof.

.....

[32] The statements made by the individual applicants to the public media were patently false, malicious and damaging to Xstrata's reputation. It is indeed startling for the individual applicants to argue that the charges against them or the conduct complained of had nothing to do with Xstrata, its policies or rules, since the statements were made in their own personal capacities but on behalf of 600 other employees. The fact remains that they acted on a frolic of their own and outside the rules of engagement. They had embarked on their march as employees of Xstrata, and had made false statements against it contrary to established policies. Their further contention that they were merely exercising their freedom of speech and did not need Xstrata's permission is clearly without merit. The employees' freedom of expression is not unfettered. Thus, they cannot embark on a march and make false statements against the employer without consequences.

[33] It follows from the above that the individual applicants had broken the rules in relation to Xstrata's communication policy despite being warned, the effect of which was to place Xstrata's name into disrepute. Their evidence or defence that they were merely exercising their freedom of expression amounts to red herring. Significantly, other than continuously having denied that they had made the statements until their belated concessions at the

arbitration proceedings, they had not at any stage appreciated or acknowledged their wrongdoing nor shown any contrition in that regard.
[34] It was argued on behalf of the individual applicants that the Commissioner in confirming their dismissal had not taken account of their long service to the company. It has long been stated that long service on its own is not sufficient to save an employee's job especially in circumstances where the conduct complained of was gross. I have already indicated in this judgment that the misconduct in question had serious repercussions for Xstrata. In any event, an employee with a long service is expected to be even more familiar with company policies and rules. Furthermore, the fact that Ndzimande was already on a final warning for similar conduct does not appear to have dissuaded the individual applicants from their self-destructing path. To this end, a sanction of dismissal as correctly found by the Commissioner was indeed appropriate in the circumstances.

3.7 Misconduct due to depression

***Legal Aid South Africa v Jansen (CA3/2019) [2020] ZALAC 37 (21 July 2020*)**

Principle:

1. To succeed in a claim for automatically unfair dismissal based on disability, factual causation and legal causation must be established.
2. Employers have a duty to deal with depression sympathetically and should investigate it fully and consider reasonable accommodation and alternatives short of dismissal in accordance with incapacity procedures.
3. Where depression may account in part for an employee's misconduct, dismissal may not be appropriate.

Facts:

A Legal Aid paralegal was dismissed at a misconduct enquiry for 17 days' unauthorised absenteeism, insolence, and a refusal to obey a lawful instruction. He referred to the Labour Court both an automatically unfair dismissal claim in terms of section 187(1)(f) of the LRA and an unfair discrimination claim under section 6 of the EEA. In both disputes, the employee claimed that the employer unfairly discriminated against him on the ground of his disability of reactive / manic depression.

A month before the disciplinary hearing the employee had brought this disability to the attention of his immediate supervisor as well as the National Human Resources Executive and CEO. **The Labour Court** held that where an employer has knowledge that an employee has a disability, the employer is under a duty to reasonably accommodate the employee. Instead of dismissing the employee for misconduct, the employer had a duty to institute an incapacity enquiry.

The LC was satisfied that the employee raised a credible possibility that the dominant reason for the dismissal was his mental condition - at the very least his condition played a significant role or influenced the decision to dismiss him.

The LC held that the dismissal of an employee for misconduct, who suffers from a mental condition which the employer is aware of, in circumstances where the acts of misconduct are inextricably intertwined with the employee's mental condition (ie his disability), constitutes an automatically unfair dismissal and unfair discrimination. The employer was ordered to reinstate the employee with full retrospective effect; to pay compensation equivalent to six month's salary and the employee's legal costs.

On appeal the LAC noted that an employee seeking to establish that a dismissal is automatically unfair on any of the grounds listed in section 187(1) of the LRA must meet the requirements of causation. This means first establishing **factual causation** (would the dismissal have occurred if there was no depression?) If the answer is yes, then the dismissal is not automatically unfair.

If the answer is 'no' that does not immediately make the dismissal automatically unfair. The next issue is one of **legal causation** (whether the disability was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal). Only if this test of legal causation also shows that the most probable cause for the dismissal was the disability, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a).'

The employee did not deny the misconduct with which he was charged. He admitted his absence from work for the 17day period and that he failed to inform his manager of his absence from work. He admitted to acting insolently and refusing to obey a lawful and reasonable instruction. The LAC said that these admissions were strong evidence that the reason for his dismissal was misconduct.

The employee's explanation was that all this misconduct, committed over a period of time, was caused by his depression. He said that his depression prevented his ability to appreciate the wrongfulness of his misconduct and that he had no self-control. Had he not been depressed, he argued, he would not have misconduct himself in this way. The LAC said that if it accepted this as true, the question remained whether the dominant or proximate reason for his dismissal was his misconduct or his depression. The employee equated the two and claimed they were causally inextricably interlinked.

The LAC then looked at **the nature of depression**, saying that depression must be looked at as a form of ill health. As such, an incapacitating depression may be a legitimate reason for terminating the employment relationship, provided it is done fairly in terms of Items 10 and 11 of the Code of Good Practice: Dismissal. If an employee is temporarily unable to work for a sustained period due to depression, the employer must investigate and consider alternatives short of dismissal before resorting to dismissal. If the depression is likely to impair performance permanently, the employer must attempt first to reasonably accommodate the employee's disability. Dismissal of a depressed employee for incapacity without due regard and application of these principles will be substantively and/or procedurally unfair.

The LAC also recognised that depression may also play a role in an employee's misconduct, even negating an employee's capacity for wrongdoing. Where severe depression impacts on the employee's state of mind (**cognitive ability**) and will (**conative ability**) to the extent that the employee is unable to appreciate the wrongfulness of the conduct, dismissal for misconduct would be inappropriate and substantively unfair, and the employer would need to approach the difficulty from an incapacity or operational requirements perspective.

But where the evidence shows that the cognitive and conative capacities of an employee have **not** been negated by depression, and the employee is able to appreciate the wrongfulness of the conduct and act accordingly, culpability or blameworthiness may be diminished by reason of the depression. In this situation,

the employee's depression must be taken into account in determining an appropriate sanction. A failure to properly take account of depression before dismissal for misconduct could possibly result in substantive unfairness.

Who carries the **onus** of proving the impact of depression? The court said that conative ability is a question of fact and an employee denying conative ability bears an evidentiary burden to prove the factual basis of the defence.

To succeed in an automatically unfair dismissal claim based on depression, the enquiry is not confined to whether the employee was depressed and if his depression impacted on his cognitive and conative capacity or diminished his blameworthiness. Rather, it is directed at a narrower determination of whether the reason for his dismissal was his depression and if he was subjected to differential treatment on that basis. Here too, the employee bears the evidentiary burden to establish a credible possibility (approaching a probability) that the reason for dismissal was differential treatment on account of his being depressed and not because he misconducted himself.

The LAC held that the employee had failed to adduce cogent evidence, whether medical or otherwise, showing that his acts of misconduct were caused by his depression or that he was dismissed for being depressed. As a consequence the employer had a legitimate basis for imposing discipline. The proximate reason for disciplining the employee was his misconduct and not the fact that he was depressed. He was relatively capable and knowingly conducted himself in contravention of the rules of the workplace. Discipline was justifiably called for.

For these reasons the LAC overturned the LC's findings of unfair discrimination and automatically unfair dismissal.

The lessons of this case can be summarised as:

1. One must ask what was the most immediate, proximate, decisive or substantial cause of a dismissal. If the proximate reason for an employee's dismissal is misconduct, and the depression only being a contributing or subsidiary causative factor, there will not be an automatically unfair dismissal.
2. An employee alleging unfair discrimination based on disability must produce credible evidence that his/her treatment differed from the treatment accorded to other employees, or, more importantly, that the reason for any such alleged differential treatment was the condition of depression.
3. Employers have a duty to deal with depression sympathetically and should investigate it fully and consider reasonable accommodation and alternatives short of dismissal. Where depression may account in part for an employee's misconduct, depending on the circumstances and the nature of the misconduct, dismissal may not be appropriate.

Extract from the judgment:
(Murphy AJA)

[41] In the first instance, depression must be looked at as a form of ill health. As such, an incapacitating depression may be a legitimate reason for terminating the employment relationship, provided it is done fairly in accordance with a process akin to that envisaged in Items 10 and 11 of the Code of Good Practice: Dismissal. If an employee is temporarily unable to work for a sustained period due to depression, the employer must investigate and consider alternatives short of dismissal before

resorting to dismissal. If the depression is likely to impair performance permanently, the employer must attempt first to reasonably accommodate the employee's disability. Dismissal of a depressed employee for incapacity without due regard and application of these principles will be substantively and/or procedurally unfair.

[42] Depression may also play a role in an employee's misconduct. It is not beyond possibility that depression might, in certain circumstance negate an employee's capacity for wrongdoing. An employee may not be liable for misconduct on account of severe depression impacting on his state of mind (cognitive ability) and his will (co native ability) to the extent that he is unable to appreciate the wrongfulness of his conduct and/or is unable to conduct himself in accordance with an appreciation of wrongfulness. Should the evidence support such a conclusion, dismissal for misconduct would be inappropriate and substantively unfair, and the employer would need to approach the difficulty from an incapacity or operational requirements perspective. Alternatively, where the evidence shows that the cognitive and conative capacities of an employee have not been negated by depression, and he is able to appreciate the wrongfulness of his conduct and act accordingly, his culpability or blameworthiness may be diminished by reason of the depression. In which case, the employee's depression must be taken into account in determining an appropriate sanction. A failure to properly take account of depression before dismissal for misconduct could possibly result in substantive unfairness.

.....

[46] Accepting thus that the respondent was depressed and had been suffering from depression since 2011, he nonetheless remained reasonably functional and able to carry out his duties throughout most of that period. He was not wholly incapacitated. Moreover, the appellant's policy was merely to require employees compelled to take sick leave to advise the appellant of the fact that they would not be reporting for duty. All the respondent was required to do was to make a phone call or send an email. The evidence does not show that the respondent was debilitated to the extent that he was unable to do these things. Furthermore, on 1 October 2013, he was sufficiently well to attend the Riversdale CCMA and had an opportunity to explain his illness to Terblanche. Instead, he was antagonistic.

[47] In the circumstances, the appellant had a legitimate basis for imposing discipline, the respondent's depression notwithstanding. That being the case, the proximate reason for disciplining the respondent was his misconduct and not the fact that he was depressed. He was relatively capable and knowingly conducted himself in contravention of the rules of the workplace. Discipline was justifiably called for.

.....

[49] Thus, the respondent did not produce credible evidence, and accordingly has failed to prove, either that the treatment accorded to him by appellant in any way differed from the treatment accorded to other employees, or, more importantly, that the reason for any such alleged differential treatment was his condition of depression. The respondent has not established a credible possibility that his dismissal was automatically unfair. Nor has he shown on a balance of probabilities discrimination on a prohibited ground under the EEA. The more probable reason for his dismissal was the misconduct to which he admitted in the disciplinary enquiry and recorded as common cause in the pre-trial minute.

[50] As already discussed, but worthy of repeating, that is not to say that the depression of an employee is of insignificant relevance. Depression, sadly, is a prevalent illness in the current environment. Employers have a duty to deal with it sympathetically and should investigate it fully and consider reasonable accommodation and alternatives short of dismissal. In addition, where depression may account in part for an employee's misconduct, depending on the circumstances and the nature of the misconduct, dismissal may not be appropriate. However, for the reasons explained, in this instance, there was no proper claim of substantive unfairness before the Labour Court which is the subject of an appeal or cross-appeal before us. Our jurisdiction in this appeal is constrained by the pleadings.

4 DISMISSALS FOR OPERATIONAL REQUIREMENTS

4.1 Obligation to consult minority unions over retrenchments

Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others [2020] ZACC 1

Principles:

1. The consultation process section 189 prescribes is procedurally fair, accords with international standards, and is not unconstitutional. The jurisprudence since the introduction of the LRA has consistently interpreted section 189 to exclude any requirement of individual or parallel consultation in the retrenchment process outside the confines of the hierarchy section 189(1) itself creates.
2. S23(1)(d) of the LRA that provides for the extension of collective agreements with a majority union to cover all employees within a bargaining unit, is also not unconstitutional.

Facts

In September 2015 Royal Bafokeng Platinum retrenched 103 employees, some of whom were AMCU members. No prior consultation had taken place with AMCU, which represented approximately 11% of employees, or with the employees themselves. This was due to a retrenchment agreement concluded between the employer and 2 other unions at the mine, NUM the majority union with 75% membership, and UASA another minority union. The agreement was extended to cover all employees and contained a "full and final settlement clause", whereby all those party to the agreement waived their rights to challenge the lawfulness or fairness of their retrenchment.

S189(1) of the LRA says that when an employer contemplates retrenchments, it must consult –

(a) any person it is required to consult in terms of a collective agreement; failing which -
(b) a workplace forum, if one exists, and any registered union whose members are likely to be affected; failing which -
(c) the employees likely to be affected or their representatives nominated for that purpose.

The above effectively creates a "cascading hierarchy of consultation": if the employer is required to consult in terms of a collective agreement, the obligation to consult (other minority) unions or a workplace forum does not arise. And the employees likely to be affected only have to be consulted when neither (a) nor (b) above apply.

The concept of 'majoritarianism' – a consistent theme under the LRA – is entrenched through s23(1) of the LRA that provides that an employer and a majority union can extend the binding nature of a collective agreement (eg a retrenchment agreement) to cover all employees within a bargaining unit, including members of another minority union.

AMCU essentially challenged whether this arrangement complied with the right to fair labour practice under s23(1) of the SA Constitution. This dispute wound its way through the Labour Court, the Labour Appeal Court and then on appeal to the Constitutional Court.

Persons who take the time and trouble to read the ConCourt's full judgment may be surprised to discover there are in fact 4 judgments: the majority judgment supported by 5 judges, a minority opposing judgment supported by 4 judges, and 2 other minority judgments by individual judges wishing to express further motivation for their views, one of which supported the conclusion reached by the 5 judges in the majority judgment and the other supporting the conclusion of the 4 judges in the main minority judgment. So the final tally was 6/5 – that's how close the final outcome was. We have commented before on how unhelpful minority judgments can be, sending a strong message to people at work trying to understand and apply SA's labour laws that even the top legal minds in the country can't seem to agree on how they should be interpreted and why.

The minority judgment would have found s189(1) of the LRA to be unconstitutional and invalid, by failing to impose a legal duty on an employer to consult with all those affected by a retrenchment. It suggests the interesting possibility that concluding a collective agreement on retrenchment with a majority union, which may be extended to cover non parties, and prior consultation with a minority union, are not necessarily mutually exclusive. Consultation and collective bargaining serve different purposes and vindicate different rights, and the outcomes from consultation (even with different groups) can then be taken into account by parties in concluding a subsequent collective agreement.

Notwithstanding the views expressed above, **the ConCourt's majority judgment** did not agree that s189(1) of the LRA is constitutionally invalid, and also dismissed the challenge to s23(1)(d) of the LRA that provides for the extension of collective agreements with a majority union to cover all employees within a bargaining unit.

The majority judgment found that the consultation process prescribed under s189 is procedurally fair and accords with international standards. It noted that since the introduction of the LRA, our jurisprudence has consistently interpreted s189 to exclude any requirement of individual or parallel consultation in the retrenchment process outside the confines of the hierarchy created in s189(1).

The majority judgment commented that dismissal for operational reasons involves complex procedural processes requiring consultation, objective selection criteria and payment of severance benefits. The process involves a shared attempt at arriving at an agreed outcome that gives joint consideration to the interests of employer and employees. Because it is not dependent on individual conduct and requires objective selection criteria, it is pre-eminently the kind of process where union assistance to employees will be invaluable, and it would be futile to provide for individual consultation. It accordingly found that the priority given to collective bargaining in section 189 is not only rational, but sound and fair.

Remembering that the final outcome in this case was mighty close (6/5 majority), it is worth noting what we perceive is a growing trend, both in various amendments to the LRA and in court decisions, to attempt to accommodate minority union representation alongside entrenched principles of majoritarianism. This trend recognises the interconnectedness between the rights of freedom of association, the right to form and join a union and the rights of unions to organise and engage in collective bargaining, which may be impaired if workers are not allowed to be

represented by the union of their choice and are forced to be represented by a union they have chosen not to join.

As commented in the ConCourt's minority judgment, this is exactly what happened in this case: AMCU members were not permitted to be represented by their own union in the consultation process. Instead, they were forced to accept representation by NUM and UASA, after the collective agreement was extended to cover workers who were not members of those two unions. The ConCourt's minority judgment attempts to show that majoritarianism is, or should be, compatible with the existence of minority unions, and allowing those unions to organise and represent their own members in competition with the majority union.

Whilst the ConCourt's majority judgment confirms it may not be necessary to consult minority unions under s189(1), it also states there is nothing to prevent employers from agreeing to do so. If minority unions have a strong presence, employers may be wise to consider doing so in the interests of workplace stability, even when a collective agreement is subsequently concluded with a majority union that is extended to cover all employees.

Extract from the majority judgment:
(Froneman J)

[107] Although not always watertight in practice, the LRA thus distinguishes, first, between dismissals for misconduct, incapacity and operational requirements; and, second, between procedural and substantive fairness in relation to these dismissals. It has been accepted that the adjudication of fairness in relation to misconduct and incapacity involves an inquiry into individual conduct and capacity. By contrast, dismissal based on operational reasons is not dependent on individual conduct or capacity but on objective factors.....

[108] The procedural requirements for a fair consultative process are set out in section 189 of the LRA. Since the introduction of the LRA, as will be shown below, our jurisprudence has consistently interpreted section 189 to exclude any requirement of individual or parallel consultation in the retrenchment process outside the confines of the hierarchy created in section 189(1).

.....

[115] .....So what the applicant seeks is to invalidate a statutory scheme clearly emergent from the LRA – one that has been consistently interpreted and applied in our labour jurisprudence without constitutional challenge for at least twenty years.

.....

[119] The legislation embodies what is fair for retrenchments in the form of a consultation requirement. This was further refined to embody the policy principle of majoritarianism. To find that the statutory provision limits the right to consultation is in my view to get things back-to-front. It upends the very source of the entitlement and, in effect, begs the question at issue. The question is not whether section 189(1) limits an individual's right to be consulted, but whether the way in which the legislation embodies the right to a fair procedure in the retrenchment process passes the constitutional test of rationality.

[120] Thus approached, it is hard to see how the option the legislation embodies is anything but rational. This emerges from the very benefits that the inclusive approach that the first judgment argues for. All an individual employee gains is a right to be heard, notwithstanding the fact that retrenchment may be inevitable. The first judgment – in proper accord with our jurisprudence – emphasises that this process is not a negotiation or anything akin to bargaining. An employer is bound to hear and respond, but not to accept or comply. What then would be the substance of the right? It is difficult to imagine that an employee would find satisfaction in making representations that can, in effect, be brushed aside. Here, the retrenchment process differs fundamentally from a misconduct dismissal, a criminal trial or any similar process, such as a commission of enquiry, where the audi alteram partem

principle operates. There, the right to a hearing arises from the very possibility that the representations might affect the final outcome.
[121] By contrast, it can only be near-futile to afford individual consultation. This emerges from the very benefits of the inclusive approach that the first judgment argues for and accepts – a necessary acceptance – that a retrenchment agreement can lawfully be extended across the workplace, affecting even unconsulted employees. So whilst an individual might have been a consulting partner, it will still be the majority union's implication in the agreement that is decisive. An employer has no obligation to reflect minority representations in the agreement.
[122] And this is for good reason. An individual employee, or even a group of individual employees, has or have scant bargaining clout, particularly where the employer is preoccupied with processing dismissal for operational requirements. A majority union, by contrast, wields coercive power, by immediate or future threat of industrial action. It is this power that may sway an employer to agree to benefits on retrenchment, or better yet, fewer or no dismissals. The first judgment does not seek to unsettle this age-old labour reality. Instead, it creates a burden with very little boon.
.....
[126] There is no procedural unfairness in the consultation process under section 189. We have seen that dismissal for operational reasons involves complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits. The process involves a shared attempt at arriving at an agreed outcome that gives joint consideration to the interests of employer and employees. Because it is not dependent on individual conduct and requires objective selection criteria, it is pre-eminently the kind of process where union assistance to employee members will be invaluable. The choice made for the pre-eminence of collective bargaining in section 189 is not only rational: it is sound, it is fair and it is based on international practice and standards.

4.2 Reason for retrenchment constituting an automatically unfair dismissal?

NUMSA and Another v Aveng Trident Steel (A Division of Aveng Africa Proprietary Limited) and Others (JA25/18) [2019] ZALAC 36 (13 June 2019)

Principle:

1. The essential inquiry under section 187(1)(c) of the LRA is whether the fundamental reason for the dismissal is the refusal to accept the proposed changes in employment.
2. The court must determine factual causation by asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is yes, then the dismissal is not automatically unfair.
3. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such refusal was the main, dominant, proximate or most likely cause of the dismissal.

Facts:

With the steel industry in decline and a 20% fall in its sales volumes and profitability in 2014, Aveng had to reduce costs to maintain its profit margins. In order to survive or remain viable, it needed to restructure. The company initiated a consultation process with NUMSA in terms of section 189A of the LRA, and an extended consultation process followed which resulted in various measures being put in place to address the situation, including discussions about restructuring the company's grading system. An "interim agreement" was reached, in terms of which an interim structure with redesigned job descriptions was agreed, whilst consultation about job descriptions and the long-term viability of the proposed job grade structure would

continue. In terms of the interim structure, employees performed additional functions and were paid extra.

NUMSA subsequently gave written notice to terminate the interim agreement, declaring its members were no longer willing to perform the additional duties. Further negotiations took place between the parties in an attempt to agree on the job grading structure and the rates to be paid, but these were unsuccessful.

After a year of consultations, Aveng informed NUMSA that the consultation process in terms of section 189 of the LRA had now been exhausted and gave notice that Aveng would implement the new structure as per the redesigned job descriptions. Employees however refused to accept offers of employment in terms of the redesigned job descriptions. Given that their previous positions had become redundant and due to their refusal to accept the alternative employment offered, all the employees were dismissed for operational reasons.

At the Labour Court NUMSA contended that the reason for the dismissal was the employees' refusal to accept Aveng's demands in respect of the altered job descriptions and grade structure, which were matters of mutual interest, and thus the dismissal was automatically unfair in terms of section 187(1)(c). Aveng denied that the dismissal was automatically unfair and maintained that the reason for dismissal was a fair reason based on its operational requirements.

The Labour Court in NUMSA obo members v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) (JS596/15) [2017] ZALCJHB (13 December 2017) concluded that the employees were dismissed not for refusing to accept any demand but for operational requirements reasons after rejecting the alternative to dismissal proposed by the employer during retrenchment consultations. The Labour Court held that the proposal to alter the job descriptions was an appropriate measure aimed at avoiding or minimising the number of dismissals and thus the dismissal was for a fair reason. Aveng was faced with operational difficulties and the only viable answer was to restructure and redesign the jobs. The LC was satisfied that Aveng had done everything reasonably possible to save the jobs and had the employees continued working in line with the new job descriptions, they would have remained in employment and suffered no adverse financial consequence.

On appeal at the Labour Appeal Court, it was held that Section 187(1)(c) of the LRA must be read in the context of LRA's protection against unfair dismissal. The prohibition in section 187(1)(c) must be read with section 188. It follows that even where there is evidence suggesting that dismissal occurred following employees' refusal to accept a demand, the employer can still show that the dismissal was for a different, more proximate, fair reason.

The fact that a proposed change is refused and a dismissal thereafter ensues does not mean that the reason for the dismissal is necessarily the refusal to accept the proposed change. The question of whether section 187(1)(c) of the LRA is contravened no longer depends on whether the dismissal is conditional or final (subsequent to a change in the wording of the section in 2014), but rather on **what the true reason for the dismissal of the employees is**. The actual reason for the dismissal needs to be determined.

The LAC said the court must determine **factual causation** by asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no, as in this case, that does not immediately render the dismissal automatically unfair; the next issue is one of **legal causation**, namely whether such refusal was the main, dominant, proximate or most likely cause of the dismissal.

The LAC concluded that the dominant reason or proximate cause for the dismissal of the employees was Aveng's operational requirements, which underpinned the entire process throughout 2014 and 2105 and informed all the consultations regarding the changes to the terms and conditions of employment. The employees' dismissals accordingly fell within the zone of permissible dismissals for operational requirements and did not fall foul of section 187(1)(c). The LAC accordingly confirmed the LC decision.

The LAC also recognised that the LRA does not distinguish between dismissals for operational reasons intended to save a business from failure and those intended simply to increase profitability. However, it noted that employers do not have carte blanche – the connection between the dismissal and the employer's operational needs must still pass the test of fairness. The real question remains: will it be fair in the given circumstances to dismiss employees in order to increase profit or efficiency?

Extract from the judgment:
(Murphy AJA)
Evaluation

[61] The amendment of section 187(1)(c) of the LRA had a restricted purpose and limited reach. It shifted the focus from the employer's intention in effecting the dismissal to the refusal of the employees to accede. It no longer matters what the employer's intention or purpose might be. It is hence now irrelevant whether or not the dismissal was intended to induce the employees to comply with a demand. The upshot is that the distinction between final or conditional dismissals as a basis for the application of section 187(1)(c) of the LRA has fallen away since it no longer has utility.

[62] The amendment is less clear about the more challenging question of when it may be permissible in terms of sections 188 and 189 of the LRA to dismiss on operational grounds employees who refuse to accede to the employer's demands for changes to their terms and conditions of employment. The LRA defines operational requirements generally to mean requirements based on the economic, technological, structural or similar needs of an employer. The definition does not specifically include a need to change terms and conditions of employment. However, as discussed, our prevailing jurisprudence has interpreted the LRA to permit dismissal on such grounds, being structural or similar needs – the upshot being that the right to retrench is implicit in section 187(1)(c) of the LRA. It is doubtful, for the reasons following, that the purpose of the amendment was to change the law in this respect.

[63] If it is no longer permitted in terms of the amendment to section 187(1)(c) of the LRA to dismiss recalcitrant employees and to employ in their place others who are prepared to work in accordance with the new terms and conditions of employment that are operationally required, as NUMSA suggests, the only way to satisfy the employer's operational requirements would be through collective bargaining and ultimately the power play. If no collective agreement can be reached on a proposed restructuring, the employer's only means of addressing its operational requirements would be an offensive exclusion lock-out or unilateral implementation in breach of contract. There will often be practical obstacles in the way of such action, especially

when an employer is confronted with economic or structural challenges. An offensive lock-out, in which the employer will be denied the right to employ replacement labour, or a breach of contract leading to litigation, usually will be self-defeating, adding to the economic pressure on an employer struggling financially and needing to restructure for that reason.

[64] NUMSA's interpretation of the amendment is not sustainable for a few reasons. Section 187(1)(c) of the LRA must be read in the context of LRA's scheme for the protection against unfair dismissal. The prohibition in section 187(1)(c) of the LRA is one of a number of the automatically unfair dismissals outlawed by section 187. It must be read with section 188 of the LRA which provides that a dismissal that is not automatically unfair is unfair if the employer fails to prove a fair reason such as one based on operational requirements under section 189 of the LRA. It follows that even where there is evidence suggesting a credible possibility that dismissal occurred because the employees refused to accept a demand, the employer can still show that the dismissal was for a different more proximate fair reason.

[65] The fact that a proposed change is refused and a dismissal thereafter ensues does not mean that the reason for the dismissal is necessarily the refusal to accept the proposed change. The question whether section 187(1)(c) of the LRA is contravened does not depend on whether the dismissal is conditional or final, but rather on what the true reason for the dismissal of the employees is. The proven existence of the refusal of a demand merely prompts a causation enquiry. The actual reason for the dismissal needs to be determined and there is no basis in principle for excluding an employer's operational requirements from consideration as a possible reason for dismissal.

[66] There is furthermore merit in Aveng's submission that NUMSA's construction would lead perversely to employers being wary of proposing any changes to terms and conditions of employment in section 189 consultations. That would undermine the fundamental purpose of section 189 to encourage engagements on all potentially viable alternatives to retrenchment.

[67] Moreover, if it is permissible in terms of section 67(5) of the LRA to dismiss protected strikers where the employer is able to demonstrate (on all the facts and circumstances of a particular case) a legitimate and substantial business necessity, the underlying policy rationale applies equally to the dismissal of employees resisting employer demands or proposals. Striking workers may not be dismissed for striking but can be retrenched where a genuine substantial operational necessity arises. By the same token, while employees cannot be dismissed for refusing to accept a demand, they can be dismissed if that refusal results in a more dominant or proximate operational necessity. This legislative scheme of collective bargaining is in line with the constitutional right of trade unions and employers to engage in collective bargaining in that any limitation of the power play is reasonable and justifiable in the balance struck between the strike weapon and the employer's power of implementation at impasse.

[68] Hence, the essential inquiry under section 187(1)(c) of the LRA is whether the reason for the dismissal is the refusal to accept the proposed changes to employment. The test for determining the true reason is that laid down in SA Chemical Workers Union v Afrox Ltd. The court must determine factual causation by asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no, as in this case, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such refusal was the main, dominant, proximate or most likely cause of the dismissal.

[69] As in all operational requirements dismissals, the merits of the employer's decision in such circumstances are open to scrutiny, but a stricter scrutiny in light of the need for judicial sensitivity to the dynamics of a legitimate power play - the driver of collective bargaining. As discussed earlier, the LAC and the SCA in Fry's Metal, in considering the merits of the dismissal in that case, accepted that the LRA does not distinguish

between dismissals for operational reasons intended to save a business from failure and those intended simply to increase profitability. In this regard Zondo JP said:

> *'This is because all the Act refers to, and recognises, in this regard is an employer's right to dismiss for a reason based on operational requirements without making any distinction between operational requirements in the context of a business the survival of which is under threat and a business which is making profit and wants to make more profit.*'

[70] However, employers do not have carte blanche. As Prof du Toit put it:

> *'…though the notion of employers being free to dismiss workers "merely to increase profit" may seem to open the floodgates to dismissal virtually at will, the causal nexus between a dismissal and the employer's operational needs must still pass the test of fairness. The real question remains: will it be fair in the given circumstances to dismiss employees in order to increase profit or efficiency?*'

[71] NUMSA's contention that the reason for the dismissal of the employees was solely their refusal to accede to the demand by Aveng that they sign new contracts of employment is not sustainable on the facts.

.....

[75] The dominant reason or proximate cause for the dismissal of the employees, therefore, was Aveng's operational requirements, which underpinned the entire process throughout 2014 and 2105 and informed all the consultations regarding the changes to the terms and conditions of employment. The employees' dismissals accordingly fell within the zone of permissible dismissals for operational requirements and did not fall foul of section 187(1)(c) of the LRA. In the result, the Labour Court did not err in its conclusion.

4.3 Resolving incompatibility through retrenchment?

Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk - (2020) 29 LAC 1.11.26 also reported at [2020] 6 BLLR 549 (LAC)

Principle:

1. Incompatibility is a species of incapacity because it impacts on work performance. If an employee is unable to maintain relationships, this may constitute a substantively fair reason for dismissal. Procedural fairness in incompatibility cases requires the employer to inform the employee of the conduct causing disharmony and to propose remedial action to remove the incompatibility. The employee should be given a reasonable opportunity to resolve issues.
2. Compensation for procedural unfairness is not based on an employee's actual (financial) losses, and is a 'solatium' (redress) for the loss of a right. Key factors in determining compensation for procedural unfairness are: i) the extent of the deviation from a fair procedure; ii) the employee's conduct; iii) the employee's length of service; and iv) the anxiety and hurt caused to the employee as a consequence of the employer not following a fair procedure.

Facts:

Avis consolidated the posts of the two incompatible managers and invited each to apply for a new post, without first consulting the employees on the chosen solution or on the selection criteria.

The matter was referred to the **Labour Court** as an automatically unfair dismissal under s187(1) of the LRA due to unfair discrimination, or alternatively that the

dismissal was unfair in terms of s189 of the LRA due to there being no bona fide operational requirements reason and Avis had not followed a fair procedure.

The Labour Court held that the employee had not discharged her onus to prove that the reason for her dismissal was discrimination. It held the structural solution of combining the positions and declaring one of the posts redundant was the only solution and "a rational commercial or operational decision". The LC concluded on this basis that the dismissal was substantively fair, but that it was procedurally unfair principally because it was presented as a fait accompli and without any meaningful consultation about appropriate measures to avoid the dismissal and the method of selecting which employee was to be dismissed. The LC awarded her compensation equivalent to 10 months' remuneration.

Avis appealed this decision to the **Labour Appeal Court.** The LAC confirmed that incompatibility is a species of incapacity because it impacts on work performance. If an employee is unable to maintain an appropriate standard of relationship with his or her peers, subordinates and superiors, as reasonably required by the employer, such failure or inability may constitute a substantively fair reason for dismissal. Procedural fairness in incompatibility cases requires the employer to inform the employee of the conduct allegedly causing the disharmony, to identify the relationship affected by it and to propose remedial action to remove the incompatibility. The employee should be given a reasonable opportunity to consider the allegations and proposed action, to reply thereto and if appropriate to remove the cause for disharmony. The employer must then establish whether the employee is responsible for or has contributed substantially to irresolvable disharmony to the extent that the relationship of trust and confidence can no longer be maintained.

The LAC found that the decision to merge the posts, with both managers competing for the merged post, was made without consultation. The LAC agreed with the LC's conclusion that the dismissal was procedurally unfair. The LAC said the requirement that employees compete for a post is not in itself a method of selecting for dismissal, and more is required. The competition for the post must proceed in accordance with identified selection criteria, and a fair selection method must be chosen to decide who is to stay and who is to go.

This case confirms that compensation for procedural unfairness is not based on an employee's actual (financial) loss, and is a 'solatium' (redress) for the loss of a right. Key factors in determining compensation for procedural unfairness are as follows:

i) the extent of the deviation from a fair procedure;
ii) the employee's conduct;
iii) the employee's length of service; and
iv) the anxiety and hurt caused to the employee as a consequence of the employer not following a fair procedure.

The LAC took account of ex gratia payments made by Avis to the employee over and above her statutory and contractual entitlements, which had been ignored by the LC, and reduced her compensation to 7 months' remuneration.

Extract from the judgment:
(Murphy JA)

[38] Before turning to the merits of the issue of procedural fairness, it may be helpful to comment briefly upon the preferable approach to deal with incompatibility in the workplace. Despite Avis ultimately having framed the problem it faced as an operational requirements issue, it, in truth, was seized with incompatibility in the workplace.

[39] Incompatibility involves the inability on the part of an employee to work in harmony either within the corporate culture of the business or with fellow employees. There has been some difference of opinion in the past about whether incompatibility is an operational requirements or an incapacity issue. The prevailing view is that incompatibility is a species of incapacity because it impacts on work performance. If an employee is unable to maintain an appropriate standard of relationship with his or her peers, subordinates and superiors, as reasonably required by the employer, such failure or inability may constitute a substantively fair reason for dismissal. Procedural fairness in incompatibility cases requires the employer to inform the employee of the conduct allegedly causing the disharmony, to identify the relationship affected by it and to propose remedial action to remove the incompatibility. The employee should be given a reasonable opportunity to consider the allegations and proposed action, to reply thereto and if appropriate to remove the cause for disharmony. The employer must then establish whether the employee is responsible for or has contributed substantially to irresolvable disharmony to the extent that the relationship of trust and confidence can no longer be maintained.

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Compensation and costs

[49] As the dismissal was found only to be procedurally unfair, compensation is the appropriate remedy in terms of section 193(2)(d) of the LRA. Section 194(1) of the LRA provides the Labour Court (or CCMA commissioner) with a discretion to determine the quantum of compensation. It reads:

> '*The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal*.'

[50] The requirement that an award of compensation be "just and equitable in all the circumstances" envisages that the Labour Court will be informed about all the circumstances which may bear upon justice and equity. The starting point should be the injustice and harm suffered by the employee and the conduct of the parties. Equity requires proper consideration of the interests of both parties. When the dismissal is unfair only on account of procedural unfairness, the patrimonial loss of the employee is irrelevant. In such instances, the award of compensation is intended to be a solatium. In Johnson & Johnson (Pty) Ltd v CWIU, Froneman DJP put it as follows:

> *'The compensation for the wrong in failing to give effect to an employee's right to fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a… penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress.*'

[51] The key factors in the determination of compensation for procedural unfairness, therefore, are: i) the extent of the deviation from a fair procedure; ii) the employee's conduct; iii) the employee's length of service; and iv) the anxiety and hurt caused to the employee as a consequence of the employer not following a fair procedure.