Legislation & Case Law Update

April 2024

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LEGISLATION UPDATE

Revised Employment Equity sector targets

Revised Employment Equity sector targets have been published for comment under section 15A of the Employment Equity Act, which was introduced by the Amendment Act no 04 of 2022. The public has been given **90 days** from 1 February 2024 (ie until 2 May 2024) to comment. This newsflash discusses some of the practical considerations and potential problem areas in applying these revised targets, should they be finalised in this form.

How do the February 2024 Regulations compare with the May 2023 Regulations?

Worklaw subscribers will be aware that these are not the first set of sector targets gazetted. Sector targets were gazetted in May 2023 that resulted in much debate, public comment and legal challenges, including a dispute referred by the Solidarity trade union to the ILO. This dispute was subsequently settled between Solidarity and Government on the basis of agreed amendments to the May 2023 Regulations, which have been incorporated into the latest Regulations – more on that later.

The May 2023 Regulations provided national and provincial employment equity 5-year targets for designated employers in 18 economic sectors under the categories of 'top management', 'senior management', 'professionally qualified' and 'skilled'. The sector targets in each case were stated under African, Coloured, Indian (summarised as Black) and White categories, and different national and provincial targets were provided. The targets distinguished between male and female employees, and also provided a blanket 2% target for employees with disabilities in each sector.

The Feb 2024 Regulations provide one 5-year employment equity target for the combined “designated group” in respect of designated employers in the same 18 economic sectors under the same categories of 'top management', 'senior management', 'professionally qualified' and 'skilled'. The targets again distinguish between male and female employees, and also provide a blanket 2% target for employees with disabilities in each sector. Having regard to the female targets, we presume these refer to all employees irrespective of race, and similarly with the disability targets.

The latest Regulations differ in 3 key areas:

- The Feb 2024 Regulations provide much more explanation and guidance on how the targets were determined and how they should be applied.
- Whilst the May 2023 Regulations provided national and provincial sector targets, the Feb 2024 Regulations provide a national sector target in each employment category.
- Whilst the May 2023 Regulations provided sector targets under African, Coloured and Indian categories, the Feb 2024 Regulations effectively provide one target for Black employees (defined in the EEA to include African, Coloured and Indian employees). The May 2023 Regulations also provided sector targets for White employees, which are not included in the Feb 2024 Regulations.

Where the Feb 2024 Regulations mirror the May 2023 Regulations is in the 5-year sector targets. Aside from moderate changes in the Finance and Insurance Activities

sector, the Feb 2024 Regulations repeat *exactly the same* national female and male designated group targets in the 4 employment categories in every one of the other 17 sectors. These have not changed at all from the May 2023 figures.

How the targets were determined

The Regulations state (clause 3.1) that the following factors were taken into account in setting the targets:

- The extent to which suitably qualified people from the designated groups were equitably represented within the occupational levels within each sector's workforce, in relation to the demographic profile of the national and regional/ provincial economically active population (EAP).
- The latest 2022 EE workforce profiles in each sector in terms of race, gender and disability, as reported by designated employers in their 2022 EE reports.
- Sector Codes and Charters published under the BBBEE Act.
- Unique sector dynamics (eg skills availability, economic and market forces etc) raised by sector stakeholders in their written submissions during the consultation process

It is difficult to see how these were applied across the various sectors, given the small variances in the targets in many instances across the sectors, and given that 95% of the targets have not changed from those set out in the May 2023 Regulations. Some of the above information may only have become available after the May 2023 Regulations were gazetted.

The following broad summary gives an overall sense across all the sectors, of what the targets set out in the Regulations project in the different categories (including male and female designated group employees, but excluding the 2% Disability category in each case):

Category	**Designated Group Target**
Top Mgt	40-50% for 78% of the sectors (14 out of 18)
Senior Mgt	48-65% for 78% of the sectors (14 out of 18)
Prof Qlfd / Middle Mgt	60-75% for 61% of the sectors (11 out of 18)
Skilled / Technical	84-91% for 83% of the sectors (15 out of 18)

For many organisations across the sectors, the above targets should not be too onerous to achieve, and many may already be within these bands. Presuming we are correct that the female targets are met with employees of any race group (given that "women" are defined in the EEA as part of the "designated group") and they form part of the total designated group sector targets, that will make it even easier for employers to achieve the racial targets embodied within the sector targets.

Applying the targets

The Regulations provide (clause 3.4) that designated employers, in developing their employment equity plans, must take into account the following:

- In addition to the gazetted designated group targets in their sector, they must also take into account their workforce profile and their applicable EAP, when setting annual numerical workplace targets.

- Having set annual targets, they will be measured (presumably annually) against progress in meeting the gazetted sector targets.
- They should not set targets for those population groups whose representation may have already exceeded their EAP in a particular occupational level.
- In setting annual numerical workplace targets, they must set numerical targets "*for all population groups*" in each of the occupational levels where there is under-representation.
- Where the numerical targets of a particular racial / gender group have been exceeded, they "*may not regress in that particular racial / gender group, but should set targets towards the EAP.*"
- They should still set annual numerical targets for all population groups in the semi-skilled and unskilled categories based on their EAP, despite these not being included in the gazetted sector targets.
- The national EAP shall apply to designated employers operating nationally and the applicable provincial EAP shall apply to designated employers operating in a particular province. Employers must choose the national or the same provincial EAP for the duration of their EE plan, and cannot use both the national and a provincial EAP at the same time.
- An employer who chooses a provincial EAP and operates in more than one province, may choose the EAP of the province where the majority of employees are located.
- An employer that operates in more than one sector, should choose the sector in which the majority of employees are located.

In attempting to consider how all this should be applied, it seems there is a potential disconnect between the above guidelines and the gazetted targets. It may well be that, given the other factors that employers need to consider in formulating their targets (their workforce profile and relevant EAP), those targets may vary considerably from the gazetted targets. This could tie in with the accepted justifications for employers not meeting the gazetted targets as discussed in more detail below.

Much attention is given in the guidelines to the national and provincial EAP statistics, whereas we are not sure how readily available this information is for many employers, and whether it can be made available on a national, provincial and regional basis, or on a job category or sector basis? EAP statistics are also not without controversy, with debate about who falls into or out of the "economically active" category.

Section 42(1)(a) and section 42(3) of the EEA and clause 3.1.1 of the Regulations talk about regional / provincial demographics, but 'regional' is dropped from subsequent clauses in the Regulations, with only 'provincial' demographics mentioned. Whilst this may just be sloppy drafting, its application may be very significant (eg Durban's demographics may be very different from those of KZN), if that is the yardstick against which an employer's compliance is being measured. Also, no consideration seems to have been given to the fact that the EAP (whether regional, national or provincial) *per sector* is likely to vary considerably. The Finance and Insurance sector is likely to look very different to the Agricultural sector for example. Similarly, we doubt whether EAP statistics are available for the different categories of top, senior and middle management, given that the gazetted targets are markedly different in each of those categories.

What does seem clear however, given that the gazetted (national) targets apply to all Black employees as defined (ie including Africans, Coloureds and Indians) and include

all female employees irrespective of race, is that this does afford employers a much wider discretion in meeting those targets, taking into account their workforce profile and the demographics of their applicable EAP. Whether or not this was intended, this in itself will probably please employers the most, aside from any other confusion the gazetted guidelines may have caused.

Incorporation of the Solidarity Settlement Agreement

As mentioned earlier, Solidarity referred a dispute to the ILO over the May 2023 Regulations, which was subsequently settled in terms of a written Agreement entered into between Solidarity and Government. In terms of that Agreement, its contents had to be incorporated into revised Regulations, which has now been done. Clause 4 is effectively a direct transcript of that Settlement Agreement, with references for example to sections of the EEA in support of the inserted content.

As a result of the above, important content has now been included in the Regulations, such as the following:

- Recognition that affirmative action is a temporary measure aimed to achieve equality.
- No absolute employment barrier may be placed affecting any persons.
- In preparing, implementing and reporting on employment equity plans and any compliance analysis, the following must be taken into account –
    - Inherent job requirements;
    - The pool of suitably qualified persons;
    - Qualifications, skills, experience and the capacity to acquire, within a reasonable period, the ability to do the job;
    - Turn-over rates and natural attrition within the workplace;
    - Recruitment and promotional trends within the workplace.
- In any compliance analysis of affirmative action, justifiable / reasonable grounds for not complying with set targets may include the following:
    - Insufficient recruitment or promotion opportunities;
    - Insufficient applicants with the relevant qualification, skills and experience;
    - CCMA awards / court orders;
    - Transfers of businesses and mergers / acquisitions;
    - Impact of business economic circumstances.
- An employer will not incur any penalties or any form of disadvantage if there are justifiable / reasonable grounds for not complying with targets.
- No employment termination of any kind may be effected as a consequence of affirmative action.

A technical legal point

These revised sector targets have been gazetted in terms of section 15A of the EEA, which was introduced by the Amendment Act no 04 of 2022. Whilst this Amendment Act was signed into law on 6 April 2023, section 16 states that the Amendment Act will take effect on a (future) date fixed by the President. This has to date never happened, which means section 15A and the other amendments contained in that Act are not yet applicable (which is the reason those amendments are not yet reflected in our version of the EEA on Worklaw).

Whilst this may be a legal technicality, it is questionable whether sector targets can be gazetted for comment in terms of a section of the Act that is not yet in force. This may provide scope at some future stage for another legal challenge to the sector targets by those opposed to them.

Comment

The Regulations state that anybody wishing to comment on them must do so in writing before 2 May 2024 and by email to –

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Parental leave redefined

Judge Roland Sutherland's recent High Court judgment in *Van Wyk and Others v Minister of Employment and Labour* (2022-017842) [2023] ZAGPJHC 1213 (25 October 2023) has declared that various sections of the Basic Conditions of Employment Act (BCEA) dealing with leave granted to parents on the birth or adoption of a child or in surrogacy arrangements, are unconstitutional.

Current BCEA provisions

The BCEA traditionally regulated maternity leave for mothers under s 25 and fathers were granted 'family responsibility' leave under s 27. The BCEA was amended on 1 January 2020, with the additions of sections 25A - C, and parental leave for fathers was removed from under the ambit of s 27. These new sections aimed to provide a more equitable leave arrangement for parents in three different circumstances, namely a child born of a mother, a child born by surrogacy, and an adopted child.

In summary these sections currently provide as follows:

> **S 25 – maternity leave:** birth mothers are entitled to at least 4 consecutive months' maternity leave, taken at any time from 4 weeks before the expected date of birth, unless otherwise agreed, or on a date from which a medical practitioner or a midwife certifies that it is necessary for health reasons.
>
> **S 25A – parental leave**: fathers of a child are entitled to at least 10 consecutive days' parental leave commencing on the day that the employee's child is born, or the date that the adoption order is granted, or the date when a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order.
>
> **S 25B – adoption leave**: for adoptive parents of a child below the age of 2, one parent is entitled to at least 10 consecutive weeks' leave and the other to the 10 days' parental leave under s 25A. The parents can elect which of them takes either leave entitlement. These provisions are gender neutral, and a pair of same-sex parents is not distinguished from a heterosexual pair.
>
> **S 25C – surrogacy leave**: parents of a child through surrogacy (referred to in the Act as "commissioning parents") acquire the same election as adoptive

parents, and can decide which of them is entitled to the 10 weeks' leave or the 10 days' parental leave under s 25A.

Note that the BCEA does not require the employer to pay for leave under these different circumstances, and claims can be made under UIF.

Facts of the case

The primary applicants in this case were a Mr and Mrs van Wyk. Mr Van Wyk is a salaried employee, whereas his wife is in business for her own account. They preferred that Mrs Van Wyk return to work as soon as possible because her business might fail were she not to be active, and she did not want to take maternity leave. They decided Mr Van Wyk would be the primary care-giver during the early infancy of their child, but he was only eligible for 10 days' paternity leave. He took extended leave, partly unpaid, from his employer by means of an ad hoc arrangement, but he was not entitled to any UIF pay-out.

These circumstances resulted in them bringing the High Court application against the Minister of Employment and Labour, challenging the constitutionality of the relevant provisions of the BCEA.

High Court's findings

The High Court found that the provisions of sections 25, 25A, 25B and 25C of the BCEA and the corresponding provisions of the Unemployment Insurance Fund Act are unconstitutional and invalid, in that they –

(a) unfairly discriminate between mothers and fathers;

(b) unfairly discriminate between one set of parents and another, on the basis of whether their children were born of the mother, conceived by surrogacy, or adopted.

The Court said its declaration of invalidity was suspended for 2 years, effectively giving Parliament that period to make the required changes to the BCEA to comply with the Constitution.

Pending those changes being made, the Court said those sections in the BCEA are to be read as entitling –

(a) any employee (man or woman) who is a single parent (through birth, adoption or surrogacy) to at least 4 consecutive months' parental leave; and
(b) employees who are a pair of parents, to collectively have 4 consecutive months' parental leave, apportioned between them as they decide.

The Court stipulated that both employers (presuming the parents would be employed by different employers, as will be the situation in most cases) must be notified prior to the date of birth, in writing, of the parents' leave election. If they choose a shared leave arrangement, the period(s) to be taken by each of them must be stated.

The Court drafted its order in a manner that effectively spelt out the wording changes that would have to be made to sections 25 to 25C. The Court also stipulated that the corresponding provisions in the UIF Act must be read to be consistent with the changes effected by its order. Each parent who is a contributor, as defined by the Act, shall be entitled to the benefits as prescribed therein.

An important technical point to note: Whilst section 172 of the Constitution gives a court the power to declare any law that is inconsistent with the Constitution to be invalid, section 172(2)(a) says that an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. Notwithstanding this, a court may make any order that is just and equitable including 'other temporary relief' pending a decision of the Constitutional Court on the validity of the Act (s 172(1)(b) and s 172(2)(b)).

The way we unravel the meaning of all this is that the 'temporary relief', being the way the High Court has interpreted these sections of the BCEA, probably only applies to the Van Wyks at this stage. We think the High Court order will have to be confirmed by the Constitutional Court before it has wider application to the general public, and we have no idea how long this process might take.

Judgment's consequences

This judgment, presuming it is not challenged on appeal and, importantly, presuming it is confirmed by the Constitutional Court (which we think it will be), has far reaching consequences for employers and employees. We summarise below what we think are the most important:

(1) Employees who are single parents – mothers or fathers, including through adoption or surrogacy, will be entitled to 4 consecutive months' parental leave (what used to be called maternity leave).
(2) Employees who are joint parents – mothers and fathers, including through adoption or surrogacy, will be entitled to share 4 consecutive months' parental leave, as agreed between them.
(3) Employees who take parental leave - mothers and/or fathers - will be able to claim UIF.
(4) Parents through adoption or surrogacy who previously had the choice between them of the 10 weeks leave and the 10 days parental leave under sections 25A – C, will in future be entitled to 4 consecutive months' leave under (1) and (2) above.

But important questions come to mind in at least 2 areas:

Firstly, presuming that joint parents will in most cases be employed by different organisations, how will an employer verify what parental leave the other employer has agreed with its parenting employee?

We suggest that employers draft a parental leave form that requires the employee to stipulate how the parental leave has been shared, and consents to the employer verifying the agreed arrangement with the other employer. We suggest this would withstand scrutiny under section 27(1)(b) of the Protection of Personal Information Act. Employers should specify that false information provided with the intention of claiming unwarranted leave, would be regarded as serious misconduct.

Secondly, how does this judgment affect employer policies that are more favourable than the BCEA's requirements – for example, currently incorporating periods of paid maternity (only) leave?

We suggest that, in the same way the BCEA's provisions have been found to be discriminatory, so too could employer polices be found to discriminate. We recommend that employers should scrutinise their polices to ensure they do not discriminate on a gender basis or between different types of parents.

To the extent that this exercise results in significant projected cost increases – eg due to much higher incidences of parental leave being taken by (male and female) employees and increased costs of hiring replacement employees, this could lead policies having to be modified. If such policies are part of terms and conditions of employment, allegations of unilateral changes to terms and conditions of employment may have to be countered with arguments based on changes being justified to comply with an employer's legal obligations resulting from the *Van Wyk* judgment.

CASE LAW INDEX

1. Breathalyser tests challenged

Samancor Chrome Ltd (Western Chrome Mines) v Willemse and Others (JR312/2020) [2023] ZALCJHB 150 (29 May 2023)

Principle:

Where an employer's alcohol policy makes testing positive a disciplinary offence, the onus is on the employer to establish that there is alcohol in the employee's blood stream. A breathalyzer test is capable of producing false positive results in certain circumstances (eg when the person tested had not eaten for more than eight hours, or eaten any substance with a yeast content) and the more reliable test is that of a blood sample tested in laboratory conditions.

Facts:

Samancor Chrome had a "zero tolerance" alcohol and drugs procedure which said that an employee was deemed unfit to enter the premises "*in the event that their breath alcohol level exceeds 0.000 percent and if the drug test indicates any illegal substances*". The policy required the employer to take disciplinary action in all cases where an employee had tested positive for alcohol or drugs. The policy said "*this offense is viewed as gross misconduct and may lead to summary dismissal*".

The employee, after 19 years of service, was dismissed after being charged with having tested positive for alcohol. He denied that he had consumed any alcohol and referred an unfair dismissal dispute to the CCMA.

At the **arbitration** hearing, a security officer testified that the employee arrived at work and was asked to take a breathalyzer test on an Alcoblow Rapid machine. The breathalyzer indicated a green light, meaning a positive result. The employee questioned this result and she tested him again on the same breathalyzer, with the same result. The employee denied that he had consumed any alcohol either that day or on the previous evening. The employee was then breathalysed on another machine, the Lion Alcometer 500 by another security officer. The result was again positive and indicated an alcohol content of 0.013%.

The employer led the evidence of a chemical pathologist who testified that a blood sample drawn from the employee was sent to Ampath Laboratory to test for the presence of alcohol in the employee's blood. The method used to determine the blood alcohol content in the sample was a plasma ethanol test, which cannot test for alcohol below 0.010g/dl. The report issued by the laboratory was negative indicating that the employees blood sample had less than 0.010 g/dl alcohol content. The pathologist testified that the blood test was more accurate than a breathalyzer test, and that breathalyzer tests may be false in certain circumstances, for example, when the person tested had not eaten for more than eight hours, or eaten any substance with a yeast content. In his opinion, the result of the test performed did not mean that the employee did not have any alcohol at all in his blood, it simply meant that there was no blood alcohol content exceeding 0.010 g/dl, but for all clinical purposes, the result was negative.

The employee went to see his family medical practitioner after having been accused of consuming alcohol, who also took a blood sample from the employee and sent it to Ampath Laboratory. That result was also negative.

Strangely, it appears the chairperson of the employee's disciplinary hearing was not influenced by either laboratory result, and found the employee guilty of testing positive for alcohol as a result of the breathalyzer tests.

The arbitrator summarized the evidence and recorded the issue that he was required to decide whether the employee had committed any act of misconduct, and whether the dismissal was the appropriate sanction.

The arbitrator made reference to the pathologist's evidence that a breathalyzer test may in certain circumstances produce false positive results, and that the more reliable test is that of a blood sample tested in laboratory conditions. The arbitrator said that he fully understood that the employer was using a method that is convenient for safety reasons to check if employees are intoxicated but that the chairperson of the disciplinary hearing ought to have taken the laboratory results into consideration since those have more accurate and reliable results. The arbitrator concluded that there was no breach of the rule by the employee as the laboratory results, coupled with the expert testimony, confirmed that the employee did not have alcohol in his blood.

The arbitrator found that the employee's dismissal was substantively unfair and ordered his reinstatement with retrospective effect.

On review at the **Labour Court**, the employer argued that the arbitrator misconstrued the nature of the inquiry he was required to undertake and based his findings on a consideration of whether the employee was intoxicated or not. The Labour Court did not agree and found that the arbitrator was fully aware that the employee had been dismissed for having alcohol in his blood, and not for intoxication, and that he was required to determine whether the employer had established this fact.

The employer had the onus of establishing that there was alcohol in the employee's blood stream. The Court found that the pathologist's evidence did not prove that there was any alcohol in the employee's bloodstream, being a negative result for any medical purposes, and that breathalyzer tests were capable of producing false positive results in specified circumstances. The Court said these factors supported the arbitrator's assessment of the probabilities in this case.

The Labour Court dismissed the employer's review application with costs, meaning that the arbitrators award that the dismissal was substantively unfair, and with the employer ordered to reinstate the employee with retrospective effect, stood.

Employers should consider whether to charge an employee for being 'under the influence' or for testing positive for a drug/alcohol test. Where the 'testing positive' charge is used, this case makes it clear that when breathalyzer and blood test results are both available, the blood test results should be regarded as the more persuasive evidence. We fail to understand how this evidence was apparently ignored in this case.

Where blood test results are not available, witness evidence that an employee was 'under the influence' (eg breath smelled of alcohol, speech slurred, behaving

abnormally etc) will assist any assessment of the probabilities, even when the charge was ‘testing positive’ in terms of a zero tolerance policy.

Employers should also be aware of the decision in *Goba and Clubland* (2002) 23 ILJ 1300 (CCMA) that found that, to establish the correctness of a breathalyzer reading, employers may have to lead evidence of the nature of the device, whether the test was properly administered, the qualifications of the tester, and the significance of the reading, if this is disputed.

Where a charge of being ‘under the influence’ is used, aqain witness evidence of an employee’s intoxicated state should be provided in support of the results of any breathalyzer or blood test conducted.

Whilst the charge of ‘testing positive’ can be justified in terms of a zero tolerance policy, occupational health and safety legislation makes "intoxication" the crucial issue. Employers have an obligation (in terms of the General Safety Regulations under the Occupational Health and Safety Act (OHSA)) not to permit any person who is or who appears to be under the influence of intoxicating liquor or drugs to enter or remain at the workplace. The Compensation for Occupational Injuries and Diseases Act (COIDA) also defines "serious and wilful misconduct" to include being under the influence of intoxicating liquor or a drug having a narcotic effect.

Extract from the judgment:
(Van Niekerk, J)

[5] **……**Broodryk testified that the blood test was more accurate than a breathalyzer test, and that breathalyzer tests may be false in certain circumstances, for example, when the person tested had not eaten for more than eight hours, or eaten any substance with a yeast content…….
……..

[17] Turning then to the applicant’s submissions in regard to what it contends are reviewable irregularities on the part of the arbitrator and the unreasonableness of the result, I am unable to find any misdirection by the arbitrator in his assessment of the evidence. The evidence discloses that after the breathalyzer tests, the employee’s blood sample, analysed by the Ampath Laboratory, produced a negative result. Broodryk, the applicant’s expert witness, confirmed that the blood test was more reliable than any breathalyzer test and that the negative result of the blood test was correct. Broodryk also confirmed that a breathalyzer test is prone to producing false positive results. …….This evidence, coupled with the evidence by Broodryk that the sample provided by the employee produced a negative result, for any medical purposes, and that breathalyzer tests were capable of producing false positive results in specified circumstances, supports the arbitrator’s assessment of the probabilities and also his finding. …….The evidence that breathalyzer tests were prone to give false positive results was corroborated by Koekemoer, who confirmed that breathalyzer tests were less reliable than blood tests and substantiated the evidence that a false positive test might be generated under certain conditions. Specifically, there was no evidential basis to reject the evidence of Broodryk who stated that ‘in my honest opinion, I think that the breathalyzer was false/positive’.

2. Delays in disciplinary proceedings

Passenger Rail Authority of South Africa v Tale N.O and Others (JR272/21) [2023] ZALCJHB 199 (29 June 2023)

Principles:

(1) Relevant factors in deciding whether a delay in disciplinary proceedings would constitute unfairness, are whether –
   (a) the delay was unreasonably long;
   (b) there is an explanation that can reasonably excuse the delay;
   (c) the employee took steps to assert his/her right to a speedy process;
   (d) the delay caused material prejudice to the employee;
   (e) the nature of the offence justified the delay.

(2) A Court on review should be disinclined to interfere with an arbitrator's credibility findings, unless they were not supported by the evidence as shown from the record.

Facts:

Four employees received an instruction from their supervisor to disconnect a railway coach from the tracks so that it could be repaired - a job that would normally take about 1 or 2 hours to complete. The employees who would normally do this work were attending a union meeting, and whilst this was not the normal work of the four instructed employees and was work below their pay grade, it was not disputed that they could do the work, that the instruction given to them was reasonable, and that they were required to do the work.

Material disputes of fact existed about what then happened between the supervisor and the four employees. The supervisor claimed they refused to do the work as it was below their pay grade, whereas they denied this. The employees claimed they were not given enough time to do the work and that the supervisor refused to listen to any explanations from their side. They were called to the boardroom and issued with charge sheets relating to serious misconduct, insubordination and operation sabotage for refusing to disconnect the coach as instructed. They were instructed by the supervisor not to return to the coach because it would be used as evidence in their disciplinary hearings.

The disciplinary hearing was not immediately convened and the employees were never suspended and continued to report to the supervisor. There was no evidence of any further incidents between the employees and the supervisor.

The employer's disciplinary rules state that a disciplinary hearing must be concluded within 30 days of the misconduct, provided that this can be delayed for legitimate reasons and subject to an extension being applied for. Whilst an extension was applied for in this case, the disciplinary hearing for the one of the four employees was only heard 2 years and 4 months after she was first issued with a charge sheet. She was found guilty of one of the three charges, namely insubordination, and dismissed.

The employee referred an unfair dismissal dispute to the **CCMA**, where the commissioner found that her dismissal was substantively and procedurally unfair and ordered reinstatement. It appears that the arbitrator found the employer's evidence on

the material disputes of fact to be inconsistent and that the employee's version was more probable. The employer also failed to call certain material witnesses to give evidence and the arbitrator drew a negative inference from this failure, namely that had they been called as witnesses, their versions may not have supported the employer's case.

The employer brought the matter on review to the **Labour Court**. The Court accepted that the employees had only been busy with their work for a short time when the supervisor accused them of refusing to carry out his instructions, and then prevented them from finishing the work. It was clear that the employees were willing to complete the work, but were prevented from doing so by their supervisor.

Bearing in mind that a Court on review should be disinclined to interfere with an arbitrator's credibility findings unless they were not supported by the evidence, the Court concluded that the commissioner's arbitration award was not reviewable. Having examined the arbitration record, the Court found that the commissioner's findings of facts were properly supported by the evidence; and he was justified in drawing an adverse inference from the employer's failure to call certain material witnesses. The Labour Court re-stated the definition of insubordination and found that there was no wilful refusal to comply with the instructions given. There was no persistent, wilful and serious challenge to, or defiance of the employer's authority.

Having regard to procedural fairness, the Labour Court noted that the employer led no evidence to explain why it took 2 years and 4 months to finalise the disciplinary proceedings when its procedures provided a period of 30 days, and agreed with the arbitrator's finding of procedural unfairness. The Court referred to *Moroenyane v Station Commander of the SA Police Services, Vanderbijlpark* [2016] JOL 36595 (LC) at para 42, which stated the criteria to apply in deciding whether a delay in disciplinary proceedings would constitute unfairness, namely whether -

(a) the delay was unreasonably long;
(b) there is an explanation that can reasonably excuse the delay;
(c) the employee took steps to assert his/her right to a speedy process;
(d) the delay caused material prejudice to the employee;
(e) the nature of the offence justified the delay.

The Labour Court also highlighted that where an employee is not suspended and remains on the job for a long period without any further problems occurring, it will be difficult for the employer to argue that the trust relationship has broken down to such an extent that dismissal is justified, even if there was misconduct. There was also no evidence led to support the contention that the trust relationship had broken down.

For these reasons the Court concluded that the award was not reviewable.

Extract from the judgment:
Snyman, AJ:
[38] ……..where there is a substantial delay in the finalisation of the disciplinary proceedings, the applicant was always duty bound to prove to the first respondent, as arbitrator, that it has a proper explanation and cause for this delay. In *Moroenyane v Station Commander of the SA Police Services, Vanderbijlpark* the Court held:

> *'In summary, I do not believe that what may be considered to be a lengthy delay in the institution, and then conclusion, of disciplinary proceedings, can per se lead to a conclusion of unreasonableness and unfairness. A disciplinary hearing cannot be*

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

[39] The Constitutional Court in *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape and Others* applied the aforesaid *dicta* in *Moroenyane supra*. The Court further had the following to say:

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

[40] *In casu*, and although the applicant acted promptly in ensuring that its internal disciplinary proceedings are not scuppered as a result of the expiry of the 30 days' time limit in the disciplinary code, this diligence did not carry through to the conclusion of such proceedings. Far from it. It appears that once it had the extension in hand as provided for in the disciplinary code, the applicant did almost nothing to ensure that the disciplinary hearing against the third respondent was expeditiously concluded. A delay of two years and four months, as a matter of general principle, and absent a cogent and acceptable explanation, would be inexcusable, especially considering the imperative of the expeditious resolution of employment disputes. The applicant offered no explanation for the delay……..
……..
[42] Therefore, and applying the aforesaid *dicta* in *Moroenyane supra*, the only criticism that can be dispensed at the third respondent is that she could perhaps have done more to assert her right to a speedy disciplinary process. But this failure pales by comparison where it comes to the duties resting on the applicant in this regard which it failed to comply with. The applicant always had the obligation to ensure an expeditious disciplinary process, and in this It must also be considered in this regard that it is recorded in the extension granted, that it is because the investigation into the misconduct has not yet been concluded. That being so, how can it take more than two years to investigate a single act of alleged insubordination? There is little doubt that this kind of delay materially prejudices the employee (third respondent), especially considering that she remained employed, working and reporting the complainant throughout this time. In addition, a single instance of alleged insubordination on the part of an employee is not such that justice cries out for it to be addressed, even if there is a material delay. And

finally, when considering the nature of the offence, it is, even on the charges as formulated from the outset, not the kind of misconduct that cannot be readily and easily concluded in disciplinary proceedings without delay. Therefore, and what happened to the third respondent in this instance smacked of unfairness…

[43] In sum, the first respondent's findings of procedural fairness are thus unassailable on review. These findings are fully supported by the facts, and is in line with the legal principles as set out above. There simply exist no justifiable grounds to upset these findings on review, and the award in this regard must consequently be upheld.

***Cibane and Another v Premier of the Province of Kwazulu-Natal and Another* (D 518/2021) [2023] ZALCD 19 (17 November 2023)**

Principle:

A court should be slow to grant a permanent stay of disciplinary proceedings due to unreasonable delays, where the accused has been charged with a serious offence and there is a societal interest in the perpetrator being brought to book. In these circumstances there should be "*insurmountable trail prejudice*" caused by the delay for a permanent stay to be granted.

Facts:

Serious allegations of misconduct involving alleged breaches of the Public Finance Management Act and supply chain management policies were made around July / August 2017 against two senior managers in the Office of the Premier KZN. The one was Chief Financial Officer and the other was Director: Supply Chain Management. When charges of misconduct were finally brought against them in July 2020, some 3 years later, they brought an application in the Labour Court to quash the charges against them on the grounds of unreasonable delay and / or a waiver of the employer's right to discipline them.

In July 2017 the KZN Premier had met with the two employees to advise that a forensic report had been provided which implicated them in acts of alleged misconduct and recommended that disciplinary proceedings be brought against them. He told them that he had been asked to authorise the implementation of the recommendations in the report, but had not done so because he had concerns about the report. The Premier questioned them about the issues and informed them that he would advise them if steps were to be taken against them. The persons who had compiled the report had not questioned the employees and had not given them an opportunity to provide explanations, and the Premier expressed serious concerns about this. The employees said the Premier conveyed the impression that he was dissatisfied with the manner in which the investigation had been conducted and would probably not implement the recommendation in the report that they should be disciplined.

The employees said they gained similar impressions of not being disciplined from a subsequent meeting in August 2017 with the Director General in the Office of the Premier.

The employees said fairness required a prompt hearing so that they could locate evidence, identify witnesses and defend themselves against the allegations, and the 3-year delay prejudiced them in doing so and was unreasonable. Further, they argued that the representations made to them by the KZN Premier and the Director General,

coupled with their conduct in not doing anything to charge them within a reasonable time, constituted a waiver of the Department's right to take disciplinary action against them. It was not open to the Department three years later to change its decision and reverse its waiver.

It is uncontroversial to state that disciplinary proceedings should be instituted against offenders within a reasonable time of the employer becoming aware of allegations. Article 10 of ILO Recommendation 166 supports this by providing that an employer should be deemed to have waived its right to terminate the employment of a worker for misconduct if it has failed to do so within a reasonable time after it has knowledge of the misconduct.

Our courts have also expressed strong views on these issues. The Constitutional Court in *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* (CCT33/18) [2019] ZACC 3 (7 February 2019) said that delays in resolving labour disputes undermine the object of the LRA, and the requirement of promptness extends to disciplinary proceedings and their expeditious completion.

But what if serious allegations are made against public sector employees, where there is a substantial degree of public interest in those allegations being investigated and perpetrators held to account? Do unacceptable delays caused by incompetent public officials who should have dealt with these matters more expeditiously negate the interests of the public in having justice applied?

The Labour Court noted that a waiver, as described in *NUMSA v Intervalve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC), is "*the legal act of abandoning a right on which one is entitled to rely, and can be proved either through express actions or by conduct plainly inconsistent with an intention to enforce the right*."

The Court found that the actions of the KZN Premier and the Director General did not constitute a waiver of the Department's right to take disciplinary action against the employees, in that the employees could not have been left with no reasonable doubt that the Department intended to surrender its right to discipline them. They had been criminally charged in July / August 2017 and were also aware that the matter had been referred to the employer's Cluster Audit and Risk Committee in late August 2017, thus negating any impression arising from the meetings with the KZN Premier and the Director General that no further action would be taken against them.

The Court also disputed whether a public entity can abandon or renounce a right introduced not only for its own benefit, but in the interests of the public as well. The Court said that "*waiver is not possible where performance by a state official is invested with any substantial degree of public interest; and no public entity can renounce a right which its duty [is] to the public*."

The right to discipline for charges concerning multiple breaches of the Public Finance Management Act and supply chain management policies by senior public employees is not just for the benefit of the employer but also in the interests of the public as well. Therefore, if the Premier and/or Director General purported to waive this right, they had no right to do so in the absence of proper grounds (such as an opinion from a proper authority that the case had poor prospects of success).

Regarding the employees' rights to have the charges quashed based on the unreasonably long delay, the Court said the question of whether a delay in finalisation of disciplinary proceedings is unacceptable is a matter to be determined on a case-by-case basis – there are no hard and fast rules. The Court referred to the test used in *Moroenyane v Station Commander of the South African Police Services* [2016] ZALCJHB 330] and applied in *Passenger Rail Authority of South Africa v Tale N.O and Others* (JR272/21) [2023] ZALCJHB 199 (29 June 2023), in determining what constituted an unfair delay in the context of disciplinary proceedings, namely whether–
(a) the delay was unreasonably long;
(b) there is an explanation that can reasonably excuse the delay;
(c) the employee took steps to assert his/her right to a speedy process;
(d) the delay caused material prejudice to the employee;
(e) the nature of the offence justified the delay.

Applying these criteria the Court found, despite the length of the delay and there being no adequate explanation for it, that this case did not qualify for a permanent stay of the disciplinary proceedings, due primarily to the nature of the offence. The Court referred to the Constitutional Court judgment in *Bothma v Els and Others* 2010 (2) SA 622 (CC) that highlighted the importance of the nature of the offence in the balancing enquiry, and endorsed the approach that a court should be slow to grant a permanent stay where the accused has been charge with a serious offence and there is a societal interest in the perpetrator being brought to book.

The Court also noted that the *Bothma* judgment said that in these circumstances there should be "*insurmountable trail prejudice*" caused by the delay for a permanent stay to be granted, whereas in this case the employees had failed to lead evidence that the delay would cause them "insurmountable trial prejudice."

The Court in this matter allowed the disciplinary proceedings to continue despite the unacceptable delays, due to the public interest factor. No doubt the outcome would have been different, had these events occurred in the private sector! The Court recognized the unreasonableness of the delays, noting that there were "*no adequate explanations for the delay*" and "*it boggled the mind*" how long the Department took to deal with one aspect. Disappointingly, the Court found no way to sanction the Department for these unacceptable delays.

What is equally disappointing is that, in a case dealing with public sector delays in pursuing disciplinary charges, the Court took no less than *15 months* to give its judgment. This has contributed to the fact that disciplinary charges which should have been initiated in 2017, will at best be kickstarted in 2024.

Extract from the judgment:
(Whitcher, J)
[31] The judgments in *Moroenyane* and in turn *Stokwe* drew from the constitutional court judgment by Sachs J in *Bothma v Els and Others.* It needs emphasize that in *Bothma* Sachs J highlighted the importance of the nature of the offence in the balancing enquiry and endorsed the approach that a court should be slow to grant a permanent stay where the accused has been charge with a serious offence and there is a societal interest in the perpetrator being brought to book for same. Sachs J also expressed the view that delay-induced trial prejudice must be insurmountable trial prejudice, but also that trial prejudice is a matter for the trial court to deal with.

[32] The applicants face serious misconduct, basically multiple breaches of the Public Finance Management Act and the first respondent's Supply Chain Management policies. Given the nature of the charges and the seniority of the applicants, there is a societal interest in the charges being aired in a disciplinary process.

[33] There is further no evidence from the applicants that the delay will cause them insurmountable trial prejudice. The first respondent pointed out that the charges and evidence are primarily documentary based. I have taken note that prior to the application(s) for the charges to be quashed, the disciplinary enquiry in fact sat on multiple occasions and each session concerned the discovery of voluminous documents to the applicants. They were also furnished with the report itself in a different process.

[34] To my mind, all these factors weigh against a finding that the delay is not unreasonable to the extent of bringing about a final termination of the disciplinary proceedings.
……..
[36] But, more importantly and decisively, there is eminent authority that no public entity may renounce a right introduced not only for its own benefit, but in the interests of the public as well; waiver is not possible where performance by a state official is invested with any substantial degree of public interest; and no public entity can renounce a right which its duty to the public.

[37] *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 49G-H articulated the point as follows: "…a provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved.
……
[39] To my mind, the right to discipline in the context of charges which concern multiple breaches of the Public Finance Management Act and Supply Chain Management policies by senior public employees is not just for the benefit of the employer but also in the interests of the public as well. Therefore, if the Premier and/or Director General purported to waive this right, they had no right to do so in the absence of proper grounds (such as an opinion from a proper authority that the case against the applicants have poor prospects of success).

3. Deciding sanction

***Sibanye Gold Limited t/a Sibanye Stillwater v Commission for Conciliation, Mediation and Arbitration and Others* (JR 1910/20) [2024] ZALCJHB 3 (19 January 2024)**

Principle:

Where an employee is found guilty of gross misconduct, it is not necessary to lead evidence about a breakdown in the trust relationship as it cannot be expected of an employer to keep a delinquent employee in its employ. Furthermore, it must be implied from the gravity of the misconduct that the trust relationship had broken down and that a dismissal was the appropriate sanction.

Facts:

AMCU members embarked on protected strike action. NUM did not take part in the strike. The strike action - that lasted about five months - was characterised by violence including acts of intimidation, assault, murder, arson, and general malicious damage to property. At the commencement of the strike, and in anticipation of how the strike action might turn out, Sibanye's management had issued briefs warning employees against acts of intimidation, violence, and assault whether verbal or physical during the strike.

Due to the on-going union rivalry, it is alleged that AMCU members committed acts of intimidation towards NUM members, who were in certain instances reported to have been assaulted and murdered. This had resulted in NUM members not reporting for duty out of concern for their safety.

An employee, Mlobeli, had on no less than five occasions arrived uninvited at the residence of a NUM member, Simolonjane, had threatened and insulted him, called him a 'rat' for belonging to NUM and attempted to recruit him to join AMCU. At some point during Mlobeli's visits, he came to Simolonjane' room armed with a stick and threatened him. Simolonjane and another employee testified that at some point during that day, they were on their way to or from the shop when they came across Mlobeli, who with stick in hand, approached them and had without provocation, attempted to assault Simolonjane. A scuffle ensued, resulting in the stick being retrieved from Mlobeli - who even on his own version was inebriated and had conceded that his stick was taken from him.

Mlobeli was dismissed for attempted assault and unlawful intimidatory acts. At the **CCMA**, the commissioner found the dismissal to be unfair, saying the evidence given by the two employees was contradictory and Mlobeli's evidence was preferred.

On review, the **Labour Court** held that the commissioner's finding, based on what was placed before her, fell outside the band of reasonableness, as the findings made were disconnected with the evidence and involved speculation by the commissioner. The award was set aside and the dismissal of Mlobeli found to be fair.

But the employer had not led evidence that the trust relationship had broken down. Did this impact on the fairness of the dismissal? The court decided that where an employee is found guilty of gross misconduct, it is not necessary to lead evidence about a breakdown in the trust relationship as it cannot be expected of an employer to keep a delinquent employee in its employ. Furthermore, it must be implied from the gravity of the misconduct that the trust relationship had broken down and that a dismissal was the appropriate sanction.

Extract from the judgment:
Tlhotlhalemaje, J:
[38] In view of the probabilities having been in favour of the applicant that the misconduct was proven, it was not even necessary for the Commissioner to consider the issue of whether evidence was led to demonstrate that the employment relationship had irretrievably broken down as a result of Mlobeli's conduct. It is trite flowing from *Impala Platinum Ltd v Jansen and Others*, that where an employee is found guilty of gross misconduct, it is not necessary to lead evidence about a breakdown in the trust relationship as it cannot be expected of an employer to keep a delinquent employee in its employ. Furthermore, it must therefore be implied from the gravity of the misconduct that the trust relationship had broken down and that a dismissal was the appropriate sanction.

[39] In this case, the invariable conclusion in the light of the evidence before the Commissioner was that during a violent strike action, Mlobeli had persistently intimidated, harassed and attempted to assault and force Simolonjane to join AMCU. His version of events was improbable particularly in the light of his bare denials in relation to the specific incidents of his misconduct. At the commencement of the strike, Sibanye had warned its employees against such conduct, and clearly Mlobeli did not heed that warning. Given the gravity of the misconduct, especially within the context of the violent protracted strike action, that was sufficient to make any employment relationship unsustainable.

Govender and Others v Commission for Conciliation, Mediation and Arbitration and Others (DA 2/2022) [2024] ZALAC 6 (26 February 2024)

Principles:

(1) In deciding an appropriate sanction, the employer or arbitrator is required to consider the nature, magnitude, and impact of the misconduct on the employment relationship.

(2) Reliance on a failure to show remorse as a factor for determining the sanction is inappropriate where the employees, in complying with an instruction, react with sadness and anger - which is not the same as contempt or a lack of remorse.

Facts:

Discussions between the employer and the union took place in April 2016 about a proposed relocation of all employees to new premises. The employer wanted its employees to move to its new premises on 1 June 2016. The union and its members (the appellants in this case) had reservations about the proposed move as they disputed the suitability, safety and hygiene of the new premises and the application of the employer's relocation policy in moving them to the new premises.

The employer held firm to its position that the employees would begin working from the new premises from 1 June 2016. The union opposed this and referred an unfair labour practice dispute to the CCMA. The referral was made on 27 May 2016 – four days before the relocation was to take effect. The employees were under the impression that, as they had referred a dispute to the CCMA, the relocation to the new premises would be suspended pending the resolution of their dispute.

On 1 June 2016, the employees reported for work, not at the new premises as directed but at the old premises, with the view of tendering their services there. They worked at the old premises until approximately 11h00 when they encountered problems after their access discs were deactivated and they were no longer able to enter the building. They then gathered at the union's office to attend a teleconference between the union and the employer's representatives. During the teleconference, it was agreed the Union would visit the site of the new premises the following day.

On Friday, 3 June 2016 employees were given an ultimatum by the employer to report for duty at the new premises on Monday, 6 June 2016. For various reasons (including service delivery protests) they only reported on Wednesday 8 June 2016 at the new premises – two days after the ultimatum had expired. During this period there was no communication between the employees or their union with the employer.

Their failure to report for duty and failure to abide by the ultimatum culminated in the employees being dismissed for unauthorized absence from the workplace and for failure to obey reasonable and lawful instructions.

An unfair dismissal dispute was referred to the **CCMA**, which resulted in an arbitration award that found their dismissals to be unfair and ordered their reinstatement. This arbitration award was taken on review by the employer. The **Labour Court**, in a judgment dated 14 June 2018, set aside the arbitration award, substituting it with a finding that the Appellants were guilty of the misconduct for which they had been dismissed. With regard to the issue of sanction, the Labour Court remitted the matter back to the CCMA for determination of that issue.

At the second **CCMA** arbitration hearing to determine what would be a fair sanction for the misconduct, the arbitrator found that the Appellants' clean disciplinary records and long service history did not mitigate the seriousness of the offences committed, and, taking into consideration that the Appellants were (in the arbitrator's view) lacking in remorse for their actions, the arbitrator found that the sanction of dismissal was fair.

On 25 September 2019, aggrieved by the aforesaid award, the Appellants launched a review application but failed to file the record of the proceedings timeously. The record was due to be filed by 6 January 2020 and was only filed on 12 June 2020, some five months later. The late filing of the record resulted in the review application being deemed to be withdrawn in terms of clause 11.2.3 of the Practice Manual. The Appellants filed an application to reinstate or "revive" the deemed withdrawn review application and sought condonation for the late filing of the record. Further, the Appellants sought condonation for the late filing of their replying affidavit in the reinstatement application, and the condonation for the late filing of the supplementary affidavit in the deemed withdrawn review application.

The **Labour Court** considered the reinstatement application and properly likened it to a condonation application. The court *a quo* held that the principles relating to condonation would apply in determining whether the reinstatement application should be granted. The Judge *a quo* held that the principles set out in *Samuels v Old Mutual Bank* would apply and that the reinstatement application (i) should be made *bona fide*; (ii) should set out a reasonable explanation which covers the entire period of the delay; (iii) the applicant must have reasonable prospects of success in the main review application; and (iv) that it would be in the interests of justice to grant condonation.

The Labour Court, in considering the extent of the delay in the filing of the record and the reasons, found the reasons for the delay to be unreasonable; that the Appellants' prospects of success were non-existent or weak; and that the prejudice suffered by the Appellants were of their own making. The Labour Court found that the Appellants failed to meet the requirements to succeed in their application to "revive" or reinstate the deemed withdrawn review application and that the Appellants were not entitled to condonation for the late filing of their replying and supplementary affidavits. Aggrieved, the Appellants applied for leave to appeal, which was granted by the court *a quo*.

At the **Labour Appeal Court** the appeal was upheld. The court was critical of the way an appropriate sanction should be assessed. It said what is required of an arbitrator is to consider the nature, magnitude, and impact of the misconduct on the employment relationship.

The LAC held that the arbitrator's view of "comply now – complain later" in the circumstances of the case has no place in our labour law sphere.

Reliance on a failure to show remorse as a factor for determining the sanction was inappropriate in this case because the employees, in complying with the order albeit with sadness and anger was not a show of contempt or a lack of remorse.

The LAC therefore held that the Labour Court had erred in finding that the Commissioner's award of reinstatement was fair. But having regard to the fact that the dismissal took place nearly eight years previously and at least two or perhaps three years of the delay could be attributed to the employees' less than efficient conduct of the litigation and the fact that training the employees to get up to speed would take a few months, the order of reinstatement should be backdated to the date of dismissal, but the employees will only be entitled to their remuneration from 1 January 2023.

Extract from the judgment:
Waglay JP:

[82] In this matter, the arbitrator who was tasked with determining the sanction for the misconduct appears to have adopted the view that, since the Respondent found that the dismissal was the appropriate sanction, it must be the correct sanction. Added thereto, so the arbitrator appears to have reasoned, the Union behaved disrespectfully to the Respondent and therefore he was not going to interfere with the sanction.

[83] This is not the way to determine what is an appropriate sanction. Although the arbitrator does say the right things, including the fact that it is his task to determine the appropriate sanction, he fluctuated in his view on this. What was required of him was to consider the nature, magnitude, and impact of the misconduct on the employment relationship. The reasoning provided by the arbitrator displays a one-sided ill-considered view, going as far as to hold that the Appellants should have first complied with the instruction given and only then complained about their relocation. The arbitrator's view of "comply now – complain later" in the circumstances of the case has no place in our labour law sphere.

……..
[85] Given the fact that the Appellants were guilty of misconduct, the arbitrator failed to appreciate that the reason the Labour Court referred the matter back to the Commission was because it was the task of the Commission to properly determine what should be the proper sanction for the misconduct committed by the Appellants. The arbitrator seems to have relied on two issues which played a crucial role in his determining the sanction (if he did determine it) and then accepted that the sanction applied by the Respondent was fair.

[86] The first issue was that the Appellants displayed no remorse and were contemptuous of the Labour Court order that found them guilty of misconduct: this was a total misreading of the evidence presented. The Appellants' evidence was essentially that they had believed that they had not acted wrongfully and that their action was driven and supported by their Union. The Union encouraged and supported them not to attend at the new premises. So, their evidence was that while they accepted the order of the Court, the context of their wrongdoing was explained, and they essentially expressed the view that their acceptance did not mean that they did not disagree with the judgment. There is nothing wrong in disagreeing with a judgment as long as there is abidance of it. Clearly, the Appellants were complying with the order albeit with sadness and anger, this is not a show of contempt or a lack of remorse. Their belief that the judgment of the Labour Court, which found them guilty of misconduct, was erroneous is fully displayed by the fact that they went up to the Constitutional Court seeking leave to appeal that judgment. The arbitrator's view in the circumstances, that the Appellants' lacked remorse, is clearly not justifiable and based on a failure to appreciate the evidence before him.
……
[93] In addition to the above two issues, the arbitrator also appears to have taken the view, as stated earlier, that it was the employer's prerogative to decide upon the sanction. Hence based upon (i) the employer's prerogative to decide on the sanction; (ii) that the Appellants failed to display any remorse, and (iii) that the Appellants were party to the discourteous conduct because they were "present" at the virtual meeting where the Union representative behaved brashly to the Respondent's representative, the arbitrator concluded that the dismissals of the Appellants were fair.

[94] None of these bases is proper or reasonable. It is not proper to take the view that the employer has the prerogative to determine a fair sanction in circumstances where you are required to determine a fair sanction……..

[95] Additionally, the arbitrator's conclusion that the dismissals were appropriate because the Appellants were not remorseful was also not reasonable. The arbitrator's reference to the fact that the Appellant's apparent joy at the manner in which the Union representative addressed Warwick and Leanne played a pivotal role in the arbitrator's decision in finding the Respondent's decision to dismiss as appropriate. The arbitrator clearly failed to consider the

fact that the Appellants were guided by their Union in their actions, inexcusable as it was (hence they were found guilty of misconduct), it had to serve as a factor for purposes of determining an appropriate sanction. Sight was also lost of the fact that the Respondent's insistence, that the Appellants' dismissal was fair because the absence of the Appellants caused service deviations which could not be tolerated by their clients, was less than candid. The arbitrator simply brushed this aside by saying it was not relevant but failed to consider that it was a crucial issue relied upon by the Respondent to demonstrate the seriousness of the misconduct and was essentially an infringement which was not going to lead to any breach of the service that the Respondent was providing to its client.

***Mathebula v General Public Service Sectoral Bargaining Council and Others* (JA16/18) [2024] ZALAC 4 (7 February 2024)**

Principle:

If an employer intends to argue that reinstatement of an employee will be intolerable, the employee must be advised in the arbitration proceedings that s/he must lead evidence on this issue. An employee's statement that the disciplinary hearing was part of a conspiracy against him does not in itself establish that continued employment will be intolerable.

Facts:

The employee was Chief Director of Corporate Services and acting head of the department at the Department of Agricultural and Rural Development and Land Administration. He was accordingly the accounting officer in terms of section 38 of the Public Finance Management Act (PFMA). He was dismissed for wilful or negligent mismanagement of the State's finances and for being in breach of section 42 of the PFMA. The other charges concerned the alleged failure to disclose a personal interest in various entities, including the irregular transfer of the amount of R73 million to six entities. It was alleged that he also transferred the amount of R70 million to Mpumalanga Agricultural Development Corporation without the approval of the Department of Treasury.

Aggrieved by his dismissal, the employee referred an unfair dismissal dispute to the **General Public Service Sectoral Bargaining Council (GPSSBC)** for arbitration. The Commissioner found the dismissal to be both procedurally and substantively fair and confirmed the dismissal.

On review the **Labour Court** concluded that his dismissal was both procedurally and substantively unfair, and ordered the employer to pay 6 months' compensation but declined to reinstate him. In declining to grant reinstatement, the LC reasoned that as the employee testified that he was the victim of a conspiracy, it was difficult to see how the trust relationship between him and the Department could persist in circumstances.

On appeal the **Labour Appeal Court** confirmed that the term "intolerable" implies a level of unbearability and requires more than the suggestion that the relationship is difficult, fraught or even sour. The conclusion of intolerability should not easily be reached and the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability.

Using this standard, the LAC held that the unfairness in the context of the present matter arose from the fact the employee was not advised in the arbitration proceedings that it would be argued that a future employment relationship would be intolerable. The other element of unfairness arose from the Labour Court's interpretation of the

statement about conspiracy: the LAC said this ignored the facts and the circumstances of this case. The LAC ordered the employee to be reinstated.

Extract from the judgment:
Murphy AJA:
[16] The underlying consideration in determining whether to reinstate or compensate an employee in terms of section 193 (1) and (2) of the LRA and whether the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or not reasonably practical has to be underpinned by fairness based on all the circumstances of the case.

[17] In *Booi v Amathole District Municipality and Others*, the Constitutional Court in dealing with the issue of reinstatement under section 193 of the LRA held that:

> *"[38] It is plain from this Court's jurisprudence that where a dismissal has been found to be substantively unfair, "reinstatement is the primary remedy" and, therefore, "[a] court or arbitrator must order the employer to reinstate or re-employ the employee unless one or more of the circumstances specified in section 193(2)(a) (d) exist, in which case compensation may be ordered depending on the nature of the dismissal."*

[18] The Constitutional Court further held that:

> *"[40] It is accordingly no surprise that the language, context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one. The term "intolerable" implies a level of unbearability and must surely require more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in section 193(2), which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal. And my approach to section 193(2)(b) is fortified by the jurisprudence of the Labour Appeal Court and the Labour Court, both of which have taken the view that the conclusion of intolerability should not easily be reached and that the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability."*

[19] The burden is on the employer to provide the reason and evidence to show that it would be intolerable to grant the reinstatement to an employee. In *Booysen v Safety and Security Sectoral Bargaining Council and Others*, the Labour Appeal Court (LAC) held that the threshold to show intolerability is high and cannot be satisfied by the employer simply reproducing the evidence that was rejected as insufficient at the point of seeking to justify the dismissal.
……..
[26] It is clear that in deciding the issue of the relief, the Labour Court, in the present matter, based its decision on the evidence of the appellant that his dismissal was nothing but a conspiracy to get rid of him. It is further apparent that the allegation of conspiracy made by the appellant was not substantiated nor tested during the arbitration hearing. The statement made by the appellant was nothing more than that certain people employed by the respondent wanted to get rid of him. The statement, which seems nothing more than a perception, was made with no reference to any specific person in the employ of the respondent. It was a general statement made towards a huge government department, which makes it difficult to see how this could have affected the trust relationship between the parties. It is a statement made clearly in the context where the appellant attempted to provide an understanding as to why the unsustainable charges could have been formulated against him.

[27] As alluded to earlier, there was no evidence to test the statement's veracity. Put in another way, the appellant was denied the opportunity to present evidence as to why he should be entitled to reinstatement in light of his conspiracy statement, nor did the employer substantiate why reinstatement was inappropriate in the circumstances.

[28] The essence of the unfairness in the context of the present matter arises from the fact the appellant was not appraised in the arbitration proceedings of the case he had to meet regarding the intolerability that impacted the reinstatement. The other element of unfairness arises from the Labour Court's interpretation of the statement about conspiracy. In my view, the approach adopted by the Labour Court in dealing with the issue of reinstatement ignored the facts and the circumstances of this case.

4. Constructive dismissal

Wesbank, A Division of Firstrand Bank Limited v Commission for Conciliation, Mediation and Arbitration and Others **(C293/2021) [2024] ZALCCT 1 (18 January 2024)**

Principles:

(1) There are 3 requirements for constructive dismissal:
- The employee must have terminated the employment contract;
- The reason for termination must have been that continued employment became intolerable for the employee;
- The employer must have made continued employment intolerable.

(2) Continued employment must have become intolerable from the perspective of a reasonable person in the shoes of the employee.

(3) The employee must have very compelling reasons for concluding that no reasonable person in their situation could be expected to continue with the working relationship. The employer's conduct must have brought the employee's tolerance to a breaking point.

(4) The legal test applicable to the review of an arbitration award concerning constructive dismissal is whether the arbitrator was objectively correct. As such, the arbitrator's finding is either right or wrong.

Facts:

The employee was employed by Wesbank as a specialist fraud and risk investigator for 17 years, before resigning on 10 February 2020. He had a clean disciplinary record prior to the issues that led up to his resignation. Whilst previously there appeared to be no problems between the investigator and his line manager, their working relationship became increasingly strained after an incident in 2018. The investigator sent his manager an email in which he jocularly referred to him as the "*master of the highest order*." The manager responded by requesting him to call him by his name out of respect. However, the investigator maintained his previous tone, and replied addressing him as "*The Wise Master of the highest order*." These emails were also circulated to other staff members. The investigator claimed there was some tension in the department, and he tried to lighten the mood with some banter. He said he was known as a bit of a joker and was a master of ceremonies at bank award ceremonies where he would perform a comedy 'roast' of management figures. In explaining to his manager why he had used these terms, he said in an email that he was just "*pissing with him*."

Although the investigator thought for some reason that his jocular tone was not offensive, his manager felt the mocking epithets were disrespectful, and the investigator was advised that disciplinary charges were being considered. He subsequently apologised in writing and offered to share his apology with the other staff who had received the emails. Even though the intended charges never materialised, the uncertainty of whether disciplinary proceedings would be instituted led the investigator to suffer from stress and anxiety. He began consulting the bank's employee wellness service provider, in anticipation of having to cope with his possible dismissal.

In March 2019 the investigator raised his concern about the pending disciplinary action with his manager during a phone conversation, and was told that the matter was considered resolved. Rather than this resolving the matter, the investigator said he was relieved to hear that, because he had felt "*a sword was hanging over him*" and remarked that he was not in a "*f…..king good space*" at that moment. He was extremely stressed having just been the victim of an armed robbery in a restaurant and due to a variety of other stressful issues he was dealing with in his life at the time. His manager then did take disciplinary action over the coarse language he used, even though it would appear there was no element of disrespect or insubordination involved, and he was issued with a final written warning. The investigator referred a dispute to the CCMA, challenging the final warning as being unfair, and the arbitrator substituted the final warning with a written warning.

These events marked the beginning of the deterioration of relations between them, culminating in the investigator's resignation on 10 February 2020. We summarise below, not in any particular order, some of the key factors and events in that downward spiral:

- The investigator lodging at least 6 grievances about his manager's conduct.
- The bank launching disciplinary action against him on charges which subsequently turned out to have little substance.
- The investigator being given poor performance ratings without prior consultation, when he had previously had high performance ratings. This resulted in him being placed on a performance improvement plan.
- Being excluded from a social media group the rest of his department belonged to.
- His compassionate leave application when his mother had a stroke and his study leave application to finish his master's dissertation, being rejected without reasons.
- His head of department's failure to express any personal concern about an assassination attempt on a witness he was about to consult as part of his duties, which also caused him to be at risk and have to temporarily move home.
- His manager recording all telephone conversations with him, even though there was no history of him disputing the contents of their conversations.
- Him taking extended sick leave for stress and anxiety.
- The bank's unwillingness to make any effort to see if he could be transferred, bearing in mind his long prior work history.
- The investigator perceiving he was being sidelined in his duties.
- The bank's head of employee relations suggesting a mutual separation agreement as a means of resolving all issues.

After his resignation the investigator referred an unfair dismissal dispute to the CCMA, claiming he had been constructively dismissed by the bank. The arbitrator found that his dismissal was unfair because the bank had made his conditions of continued

employment intolerable, and she awarded him 10 months' remuneration as compensation. In determining that he had been constructively dismissed, the arbitrator concluded that he had exhausted all possible internal procedures. She also found that the bank was "far from happy" that he had referred a case to the CCMA which had resulted in the downgrading of his final written warning to a warning.

Even after the investigator had resigned, the bank still instituted a REDS hearing which prejudiced Aylward's ability to get employment in the financial sector, and the arbitrator reasoned this was indicative of a vindictive attitude towards him. ('REDS' is an acronym of *Register of Employees Dishonesty System*, a system created by the banking Association of South Africa in terms of which employees can effectively be blacklisted from obtaining work in the financial sector if they have found to be dishonest in a REDS hearing.) The investigator's manager conceded when giving evidence that the bank should not have found him guilty in the REDs hearing.

The bank brought an review application in the Labour Court in an attempt to overturn the arbitrator's award. The Labour Court clarified that the legal test applicable to the review of an arbitration award concerning constructive dismissal is whether the arbitrator was objectively correct. As such, the arbitrator's finding is either right or wrong: it is not assessed on the '*standard or reasonableness*' determined by *Sidumo v Rustenburg Platinum Mines Ltd and Others*, or, to put it differently, whether it is a finding no reasonable arbitrator could have arrived at.

Regarding the test for constructive dismissal, the Court referred to the Labour Appeal Court's decision in *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004) 25 *ILJ* 2337 (LAC) at paragraph [29] in which the LAC said there are 3 requirements for constructive dismissal:

- Firstly, the employee must have terminated the employment contract;
- Secondly, the reason for termination must have been that continued employment became intolerable for the employee;
- And thirdly, it must have been the employer who made continued employment intolerable.

In answering the question of from whose perspective the employee's continued employment has become intolerable, the Court referred to *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) at para [49], which held that this *"must be made from the perspective of a reasonable person in the shoes of the employee……..The test remains an objective one. The idiosyncrasies of the particular employee are not the benchmark. The assessment must be made from the perspective of a reasonable person in the shoes of the employee, that is, from the perspective of a reasonable person with the same background, life experience and position."*

The Court said the employee must have very compelling reasons for concluding that no reasonable person in their situation could be expected to continue with the working relationship. Referring to *Gold One Ltd v Madalani & others (2020) 41 ILJ 2832 (LC)*, the Court said "*intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee's tolerance to a breaking point*."

Applying the above principles and based on its assessment of the evidence about the factors that led to the deterioration of relationships, the Labour Court agreed with the

arbitrator's conclusion that the investigator's resignation amounted to a constructive dismissal. The 'final straws' that appeared to lead the Court to this conclusion were the delays in processing the investigator's grievances and the bank CEO's response to the investigator's final request for assistance.

Despite the bulk of the investigator's grievances having been lodged in August 2019, these had still not been heard by the time he resigned on 10 February 2020. The Court rejected the bank's explanations for the delays, which included that the investigator had been on sick leave for much of the intervening time.

On 25 January 2020 the investigator addressed correspondence to the bank CEO in which he complained about the lack of progress in addressing his grievances. He said he sent the email "*because he was in a really bad, bad, bad space*" and was desperate for assistance from 'the top', and he wanted to see if the process could be expedited. The CEO responded to his email on 29 January 2020, treating his request as if it was a legal pleading, and merely advising that the grievances were still being dealt with internally as well as externally with the CCMA (which was factually incorrect). On 7 February 2020, he addressed further correspondence to the CEO requesting an outcome by close of business that day. The CEO never responded to the email and on 10 February 2020 he resigned with immediate effect, at a time when he was facing misconduct charges against him. The Court found that the CEO's response that the investigator's grievances were being addressed internally was perfunctory, misleading and indifferent after such an extensive delay, and that it was clear nothing was likely to change in the bank's attitude about expediting the grievance.

For the above reasons the Court dismissed the bank's review application.

The judgment is useful for clarifying the grounds for review in constructive dismissal cases, and the factors courts and arbitrators will need to consider in deciding whether a resignation amounts to a constructive dismissal. But its real value we think lies in what the Court had to say about conflict management and workplace relationships. In giving its judgment the Labour Court commented that the deterioration in relationships in this case were not characterised by a single decisive moment, but involved an accumulation of conduct over time that created an increasingly oppressive work relationship for the investigator, "*with no functioning mechanism available to halt the deterioration*".

We suggest the situation cried out for someone within the ranks of senior management to take a step back and attempt to analyse whether and how the increasingly damaged relationships could be repaired, rather than focussing on the manifestations of the conflict that arose. Avenues could have been explored for someone within the organisation to facilitate some process involving the investigator and his manager, in an attempt to repair their relationship. A neutral outside facilitator could also have been a useful intervention. Tokiso for example – see www.tokiso.co.za – has very experienced facilitators that could be used in these types of situations.

It goes without saying how much the bank would have saved in time and money, had these avenues been successfully explored. And a skilled investigator with a clean record until these events occurred, may still be doing a job he said he loved and which provided a valuable resource to the bank.

Extract from the judgment:
(Lagrange, J)

[41] The Labour Court and the Labour Appeal Court have consistently applied a correctness test in reviews of constructive dismissal awards. Contrary to Aylward's contention, the Labour Appeal Court has found that the question whether an employee was constructively dismissed or not concerns the determination of a jurisdictional fact, which must be established objectively…….

…….

[43] The fundamental requirements that must be established to prove that a constructive dismissal occurred were set out by the Labour Appeal Court in *Solid Doors*:

> *"[28] It should be clear from the above that there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer."*

…….

[49] The last important principle relevant to this review concerns the determination of intolerability. Obviously, there is not a finite list of factual scenarios which would make the employment relationship intolerable, but the employee must have very compelling reasons for concluding that no reasonable person in their situation could be expected to continue with the working relationship:

> *[46] … It is well-accepted that intolerability is a high threshold, 'far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter an obnoxious, rude and uncompromising superior who may treat employees badly'. Put otherwise, intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee's tolerance to a breaking point."*

……..

[51] The inevitable question that must be answered in determining whether the employee's situation is intolerable is: by whose standard is intolerability to be gauged? In *Mafomane v Rustenburg Platinum Mines Ltd*, this court held that:

> *"The conclusion that the question whether the employee's continued employment has become intolerable in that he or she cannot "reasonably" be required to endure it, must be made from the perspective of a reasonable person in the shoes of the employee, obviously does not mean that the employee's own views must prevail. The test remains an objective one. The idiosyncrasies of the particular employee are not the benchmark. The assessment must be made from the perspective of a reasonable person in the shoes of the employee, that is, from the perspective of a reasonable person with the same background, life experience and position."*

Sanlam Life Insurance Limited v Mogomatsi and Others (CA12/2022) [2023] ZALAC 15 (17 August 2023)

Principle:

Where the employee claims constructive dismissal based on psychiatric ill health, the employee must prove that the employer was aware or ought to have been aware of the employee's psychiatric ill health. An employee should not be allowed to rely on the fact that certain rules which apply to all employees, frustrates, irritates or do not suit him or her as the basis for a claim of constructive dismissal.

Facts:

The employee was employed as an ethical hacker who tested the information technology systems of the employer and allied companies for safety breaches in order to prevent them from being hacked.

In the two years of his employment, the employee had several conflicts with the employer, some of a disciplinary nature and others about his performance and attendance at work. He was accused of not being a team player.

The employment relationship was terminated by the employee and he referred a constructive dismissal dispute to the **CCMA**. During the arbitration proceedings he did not mention his mental health condition as the reason for his resignation, neither did he mention the employer's actions as exacerbating his condition. The commissioner had regard to all the incidents that the employee had referenced as the reason why he was of the view that the employer made continued employment intolerable. She found that the employee failed to prove that he was constructively dismissed and found that he had resigned. She therefore dismissed the case.

It was only in the review application to the **Labour Court** that the employee mentioned that his mental health condition led to his resignation. The court found that no weight was given to the employee's mental health during the arbitration. It found that there was no evidence that the Company considered an incapacity/ill health process rather than a disciplinary process in the run up to the employee's resignation. This led to the court's conclusion that on the evidence before the CCMA, the applicant did prove that the employment relationship became intolerable, and that the termination of the employment relationship in this case should, on a correct assessment, have been found to be a constructive dismissal. It ordered the employer to pay the employee an amount equivalent to four month's salary as compensation.

On appeal to the **Labour Appeal Court**, the court confirmed that where an employee claims constructive dismissal based on psychiatric ill health, the employee must prove that the employer was aware or ought to have been aware of the employee's psychiatric ill health. If an employer is aware of an employee's psychiatric illness and the employer is indifferent or insensitive with regard to the employee's mental illness or vulnerability and makes continued employment intolerable, a proper case for constructive dismissal might be established.

The LAC held that the Labour Court's finding that the employee's mental ill health was common cause was not substantiated by the facts that were before the commissioner. Therefore, the conclusion that the employee's claim '*should have incorporated the common cause mental ill health suffered by him during the material period*' was also

incorrect. There was no evidence that this employer was aware of the employee's mental ill health. Even when the employee took his last sick leave, he said that he had the flu and not that he was suffering from stress or anxiety. It was only after his resignation that his medical practitioner certified that he had resigned due to stress.

The LAC said that the Labour Court has lost sight of the fact that the onus on an employee to prove a constructive dismissal is heavy. An employee should not be allowed to rely on the fact that certain rules which apply to all employees, frustrate, irritate or do not suit him or her as the basis for a claim of constructive dismissal. The appeal succeeded because the LAC found that the commissioner had correctly considered all the incidents cumulatively and concluded that the employee was not constructively dismissed but resigned.

This case is a reminder for parties to lead crucial evidence at the arbitration and not wait until a later hearing. We understand that mental ill health can be stigmatised and there is reluctance on employees to report this to the employer. But the failure to do so means that an employer will not be blamed for not making reasonable accommodation if it does not know about the disability.

Extract from the judgment:
CJ Musi JA:

[33] I agree with the court *a quo* that mental ill health may be a justifiable reason to terminate an employment relationship, provided it is done fairly. However, that is irrelevant for present purposes. Here the dispute is not an unfair dismissal in the conventional sense, relating to conduct or capacity, but a constructive dismissal. To prove a constructive dismissal, the facts of the case must point to the employer having been aware or ought to have been aware of the mental distress of the employee. If an employer is aware of an employee's psychiatric illness and the employer is indifferent or insensitive with regard to the employee's mental illness or vulnerability and thereby making continued employment intolerable a proper case for constructive dismissal might be established.

[34] An employer must always be vigilant and act sensitively when the employer becomes aware or ought to be aware of a particular susceptibility or vulnerability of an employee. In a case where the employee claims constructive dismissal based on psychiatric ill health, the employee must, therefore, prove that the employer was aware or ought to have been aware of the employee's psychiatric ill health.

……..

[36] During the arbitration proceedings he did not mention his mental health condition as the reason for his resignation, neither did he mention the employer's actions as exacerbating his condition. It was only in the review application that he mentioned that his mental health condition (stress) led to his resignation.

……..

[38] On his own case, his mental condition was not mentioned at the arbitration hearing. The medical certificate which stated that he resigned due to stress was presented after his resignation. The court a quo's finding that the employee's mental ill health was common cause is not substantiated by the facts that were before the commissioner. Therefore, the conclusion that the employee's claim 'should have incorporated the common cause mental ill health suffered by him during the material period' is also incorrect. His mental ill health was not common cause.

[39] The court *a quo* mentioned that 'there was no evidence that the Company considered an incapacity/ill health process rather than a disciplinary process in the run up to the applicant's resignation'. This comment is misplaced because there was no evidence whatsoever that the employee was incapacitated due to mental ill health.

……..

[43] It is important to note that the court *a quo* did not mention in what manner the employer made the employment relationship intolerable. It conflated the requirements for an incapacity dismissal with those of a constructive dismissal. The employer, in both instances, must be aware or ought to be aware of the mental infliction before a duty can be placed on the employer to act in one way or the other. There was no evidence that this employer was aware of the employee's mental ill health. Even when he took his last sick leave he said that he had the flu and not that he was suffering from stress or anxiety. It is only after his resignation that his medical practitioner certified that he had resigned due to stress.

[44] I am convinced that the court *a quo* misdirected itself when it adjudicated the review based on evidence that was not before the commissioner. In any event, there was insufficient evidence to conclude that the employer made continued employment intolerable. The court *a quo*, therefore, erred in finding that there was a constructive dismissal. It, unfortunately, lost sight of the fact that the onus on an employee to prove a constructive dismissal is heavy. An employee should not be allowed to rely on the fact that certain rules which applies to all employees, frustrates, irritates or do not suit him or her as the basis for a claim of constructive dismissal.

5. Strikes and lockouts

5.1 Violence challenging protected status?

***African Meat Industry and Allied Trade Union (AMITU) and Others v Shave and Gibson Packaging (Pty) Ltd* (D 1050/2019) [2023] ZALCD 17; [2024] 1 BLLR 54 (LC); (2024) 45 ILJ 79 (LC) (17 October 2023)**

Principle:

A strike does not lose its protected status because of (a) unreasonable demands; (b) the duration of the strike; and (c) high levels of violence and intimidation. Rendering the strike unprotected would impermissibly denude the constitutional right to strike of those striking employees who exercised their right peacefully.

Facts:

Employees embarked on a protected strike over a wage dispute. At the commencement of their strike, employees began picketing outside the workplace. The employer delivered a notice of a lockout which it said would continue until the strikers accepted its "demand" of a "zero percent increase". For some days, the employer's attorney complained to the union that the strikers were brandishing weapons and threatening non-strikers and invited the union to view video footage, and subsequently claimed that the violence had escalated.

The employer then obtained an interdict setting picketing rules and ordering employees not to carry arms. After these rules were confirmed by the CCMA, the employer's attorney informed the union that vehicles had been stoned, the home of a non-striker firebombed and a threatening WhatsApp message had been circulated (The English translation reads as follows: *"It will be good for you to stay at home and leave us to show this white man of yours, you rats, exactly who we are. We are tired of you all working, while we are not working- what is next is the death of yourself and your family.")*

The employer called on the union to identify the perpetrators, failing which the strikers would be charged with "derivative misconduct".

Employees were later charged with the following;
Count 1: Participating in an 'unprotected' strike which was "not functional to collective bargaining" due to high levels of violence and intimidation, unreasonable union demands and the protracted duration of the strike;
Count 2: Derivative misconduct by failing to identify the perpetrators of criminal acts, including the stoning of and shooting at vehicles;
Count 3: Being in contempt of the court order, alternatively breaching picketing rules;
Count 4: Harassing and/or intimidating or assaulting specific individuals employed or contracted by the company.

The employees who were found guilty on these charges and dismissed, claimed unfair dismissal in the Labour Court.

Participation in an unprotected strike

The Court considered the employer's submission that the strike had lost its protected status because of -

(a) Unreasonable demands

The Court held that the employer had no right to treat the strike as unprotected on the basis of its view that the wage demands were unreasonable. It said that the reasonableness of demands made in the collective bargaining process is not justiciable. As long at the demand relates to matters of mutual interest between the employer and employee, it does not fall foul of sections 64(1)(a) and/or 65 of the LRA and the demand is lawful. This accords with the view of the LAC in *NEHAWU v Minister for The Public Service and Administration and Others* (JA19/2023) [2023] ZALAC 7; [2023] 6 BLLR 487 (LAC); (2023) 44 ILJ 1207 (LAC) (13 March 2023):

> *"A strike uses collective action and the withdrawal of labour as an exercise of power in an attempt to press an employer to meet certain employee demands. An employer's claim that it will not accede to such demands or that it has not budgeted for or obtained the required approvals to accede to such demands does not necessarily make either the demands or the strike itself unlawful." (*para 49*)*

(b) The duration of the strike

The Court noted that it was given no legal authority which holds that an otherwise protected strike loses its protection after a "protracted" duration. Industrial action – whether a strike or lockout – is a deliberate battle where the stakes get higher the longer the industrial action continues. To withdraw the protected status of a strike at the point where it was becoming 'effective' would be to undermine the purpose of industrial action. The Court dismissed this argument.

(c) The high levels of violence and intimidation

The Court noted that some previous judgments and journal articles by respected academics had supported the idea that strike violence constitutes an implied limitation on the right to strike. *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union & others* (LC: J 2510/11, judgment 5 December 2011) said the following:

> "*When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.*"

At the same time the Labour Court has acknowledged that this is not a conclusion that ought to be reached lightly because this conclusion denies the exercise of fundamental labour rights. *National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW) and Others v Universal Product Network (Pty) Ltd*; (2016) 37 ILJ 476 (LC); [2016] 4 BLLR 408 (LC) said the following:

> *"While, as it has previously indicated, this court will in appropriate circumstances declare an initially protected strike unprotected on account of levels and degrees of violence which seriously undermine the fundamental values of our Constitution, this is not a conclusion that ought lightly to be reached. A conclusion to this effect itself denies the exercise of fundamental labour rights…"*

Unease with the compatibility of a right to strike with violent tactics has led another case to conclude that "*The constitutionally protected right to strike does not encompass a right to carry dangerous weapons on a picket line which, by their nature, not only expose others to the very real risk of injury, but also serve to threaten and intimidate*" (*Pailprint (Pty) Ltd v Lyster N.O and Others* (DA18/2017) [2019] ZALAC 43 (13 June 2019)).

In *African Meat Industry* – the subject of this case study – the Court appeared to agree with the view that where violence is employed in the power play to accelerate the effectiveness of the strike and a court order interdicting the violence has proven ineffective, the strike should lose its protection and may be interdicted. The Court however felt it was constrained by the Labour Appeal Court's view (given subsequent to the above judgments) in *NEHAWU v Minister for The Public Service And Administration and Others* (JA19/2023) [2023] ZALAC 7; [2023] 6 BLLR 487 (LAC); (2023) 44 ILJ 1207 (LAC) (13 March 2023) that took the view that an otherwise protected strike does not lose its protected status on account of violence, as rendering the strike unprotected would impermissibly denude the constitutional right to strike of those striking employees who exercised their right peacefully.

Under the circumstances the Court concluded that "*it was not convinced that the employer had the right to treat the strike as unprotected on account of the violence and intimidation perpetrated by some, maybe even many of the strikers."* In any event the Court noted that the employer had not applied for an interdict suspending the strike, as it should have done, and had also not complied with the Unfair Dismissal Code of Good Practice that required employees to be warned through an ultimatum that they were participating in an unprotected strike, before being dismissed.

Findings on the other charges

Based on the evidence led, the Court found that only 3 strikers were positively identified as engaging in intimidation, harassment and assault, justifying their dismissals. As to the charge of defying the interdict, the Court found that 16 of the strikers had continued to carry weapons after receiving the interdict and their dismissal was justified, whereas the dismissal of the remaining employees was ruled substantively unfair.

The Court noted that the charge of "**derivative misconduct**" is generally used when the perpetrators of criminal actions cannot be identified, but the employee must be proved to have had actual knowledge which he/she refused to disclose. Also, the employee must have been offered guarantees of protection by the employer in return for disclosure.

The Court referred to *Numsa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others (CCT202/18) [2019] ZACC 25 (28 June 2019)* where the Constitutional Court considered whether there was a duty on the part of employees to disclose information pertaining to the misconduct of other employees to their employer. The Constitutional Court held that the duty generally arising in an employment relationship is a reciprocal contractual duty of good faith, which itself does not impose an obligation on any employee to disclose information of misconduct of their fellow employees to their employer, in the absence of any reciprocal obligation on the part of an employer itself to give something to the employees in return (such as guarantees for their safety).

An implication of this is that the employer had to prove (using the balance of probability standard) actual knowledge of the perpetrators of the wrongdoing on the part of the employees, and the reciprocal nature of the trust relationship between the employer and employees would have required the employer to guarantee the safety of the disclosing employees. The Court said it also logically follows that where the employer had the means to obtain the information, there would have been no ground to burden the employees with a duty to provide that information.

Applying the above principles to the facts of this case, the Court found that the employees could not be found guilty of derivative misconduct. It had not been shown

that the accused employees had actual knowledge of the perpetrators of the unlawful conduct, and the Court also felt that the employer was in a position to obtain certain information without the assistance of the strikers (eg through photographs, WhatsApp messages, social media posts etc). The employer had also not discharged its reciprocal duty of good faith by providing guarantees of whistle blowers' safety.

As an aside, the charge of "**common purpose**" was not raised in this matter, perhaps because the Constitutional Court has recently so clearly limited its application in *Numsa obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd (CCT 233/21) [2022] ZACC 30; (2022) 43 ILJ 2269 (CC) (22 August 2022)*. In that case it was held that to establish common purpose, evidence is required that individual employees associated themselves with the violence before it commenced, or even after it ended. For liability to attach, there must be proof on a balance of probabilities of an employee's complicity in the acts of violence, which is extremely difficult to establish.

In summary and based on the above findings, the Court found that the dismissals of only 18 out of the 126 applicant employees were substantively fair. Turning to the relief to be granted the employees whose dismissals were found to be unfair, the Court found that the employer's submissions that a continued employment relationship with them would be intolerable were "*compelling*" due to the violence and intimidation that plagued the strike and that none of them disassociated themselves from the violence and the inflammatory statements made by their union.

However, the Court found that it was constrained by the fact that there was no direct or circumstantial evidence linking any of the applicant employees to the violence and intimidation, and also by the Constitutional Court's reasoning in *Numsa obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd* (CCT 233/21) [2022] ZACC 30; (2022) 43 ILJ 2269 (CC) (22 August 2022), which found there is no duty on employees to dissociate themselves from violence and intimidation committed by other employees during a strike or to even condemn it.

All but the 18 who had been implicated in unlawful conduct were reinstated retrospectively to 14 June 2019. They were not reinstated back to 14 September 2018 (the date of their dismissals) due to their 9-month delay in bringing their applications.

Conclusion: A sense of unease

It remains to be seen whether the employer intends taking this matter on appeal, giving the Labour Appeal Court a fresh opportunity to consider some of these themes and perhaps consider whether the facts of this case are distinguishable from those in the *NEHAWU v Minister for The Public Service and Administration* case discussed above. What is clear is that currently the Labour Court, being required to follow judgments of the LAC and Constitutional Court, has little scope to terminate the protected status of

a strike or to allow the employer to use means such as derivative misconduct as a 'short-cut' to attribute liability for misconduct on all strikers.

We are left with a real sense of unease, given the violent nature of many strikes and because most employers lack the capacity to monitor and control the violence that inevitably occurs, and obtain sufficient evidence to identify the perpetrators.

This sense of unease seems to have been shared by the LAC in a case cited above – *NEHAWU v Minister for The Public Service And Administration and Others* (JA19/2023) [2023] ZALAC 7; [2023] 6 BLLR 487 (LAC); (2023) 44 ILJ 1207 (LAC) (13 March 2023). Dealing with the complexity of strikes the court said:

> *"[53] … Within the context of our deeply troubled and divided history and the continued violence of South African life to which so many people are continually exposed, there remain serious and continued challenges in how to address criminal and violent misconduct, such as that commonly witnessed during strike action and which too often characterises industrial relations in this country. The Labour Court is inundated with applications to interdict unlawful conduct, violence and intimidation in the course of protected strikes……It is perhaps appropriate to note that the inaction of the SAPS in the face of criminal behaviour is extraordinary. It has become commonplace for the SAPS to walk away from scenes of criminal behaviour in a strike context, calling it a private or civil matter. Criminal conduct is neither private nor a civil matter. The SAPS are obliged to maintain law and order. It is their duty to act to enforce the law and not to await a court to order them do so."*

Despite the comments expressed above in March 2023, we have little confidence that employers faced with violent strikes will experience a markedly different approach from the SAPS going forward.

We summarise below what we think are the key learnings arising out of the *African Meat Industry* judgment that provided the basis for the case study covered in this article:

- Employers currently have little authority to attack the protected status of a strike due to accompanying violence and intimidation;
- Attempting to prove 'common purpose' or 'derivative misconduct' is extremely difficult, given the requirements imposed by the Constitutional Court;
- Employers intending to dismiss employees for strike related misconduct should ensure they comply with all the requirements of the Dismissal Code of Good Practice, including the issuing of an appropriate ultimatum and prior consultation with union representatives;
- And perhaps most importantly, the need for a dedicated team or person tasked with collecting evidence during a strike, to prove in subsequent proceedings which employees were implicated in strike related misconduct.

Extract from the judgment:
Whitcher J:
Did the violence and intimidation render the strike unprotected?
[91] The first judgment directly in point is *Tsogo Sun* in which Van Niekerk J made this obiter comment:

'…When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.'

[92] In a later judgment (*UPN*), with reference to *Tsogo Sun*, Van Niekerk stated:

'While, as it has previously indicated, this court will in appropriate circumstances declare an initially protected strike unprotected on account of levels and degrees of violence which seriously undermine the fundamental values of our Constitution, this is not a conclusion that ought lightly to be reached. A conclusion to this effect itself denies the exercise of fundamental labour rights, and as the Constitutional Court pointed out in [Moloto] this court ought not to easily adopt too intrusive an interpretation of the substantive limits on the exercise of the right to strike…'

[93] In *UPN*, Van Niekerk J stressed that strike violence is a denial of the right of those at whom violence is directed, typically those who elected to continue working and replacement labourers.

[94] There's also a plethora of journal articles by respected academics and practitioners and other obiter dictums from this Court that strike violence constitutes an implied limitation on the right to strike. In summary, the reasoning is that where violence is employed in the power play to accelerate the effectiveness of the strike (is a constitutive element of the power play) and a court order interdicting the violence has proven ineffective, the strike loses its protection and may be interdicted. Put differently, once violence replaces the refusal to work as the focal point of the strike, then it no longer qualifies as a 'strike' as defined. The cross-over occurs when the violence takes its toll, resulting in non-strikers and replacement labourers refusing to work – it being at this point that the strikers secure an illegitimate advantage that serves to skew collective bargaining power, and places the employer under [illegitimate] economic duress. The view that the act of striking and the conduct of strikers are different phenomena, and should be treated as such fails to appreciate the dynamic involved in strike violence. Strike violence is not about violence *per se* – instead it is about the effect it has on the collective bargaining power of the parties. Typically, strike violence serves to scare away non-strikers and replacement labourers, which results in the strike being more effective and the employer is placed under undue economic duress.

[95] Given the definition of a strike and the rationale behind the right to strike, these views are compelling.

……

[99] However, the Labour Appeal Court in *NEHAWU v Minister for the Public Service and Administration and Others* has essentially taken the view that an otherwise protected strike does not lose its protected status on account of violence. In the case of the NEHAWU strike, which was also characterised by extreme violence, the Court stated:

> The shocking reports of widespread strike misconduct and intimidation, which appear to characterise the current strike and which have resulted in unopposed interdictory relief being granted against NEHAWU and its members in most provinces, are not disputed by NEHAWU. Such conduct is not only illegal but wholly unjustified and unwarranted. By doing so, NEHAWU and its members display a total disrespect for the law. Yet, even in spite of this, as was stated by the Constitutional Court in *South African Transport and Allied Workers Union and another v Garvas and others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae)*–
>
> '[A]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the

> demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.'

[100] The LAC also referred to *Commercial Stevedoring Agricultural and Allied Workers' Union and others v Oak Valley Estates (Pty) Ltd and another* in which the Constitutional Court held that:

> 'Where a person lawfully exercises their right to protest, strike or assemble, but is nonetheless placed under interdict, that person's constitutionally protected rights are impermissibly denuded…'

[101] In other words, rendering the strike unprotected would impermissibly denude the constitutional right to strike of those striking employees who exercised their right peacefully.

[102] In the circumstances, I am not convinced that the Respondent had the right to treat the strike as unprotected on account of the violence and intimidation perpetrated by some, maybe even many of the strikers.

5.2 Replacement labour during lockouts

National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd (CCT 105/22) [2023] ZACC 11 (18 April 2023)

Principles:

The use of replacement labour during a lock-out "*in response to a strike*" under section 76(1)(b) of the LRA, is confined to the duration of the strike. A "strike' is a state of affairs occurring with a particular purpose - it either exists or it does not. A "strike" ends when there is no longer a concerted withdrawal of labour. If employees suspend a strike, there is no longer a strike as defined.

Facts:

This case concerns an interpretation of section 76(1)(b) and whether the situation in question constituted a lock-out "*in response to a strike*".

Numsa members employed at Trenstar (Pty) Ltd embarked on a protected strike in October 2020 in support of a demand for the payment of a 'once-off' gratuity of R7500. After several weeks Numsa's attorneys wrote to Trenstar's attorneys advising that the union was suspending its strike but that this was not be construed as a withdrawal of the demand for the gratuity.

Trenstar responded by giving 48 hours' notice of its intention to lock-out Numsa members under section 61(4)(c), for the purposes of compelling them to drop their demand for the gratuity. Trenstar recorded that the lock-out was in response to their strike under section 76(1)(b).

Numsa disputed that the lock-out was in response to a strike, as by the time it began the strike had ended, and launched an urgent application in the Labour Court challenging the company's right to use replacement labour during the lock-out. Trenstar responded by claiming that the strike had not ended and had merely been suspended, and could at any time be reinstated.

The Labour Court rejected Numsa's challenge, not accepting that the mere suspension of a strike should disqualify the use of replacement labour under section 76(1)(b). In light of the Labour Court's judgment, NUMSA's members abandoned their demand for a gratuity and the lock-out ended. They had little choice but to capitulate, as Trenstar could have continued using replacement labour indefinitely during the lock-out without any negative impact on its business operations.

Despite the dispute having ended, Numsa attempted to appeal the LC judgment to the Labour Appeal Court but the LAC rejected the appeal without dealing with the merits of the dispute, on the basis that the matter was 'moot' (ie having no practical relevance) as the strike and lock-out had both ended.

Numsa then referred the matter on appeal to the Constitutional Court. The ConCourt accepted it should deal with this matter despite it being moot, as the interpretation of section 76(1)(b) is a matter of importance in the labour field, particularly for those involved in collective bargaining who should know where they stand when it comes to the use of replacement labour during lock-outs.

Regarding whether the lockout was in response to a strike, the Court said no strike existed once employees suspended the strike. In order for there to be a strike as defined in the LRA, there must be a concerted withholding of labour and this concerted withholding of labour must be for a specified purpose. If employees are not refusing to work and are not retarding or obstructing work, they are not on strike, and no strike exists. A strike is a state of affairs occurring with a particular purpose, and it either exists or it does not. A strike ends, in the sense of no longer existing, when there is no longer a concerted withdrawal of labour.

The Court interpreted section 76(1)(b) in a way that limited the use of replacement labour to the duration of the strike. In other words, once the strike ends, any continued lock-out would no longer be "*in response to a strike*", meaning that replacement labour could not be used from that point onwards.

The Constitutional Court overturned the Labour Court's judgment and replaced it with an order that Trenstar was not allowed to use replacement labour during its lock-out.

The Constitutional Court judgment, which we think strikes the right balance in regulating the power play between parties involved in industrial action in a specific situation, has very limited application. It prevents the use of replacement labour when a lock-out is instigated after a strike has been suspended or no longer exists. It has in any event always been part of our law that replacement labour cannot generally be used during a lock-out.

The Constitutional Court also makes the noteworthy point that our legislation on the use of replacement labour during industrial action is more 'employer friendly' than many other countries. The LRA, in allowing an employer to use replacement labour during a strike, has already allowed a significant weakening of the efficacy of strikes. The norm advocated by the International Labour Organisation (ILO) is that employers should not be entitled to use replacement labour during strikes, except in the case of essential services or where the strike would cause an acute national crisis.

Extract from the judgment:
Rogers J (unanimous)
[24] I start with the distinction Trenstar draws between a suspended and terminated strike. In order for there to be a strike as defined in the LRA, there must be a concerted withholding of labour and this concerted withholding of labour must be for a specified purpose. If employees are not refusing to work and are not retarding or obstructing work, they are not on strike, and no strike exists. This is the ordinary meaning of the words used in the definition of "strike". If the employees were previously refusing to work for a prescribed purpose, but are no longer refusing to work, there is not a strike. The fact that the grievance or dispute underlying the prescribed purpose remains in existence does not mean that the strike has not come to an end; a demand unaccompanied by a concerted withdrawal of labour is not a "strike".

[25] The LRA does not deal with the "termination" of strikes or with "suspended" strikes. This is unsurprising. A "strike' is a state of affairs occurring with a particular purpose. It either exists or it does not. A "strike" ends, in the sense of no longer existing, when there is no longer a concerted withdrawal of labour.
……
[41] An employer who decides to persist with an exclusion of employees from the workplace after they have ended their strike and tendered their services is no longer responding to the strike, but is choosing to use the lock-out offensively in a way that is indistinguishable from the employer who, in the complete absence of a strike, embarks on a lock-out to compel compliance with its demand. To say that the ongoing lock-out is still responding to the strike is to treat the ongoing lock-out almost as some form of punishment because the employees chose to embark on a protected strike. The lawmaker could not have intended to reward retribution of that kind.
……
[45] This Court's jurisprudence thus mandates us to prefer an interpretation which confines the use of replacement labour to the duration of the strike, provided that section 76(1)(b) is reasonably capable of that meaning. For the reasons I have given, that is a meaning which the language of the section can bear.

5.3 Employer provocation

Mlondo and Others v Electrowave (Pty) Ltd (D343/2021) [2023] ZALCD 8 (18 May 2023)

Principles:

(1) For employees to escape the ordinary consequences of participation in an unprotected strike by way of provocation, the conduct by the employer must be egregious, and there must be substantial justification to excuse a failure to comply with the applicable procedures.
(2) Ordinarily, the labour court does not make orders for costs against aggrieved employees. But where legal representatives backpedal on concessions and present a contrived version of the facts, the legal representatives ought to be liable for at least a portion of their client's costs, payable on a punitive scale.

Facts:

Confronted by an unprotected strike, the employer asked employees to put their grievances in writing and that these would be discussed when work resumed. The demands were submitted in a handwritten document. On the same morning, the employer issued a first ultimatum requiring the striking employees to resume normal duties by 9:00. The ultimatum contained a clause to the following effect: "*Despite the contents of this ultimatum or any discontinuing of the strike for any reason whatsoever,*

the company expressly reserves its rights to take disciplinary action, which may include dismissal, against those employees who participated in the unprotected strike in the first place."

The employer had clearly taken legal advice about the wording of the ultimatum as a result of the LAC's judgment in *AMCU obo Rantho and Others v SAMANCOR Western Chrome Mines* (JA62/19) [2020] ZALAC 46; (2020) 41 ILJ 2771 (LAC) (1 October 2020) that found based on the facts of that case, that where illegally striking employees obey an ultimatum and return to work within the stipulated time, the employer will not be entitled to dismiss them. The employer's ultimatum in that case constituted a waiver of its right to dismiss for the period of its duration.

A second ultimatum, in similar form and requiring employees to resume normal duties by 10:00 was issued at 9:00. A third and final ultimatum was requiring employees to resume their normal duties by 11:00. The employees failed to respond to the ultimatum and between 13:00 and 13:30 the employer issued letters of suspension pending the outcome of an investigation.

The arrangements for the format of the disciplinary hearing, having regard to Covid-related constraints, was discussed with shop stewards. The union was advised that the disciplinary hearings for shop stewards would be conducted separately. At the outset, it was proposed that since the boardroom could not accommodate all the affected employees, limited numbers of employees (including the shop stewards) would be permitted to remain in the boardroom, with other employees located within the premises, in the warehouse, with access to a big-screen TV on which the proceedings would be streamed. This proposal was rejected by the shop stewards who with the employees, elected to leave the meeting. The hearing continued in their absence and the independent chairperson made a finding to the effect that the employees had committed an act of serious misconduct, and that the penalty of summary dismissal was warranted.

At the separate disciplinary hearing for shop stewards, and after considering aggravating and mitigating factors, the independent chairperson dismissed both shop stewards for participation in an unprotected strike.

The employees referred a dispute to the **Labour Court** in which they contended that their dismissal for participation in an unprotected strike was substantively and procedurally unfair. Their submission was that the employer provoked the work stoppage by (a) deciding to implement short time without consultation; (b) unilaterally deciding to implement job grading in five years' time in breach of a collective agreement. The employees also argued that the three ultimatums were unlawful in that even if there were to be a return to work within the period stipulated by the ultimatum, employees could nonetheless be disciplined. There were also allegations of procedural unfairness.

Regarding the argument on provocation by the employer, the court said that it is correct that a court ought properly to take into account conduct by an employer which may serve to excuse any failure by employees to refer their dispute to the statutory dispute resolution mechanisms, but the threshold is set high. For employees to escape the ordinary consequences of participation in an unprotected strike by way of provocation, the conduct by the employer must be egregious (ie shocking), and there

must be some substantial justification proffered to excuse a failure to comply with the applicable procedures.

Looking at the evidence, the court was satisfied that both the issue of short-time and job grading did not constitute provocation, mainly because both issues had been raised long before in consultative meetings. The court found that the employees showed no regard for the statutory dispute resolution processes – instead, they conducted themselves as if they did not exist.

The court held that the employees' contravention of the LRA was serious, they made no attempt whatever to comply with the Act, their strike was not in response to any unjustified conduct by the employer, they were aware that an unprotected strike was an act of misconduct for which they may be disciplined, they were aware that they had final written warnings for the same offence, and they were afforded a right to be heard prior to dismissal. The court therefore held that the dismissal of the employees was both substantively and procedurally fair.

As regards **costs**, the court confirmed that ordinarily, the court does not make orders for costs against aggrieved employees, who misguidedly but in good faith, pursue legitimately felt grievances against their employers. But the legal representatives made a desperate attempt to backpedal on concessions already made and presented a contrived version of the facts. The case presented was made up as they went along with little regard for the pleadings. The court held that the legal representatives ought to be liable for at least a portion of the employer's costs, payable on a punitive scale.

This case is a reminder that the LRA makes a clear distinction between protected and unprotected strike action. The consequences of each are equally clear – protected strike action carries an immunity against dismissal and civil liability; unprotected strike action does not. An allegation that the employer provoked the unprotected strike needs to be supported with clear evidence.

Extract from the judgment:
Van Niekerk, J

[23] In the face of a clear legislative policy to reward compliance with the statutory dispute resolution mechanisms, caution ought to be exercised to maintain the distinction between protected and unprotected strike action and avoid any blurring of the lines. An appeal to provocation is one of the not uncommon means whereby exculpation is sought against the consequences of flouting the carefully crafted procedures that seek to maintain industrial peace. While it is correct that a court ought properly to take into account conduct by an employer which may serve to excuse any failure by employees to refer their dispute to the statutory dispute resolution mechanisms, the threshold is set high. For employees to escape the ordinary consequences of participation in an unprotected strike by way of provocation, the conduct by the employer must be egregious, and there must be some substantial justification proffered to excuse a failure to comply with the applicable procedures.…….

[32] In summary: for the purposes of items 6 and 7 of the Code of Good Practice, the applicants' contravention of the LRA was serious, they made no attempt whatever to comply with the Act, their strike was not in response to any unjustified conduct by the employer, the applicants were aware that an unprotected strike was an act of misconduct for which they may be disciplined, they were aware that they had final written warnings for the same offence, and they were afforded a right to be heard prior to dismissal. I find therefore that the dismissal of the applicants was both substantively and procedurally fair. Their referral thus stands to be dismissed.

5.4 Wages paid erroneously to strikers

North West Provincial Legislature and Another v National Education Health and Allied Workers Union obo 158 Members (JA17/22) [2023] ZALAC 12 (21 June 2023)

Principle:

While the no-work no-pay principle for striking employees is legal, where the employer erroneously pays wages to striking workers, the employer may not reclaim this money by deducting from subsequent wages except where the employer complies with section 34(1) of the BCEA.

Facts:

When employees engaged in unprotected strike action, the secretary of the North West Provincial Legislature (NWPL) issued a communique to staff members informing them that, given the unprotected industrial action, the principle of no-work no-pay would apply to those employees who did not attend work.

When the Labour Court interdicted the strike, declaring it unlawful, the secretary issued a further communique to staff that the principle of no work no pay was to be implemented from 15 December 2020.

Despite the communiques issued, remuneration was paid to all striking employees by the NWPL, apparently because the NWPL failed to halt its payroll run to striking workers. Following this, the NWPL advised the employees that it would deduct the remuneration paid to employees who had been on strike from their salaries over a number of months.

This caused a dispute between the parties and the secretary informed the employees that the NWPL would proceed to deduct three working days' remuneration each month from employees' remuneration until 15 April 2022. In response, NEHAWU approached the Labour Court on an urgent basis under section 77(3) of the BCEA seeking to interdict the NWPL from making the deductions.

The **Labour Court** found that section 34(1) of the BCEA applies to any deduction from an employee's remuneration, unless the legislated exceptions exist, namely that the employee agrees in writing to the deduction, or the deduction is permitted by law, collective agreement, court order or arbitration award. Since no written agreement had been concluded with the employees, and no law permitted a deduction from the salary of any employee, the deduction of remuneration by the NWPL was not permitted. The Labour Court found there to be no conflict between section 67(3) of the LRA, which provides for no work no pay during a protected strike, and section 34 of the BCEA. Consequently, the deductions made, or those intended to be made, were unlawful and the NWPL was interdicted from deducting remuneration from the salaries of NEHAWU's members until it had complied with section 34 of the BCEA.

On appeal to the **Labour Appeal Court** it was confirmed that the NWPL was not obliged to remunerate the employees for services that they did not render during their unprotected strike, but it did so. The payment made by the NWPL to striking employees falls squarely within the definition of remuneration, as set out in both the LRA and the BCEA. Having paid such remuneration, it did not matter that payment

was made during the course of a strike. It remained remuneration paid to employees and the right to fair labour practices, to which the BCEA gives effect, requires that deductions from remuneration are governed by section 34.

While we respect the logic of the court, we are surprised that consideration was not given to *section 34(5)(a)* of the BCEA which says an employer may not require or permit an employee to repay any remuneration *"except for overpayments previously made by the employer resulting from an error in calculating the employee's remuneration".* If nothing else the court should have considered this section as a basis for allowing the deduction.

Case law has allowed deductions for overpayment without first getting the employee's written agreement to do so. In other words, section 34(5)(a) has on occasions been applied as an exception to the conditions imposed by section 34(1).

In *Jonker v Wireless Payment Systems CC (2010) 31 ILJ 381 (LC)* the court said that as a general rule the BCEA prohibits deductions from employees' salaries without their prior consent. However, deductions without consent were permitted where the employee had been overpaid in error. In such an instance the employer merely had to advise the employee of the error in payment and the amount of the deduction to be made. The cases of *Cenge & others v MEC, Department of Health, Eastern Cape & another (2012) 33 ILJ 1443 (LC)* and *Sekhute and Others v Ekhuruleni Housing Company Soc (J1862/17) [2017] ZALCJHB 318 (5 September 2017)* followed this approach.

While the court said that the no-work no-pay principle for striking employees is legal, where the employer erroneously pays wages to striking workers, the employer may not reclaim this money by deducting from subsequent wages except where the employer complies with Section 34(1) of the BCEA. The court was not saying that deductions could not be made if agreement in writing is reached to allow the deductions.

Extract from the judgment:
Savage AJA:
[12] In spite of the fact that the NWPL was not obliged to remunerate the respondent employees for services that they did not render during their unprotected strike, it did so and thereafter sought to deduct such remuneration paid from their salaries unilaterally, without agreement or order obtained through an adjudicative or judicial process.
……
[15] Having paid such remuneration, it mattered not that payment was made during the course of a strike. It remained remuneration paid to employees and the right to fair labour practices, to which the BCEA gives effect, requires that deductions from remuneration are governed by section 34.

5.5 Organisations liable for acts of officials?

Economic Freedom Fighters v Brightstone Trading 3 CC t/a Gordon Road Spar and Others - (JA129/2021) [2023] ZALAC 21 (17 August 2023)

Principles:

1. **Ostensible authority** of an agent, such as an official of a political party, is established if it can be shown that the conduct of the principal (the political party) created an impression that the agent had the power to act on its behalf. The agent

does not authorise herself or himself. Rather, authorisation flows from the principal's conduct.

2. To hold a party liable on the basis of ostensible authority, it must be shown to have been:
   (a) a representation by words or conduct;
   (b) made by the principal, and not merely by the agents, that they had authority to act as they did;
   (c) in a form such that the principal should reasonably have expected outsiders would act on the strength of it;
   (d) with reliance placed by third parties on such representation;
   (e) which reliance was reasonable; and
   (f) caused consequent prejudice to third parties.

Facts:

On 15 April 2021 a Spar employee was demoted from the position of floor manager to cashier. As a result Mr Sono (an EFF local branch official) addressed a letter to Spar on the EFF local branch letterhead, in which he requested a meeting with management on 16 May 2021 to discuss the issues set out in his letter.

After Spar did not respond to the letter, Mr Sono arrived at Spar's premises on 16 May and demanded the reinstatement of the former floor manager into her previous position and threatened to shut down the store if the demand was not met. When the demand was not met, Mr Sono and a number of protesters forced the store's closure. Cashiers were shouted at and shoppers were threatened and instructed to leave the store. The entrance to the shopping centre was barricaded and the store was required to close for the day. A similar incident occurred two weeks later and the store was closed again.

Spar instructed its attorneys to address a letter to the EFF's Johannesburg James Sofasonke Mpanza Region, demanding that the EFF and its members cease all illegal conduct and interference with its business operations. Despite this, protest action intensified and Spar approached the **Labour Court** for an urgent interdict. On 1 June 2021, the Labour Court granted an interim interdict, restraining the EFF, its members and all other persons acting on their instructions, and named employees from engaging in unlawful action which disrupted Spar's business operations.

The EFF opposed the interdict application, distancing itself from the protest action and the unlawful activities associated with it. It denied that Mr Sono, a local EFF branch official (who was not cited as a party to the application), had been authorised to act on the EFF's behalf. On the return date, the Labour Court confirmed the interdict, making a costs order against the EFF in doing so. The Labour Court found that *'…the enquiry is not whether the EFF, through the provisions of its constitution or otherwise, conferred authority on Mr Sono and its members to protest at the applicant's premises. It is whether, on the probabilities of the pleaded facts this court can conclude that Mr Sono and the protesters created the appearance that they had the power to act on behalf of the EFF*.'

The EFF was found liable for Spar's costs on the basis of the doctrine of 'ostensible authority', as Spar had succeeded in showing that it relied on a misrepresentation by Mr Sono and the protesters that they acted on behalf of the EFF, which reliance was not unreasonable or misguided.

The EFF appealed the order to the **Labour Appeal Court**. The LAC, referring to the Constitutional Court decision in *Makate v Vodacom [2016] ZACC 13; 2016 (4) SA 121 (CC) at paras 46-47* held that for the doctrine of ostensible authority to apply, the Labour Court was required to find that the EFF had created an appearance or representation by words or conduct that Mr Sono and/or his other EFF members involved in the protest action had authority to act as they did. The LAC said there was no evidence of such appearance or representation having been made by the EFF, nor one that the EFF should reasonably have expected that outsiders would act on the strength of and that would lead Spar reasonably to rely on such representation to its consequent prejudice. The fact that Spar wrote to the regional office of the EFF indicates that it was aware that higher authority within EFF structures may be called upon to intervene to halt the unlawful conduct of Mr Sono and the protestors. This gave credence to a finding that the EFF had not created a representation by words or conduct that Mr Sono or other protestors had the authority to act on behalf of the EFF as they did.

The LAC granted the EFF appeal against the Labour Court order and its costs order. The LAC said that the ostensible authority of an agent, such as an official of a political party, is established if it can be shown that the conduct of the principal (the political party) created an impression that the agent had the power to act on its behalf. The agent does not authorise herself or himself. Rather, authorisation flows from the principal's conduct.

To hold a party liable on the basis of ostensible authority, it must be shown to have been: (a) a representation by words or conduct; (b) made by the principal and not merely by the agents that they had authority to act as they did; (c) in a form such that the principal should reasonably have expected that outsiders would act on the strength of it; (d) with reliance placed by third parties on such representation; (e) which reliance was reasonable; and (f) caused consequent prejudice to third parties.

We have real concerns about the practical application of this judgment. Having received a letter from an EFF branch official on an EF letterhead, was it not reasonable for Spar to assume that the official was acting on behalf of the EFF? We also take issue with the LAC's implication that because Spar wrote to the EFF's regional office, it was acknowledging that the branch official may not have authority to act on the party's behalf. All it was presumably doing by writing to the regional office, was asking for them to intervene and resolve the matter?

Where does this leave another employer receiving a similar letter from a branch official of a political party (or a trade union for that matter, or even an attorney from a law firm) and attempting to hold that organisation liable for the conduct of its agent? We suggest that to cover its bases and to be secure in establishing ostensible authority, the employer would need to address a letter to a higher authority within that organisation confirming that it would regard the agent in question as having authority to act on the organisation's behalf unless this was disputed by the organisation by a specified date.

Despite its finding, the LAC said "*the EFF would nevertheless be well advised to take appropriate steps to prevent future such unlawful conduct from arising*." This throwaway line does not deal with a major concern of employers in having to deal with workplace demands and coercive action from politicians rather than trade unionists.

Extract from the judgment:
Waglay JP, Savage *et* Gqamana AJJA:
[10] It follows that ostensible authority is established if it can be shown that the conduct of the principal created an impression that the agent had the power to act on its behalf. It is therefore the conduct of the principal that must be examined in order to determine whether it created the appearance that the agent had the authority to bind the principal. The agent does not authorise herself or himself. Rather, authorisation flows from the principal's conduct.

[11] Subsequent to the decision in *Makate*, this Court in *Western Platinum Ltd v National Union of Mineworkers obo Mathulatsipi and Others* held that:

> *'[3] … The true position is that ostensible or apparent authority cannot be founded upon a representation made by the agent alone. In order for the principal to be bound by virtue of an estoppel, the representation must be made by the principal itself…*

[12] The Labour Court in *Maye Serobe (Pty) Ltd v Labour Equity General Workers Union of South Africa obo Members and others*, with reference to the decision of the Supreme Court of Appeal in *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and others*, found that to hold a party liable on the basis of ostensible authority, there must be shown to have been (a) a representation by words or conduct; (b) made by the appellant and not merely by the agents that they had authority to act as they did; (c) in a form such that the appellant should reasonably have expected that outsiders would act on the strength of it; (d) with reliance placed by the respondents on such representation; (e) which reliance was reasonable; and (f) caused consequent prejudice to the respondents.

6. Retrenchment

Solidarity obo Member v Die Humansdorpse Landbou Kooperasie Ltd (P46/23) [2023] ZALCPE 10 (26 May 2023)

Principle:

In a section 189(3) notice, the number of employees likely to be affected refers to the employees the employer contemplates dismissing. The LRA does not intend two different categories of employees, namely those who must receive the notice and must be consulted, and the other category being those the employer actually contemplates dismissing who must also be consulted.

Facts:

At the time it needed to embark on a retrenchment process, the employer employed a workforce of about 712 employees. It issued a section 189(3) notice to 63 of its employees. In that notice it indicated that it was contemplating retrenching between 35 and 45 employees for operational reasons. The 63 employees given notice worked in about 12 different departments and were identified as being affected by the looming retrenchment process.

The employer did not believe that the proposed number of dismissals triggered a retrenchment process under section 189A (the process for larger scale retrenchments), particularly because it amended the maximum contemplated number of retrenchments to between 35 and 40 employees. But by giving notice to 63 employees, it was argued that the employer had brought the retrenchment within the formula contemplated in section 189A(1)(a)(v), which states that section 189A has to be followed if the employer has more than 500 employees and contemplates

retrenching at least 50 of them. This includes employees retrenched during the past 12 months, and the employer had during this period retrenched another 8 employees.

Solidarity brought an urgent application in the **Labour Court,** seeking an order compelling the employer to follow a fair retrenchment procedure under section 189A. The Court said section 189(3) should be read with section 189(1). Written notice under section 189(3) was intended to be given to those likely to be affected by the proposed retrenchments, which in effect would be those employees the employer contemplates retrenching. Having given notice to 63 employees, the Court said those were the employees the employer contemplated retrenching. Otherwise it made no sense to consult with them under section 189(1).

The Court declared that the employer had acted in a procedurally unfair manner in retrenching the employees without following the requirements of section 189A, and ordered the employer to reinstate the dismissed employees and continue with a meaningful joint consensus-seeking process under sections 189 and 189A.

The strict learning from this judgment is for employers to be careful to only give notice under section 189(3) to those employees it contemplates retrenching. We agree with this, and that unnecessary anxiety should be avoided amongst a larger group of employees. But we think it could be argued that this judgment misunderstands the dynamic of the consultation process. Section 189(3) clearly anticipates that in the consultation process there can be an agreed change to the employer's plans, a reconsideration of an alternative to dismissal, a revision on the numbers to be retrenched, and different selection criteria to be adopted. As an example, an employer's financial circumstances may dictate that it has to shed say 30 employees, but it is open to how the selection criteria are decided, and proposes consulting a wider group of 60 employees, from whom the 30 employees to be retrenched would be selected.

The mechanical approach adopted in this case seems to us to overlook that the consultation process could result in changes which could mean that the procedures of section 189A may not have to be triggered. By identifying a slightly broader group in appropriate circumstances, some flexibility may be given to the parties to achieve as fair a process as possible.

Extract from the judgment:
Jolwana AJ:
[18] In any event, the respondent issued notices to only 63 employees that were in certain identified departments. Therefore, each and everyone of those 63 employees was, as a matter of law, an employee likely to be affected by the proposed dismissals. None of them could, on any reading of section 189(1), assume that they were not affected. The question therefore is whether the number of employees an employer contemplates dismissing as referred to in section 189(1) is different from the number referred to in section 189(3)(c) to whom critical and detailed information concerning the whole process must be disclosed in the notice. I am of the view that the number referred to in both subsections is the same. In other words, if the employer believes that a certain number of employees may be affected, those are the employees it contemplates dismissing. Were it not so, it would make no sense to consult, in this case, with 700 or so employees when only 63 of them are in the retrenchment radar. Similarly, consultation with 63 employees when only 40 employees may be affected or the employer contemplates dismissing is counterintuitive in my view. I simply do not think that the Legislature intended two different categories of employees, that is the ones who must receive the notice and must be consulted and the other category being those the employer actually contemplates dismissing who must also be consulted. The interpretation that seeks to

distinguish the number of employees referred to in section 189(1) from the one referred to in section 189(3)(c) would lead to an avoidable absurdity.

7. Arbitrary discrimination

Mkalipi v Minister of Labour and Employment NO and Another (JS 257/2022) [2023] ZALCJHB 251 (25 August 2023)

Principles:

Whilst it was not enough for conduct to be merely capricious or arbitrary to constitute discrimination on an arbitrary ground, the fact that it has the effect of potentially impairing the human dignity of a person makes it analogous to the so-called listed grounds, thereby falling within s6(1) of the EEA. For "*any other arbitrary ground*" to be regarded as analogous to the listed grounds of unfair discrimination, does not mean "*sounding like*" the other grounds either in meaning or context. The required similarity is acquired from what the unfair discrimination does to a person's fundamental human dignity, which must be tested in evidence on a case by case basis.

Facts:

Discrimination is prohibited and defined under section 6(1) of the Employment Equity Act, which includes discrimination "*on any other arbitrary ground*". The LAC in *K Naidoo & Others v Parliament of the Republic of South Africa* CA4/2019 [2020] ZALAC 07 May 2020 engaged in the debate as to whether a narrow or broad interpretation should be given to this phrase, and effectively supported a narrow interpretation of that section. The LAC found that the intention of the phrase was not to outlaw "*arbitrariness*" per se, but rather to outlaw unfair discrimination that is rooted in another arbitrary ground analogous to the listed grounds, and which must have the potential to impair the fundamental human dignity of a person.

Respondents (and their lawyers) defending arbitrary discrimination claims have routinely required applicants to identify and name the analogous ground on which they allege they have been arbitrarily discriminated against. When the applicants have difficulty in doing so, the respondents have successfully taken exception to the applicants' claims. The respondent in this matter attempted this strategy but without success on this occasion.

In this case the Chief Director: Labour Relations somewhat controversially sued his current employer, the Department of Labour and Employment, claiming he had been arbitrarily and unfairly discriminated against. His discrimination claim is based on the difference in how he and a colleague were treated. He alleges he performs more complex and demanding work than his colleague, or at least work of equal value, and yet he is graded and paid below the level of his colleague, who also holds the post of Chief Director but with much shorter service in that position. He claims that the difference in treatment between himself and his colleague is arbitrary under section 6(1) of the EEA, because there is no operational or employment reason for the difference.

The Department took an exception to the Chief Director's claim, stating that he had failed to identify an arbitrary ground analogous to the listed grounds stated under section 6(1) and which has the impact of infringing his dignity.

The Court did not agree with the Department's views. Applying the rationale from *Naidoo*, the Court said that whilst it was not enough for the conduct complained of to be merely capricious or arbitrary, the fact that it has the effect of potentially impairing the human dignity of a person, makes it analogous to the so-called listed grounds. The Court said the fact that the Chief Director was placed at a lower grading level affected how colleagues and junior employees might regard him and this was a continuing and serious affront to his human dignity. The value he brings to his post is viewed as being less than that of his colleague by their employer for no justifiable operational and employment reason.

The Court made it clear that for "*any other arbitrary ground*" to be regarded as analogous to the listed grounds of unfair discrimination, does not mean "*sounding like*" the other grounds either in meaning or context. The required similarity is acquired from what the unfair discrimination does to a person's fundamental human dignity. In saying this, the Court recognized that when people complain of unfair discrimination that they experience in the workplace, they are not always able to say, for instance, whether it is attributable to their race, colour or culture or any of the other listed grounds.

For these reasons the Court rejected the Department's exception application, which means this matter will to proceed to trial for the Chief Director's allegations and claims to be tested in evidence.

The Labour Court was clearly uncomfortable with having to confine the test for arbitrary discrimination within the confines of grounds analogous to or sounding like the listed ones, and appears to have widened the test to include any arbitrary discrimination that impaired an employee's dignity. The Court made the point that "*unfair discrimination must be removed from our society regardless of the basis thereof being put in one or other category."*

If the Labour Court's approach is to be consistently followed, applicants claiming discrimination on an arbitrary ground would only have to show that the arbitrariness of the conduct they complain about had impaired their human dignity, to satisfy the required criteria of it being analogous to the listed grounds specified in section 6(1) of the EEA. And as the Court appears to have accepted, any arbitrary discrimination that has no justifiable operational or employment reason will probably inevitably impair the affected employee's dignity. This will however still have to be tested in evidence on a case by case basis.

Extract from the judgment:
(Jolwana AJ)

[22] I do need to make two points very clear. The first one is that the "any other arbitrary ground" being analogous to the other grounds of unfair discrimination, does not mean "*sounding like*" the other grounds either in meaning or context. I am of the view that the similarity referred to in both *Harksen* and *Naidoo* 2 is in respect of what the unfair discrimination does to a person's fundamental human dignity. Whether or not the complainant will, at the trial, be able to show that it does have that effect is not for determination at the pleading stage. The applicant merely has to plead that the ground he relies on has the effect of impairing his fundamental human dignity as a person. The attributes of the pleaded ground of unfair discrimination must show a relationship with the listed grounds by how his fundamental dignity is imperiled as a consequence. Just by way of illustration conscience is a listed ground of discrimination. But how does one show in pleadings that the basis for the alleged unfair discrimination is his/her conscience. Put differently, if the applicant is being

unfairly discriminated against because of his conscience, what would be the conduct of his employer that he or she would be required to plead for him to have pleaded a discrimination on the ground of conscience or a ground analogous to conscience?

[23] The second point I need to emphasize if even at if the risk of stating the obvious, is that this is not the stage for a litigant to prove his or her allegations. Therefore, I am not making any suggestion, directly or indirectly that he has shown that there is unfair discrimination on an arbitrary ground or that he has proven the existence of the unfair discrimination on an arbitrary ground. It is the trail court, based on the evidence to be led during trial that must determine those issues. The trial court may very well find against the applicant. But for present purposes and bearing in mind the fundamental principle on exceptions which is that a court must accept all allegations of fact made in the particulars of claim as true. I am of the view that the facts alleged by the applicant in his statement of claim, if proved, would amount to unfair discrimination in my view. I cannot see the respondents having any difficulties in pleading to the applicant's statement of claim.

……

[25] The debate about unfair discrimination on an unlisted ground which is considered to be what the additional ground of unfair discrimination – unfair discrimination "on any other arbitrary ground", has taken various forms and has been raging for a while now. I do not think that the dust has settled yet on that debate and in fact it does not look like it is about to settle anytime soon. This is hardly suprising regard being had to our nervousness, justifiably so, whenever two human beings are, for no apparent reason, treated differently and the harm that may do to human dignity. This is in part because in some ways when people complain of unfair discrimination, they are not always able to say that the unfair discrimination that they experience in the workplace for instance, is attributable to their race, colour or culture or any of the other listed grounds. Therefore, even to say that, as it has been said in some cases, unfair discrimination on an arbitrary ground must be on a ground similar to the listed grounds or one or some of them, does attract some degree of controversy in my respectful view. It therefore needs to be carefully assessed on the facts of that particular case.

8. Employees holding political office

South African Municipal Workers Union v Minister of Cooperative Governance and Traditional Affairs and Another (J 945/2023) [2023] ZALCJHB 323 (17 November 2023)

Principle:

Section 19 of the Constitution guarantees the right of every citizen to make political choices and to participate in the activities of a political party.

Facts:

The Local Government Municipal Systems Act (the 'Systems Act') prohibits municipal employees from holding office in a political party. That limitation previously applied only to senior management (municipal managers and managers directly accountable to them), but in 2022 the Act was amended to provide for the insertion of section 71B, which extended the prohibition to all municipal employees whatever their status.

Samwu accepted that senior municipal management employees wield important decision-making powers and influence over municipal resources and policy, which could potentially result in a conflict of interest between their fiduciary duties as employees and the interests of a political organisation in which they may hold office. Samwu however challenged the extension of the prohibition to all municipal employees as being unconstitutional, and in particular, in breach of section 19 of the

Constitution. This section guarantees the right of every citizen to make political choices and to participate in the activities of a political party.

Samwu's application was opposed by the SA Local Government Association (SALGA) and the Minister of Cooperative Governance and Traditional Affairs. SALGA had supported the extension of the prohibition to all municipal employees to achieve what was termed the professionalisation of local government in the face of an inability by municipal managers to exercise proper disciplinary supervision in circumstances where party officials were employed by the same municipality, but in lower positions. In SALGA's view, the amendment presented an opportunity to professionalise local government by limiting the rights of officials with political influence and thereby improve service delivery.

Whilst SALGA and the Minister did not dispute that the prohibition infringed employees' political rights under section 19, they argued that it was a justifiable limitation under section 36(1) of the Constitution. SALGA contended that only a complete ban on political membership at all levels of local government will achieve the objectives of stable local government and the promotion of service delivery. SALGA argued that it would depoliticise and professionalise local government and thus avoid political interference, which it claimed was the root cause of poor service delivery. SALGA's point was that when junior municipal staff hold positions in political parties, they are able to use their political influence to dictate to senior management.

The Court noted that a limitation of rights under section 36(1) of the Constitution would only be reasonable and justifiable if there were not other less restrictive means that could have been used to achieve the same ends. In this case the Court felt that there were other less restrictive means to achieve the stated purpose of a depoliticised and professional local government service, namely the previous limited ban in the Systems Act on only senior municipal management (who make the decisions over municipal resources and policy) being excluded from holding office in a political party.

The Court concluded that there was insufficient evidence placed before it to justify the submissions that it was necessary to extend the ban to all municipal employees. In addition, municipalities and municipal managers are armed with numerous legal remedies to avert unlawful interference from junior employees who hold political office. These include the enforcement of the code of conduct which expressly prohibits undue influence by employees over others. If junior employees are guilty of misconduct, disciplinary action can be taken against them, and in extreme cases legal remedies are available. A failure by municipalities to use these remedies designed to ensure accountability, cannot be the basis for the denial of constitutional rights.

The Court recognised that many municipalities are dysfunctional, and that the objectives of professionalising municipal management and improving service delivery are legitimate objectives which require urgent implementation. But, the Court concluded, the applicants had failed to establish that the prohibition on all municipal employees holding political office would resolve the deep-seated causes of conflict in the municipal sector

The Court declared the provisions of the Systems Act that prohibit all municipal employees from holding office in a political party, to be unconstitutional and invalid. In doing so, the Court provided alternative wording to be inserted into section 71B. As

required, the Court referred its order to the Constitutional Court for confirmation, before it can take effect.

Presuming the Labour Court's order will be confirmed by the Constitutional Court, it will mean municipal employees outside the ranks of senior management will be entitled to hold office in a political party.

Whilst private sector employees fall outside the scope of the Systems Act, attempts to prevent all private sector employees from holding political office are likely to meet a similar fate. Whether a contractual ban on senior management in the private sector holding political office would stand up to scrutiny, would depend on the facts of each case. Relevant factors may include the extent to which that organisation sourced government contracts or interacted with government departments in the normal course of business.

Extract from the judgment:
(Van Niekerk, J)

[1] Section 19 of the Constitution guarantees the right of every citizen to make political choices and to participate in the activities of a political party. The nature of the rights established by section 19(1) are fundamental to the democratic project……..
……..
[6] The issue to be determined then is whether section 71B of the Systems Act, to the extent that it prohibits municipal staff other than municipal managers and managers accountable to them from holding political office in a political party, passes constitutional muster
……..
[33] A limitation will not be proportional if other, less restrictive means could have been used to achieve the same legislative ends. Put another way, a provision that limits a fundamental right must be appropriately tailored and narrowly focussed, with a margin of appreciation to be afforded to the state in relation to whether there are less restrictive means available to achieve the stated purpose. In the present instance, there is a less restrictive means to achieve the legislative purpose, in the form of the narrow limitation, a limitation that has been in existence since 2011 and by which, on the Minister's undisputed account, resulted in "*stabilization of the municipal sector which for years has been plagued by political infighting, resulting in instability*". Given what is contended to be the success of the narrow limitation in the form of the previously applicable section 56A, the obvious question is why the impugned extension is necessary to achieve a purpose already achieved?

[34] The primary factor that arises for consideration in the present instance is the relationship between the impugned extension and its purpose. As a starting point, I would observe that where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law, usually the organ of state responsible for its administration, must place material regarding those considerations before the court. If the state fails to do so, and there are cogent objective factors pointing in the opposite direction, the state will have failed to establish that the limitation is reasonable and justifiable. Evidence must be tendered to demonstrate that that the existence and enforcement of the impugned extension can reasonably be expected to control the risks that the respondents have identified, and advance the purpose of the extension.

[35] The Minister has placed no evidence before the court to justify the impugned extension as constitutionally valid. She submits that the Court need not conduct or adopt a purely factual enquiry, but ought rather to 'apply common sense' as and 'judicial knowledge'. There is no merit in this appeal. As I have indicated, the applicable principle is one that requires a party relying on justification to place sufficient information before the Court as to the policy that is being furthered, the reason for that policy and why it is considered reasonable in pursuit of

that policy to limit a constitutional right. This is not a case where the Court can uphold a claim of justification based only on what is contended to be common sense and judicial knowledge.

9. Restraints of trade

Sadan and Another v Workforce Staffing (Pty) Ltd (JA38/23; JA39/23) [2023] ZALAC 23 (17 August 2023)

Principle:

Where a restraint clause prohibits ex-employees from plying their trade or engaging in commerce throughout the Republic, the duration of the limitation must be subjected to rigorous scrutiny. The employer will be required to explain if there were any less restrictive means available to the employer to protect its proprietary interest.

Facts:

The employer provided staffing solutions, human resources, staff placement, and related services throughout the country. Over the years it also designed and developed unique computer programmes for staff management, generation of payrolls and invoicing to clients.

The first appellant was employed by the employer as its General Manager of Sales. The second appellant was employed as the employer's National Sales Executive. As part of their employment contracts were restraint of trade agreements which prevented employment with companies which competed with the business conducted by the employer, and conducted their business within a 50 kilometre radius from any office, branch where the employee was employed or at which the employee undertook or was given any responsibility during the duration of his/her employment with the employer.

During their employment, the appellants established close relationships with the employer's customers and had become privy to information, *inter alia*, regarding the employer's pricing strategies, costing of its products and profit margins. The appellants also had access to the employer's client database, marketing material, business strategies and financial information. The first appellant was responsible for developing and implementing sales strategies for allocated regions, revenue generation, achievement of sales targets and recruitment, and selling staffing services and solutions to customers. The second appellant, in his capacity as National Sales Executive, entertained customers by hosting them for breakfast and arranging social events such as golf days. In the course of executing his responsibilities, which related to the procurement of new business and managing existing customer relationships, the second appellant was intricately involved with the employer's customers.

After their resignations they both took up employment with one of the employer's competitors, namely Rise Up Group (Pty) Ltd (Rise Up). Rise Up also operates in Durban, Secunda and Johannesburg and provides staffing solutions in those areas. It was not disputed that it does so in competition with the employer.

The employer sought to restrain both appellants in the **Labour Court** which enforced the restraint of trade agreements concluded by the parties.

The appeal to the **Labour Appeal Court** was on limited grounds and directed only against those paragraphs which effectively prohibited the appellants from taking up employment with the employer's competitors anywhere in the RSA for a period of two years. The appellants contended that the restraints were unreasonable and against public policy, both in respect of their territorial reach and duration. They consequently sought partial enforcement of the agreements.

The LAC first confirmed that restraint agreements must be given meaning and business-like efficacy by having regard to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Using these principles the LAC held that the agreement had the effect of prohibiting the appellants from taking up employment with the employer's competitors anywhere in the Republic for a period of two years.

The undisputed facts establish that both appellants were not confined to the respondent's Cresta offices but performed their duties nationally and had formed close relationships with the respondent's clients throughout the Republic. It was thus reasonable for the respondent to expect its employees to commit to a covenant that would protect its interest wherever such employees had the opportunity to form relationships with clients. In the case of the appellants, who were both employed in capacities that required of them to perform their duties nationally, only a country-wide limitation would have achieved that objective.

But the LAC held that because the restraint clause prohibits the appellants from plying their trade or engaging in commerce throughout the Republic, the duration of the limitation must be subjected to rigorous scrutiny. The court asked if there were any less restrictive means available to the employer effectively to protect its proprietary interest. The LAC held that, other than relying on the cursory assertion that a restraint of two years is required to protect its proprietary interest, namely its relationships with clients, the employer failed to provide any compelling evidence to justify such a manifestly onerous and unreasonable limitation of the appellants' constitutional rights to ply their trade and engage in commerce. The LAC found that a period of two years is an inordinately long time merely to allow new employees to meet with and develop relationships with existing clients. It is also disproportionate, particularly having regard to the fact that the territorial limitation extends to the whole of the Republic.

The LAC held that a partial enforcement of the restraint for a shorter period of 1 year would suffice to ensure protection of the employer's proprietary interest.

The court said that the facts of this case were distinguishable from those in *Beedle v Slo-Jo Innovations (Pty) Ltd*, where the LAC was satisfied that a comprehensive explanation had been offered as to why two years was necessary to protect the employer's interests. It explained that the lead time for the conceptualisation of a product required by one of its customers until the product is brought to market, can take between 24 to 36 months. Also, the employee was free to be employed in any position where she could exploit her skill and knowledge, save in the specific context of the beverage industry in which the employer traded. This confirms that the facts of each case determines whether a restraint is unreasonable.

Extract from the judgment:
Smith AJA:

[17] In our law, restraints of trade agreements are valid, binding, and enforceable, unless their enforcement would be unreasonable. The test for determining the reasonableness of a restraint of trade agreement was set out in *Basson v Chilwan and Others*, where Nienaber JA postulated the following considerations: (a) Does one party have an interest that deserves protection after termination of the agreement? (b) Is that interest threatened or being prejudiced by the other party? (c) If so, does that interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

[18] In *Reddy v Siemens Telecommunications (Pty) Ltd* (*Reddy*), the Supreme Court of Appeal (SCA) posited a fifth consideration, namely whether the restraint goes further than necessary to protect the interest. The Court held that this consideration corresponds with s 36(1)*(e)* of the Constitution, requiring a consideration of less restrictive measures to achieve the purpose of the limitation and that "*[t]he value judgment required by Basson necessarily requires determining whether the restraint or limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*"'.

[19] Once the party seeking to enforce a restraint of trade agreement has established an interest worthy of protection and that the other party is threatening that interest, the onus is on the party resisting the enforcement of the agreement to prove that it would be unreasonable. The appellants thus bore the onus of proving that the enforcement of the restraint will be unreasonable, both in respect of its territorial operation and duration.

[20] In deciding whether or not it would be reasonable to enforce a restraint of trade, the court must make a value judgment, mindful of the following policy considerations: (a) that public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*; and (b) all persons should, in the interests of society, be productive and permitted to engage in trade and commerce or their professions. Both considerations reflect not only common law but also constitutional values. In *Reddy,* the court held that:"*[c]ontractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in s 22*". In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*, Rabie CJ held that a court may, in the public interest, order that either the whole or only a part of the restraint on trade be enforced.

[21] The question then arises as to whether the territorial limitation and duration of the restraints are reasonable……..
……..
[26] In this matter the 'careful balancing exercise' mentioned in *Beadicia* implies a value judgment pursuant to the balancing of the respondent's right to hold the appellants to the agreements, on the basis of the principle of *pacta servanda sunt*, against the appellants' constitutional rights to ply their trade and engage in commerce.

[27] Because clause 13.4 prohibits the appellants from plying their trade or engaging in commerce throughout the Republic, the duration of the limitation must be subjected to rigorous scrutiny……
……
[29] It is common cause that in this case, the operation of paragraph 3.2 of the order effectively serves to prevent the appellants from exploiting the only skills they have and from plying their trades anywhere in the country for a period of two years. Other than relying on the cursory assertion that a restraint of two years is required to protect its proprietary interest, namely its relationships with clients, the respondent has failed to provide any compelling evidence to justify such a manifestly onerous and unreasonable limitation of the appellants' constitutional rights to ply their trade and engage in commerce. To my mind, a period of two

years is an inordinately long time merely to allow new employees to meet with and develop relationships with existing clients. It is also disproportionate, particularly having regard to the fact that the territorial limitation extends to the whole of the Republic.

[30] I accordingly agree with Mr Cassim that the enforcement of the impugned clause on the basis contended for by the respondent will be unreasonably harsh in that it will effectively preclude the appellants from being gainfully employed anywhere in the country for an inordinately and disproportionately long period. I am therefore of the view that the period is unreasonable, and its enforcement will thus be contrary to public policy.

[31] A partial enforcement of the restraint for a shorter period will, in my view, suffice to ensure protection of the respondent's proprietary interest. I consequently find that the respondent's proprietary interest will be sufficiently protected if the restriction mentioned in paragraph 3.2 of the order endures for a period of one year from the appellants' last days of employment.

10. Agency shop Agreements

Association of Mineworkers and Construction Union v UASA (Formerly named United Association of South Africa) and Others (DA13/2022) [2023] ZALAC 16 (17 August 2023)

Principle:

An agency fee in terms of s 25 of the LRA is paid because the minority union receives a service from the majority union or unions. When no service is rendered or it is rendered by the minority union itself, there is no justification for the majority union to receive agency fees from the minority union's members. Generally, in agency shop agreements, it must be implied that when a minority union becomes a bargaining agent, its members should not pay an agency fee unless there are express terms to the contrary in the contract between the parties.

Facts:

At the National Bargaining Council for the Sugar Manufacturing and Refining Industry (NBCS)), the employers had always been represented by the Sugar Manufacturers and Refiners Employer's Association (SMREA)). UASA, formerly known as the United Association of South Africa) and FAWU, the Food and Allied Workers Union) were registered trade unions traditionally members of the NBCS.

AMCU began recruiting within the sugar industry and when AMCU's membership was such that it was entitled to representation in the NBCS in terms of the NBCS' constitution, AMCU was officially admitted as a member of the NBCS.

A few days before AMCU's admission to the NBCS, SMREA, FAWU and UASA (acting jointly as the majority or representative union) entered into an agency shop agreement in terms of s 25 of the LRA. They agreed that the employer would deduct an agency fee of 1,4% of the basic wages of employees in the bargaining unit, that the agency fee could be deducted monthly without an employee's authorization and paid into a separate account administered by the unions. The rest of the provisions were a repetition of s 25.

Despite AMCU's admission as a member of the NBCS, the agency shop agreement meant that AMCU's members were still compelled to pay the agency fee. AMCU members, therefore, remained subject to double deductions: their ordinary union levies and the agency fees.

AMCU referred a dispute to the **CCMA** about the interpretation and application of the Council's main collective agreement. The dispute was not resolved at conciliation and AMCU referred the dispute to arbitration, seeking that its members be excluded from paying agency fees. During the arbitration, AMCU expressly stated that it did not challenge the constitutionality of s 25 and that it accepted that the agreement complied with the provisions of s 25. It also accepted the legislature's policy choice in favour of majoritarianism and did not challenge the majoritarianism principle.

AMCU contended that the agency shop agreement was unfair on its members as they were not 'free riders', since they were represented by AMCU at the NBCS. It had assumed that its admission as a bargaining agent would result in the cessation of the agency fee that its members were compelled to pay. Since its members were compelled to pay the agency fee and their union levies, the agency fee was being used as a tool to induce their members to join FAWU or UASA.

The commissioner, in dismissing AMCU's application, found that in s 25 there is no mention of unions that become bargaining agents having a special dispensation. The agency shop agreement likewise does not give the bargaining agents any special dispensation.

Dissatisfied with the arbitration award, AMCU approached the **Labour Court** seeking to have it reviewed and set aside. AMCU argued that the agency shop agreement was ill-conceived and it should, in good faith, have included AMCU. The NBCS opposed AMCU's application, contending that the agency shop agreement was properly entered into by the majority unions (FAWU and UASA acting jointly) and that it was done in accordance with the majoritarianism principle.

The Labour Court rejected AMCU's review application. It questioned how effective a minority union's service to its members would be, where a majority union (or alliance of unions) is present in a bargaining council? The court was not convinced that the plain meaning of s 25 leads to such an absurd or iniquitous result that it should be tempted to rewrite the provisions of the law under the guise of rendering a purposive interpretation. It concluded that in wording, content and format the agreement complied with s 25.

On appeal the **Labour Appeal Court** disagreed with the Labour Court. The LAC said that the philosophy behind agency fee agreements was to address the free rider problem – those who receive a benefit without the concomitant burden of paying for it. An agency fee in terms of s 25 is based on fairness and paid because the minority union's members receive a service from the majority union(s). When no service is rendered or it is rendered by the minority union itself, there is no justification for the majority union to receive agency fees from such minority union's members.

The LAC said that whilst the agency shop agreement in this case complied with s 25, when one had regard to the purpose of an agency shop agreement, it "*becomes manifestly clear that the collective agreement in this matter is utterly unfair. It offends the principle on which it is based*." The LAC held that generally in agency shop agreements, it must be implied that when a minority union becomes a bargaining agent, its members should not pay an agency fee unless there are express terms to the contrary in the agreement between the parties.

The LAC granted AMCU's appeal, which had the effect of overturning the arbitration award. The LAC replaced the award with an order providing that the agency fee must not be deducted from AMCU"s members for as long as AMCU remained a bargaining agent at the NBCS. The LAC's order also required agency fees paid by AMCU's members after it became a member of the NBCS (1 August 2017) to be repaid to them.

This judgment is a novel interpretation of s 25, which contains no provision dealing with the fairness of an agency shop agreement or whether it binds members of a minority union which has qualified to join a bargaining council. The judgment is based on sound principles but is controversial, importing a precondition of fairness into the other qualifications contained in s 25. On the basis of this judgment, when agency shop agreements fail to address the free rider concept, they may not be found to be binding.

Extract from the judgment:
CJ Musi JA:

[21] The legal philosophy behind making agency fees compulsory is to address the free-rider problem: those who receive a benefit without the concomitant burden of paying therefor. Making those who receive a benefit pay a consideration for enjoying the benefit is rooted in the fairness or fair-play principle.

……

[32] I agree with the court *a quo* that textually, the collective agreement passes muster. However, when one has regard to the purpose of agency fee arrangements it becomes manifestly clear that the collective agreement in this matter is utterly unfair. It offends the principle on which it is based. The majority unions receive money for a service which they do not provide for AMCU's members. AMCU is there to negotiate on behalf of its members. Why should they pay the majority unions whilst they are not free riders? The mischief of free riding is eliminated by AMCU's presence at the bargaining table. There seems to me to be no fair justification for the majority unions in this case to receive any fair share contributions from AMCU members.

[33] It is common cause between the parties that the collective agreement does not expressly exclude a minority union from becoming a bargaining agent, after meeting the threshold determined by the parties in the constitution of the bargaining council. Why would the constitution allow a union to become a bargaining agent on behalf of its members and then still burden them with the obligation to pay agency fees? The added burden is, in my opinion, manifestly unconscionable. How should this unfairness be addressed?

[34] The collective agreement has a negative and prejudicial effect on AMCU's members. Although they are not parties to the agreement, it affects them directly. The textual interpretation of the agreement does not yield a sensible result, in fact, it has a manifestly unfair and unbusiness-like result.

……..

[36] Importantly, these factors point to the fact that no violence would be done to the agreement if it is interpreted in a manner which renders the agreement fair, reasonable, business-like and in conformity with the purpose of this kind of union security arrangement. In my view, the only way to give business efficacy which does not contradict the express terms of the agreement and addresses the free rider problem is as follows: once AMCU became a bargaining agent its members were no longer free riders and they should therefore not pay agency fees. This is how the agreement should be interpreted, because all the parties to the contract knew why agency fees are paid. They were aware that the *raison d'etre* (reason for the existence) of the agency fee would dissipate when AMCU becomes a bargaining agent. It was clearly within their contemplation. The agreement does not expressly prohibit such an arrangement. The same result is achieved if a term were to be implied in this contract.

……

[40] As pointed out above, agency shop agreements are based on fairness. The agency fee is paid because the minority union receives a service from the majority union or unions. When no service is rendered or it is rendered by the minority union, there is no justification for the majority union to receive agency fees from such minority union's members.

[41] Generally, in agency shop agreements, it must be implied that when a minority union becomes a bargaining agent, its members should not pay an agency fee unless there are express terms to the contrary in the contract between the parties. The implied term, in this matter, is clear. It is necessary and obvious to give business efficacy to such agreements.

[42] It is manifestly clear in the contract under consideration that a term such as the one in the preceding paragraph gives obvious business efficacy to the agreement. Without it, the agency fee agreement 'would lack, commercial or practical coherence'.