Labour Law Webinar

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CASE LAW INDEX

PROCEDURAL MATTERS

COVID -19

The effect of Covid-19 on collective agreements

Public Servants Association and Others v Minister of Public Service and Others (J500/2020) [2020] ZALAC 54 (15 December 2020).

Principle:
The conclusion of a collective agreement which infringes the mandatory legal requirements governing such agreements, will be held to be invalid and unenforceable, even where there has been partial compliance by the parties.

Facts:
The dispute concerns a collective wage agreement entered into between the Government through the offices of the Minister of Public Services and Administration and union members to the Public Service Co-ordinated Bargaining Council ('PSCBC') which was concluded in 2018. The agreement covered adjustments to the salary structure of public service employees for three financial years, and the collective agreement was implemented for both the 2018/2019 and the 2019/2020 financial years. The dispute concerned the enforceability of part of the collective agreement that provides for salary increases for these employees for the financial year 2020/2021.

Certain public sector unions brought an application to enforce the application of the collective agreement for the financial year 2020/202, which government contended would cost the fiscus R 37.8 billion. The Minister of Finance launched a counter-application seeking declaratory relief that the relevant clause was unlawful, invalid and unenforceable, as it had been concluded in contravention of the public Service regulations LAC decided that an unlawful agreement was concluded as it had infringed the mandatory legal requirements governing the conclusion of a collective agreement by Government. In dealing with the delay by Government in challenging the invalidity (especially by paying for the first 2 periods of the agreement), the LAC took into account the large sum of money that would be required to be paid from the public purse and the parlous state of the State's finances as a result of Covid-19. The LAC said the Court's discretion should take into account *"whether there is a legal justification for the payment of so large a sum of public monies to a relatively small cohort of the South African population"*.

The court [para 45] said:

> *"An exercise of a discretion depends on the particular case. Under the present financial circumstances, it does not appear to be just and equitable to order government to expend significant and scarce financial resources on employees whose jobs are already secured and salaries have been paid in full, particularly in circumstances where the imperative exists for the recovery of the economy to the benefit of millions of vulnerable people. For example, the provision of social grants to fellow South Africans living on the margin could well be imperilled by such a decision, as might the need to pay for significant and critical additional medical costs caused by the pandemic."*

Unions have indicated they may appeal this judgment to the Constitutional Court. This case involved huge amounts of money, the state as employer and the consequences of the Covid pandemic. We think this factual matrix had a direct

impact on the outcome of this case, and individual employers are unlikely to be treated in a similar way if they choose not to implement a collective agreement

Extract from the judgment:
(Phatshoane ADJP, Davis JA and Coppin JA)
[30] National Treasury is given a particular status under the Constitution. The constitutional provision set out in s 216 of the Constitution ensures that National Treasury is one of the guardrails to ensure that the appropriate standard of constitutional governance is adhered to by the Executive. The inclusion of the role of National Treasury in Regulation 79 fits together with the purpose of s 216 of the Constitution. Absent compliance with Regulation 79, it matters not whether Cabinet might have approved the agreement, in that, whatever the Minister of Finance may or may not have said in Cabinet cannot be read to equate to compliance with s 216 of the Constitution read together with Regulation 79. The argument that the collective agreement breached the applicable regulations, namely Regulation 78 and 79, must thus be upheld. This leads to the second issue raised by counsel for the respondent unions, namely consideration of the consequences of a decision to declare Clause 3.3 of the collective agreement to be invalid.

The consequences of invalidity
[31] On the assumption that clause 3.3 was declared to be invalid, counsel for the applicants referred to the decision in State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) in support of an argument that, notwithstanding a declaration of invalidity of clause 3.3, the Government should not benefit from such a finding...
.....
[45] An exercise of a discretion depends on the particular case. Under the present financial circumstances, it does not appear to be just and equitable to order government to expend significant and scarce financial resources on employees whose jobs are already secured and salaries have been paid in full, particularly in circumstances where the imperative exists for the recovery of the economy to the benefit of millions of vulnerable people. For example, the provision of social grants to fellow South Africans living on the margin could well be imperilled by such a decision, as might the need to pay for significant and critical additional medical costs caused by the pandemic.

[46] In the exercise of a discretion of the kind set out in Gijima, supra, considerations of the effect on the public purpose in general and the impact on millions of South Africans who barely survive on a day to day basis and need all the help the State may be able to provide are paramount considerations. As Mr Mojanane stated in his affidavit, Government has very limited capacity to borrow additional funds and the national interest burden is now a critical expenditure item in the National Budget. In our view, the normative vision of the Constitution which aims that everyone living in the country should live a dignified life and hence those most in peril should be assisted first dictates the outcome of the discretion in this context.

National Union of Mineworkers obo Members / PPC Cement SA (Pty) Ltd - (2021) 30 CCMA 4.2.1 also reported at [2021] 2 BALR 190 (CCMA).

Principle:
Section 24 of the LRA applies to disputes over the *interpretation* or *application* of collective agreements. Section 24 cannot be used as a mechanism to enforce collective agreements.

Facts:
PPC Cement and NUM signed a 2-year wage agreement in 2019, agreeing to a 3% wage increase in 2019 and a 6,5% increase in 2020. The negotiated increase was implemented in 2019 but the Company refused to implement the 6,5% increase in 2020 due to the impact of the Covid-19 pandemic on its business.

The Union referred a dispute to the CCMA under section 24(5) of the LRA, claiming that the wage agreement should be enforced, unless amended by agreement between the parties.

The CCMA Commissioner noted that the dispute had been referred under section 24(5) of the LRA. Linking to section 24(1), this effectively provides (under the heading of *"Disputes about collective agreements"*) for arbitration to resolve disputes *"about the interpretation or application of a collective agreement"*.

The Commissioner interpreted this section narrowly, and said that it was intended to deal with disputes about how a collective agreement should be *"interpreted or applied"*. A dispute over *"interpretation"* of a collective agreement exists when the parties disagree over the meaning of a particular provision. A dispute over the *"application"* of a collective agreement arises when the parties *disagree over whether the agreement applies* to a particular set of facts or circumstances. The Commissioner summarised the critical facts described by the Union as being, in a nutshell, whether it was fair for the employer to not implement the wage agreement, which fell outside the jurisdiction of section 24.

The Commissioner accordingly ruled that the CCMA lacked jurisdiction to deal with the Company's failure to implement the wage agreement, and dismissed the application.

We are concerned by the Commissioner's ruling, and suggest it mixed up issues of legality and fairness. The Commissioner referred to *HOSPERSA obo Tshambi v Department of Health, Kwa-Zulu Natal (2016) 37 ILJ 1839 (LAC)*, in support of the view that section 24 cannot be used as a mechanism to 'enforce' collective agreements. But the facts of that case were very different - they concerned an attempt to invoke section 24 to circumvent an obviously late referral of an unfair labour practice dispute, which should have been processed within the required 90 day period (whereas no time limit applies to s24 disputes). The employee had been suspended without pay, and attempted to frame this as a dispute over the enforcement of a collective agreement, based on a clause in that agreement requiring suspension to be paid. Under those circumstances, the LAC was clearly right to send the employee packing.

If this dispute does fall outside section 24, what then are the next steps for the Union? And for employers, consider what your remedy would be if a union refused to comply with a collective agreement you had negotiated with them? Clearly a collective agreement is legally binding unless there are reasons why this is not so - it seems to us that the enforcement of such an agreement is best resolved, being a dispute of 'right', by some form of adjudication. We suggest strike action would be inappropriate, given that this dispute should be resolved by considering the rights and obligations of the parties.

The Union could take the award on review. But even if it is overturned, the LRA does not appear to give an arbitrator clear powers to resolve a dispute about the enforcement of a collective agreement (as opposed to the specific powers given to arbitrators to resolve unfair dismissal and unfair labour practice disputes, for example).

Another approach for the Union may be to consider a Labour Court application under section 158(1)(a)(iii) of the LRA, asking the Court for an order of specific

performance, and directing the Company to comply with the terms of the collective agreement.

Collective bargaining must surely be a primary remedy in dealing with crisis situations resulting from Covid-19. Where the enforcement of a collective agreement would have catastrophic consequences, sense should prevail in seeking to agree on more appropriate alternatives and, if necessary, to amend agreements already entered into. If the enforcement of a multi-year wage agreement would result in large scale retrenchment or even the closure of the business, it should be in all parties interests to agree alternatives.

Extract from the judgment:
(Commissioner: N Bisiwe)

[9] A dispute *over interpretation* of a collective agreement exists when the parties *disagree over the meaning* of a particular provision. A dispute over the *application* of a collective agreement arises when the parties *disagree over whether the agreement applies* to a particular set of facts or circumstances.

[10] The critical facts put before me by the union is whether, in a nutshell, it is fair for the respondent to unilaterally, without agreement, not implement the agreed wage increments for the 2020/2021 year.

[11] In *CUSA v Tao Ying Industries and others (2008) 29 ILJ 2461 (CC)* the Constitutional Court held that:

> *"A Commissioner must as the LRA requires, deal with the substantial merits of the dispute. This can only be done by ascertaining the real dispute between the parties. In ascertaining what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The nature the parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute and the outcome requested by the union . . ."*

[12] The Labour Court has held that to fall within the scope of section 24(5) of the LRA, the dispute must concern the interpretation or the application of the agreement, *not the fairness of its application* - see *PSA obo Liebenberg v Department of Defence (2013) 34 ILJ 1769 (LC)*.

[13] In *HOSPERSA obo Tshambi v Department of Health, Kwa-Zulu Natal (2016) 37 ILJ 1839 (LAC)*, the Court confirmed that a dispute over the interpretation and application of a collective agreement exists where the parties disagree over the meaning and application of a clause in the agreement. References under section 24 cannot be used as a mechanism to enforce collective agreements.

[14] The Labour Appeal Court has cautioned that disputes about interpretation or application of collective agreements give rise to jurisdictional challenges about the actual nature of the dispute. The Court has pointed out that where the main dispute between the parties is the interpretation or application of the collective agreement, the CCMA has jurisdiction. However, if the interpretation or application is only an issue but the main dispute is about the fairness, legality or otherwise in relation to that agreement, the CCMA lacks jurisdiction. The fact that a dispute is referred as an *interpretation / application of a collective agreement* does not detract from the real issue in dispute nor will it change what the real dispute is about. This was illustrated in *Johannesburg City Parks v Mphahlani NO and others [2010] 6 BLLR 585 (LAC)* and *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and others [2010] 6 BLLR 594 (LAC)*.

Award

a. I find that the real issue in dispute between the parties is not the interpretation and/or the application of a collective agreement. The real dispute is about the respondent's refusal and/or failure to pay wage increments for the 2020/2021 financial year.
b. The CCMA lacks jurisdiction to arbitrate this dispute about non-implementation of a wage increment.
c. The referral is dismissed.

Unilateral wage deductions during Covid-19

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

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

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

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

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

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

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

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

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

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

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

Extract from the judgment:
(Prinsloo J)

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

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

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

[71] As to what forms part of the terms and conditions of employment, the Court held that any variation to an employee's salary, irrespective of whether it is increased or decreased, amounts to a change in terms and conditions of employment and cannot be effected unilaterally. Salary is a quid pro quo for work rendered and any change that has the effect of affecting an employee's salary or remuneration package, constitutes a change to terms and conditions of employment.

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

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

.....

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

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

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

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

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

Dismissal for refusing to work during the pandemic

Beck / Parmalat SA (Pty) Ltd [2021] 2 BALR 131 (CCMA).

Principle:
A dismissal following an employer's refusal to grant an employee special leave may be unfair where an employee has a compelling reason to be absent from work during the Covid-19 pandemic.

Facts:
The employee, a laboratory analyst, was dismissed for being absent from work without permission for 21 days during the level 5 lockdown implemented to combat the Covid-19 pandemic. She admitted that she had not reported for duty during this period, but claimed that she had decided to remain at home after her application for leave (even unpaid) had been turned down and that she had been forced to take the decision for herself because she was afraid of infecting her family. The employer claimed that it was required to continue full production during the lockdown because it provided what had been deemed an essential service, that all prescribed safety precautions had been taken and that only pregnant employees and those with underlying chronic conditions had been allowed to stay at home during the period in question.

The Commissioner accepted that the employer, as a supplier of essential services, had heeded the President's call to continue production and had taken measures

expected of it. However, the employee was not merely seeking the comfort of her family because she was scared of an unknown virus. She had informed her manager that her child suffered from asthma and that she was living with her vulnerable elderly mother. Although the employer had 16 other employees in the laboratory, it had not even considered the employee's proposal that she take unpaid leave. The employee had a reasonable explanation for not reporting for duty as contractually required and the employer was more concerned about creating a possible precedent than with dealing with the employee's personal circumstances. Her dismissal was, accordingly, unjustified and unfair.

The Commissioner noted that although there was no reason not to reinstate the applicant, it would be unfair to the employer to make reinstatement fully retrospective. The applicant was reinstated, with back pay limited to a month's salary.

We don't normally cover CCMA awards on Worklaw due to their limited precedent setting value, but we have dealt with this one as it relates to the important issue of whether an employer can compel an employee to be at work during the Covid pandemic. But we think it is concerning that the award does not even mention the relevant provisions of the revised Consolidated Direction on Occupational Health and Safety Measures published by the Dept of Employment and Labour, and which deal specifically with this issue. Worklaw's October 2020 newsflash discussed the revised Measures.

Clauses 14 and 15 of these Measures create a right for an employee to refuse to work without fear of dismissal where there is *"reasonable justification"*, with the employer's Covid 'return to work' Plans required to incorporate a specified dispute procedure to deal with conflict arising from these issues. Sadly none of this was canvassed, and we await further awards and judgments that may shed light on the application of these principles.

Extract from the award:
(N Bisiwe, Commissioner)
[15] The elements of the offence of absenteeism are that the employee must have been absent from work when contractually obliged to render service, and that the employee had no reasonable excuse for his/her absence. It is trite law that an employee may have compelling reason to absent himself from work even though he has been told that he may not take leave. *Kievits Kroon Country Estate (Pty) Ltd v CCMA [2011] 3 BLLR 241 (LC)* provides an instructive example of that. The question the Court asked was whether the employee's absence from work was justified. The employer's refusal to grant the employee special leave was considered unjustified and the subsequent dismissal of the employee unfair. This decision was upheld on appeal by the Labour Appeal Court.

[16] I find that the applicant had a reasonable excuse for her absence from work, even though she was contractually obligated to work. The respondent does not deny knowledge of the circumstances that caused the applicant to stay away from work. It merely argues that she was not authorised to be absent, despite such circumstances. It seems that the respondent was more concerned against creating a precedent if they allowed the applicant to take leave and, possibly, open the flood gates for other employees to seek to be considered for leave. That is unfortunately the task entrusted on managers, to manage the workplace by evaluating circumstances and taking decisions based on those evaluated circumstances. It is not a tick box exercise. Equally, precedence is an important principle in our law. However, the principle that *each case is based on its own merits*, is a very important one. That is why courts sit daily to hear merits of cases and decide cases on their own unique facts.

[17] It seems to me that had the respondent considered the applicant's request, and differentiated her situation from that of other employees who simply wanted to be with family at the time, they would have seen justification in her request. The fact that she was even willing to forgo her salary would have been considered less burdensome on the respondent.

[18] I find that the respondent has failed to discharge the onus to prove that the applicant's dismissal was justifiable under these circumstances.
……..
[20] I have considered that the applicant had offered and was willing to take unpaid leave. It has been six months since the applicant was dismissed. The country has, since then, moved from Level 5 lockdown to Level 1, with much awareness about safety and precautionary measures against the corona virus. I will order for her retrospective reinstatement with back pay only for the period since 21 September 2020, when Level 1 lockdown was announced. The applicant has throughout made it clear that her family safety was more important than money. I have taken that into account in balancing the financial implication of her reinstatement, so as not to unfairly burden the respondent with a huge cost of her reinstatement.

Pre-retrenchment consultation on Zoom during the pandemic

Food and Allied Workers Union (FAWU) v South African Breweries (Pty) Ltd (SAB) and Another (J435/20) [2020] ZALCJHB 92; (2020) 41 ILJ 2652 (LC) (28 May 2020).

Principle:

1. There is nothing procedurally unfair if a consulting party proposes the usage of the zoom application or some other form of video conferencing.

2. When an employer invites an employee or the trade union to consult and they either reject or ignore such invitation, or initially participate but later abandon the process due to no fault of the employer, the dismissal cannot be said to be procedurally unfair if the employee is subsequently dismissed without consultation or without a completed consultation process.

Facts:

The question that arose in this matter is whether conducting a Section 189 consultation process through the Zoom app is acceptable or not, and if unacceptable, does a continuation of the section 189 consultation using the application amount to procedural unfairness?

The background to the case was that SAB found the need to restructure its business operations and contemplated dismissal based on operational requirements. A Section 189(3) notice was then issued. Given the number of affected employees, the SAB requested facilitation of the consultation process. The facilitator facilitated a few meetings without any material hindrance. It is common cause that when the SAB requested facilitation, it stated in the request form that the affected employees were about 500, a number which increased to 1 200 during the process.

Following the declaration of the national state of disaster, restrictive measures were required, including measures which hindered the smooth running of the facilitated consultation process. This prompted the CCMA to propose alternative methods, such as the usage of the Zoom app. FAWU objected and this culminated in the facilitator recusing himself from the process and a new facilitator being appointed. At the time of the announcement of the restrictive measures and the subsequent

national lockdown, parties had agreed on a timetable. One of the facilitated meetings was scheduled to happen on 25 March 2020.

Instead of meeting on Zoom, FAWU insisted on halting the process until the end of the lockdown period. Due to that impasse, FAWU did not participate any further. FAWU then made an urgent application to the Labour Court for an order declaring the consultation process to be procedurally unfair, and interdicting SAB from continuing with or finalising the retrenchment process. The basis of the application was partly that the proposed consultation was on the Zoom app which rendered the procedure unfair.

The Labour Court pointed out that the LRA does not prescribe the form which the consultation process must assume. With what the court called "the new normal", the court was clear that Zoom is an appropriate form in which meetings can take place. What is a priority in this period, the court said, is health and safety. The court said on-line consultation is a necessary tool to ensure that restrictions like social distancing are observed. The court dismissed the application and held that there is nothing procedurally unfair if a consulting party suggests the usage of Zoom or some other form of video conferencing.

Extract from the judgment:
(Moshoana, J)
The issue of the zoom application.
25. Elsewhere in this judgment, I referred to this issue as the straw that broke the camel's back. I also stated that the outbreak of Covid-19 ushered the *new normal*. Zoom as an application precedes the outbreak of Covid-19. It is just that it was not conveniently used and if used it was used in a parsimonious fashion. The LRA does not prescribe the form which the consultation process must assume. In section 189 one observes traces of a consultation by correspondence - section 189 (6) (b). It would not be incongruous to conclude that a consultation process may fairly be undertaken through correspondence. The difficulty here is that normally, consultation takes a form of physical meetings. However, when the *new normal* presents itself, it does not follow that the commanded consultation can no longer happen.

26. With the *new normal* - lockdown period during Covid-19 pandemic - zoom is the appropriate form in which meetings can take place. What is involved in this period is the health and safety issue. Thus the usage of the zoom application is not panoply. It is a necessary tool to ensure that restrictions like social distancing as a measure to avoid the spread of the virus are observed. Much as the applicant has its convenient preferences, those preferences are self-serving and are ignorant of the bigger issue of health and safety. Therefore, in my view, there is nothing procedurally unfair if a consulting party suggests the usage of the zoom application or some other form of video conferencing. This accords with the *new normal* and is actually fair. The appointed facilitator, who possesses powers to make a final and binding ruling on procedure was not averse to the zoom application. In an attempt to demonstrate the inefficacy and unreliability of the zoom application, the applicant's counsel pointed to an incident where Mr Van As's screen hanged and his connectivity to the proceedings was compromised as one of the difficulties that are raised by the applicant with the zoom application. To that I say anywhere where technology is employed, even in a physical meetings, where a presentation to be made on a projector fails, it is expected of teething problems to emerge. However such would not relegate the technology to obsoleteness to a point of any form of unfairness. In my view, the applicant's complaint of procedural unfairness in this regard is lacking in merit.

Incomplete consultation process
……..
30. Having stated the above, I return to that statement of the organogram not being

finalised. The principle in *Aunde* does not apply to that statement. What applies is what was said by the LAC in *SAA v Bogopa and others*. There, Zondo JP, (as he then was) formulated the law as follows:

> *"[48] ...When an employer invites an employee or employees or his or their trade union to consult and the employee(s) or the trade union either rejects or ignores such invitation, or initially participates but later abandons the process due to no fault of the employer, the dismissal cannot be said to be procedurally unfair, if the employee is subsequently dismissed without consultation or without a completed consultation process."*

31. In *casu*, even if it can be said that consultation was not completed on the issue of the structure, it is undisputed that parties were due to still consult on 25 March 2020. The applicant refused to participates for reasons that I have already pronounced on earlier. It is no fault of the SAB that the applicant chose to abandon the process for reasons of the usage of a fair application of zoom. During the oral submissions held on the relegated zoom application, SAB made a *"with prejudice"* offer to continue to consult with the applicant on the remaining topics for consultation and such an offer was outrightly rejected.

32. When the offer was made, I had pointed out to the applicant's counsel that I was willing to stand the proceedings down to enable her to obtain instructions on the offer. To my utter amazement she instantaneously informed the Court that she was instructed to reject the offer. In *Bogopa*, the affected employees refused an invitation to consult on the basis that the employer had already placed them in a *fait accompli*. Of course, this stance was rejected by the LAC as demonstrated above. The procedure in section 189A (13) is there to ensure that a fair consultation happens with a view to ultimately preserve job security. A party would approach this Court in the ask and quest for a fair process, which ultimately commands to the *audi alteram partem* principle. However, where a party in an open Court rejects an offer to be consulted, such a party cannot lament about procedural unfairness.

DISCIPLINE & DISMISSAL

Discipline after resignation

***Standard Bank of South Africa Ltd v Nombulelo Chiloane (JA85/18) [2020] ZALAC 43 (10 December 2020)*.**

Principle:
A *'resignation with immediate effect'* does not terminate the employment relationship when the employment contract stipulates a notice period. Where termination of employment is in breach of a contractual term, the terms of the contract remain valid and binding unless the receiving party elects not to act on it.

Resignation that is not in compliance with contractual notice requirements does not validly terminate the contract of employment unilaterally: it is only the resignation that complies with notice requirements that serves unilaterally to terminate the contract.

Facts:
The employee was given notice to attend a disciplinary hearing, having allegedly cashed a cheque without following proper procedures. The cashed cheque was fraudulent, which caused the employer a loss of just under R30 000.00.

The employee resigned "with immediate effect" on the day she received the notice to attend the disciplinary hearing. She was told she was required to serve a four week notice period as provided in her contract of employment, that she was suspended, and that the hearing was set to continue during her notice period.

The employee took the view that her letter of "resignation with immediate effect" ended the employment relationship and as such, the employer was not entitled to proceed with the hearing. The chairperson rejected the argument and decided to proceed. At this point, the employee and her attorney left the hearing and it continued in her absence. The employee was found to have committed misconduct and was summarily dismissed.

The employee brought an urgent application in the Labour Court seeking an order declaring her dismissal "null and void" and interdicting the employer from listing her name on the Banking Association of South Africa's central database "the Register for Employees Dishonesty System" (REDS).

The LC held that once an employee resigns with immediate effect, the employment relationship comes to an immediate end and the employer has no right to insist that the employee serves the notice period. The LC declared her dismissal to be "null and void". This decision was taken on appeal to the LAC.

The LAC emphasised that employment relationships are governed by contract and statute (the BCEA requires a notice period even if this has not been agreed between the parties). An agreement between the parties (as in this case) that notice is required to terminate their relationship, has meaning. It must be complied with, unless the party receiving the notice of termination does not seek to enforce that term of the agreement. The LAC stated clearly that the argument that an employee who resigns with immediate effect cannot be compelled to continue working the notice period, because resignation is a valid unilateral act, is "misconceived".

The LAC confirmed that where termination of employment is in breach of a contractual term, the terms of the contract remain valid and binding unless the receiving party (the employer in this case) elects not to act on it. Resignation that is not in compliance with contractual notice requirements does not validly terminate the contract of employment unilaterally: it is only a resignation that complies with notice requirements that serves unilaterally to terminate the contract.

The contract and the reciprocal obligations contained in it only terminate or take effect when the specified notice period runs out. Alternatively, absent a contractual term, the parties are bound to the notice periods provided in the BCEA.

On this basis the LAC concluded that the employee's resignation with "immediate effect" was of no consequence, because it did not comply with the contract which governed her relationship with her employer. The employer was thus correct to read into the resignation a four week notice period, within which period it was free to proceed with the disciplinary hearing.

Extract from the judgment:
(Waglay JP)

[15] The argument that where an employee gives notice of termination by way of resigning with immediate effect, such an employee cannot be compelled to continue working for the employer because resignation is a valid unilateral act that comes into effect on the date the employee dictates that it will come to an end is misconceived.

[16] An agreement between the parties that in the event of either terminating their relationship, they must give four weeks' notice has meaning. It requires, in express terms, that one party must give the other four weeks' notice unless, as stated earlier, the party

receiving the notice of termination does not seek to enforce that term of the agreement. The notice term remains valid and binding and where no such term is agreed upon the parties are still required to give such notice as provided for in the BCEA.
.....
[18] *Lottering* and the judgments that follow similar arguments are clearly wrong. Where termination of employment is in breach of a contractual term which requires the giving of notice or, absent such term, where termination of employment is in breach of the BCEA unless there is an acceptance by the party receiving the non-compliant notice of termination, the terms of the contract or the statute remain valid and binding. This is so *"since repudiation terminates the contract only if the innocent party (here the employer) elects not to act on it."*

[19] As counsel for the appellant properly stated, resignation that is not in compliance with contractual notice requirements does not validly terminate the contract of employment unilaterally; it is only the resignation that complies with notice requirements that serves unilaterally to terminate the contract.
.....
[22] In the circumstances, where a contract prescribes a period of notice the party withdrawing from the contractor or resigning is obliged to give notice for the period prescribed in the contract. The contract and the reciprocal obligations contained in it only terminate or *take effect* when the specified period runs out. Alternatively, absent a contractual term the parties are bound to the notice period provided in the BCEA.

[23] In this matter, the employee's narration that her resignation was with "immediate effect" was of no consequence because it did not comply with the contract which governed her relationship with her employer and the employer was thus correct to read into the resignation a four week notice period within which period it was free to proceed with the disciplinary hearing.

[24] The decision of the Labour Court is thus liable to be set aside.

Dismissal for cannabis use

Rankeng / Signature Cosmetics and Fragrance (Pty) Ltd [2020] 10 BALR 1128 (CCMA).

Principle:
If an employee is charged with being 'under the influence' of dagga/cannabis, the employer will need evidence to substantiate this and show that the employee's performance was likely to be impaired. A positive drug test is in itself insufficient.

Facts:
The employee, employed as a picker, was charged with being under the influence of cannabis while at work. He admitted to smoking a full "zol of cannabis" early in the morning prior to going to work. He smoked at around 5:00am and left his house around 6:30am to report for duty around 7:00am. He was asked to take a drug test through Lancet Laboratories. He tested positive for cannabis and was dismissed. At the CCMA he disputed that the offence warranted a dismissal.

The policy of the company prohibited anyone from working while under the influence of alcohol or drugs. The company was very strict on this policy because it was a compliance issue in terms of the Occupational Health and Safety Act. The General Safety Regulations made in terms of the Occupational Health and Safety Act (OHSA) state that an employer may not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs to enter or remain at the workplace. The company policy recommended dismissal even for the first offence.

At the CCMA the employee argued that the fact that he was allowed to continue working (even though this was in a safe environment) demonstrated that he was not under the influence of any drug. He further argued that the Lancet Laboratories report did not say he was under the influence of cannabis, but merely indicated that he had tested positive for cannabis.

The CCMA commissioner found that there was insufficient evidence of the charges against the employee, namely that he was under the influence of cannabis, and that his dismissal was accordingly unfair. Although the company's evidence was that the employee's eyes were red and watery, it did not refer to any evidence of 'impairment' which would suggest an inability to perform tasks allocated. On the contrary, although management was required by its Disciplinary Code to send the employee home if it was suspected that he was under the influence of drugs, they chose to allow him to work, albeit in a safe environment. In the commissioner's view that was an acceptance that although he tested positive for cannabis, it had not affected his ability to perform his work.

The commissioner did however find that it was irresponsible of the employee to take a substance that *"may have the ability to impair his mental or physical abilities"*. For that reason, the employee was reinstated without back-pay and on a final written warning valid for 12 months.

Our comment: We are generally wary of including CCMA awards under Worklaw's case law section due to their limited precedent-setting capacity. But we have included this award, as it highlights the possible distinction between an employee testing positive for cannabis use and being 'under the influence', given the length of time after cannabis use that a person can still test positive. It also contradicts a previous CCMA award in Mthembu and others / NCT Durban Wood Chips [2019] 4 BALR 369 CCMA that simply equated a positive cannabis test as proof of being 'under the influence'. We do however have concerns about what the employee was given a final warning for, given that the commissioner found that the charge of being under the influence had not been proved.

The lesson of this case is that if an employee is charged with being 'under the influence', the employer will need evidence to substantiate this and be able to show that the employee's performance was likely to be impaired. Employers that need to strictly comply with OHSA regulations may also have to amend their disciplinary codes to list *'testing positive for cannabis use'* as a form of misconduct.

Extract from the award:
(Commissioner N Mbileni)

[15] It is common cause that the applicant smoked Cannabis on 29 May 2019. It is further common cause that when he was tested his results came back positive. The only issue in dispute is whether the applicant was under the influence of the drug which he admitted to taking in the morning before coming to work. Further, whether testing positive for Cannabis was a dismissible offence in terms of the respondent's policy.

[16] The applicant was charged with being under the influence of Cannabis at the workplace. The disciplinary code of the respondent states that management should not allow any employee to remain on its premises if it is suspected that they (employee) are under the influence of any drug. It further provides that whether or not an employee is fit to report for duty will be determined by the respondent's management by exercising reasonable discretion.

[17] It would appear that in this case the reasonable discretion of management was that the

applicant was fit to continue working. They exercised reasonable discretion to restrict him to a particular area. The problem with a charge of being under the influence of drugs is that there has not been any scientific method of determining whether a person is under the influence of the drug such that there is an impairment in their performance. It is suggested that the employer needs to prove that the employee was under the influence of a narcotic drug such as dagga or Cannabis.

[18] Employers may however rely on circumstantial evidence such as obvious signs of physical or mental impairment. Although the respondent's evidence was that the applicant's eyes were red and watery, it did not refer to any evidence of impairment which would suggest an inability to perform tasks allocated. On the contrary, when management was empowered by the Code of Conduct and Discipline to send the applicant home, they chose to allow him to work. In my view that was an acceptance that although he tested positive for Cannabis, which he had already admitted to taking, it had not affected his ability to perform his work.

[19] In the circumstances, dismissal was too harsh and was not an appropriate sanction. I have taken into account though that the applicant was aware that the policy of the respondent prohibits the use of drugs on duty. It was irresponsible to take a substance that may have the ability to impair his mental or physical abilities.

Award
[20] I, therefore, order the respondent Signature Cosmetics and Fragrance (Pty) Ltd to reinstate the applicant Ofentse Rankeng with effect from 15 July 2020 without any back-pay.

[21] I further [order] that he be issued with a final written warning, valid for a period of 12 months.

When is ‘borrowing’ theft?

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

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

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

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

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

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

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

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

On review the **Labour Court**, approved the finding of guilt on the abuse of managerial authority, and on the failure to follow waybill procedure. On the other charges, the Labour Court was not persuaded that there was any dishonesty. The court said that the employee could not be found guilty of theft, but he could be guilty of some misconduct, of taking company property and not returning it. There was no evidence that suggested that this was an act of dishonesty. The court said that he was not acting secretly nor was he acting to the prejudice of the company, and confirmed the arbitrator's finding that the dismissal was unfair.

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

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

Extract from the judgment:
(Sutherland JA)

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

[18] To articulate the notion of a misappropriation of property that is free of dishonesty is a contradiction in terms. In my view, to describe the deliberate retaining of property which the

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

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

[20] Moreover, even were I to be wrong about the establishment of guilt of theft by Ngorima on this body of evidence, and, thus, a finding of theft per se, on these facts, were to be unsafe, there is another significant dimension to the conduct of Ngorimato be weighed which renders him culpable of serious misconduct. That conduct is, as alluded to above, the brazen abuse of his status and seniority to appropriate the labour of Jansen for private purposes, something for which there is no hint that he had the authorisation to do, and the causing of the cutting up of company property. This is an example of an abuse of his managerial position for which the disciplinary code provides dismissal as an appropriate sanction. In the context of large businesses, such as a Mine, where vast quantities of company property are continually in the possession of a large number of employees, a strict standard of conduct is usually and appropriately applied to everyone. Ngorima as a senior employee was obliged to set a good example: he did not. Ngorima was, in the circumstances, indeed guilty of serious misconduct in this regard and dismissal is appropriate.

When is inconsistency in discipline allowed?

Samcor Limited (Eastern Chrome Mines) v Commission for Conciliation, Mediation and Arbitration Limpopo and Others (JA140/2018) [2020] ZALAC 17 (18 May 2020).

Principle:

1. Where the conduct of employees carries a high risk of potential danger to the safety of others, particularly when there is manifest disregard for safety regulations, dismissal is clearly justified.
2. Where one employee is acquitted after an assessment of the merits of a case, even if wrongly so, this cannot form the basis of a finding of inconsistency which justifies the reinstatement of other employees found to be guilty of misconduct.

Facts:

The employees were part of a crew working at the employer's mine. The mine shift boss instructed the miners not to drill or blast in the so-called tip area because this tip was affected by a vertical fault. Shortly thereafter, the mine overseer visited this site and found the employees drilling without a temporary support and safety net having been installed. He issued a verbal instruction to cease drilling and to install

the temporary support and safety net before they could drill. Some ten minutes later he heard the noise of drilling machines coming from the direction of the tip. He returned to the tip and found that the employees had continued working without installing the requisite safety measures. He testified that he then issued the employees with a written instruction. This instruction was also disobeyed, leading to disciplinary action being taken against the employees.

The five employees were charged with a breach of company safety rules and procedures, with a failure to carry out a lawful instruction, and gross neglect of duty. Except for one miner, who was apparently the girlfriend of the mine overseer, they were found guilty and dismissed.

The dispute proceeded to **arbitration at the CCMA**. The arbitrator concluded that the employer had proved, on a balance of probabilities, that the employees had been guilty of working without installing a temporary support and safety net. However as the girlfriend of the mine overseer, who had been part of the crew, had not been dismissed, the arbitrator found that the employer had failed to justifiably differentiate between the employees. The employer had shown bias by not finding her guilty and dismissing her. For this reason, he found that the dismissal of all the employees was substantively unfair and ordered their reinstatement.

On **review at the Labour Court** it was held that the employer had failed to prove on a balance of probabilities that the employees had defied the written instruction given to them by the mine overseer to stop working. For this reason, the employer's application to overturn the award was dismissed.

On appeal the **Labour Appeal Court** found that the Labour Court had incorrectly concentrated on the issue of the response by the employees to the instruction given by the mine overseer rather than analysing the central finding of the CCMA, namely not being consistent in disciplining all the employees involved in the same misconduct. In any event, the LAC disagreed with the LC's finding that the employer had failed to prove that the five employees had defied the mine overseer's written instruction to stop working.

Having regard to the alleged inconsistent treatment, the LAC noted that the evidence showed that the employee who was not dismissed, had not been present when the mine overseer gave the instruction to cease drilling and to install the temporary support and safety net, as she had been sent to fetch explosives. As a result, the facts of her case were different to those of the other five employees and she had been found not guilty.

But in any event, the LAC said, the fact that she was acquitted by a chairperson who honestly and conscientiously applied his mind to the case, even if incorrect, cannot form the basis of a finding of inconsistency of discipline that then benefits the other guilty employees. The LAC confirmed that it cannot be fair that other employee's profit from that kind of wrong decision, and a wrong decision can only be unfair if it is capricious (ie unjustified), or induced by improper motives or a discriminating policy.

The LAC noted that where employees' misconduct carries a high risk of potential danger to the safety of others, dismissal is clearly justified. The LAC found that the five employees had disregarded both a verbal and written instruction to ensure that adequate safety measures were to be installed, and confirmed that their dismissal was fair.

Extract from the judgment:
(Davis JA)

[20] For some reason, however, the court a quo concentrated on the issue of the response by the employees to the instruction given by Mr Madikwane rather than analysing the central finding of the second respondent, namely the inconsistency of discipline which justified a finding in favour of the five employees. In other words, the central finding of the arbitration award was that there was unjustifiable differentiation between the employees and Ms Simphiwe Maseko. Yet this received no examination for as Basson AJ made clear in his judgment: *'The dispute which I need to determine is whether the employees are guilty of failing to carry out a lawful instruction. The lawful instruction in question is the written instruction issued by Madikwane to the effect that the employees should have withdrawn, i.e. stopped what they were doing and fixed the substandard conditions before they could continue with their normal duties*.'

[21] Ms Maseko was charged as is evident from a notification issued to her to attend a disciplinary hearing on 1 December 2015. The charges brought against her were similar (but not the same) as those brought against the other employees. As explained by Mr Madikwane, the charges brought against Ms Maseko were slightly different because, in the case of other employees, there was evidence of drilling and therefore an additional charge of being found to have drilled without installing the necessary temporary support was brought against these employees.

[22] Mr Madikwane stated, insofar as Ms Maseko was concerned, that: *'When I arrived at 8 knot, Ms Maseko was not there, hence in the first place there was no charge instituted against her. After a long discussion between the union and management, an instruction was issued that Ms Maseko, action must be taken against her as well, for her to prove her innocence*.' Ms Masha testified that she had sent Ms Maseko to fetch explosives that she had ordered. For this reason, Ms Maseko was not present when Mr Madikwane arrived on 19 October. Her absence from the site was also confirmed by Father Mandla Mhlongo, the drilling operator who also testified before second respondent.

[23] The basis for the second respondent's finding of inconsistency of discipline was not based on an error conducted at the disciplinary hearing of Ms Maseko. But, in any event, that she was acquitted cannot form the basis by which the finding of inconsistency of discipline can come to the aid of the other employees. This court made this point clear in SACCAWU & others v Irvin Johnson Limited [2008] BLLR 869 (LAC): *'If a chairperson conscientiously and honestly, but incorrectly, exercise his or her discretion in a particular case in a particular way, it would mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employee's profit from that kind of wrong decision. In a case of plurality dismissal, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy*.'

The appropriate sanction

[25] In his award, the second respondent recorded that *'the employees were aware of the rules that the rules were valid and reasonable and that the dismissal is an appropriate sanction for the contravention of the rules'*. This was a concession wisely made in the light of 3 (4) of the Code of Good Practice - Dismissal. While generally it is not appropriate to dismiss an employee for a first offence, this default position does not have to be followed if the misconduct is serious, which includes the wilful endangering of the safety of others. Where the conduct of employees carries a high risk of potential danger to the safety of others which is certainly the case when there is manifest disregard for safety regulations at a mine, dismissal based on the conduct of which the five employees have been found guilty is clearly justified.

……..

[27] In my view, once a finding has been made that, on the available evidence, the five employees disregarded both a verbal and written instruction to ensure that adequate safety measures were to be installed, the sanction of dismissal was justified.

Resolving incompatibility through retrenchment

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

Principles:

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

Facts:

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

The matter was referred to the **Labour Court** as an automatically unfair dismissal under s187(1) of the LRA due to unfair discrimination, or alternatively that the dismissal was unfair in terms of s189 of the LRA due to there being no *bona fide* operational requirements reason and Avis had not followed a fair procedure.

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

Avis appealed this decision to the **Labour Appeal Court**. The LAC confirmed that incompatibility is a species of incapacity because it impacts on work performance. If an employee is unable to maintain an appropriate standard of relationship with his or her peers, subordinates and superiors, as reasonably required by the employer, such failure or inability may constitute a substantively fair reason for dismissal. Procedural fairness in incompatibility cases requires the employer to inform the employee of the conduct allegedly causing the disharmony, to identify the relationship affected by it and to propose remedial action to remove the incompatibility. The employee should be given a reasonable opportunity to consider the allegations and proposed action, to reply thereto and if appropriate to remove the

cause for disharmony. The employer must then establish whether the employee is responsible for or has contributed substantially to irresolvable disharmony to the extent that the relationship of trust and confidence can no longer be maintained. The LAC found that the decision to merge the posts, with both managers competing for the merged post, was made without consultation. The LAC agreed with the LC's conclusion that the dismissal was procedurally unfair. The LAC said the requirement that employees compete for a post is not in itself a method of selecting for dismissal, and more is required. The competition for the post must proceed in accordance with identified selection criteria, and a fair selection method must be chosen to decide who is to stay and who is to go.

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

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

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

Extract from the judgment:
(Murphy JA)

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

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

[40] In the present case, Avis initially approached the difficulty in the sales division as an incompatibility problem, as is evident from the attempted facilitation by Weyers and Geldenhuys' s letter of 11 August 2015 seeking information about the nature and causes of the disharmony and identifying solutions to resolve the problem. However, after receiving responses from both managers, Avis opted to restructure the division and to declare one position redundant. Hence, Avis did not complete a process establishing the cause, or attributing any blame, for the disharmony. Nor did it put forward a proposal to remedy the problem of incompatibility on any basis other than declaring one of the two posts redundant. This solution was discussed first in the meetings of 8 and 10 September and culminated in

the critical letter of 17 September 2015. In the result, absent any cross-appeal on the substantive issue, the primary question on appeal is whether the operational requirements dismissal was procedurally fair in terms of section 189 of the LRA.

Compensation and costs

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

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

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

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

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

Beware social media

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

Principle:

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

Facts:

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

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

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

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

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

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

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

had been given a final warning for racist language. The LC set aside the arbitrator's award and found the employee's dismissal to have been fair.

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

Extract from the judgment:
(Van Niekerk J)

[14] In Rustenburg Platinum Mine v SA Equity Workers Association obo Bester & others (2018) 39 ILJ 1503 (CC), the Constitutional Court had occasion to consider the issue of race descriptors that on the face of it are neutral but which may be regarded as racially abusive or insulting. The court said the following regarding the context in which the words (in that case, 'swart man') were uttered:

> *[38] It is accepted by both parties (the applicant and first respondent) that the use of the words 'swart man', per se, is not racist and that in the context in which the words were used to dictate whether they were used in a racist derogatory manner. It was also accepted that the test to determine whether these differences racist is an objective - whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist derogatory...*

[15] This passage is quoted by the arbitrator, and appears to be relied on by the arbitrator in his determination that Skweyiya was 'overly sensitive' in his reading and understanding of the meme, and that a 'reasonable reader' informed of all the 'correct facts' would not have understood the meme to have any racial overtones. But what the arbitrator ignored was the caution expressed by the Constitutional Court in Bester against a presumption of neutrality. The court stated:

> *[48] The Labour Appeal Court's starting point that phrases are presumptively neutral fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past - of what is neutral, normal and acceptable - might be used as the starting point in the objective enquiry without recognising that the root of this view skews such enquiry. It cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral - our societal and historical context dictates the contrary .....*
>
> *[49] The Labour Appeal Court, by sanitising the context in which the words were used, incorrectly applied the test to determine whether the words used are derogatory, in the context of this matter, to the facts in this matter. The Labour Appeal Court, as well as the commissioner, failed to approach the disputed and impartial manner taking into account the 'totality of the circumstances'. Not only was 'swart man' as used here racially loaded, and hence derogatorily subordinating, but it was unreasonable to conclude otherwise. It was unreasonable for the commissioner, within this context, to find that using 'swart man' was racially innocuous ".*

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

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

[18] In the present instance, the context is one in which the employee had been found guilty, only five days prior to the incident that gave rise to his dismissal, of using racist and derogatory language. The meme that he sent may have been inadvertently sent to Skweyiya, but that does not impact on the nature of the meme or any derogatory connotation that it might have. The fact remains that the meme was sent by the employee to Skweyiya, who took great offence at its content. ……..

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

DISCRIMINATION

Discrimination – physical disability

City of Cape Town v South African Municipal Workers Unions obo Damons (CA01/2019) [2020] ZALAC 9 (18 May 2020).

Principle:
Where it is not possible for a disabled employee to perform the essential requirements of a job, it is not unfair to refuse to promote the employee to this job.

Facts:
A firefighter, after 9 years of employment with the City of Cape Town, suffered a permanent injury while on duty. The injury constituted a disability for the purposes of the EEA, because it was a long-term physical impairment which resulted in his inability to perform the duties of an active firefighter.

After the injury the employee was accommodated by being placed in alternative posts, first in the Finance and Billing section, and thereafter in the Safety Education section. This position did not require any intensive physical exercise. His obligations were administrative and educational. He continued to retain the designation of firefighter and was paid at the appropriate salary level for a firefighter, including a

22.8% standby allowance. But it was accepted that he was no longer able to perform the core functions of a firefighter, which involve physical activity.

The City of Cape Town published a Fire and Rescue Advancement Policy ('the Policy'), which applied to the advancement of permanent staff members actively involved with operational firefighting. In order to be promoted from the rank of firefighter to that of senior firefighter, the Policy required, among other things, a successful practical (physical) assessment. The employee was unable to complete the practical assessment as a result of his disability, and was also unable to meet the stated inherent requirements of a firefighter. He claimed that because the Policy precluded him from advancing to the position of senior firefighter, the Policy and its implementation constituted an act of unfair discrimination because of his disability.

The **Labour Court** found in his favour, rejecting the City of Cape Town's argument based on 'the inherent requirement of the job', namely that the employee was unable to continue as an active firefighter. The LC said this argument was undermined because the City had decided to continue to employ him in the Fire and Rescue Services, albeit in a position that did not require active firefighting. The LC held that the way in which City had applied the Policy to the employee prevented him from advancement as a result of his disability, and its conduct amounted to an act of unfair discrimination.

In the **Labour Appeal Court** the starting point was to look at the meaning of "inherent requirements". In IMATU & another v City of Cape Town (2005) 26 ILJ 1404 (LC) the Labour Court, in dealing with the duties of a firefighter, had accepted that physical fitness was an inherent requirement for the job. The LAC also relied on the judgment in TFD Network Africa (Pty) Ltd v Faris (CA 4/17) [2018] ZALAC 30 (5 November 2018) (para 37), which confirmed that "inherent requirements" must be rationally connected to the performance of the job and must be reasonably necessary to the accomplishment of that purpose. The LAC accepted that the inherent requirements (including physical ability) for the post of senior firefighter were rationally connected to the functions that had to be performed.

The LAC considered Item 6.5.1 (b) and Item 7.5.1 (b) of the Code of Good Practice and Employment of Persons with Disabilities. These provisions indicate that a disabled employee cannot be discriminated against compared to other employees who do the same work. This means that a policy must be designed to reduce the impact of the impairment of the person's capacity to fill the essential functions of the job. But in this case, it is not possible for the employee to perform the essential requirements of an active firefighter, nor could it possibly be in the public interest to have firefighters who are not capable of dealing with the outbreak of fires.

For these reasons the LAC overturned the LC judgment, holding that there was no basis to conclude that either the contents of the Policy or its application to the present dispute constituted unfair discrimination in terms of s 6(1) of the EEA.

This judgment confirms earlier decisions about the requirement of a rational connection between an inherent requirement and the job to be performed. It also clarifies that discrimination is not assessed by looking at different treatment of all employees but by looking at employees doing the same job.

Extract from the judgment:
(Davis JA)

[13] It is clear from this evidence that appellant raised the defence of the inherent requirements of the job in respect of the possible advancement of Damons to the position of Senior Firefighter. Furthermore, since 2009, that is before Mr Damons' unfortunate accident had produced the Policy, that is on 1 April 2009. The Policy contained a specific requirement that before a Firefighter could be promoted to a Senior Firefighter there was a need to undergo a practical physical assessment which Mr Damons could not pass, owing to his disability.

Inherent requirement of a job

[14] In *Imatu and another v City of Cape Town (2005) 26 ILJ 1404 (LC)*, the Labour Court, in dealing with the duties of a Firefighter, accepted that physical fitness was an inherent requirement for the job and further said at para 17 of its judgment *'it was accepted by all the witnesses that Murdock had the necessary state of physical fitness to perform the task of the job'*. In a different context, but nonetheless relevant to the present dispute, this Court in the *TDF Network Africa (Pty) Ltd v Faris [2019] 2 BLLR 127 (LAC)* at para 37, in dealing with whether a requirement is inherent or incapable in the performance of a job, said:

> *'[T]he requirement must be rationally connected to the performance of the job. This means that the requirement should have been adapted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work - related purpose and must be reasonably necessary to the accomplishment of that purpose.'*

[15] The court a quo correctly noted that appellant, following Mr Damons' disability, engaged in a *'painstaking series of incapacity investigations*' and ultimately placed him in position that did not require active firefighting. It is difficult to see how this conclusion can justify the further one reached by the court a quo, namely that Damons' disability which prevented him from being advanced amounted to unfair discrimination. To the extent that there is a differentiation between Damons and active firefighters, who are considered for promotion, this is justified both by the rational requirements contained in the Policy and by the inherent requirements for the position of a Senior Firefighter. …….

[16] Significantly, Item 6.5.1 (b) of the Code of Good Practice and Employment of Persons with Disabilities (Government Gazette 9 November 2015) provides that 'employers should reasonably accommodate the needs of persons with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job.'

[17] Item 7.5.1 (b) of this Code then provides 'that an employer may not retain employees who become disabled, on less favourable terms and conditions than employees doing the same work, for reasons connected with the disability.'

[18] These provisions indicate that a disabled employee cannot be discriminated against other employees who do the same work and, to that specific extent that the doctrine of reasonable accommodation applies. A policy must be designed to reduce the impact of the impairment of the person's capacity to fill the essential functions of the job. But in this case, it is not possible for Damons to perform the essential requirements of an active firefighter nor could it possibly be in the public interest to have firefighters who are not capable of dealing with the outbreak of fires which, in the area of jurisdiction of the appellant, are notoriously frequent.

[19] In my view, there was no basis to conclude that either the contents of the Policy or its

application to the present dispute constituted unfair discrimination in terms of s 6(1) of the EEA.

Discrimination – pregnancy

Mahlangu v SAMANCOR Chrome Ltd (Eastern Chrome Mines) (JA117/2018) [2020] ZALAC 14 (18 May 2020).

Principle:
Where an employer treats a pregnant employee differently from other pregnant employees and is unable to justify this differentiation as being rational and not unfair, this will amount to unfair discrimination.

Facts:
S 26 of the BCEA says that if it is *"practicable for the employer to do so"* an employer must offer suitable, alternative employment to an employee during her pregnancy and for a period of 6 months after the birth of a child. Previous cases have often turned on the "practicability" of finding an alternative job.

In this case the employer's 'Pregnancy in the Workplace Procedure' said the following:

1. *'In terms of section 26(2) of the BCEA, where reasonably practicable, the Company may offer suitable alternative employment to an employee during pregnancy and breast-feeding if she is engaged in risk work...*
2. *If possible, alternative employment will be on terms that are no less favourable than the employee's ordinary terms and conditions of employment.*
3. *if there is no suitable alternative work, the employee will be sent on unpaid leave....'*

In addition, the clause provided that -

> *'...maternity leave will only be applicable once during a three-year cycle. Should a female take maternity leave twice during the three-year cycle, the second occurrence would be as per the BCEA stipulations, i.e. four (4) months unpaid...*

The employee was an underground heavy-duty truck driver. She fell pregnant for the second time in a period of three years and reported her pregnancy to the employer on 28 May 2014. In accordance with its health and safety policy, the employer relieved her of her hazardous responsibilities underground with immediate effect. The employee's maternity leave was to commence on 29 November 2014. She was placed on unpaid leave from 4 June 2014 to 28 November 2014.

The employee took issue with the fact that she was the only pregnant employee who was not offered alternative employment before her maternity leave commenced. She claimed that the employee unfairly discriminated against her by reason of her pregnancy in not placing her in an alternative position in the period prior to 29 November 2014 when she went on unpaid leave.

The employer said that it was unable to find her a suitable alternative position. But the LAC found the evidence strongly suggested that the reason was that it was the employee's second pregnancy in 3 years. Another pregnant woman who reported her pregnancy 2 days later was placed in alternative employment. The policy did not bar alternative employment being found for such an employee but the employer used the second pregnancy as the reason for not offering alternative work.

The LAC said that it is apparent from the facts that in its treatment of the employee, the employer had differentiated between the employee and other employees. This differentiation arose on the basis of her pregnancy for a second occasion in a three-year cycle. The employer had failed to show that the discrimination was rational and not unfair or was otherwise justifiable. In the circumstances, the conclusion was inescapable that the employer's decision in refusing to place the employee into alternative employment prior to her unpaid maternity leave constituted an act of unfair discrimination. The employer was ordered to pay the employee the salary due to her for the period from 4 June 2014 to 28 November 2014.

In this case the employer had stuck to the version that no act of discrimination had taken place because it could not find alternative employment. It was in effect relying on the first 'leg' of Section 11(1) of the EEA which says:

1. *'If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-*

    a. *did not take place as alleged; or*
    b. *is rational and not unfair, or is otherwise justifiable.'*

The employer did not appear to try to justify the policy in terms of s 11(1)(b). The decision in this case was reached simply because the employer had not discharged the onus of showing that a policy of discriminating against an employee who has a second pregnancy in 3 years is rational and not unfair, or is otherwise justifiable.

Extract from the judgment:
(**Savage AJA)**
[1] It is apparent from the facts that in its treatment of the appellant, the respondent differentiated between the appellant and other employees. This differentiation arose on the basis of her pregnancy for a second occasion in a three-year cycle. The respondent failed to show that the discrimination was rational and not unfair or was otherwise justifiable. In the circumstances, the conclusion is inescapable that the respondent's decision in refusing to place the appellant into alternative employment with effect from 4 June 2014, prior to her unpaid maternity leave scheduled to commence on 29 November 2014, constituted an act of unfair discrimination.

[2] Since no damages were proved by the appellant, she is only entitled to receive the salary she would have earned had she be placed into alternative employment from 4 June 2014 to 29 November 2014. The arbitrator erred both in awarding damages to the appellant and in ordering the relief that he did in respect of the respondent's policy when no such dispute was before him. The arbitration award in these respects cannot stand.

Discrimination on an arbitrary ground

K Naidoo & Others v Parliament of the Republic of South Africa CA4/2019 [2020] ZALAC 07 May 2020.

Principle:
In applying the term *'any other arbitrary ground*' in s 6 of the EEA, the prohibition is not to outlaw "*arbitrariness*" per se, but rather to outlaw unfair discrimination that is rooted in "*another*" arbitrary ground, which must have the potential to impair the fundamental human dignity of a person.

Facts:
The 2014 amendments to the EEA added *"or any other arbitrary ground"* to the listed grounds for unfair discrimination under s 6(1) of the EEA. There has been a divergence between a narrow or broad interpretation to what *"any other arbitrary ground"* means. The narrow interpretation adopted in many cases requires a link to a specified ground similar in nature to those listed under s 6(1), while the broad interpretation allowed for any 'capricious' or arbitrary act or policy which unfairly impacted on employees. This Labour Appeal Court decision strongly supports a narrow interpretation of the phrase *"any other arbitrary ground"*.

The employees in this case were Protection Officers (POs) in the Parliamentary Protection Service maintained by the Secretary of Parliament. POs are deployed on a range of duties including access control, surveillance of the establishment assets, and acting as orderlies during sessions of Parliament. Many of the employees in this case were long-standing POs.

In response to the unruly behaviour of some members of Parliament, the Secretary recruited additional security staff, called Chamber Support Officers (CSOs), to ensure order during sessions of Parliament. The CSOs were engaged at higher rates of pay than the longer-serving POs. This discrepancy resulted in a grievance, which ultimately led to the dispute in this litigation. The POs alleged that the decision to pay higher salaries to the CSOs was capricious (ie random, arbitrary) and based on an act of nepotism by the manager, who decided to head-hunt his former colleagues from the SAPS.

The POs brought an application before the **Labour Court** alleging unfair discrimination and invoking the provisions of s 6 of the EEA. In a pre-trial conference, agreement was reached to limit the issues to be put before the court to this question of law:

> *whether the applicants' description of the alleged wage disparity is capricious, baseless, unfair and unreasonable and unjustifiable, establishes an arbitrary ground of discrimination for the purposes of section 6(4) read together with section 6(1) of the EEA.*

The critical argument in this case was whether the POs allegations were covered by the term *"...any other arbitrary ground."* On this issue, the Labour Court found that no cause of action covered by section 6(1) had been pleaded.

On appeal to the **Labour Appeal Court**, the court opted for a narrow interpretation of the term *"...any other arbitrary ground"* in s 6(1) of the EEA. The LAC found that the purpose behind the prohibition in s 6(1) is not to outlaw "arbitrariness" per se, but rather to outlaw unfair discrimination that is rooted in "another" arbitrary ground, which must have the potential to impair the fundamental human dignity of a person.

The LAC dismissed the appeal against the LC judgment. The LAC said there needs to be *'caution against being seduced by the idea that anti-discrimination law can be weaponised to solve all labour market ills'*. The lesson for employees with a sense of discrimination is to check if the ground of that alleged discrimination can be identified and is similar to the listed grounds, and whether it can be shown that their human dignity has been affected. Being aggrieved or angry at a workplace practice or policy that you perceive to be arbitrary, might not be enough.

Extract from the judgment:
(Sutherland JA)

[26] ... The essential point is that the phrase to which meaning must be attributed is "... any other arbitrary ground" and not the word "arbitrary," free from its context and function. In this context the word "arbitrary" is not a synonym for the word "capricious." The injunction in section 6(1) is to outlaw, not "arbitrariness", but rather to outlaw unfair discrimination that is rooted in "another" arbitrary ground (the syntax of " ...any other..." cannot be understood as otherwise than looking back at what has been stipulated in the text that precedes it). Capriciousness, by definition, is bereft of a rationale, but unfair discrimination on a "ground" must have a rationale, albeit one that is proscribed. The glue that holds the listed grounds together is the *grundnorm* of Human Dignity. The authors express this view, with which I agree:

> *"Discrimination is about infringement of dignity (or a comparably serious harm), about an identifiable and unacceptable ground and about the link directly or indirectly) between that ground and the differentiation. Should a ground not be listed, it should meet the well-established test for unlisted grounds: it must have the potential to impair the fundamental human dignity of a person (or have a comparably serious effect) and has to show a relationship with the listed grounds.'*

[27] Accordingly, the decision by the Prinsloo J in the Court a quo to apply the narrow compass interpretation of the phrase "...any other arbitrary ground..." in section 6(1) is endorsed by this Court.

Is there a cognisable case pleaded on the narrow compass interpretation?

[28] The next step is to consider whether, upon the narrow compass construction of section 6 (1), the appellants have pleaded a cognisable case. What exactly is averred by the appellants? Allusions are made to nepotism, differences in years of service and recruitment of the Chamber Support Officers from the ranks of persons who were members of the SAPS at that moment of recruitment. The responsibility for this grievance is alleged to be the brainchild of their manager, Van der Spuy. A fair reading of these averments reveals that the critical allegation is that a group of persons have been given preferential treatment based on their affinity with Van der Spuy who is a fan of the SAPS: in a word, this is nepotism.

[29] Do these averments that the protection officers are the victims of nepotism meet the test in *Harksen v Lane NO*? In my view it does not. Nepotism, in any case, cannot be countenanced, even more so in the case of Parliament. However this court is required to determine this dispute in terms of the EEA and nepotism is not a necessary affront to human dignity, in neither the sense contemplated by section 9 of the Constitution, nor in section 6 (1) of the EEA. To be neglected because of nepotism implies no characteristic of a person so victimised nor does it invoke any pejorative perspective of such person, whether inherent or adopted. Nepotism differs from, for example racism, where the bearer of authority or of power rejects X because of X's race and prefers Y because of Y's race. If what Van der Spuy has done is indeed to prefer his chums to the appellants; ie behaved nepotistically, that conduct, however wrongful, is not unfair discrimination within the purview of section 6(1).

[30] In the appeal, counsel for the appellants correctly conceded that the Statement of Case, filed by the appellants, had been composed on the premise that the broad compass applied and that if the argument in support of the broad compass failed, the statement of case had not made out a proper cause of action. This is a correct concession because the ground relied upon in the statement of case, if indeed it can properly be understood to be a "ground" is not analogous to the listed grounds in section 6(1).

[31] Accordingly, the appeal must be dismissed in relation to the point agreed to be decided.

PROCEDURAL MATTERS

Referring two claims at the CCMA

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

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

Facts:
The employer issued a notice to the employee in which it called for representations as to why his services should not be terminated on the grounds of incompatibility. The letter set out a series of grounds 'on which I hold the preliminary view that your services should be terminated on grounds of incompatibility.'

The employee did not make any representations following the receipt of this letter. The employer then wrote a further letter to the employee dismissing the employee with immediate effect on the grounds of incompatibility.

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

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

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

The point *in limine* was upheld by the Commissioner because the two disputes are the same in nature as it relates to the employee's dismissal. The matter was already referred to the Labour Court for adjudication and therefore the CCMA lacked jurisdiction to arbitrate the matter.

The employee then approached the **Labour Court** contending that the CCMA did indeed have jurisdiction to hear this second referral. In dismissing this application,

the Labour Court noted that this was not a case where there were two causes of action but rather one where the employee sought two separate hearings for the same dismissal which was impermissible in law.

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

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

Extract from the judgment:
(Davis JA)

[17] The question that therefore requires determination, in this case, is whether both the CCMA and the court *a quo* were confronted with the same dispute; that is a single act of dismissal of the appellant by the third respondent and that the fact that the former had raised two justifications for his argument that the dismissal was unfair did not mean that *lis pendens* should not be invoked in this case.

[18] Of relevance to the determination of this question is a recent judgment of the Constitutional Court in *Association of Mine Workers and Construction Union and others v Ngululu Bulk Carriers (Pty) Ltd (in liquidation) and others [2020] ZACC 8*...

……

[22] The Constitutional Court rejected respondent's arguments and overturned the decision of the Labour Court. With regard to the first argument, namely that, as the first dismissal had been reclassified by the appellant as an automatic unfair dismissal, and that claim had to be conciliated before the Labour Court could entertain it, the Constitutional Court took the view that the fact that an unfair dismissal dispute had been referred to conciliation and had been conciliated it appeared to have been ignored by the Labour Court. In short, 'the flaw in the Labour Court's reasoning stems from its characterisation of an automatically unfair dismissal as a dispute separate from an unfair dismissal dispute that was referred to conciliation. That court overlooked the fundamental issue which is that what was referred to conciliation was the unfairness of the dismissal regardless of whether the unfairness concern was automatic or otherwise. And that is not reasons for dismissal which must be referred to conciliation but the unfairness of the dismissal.' (para 21)

[23] With regard to the argument based on *lis pendens*, the Constitutional Court noted that the causes of action in the two proceedings were different as were the subject matters. There were two separate causes of action: One, dealing with dismissal as a result of the unprotected strike and another being the decision regarding a selective reemployment.

[24] In the present case, as I have emphasised, there was only one dismissal. That dismissal was referred to conciliation and then to the Labour Court ... As the Constitutional Court said in the AMCU case, it is not reasons for a dismissal which must be referred to conciliation but the unfairness of the dismissal' (para 21), because the Constitutional Court considered that there were two separate dismissals, the approach adopted by the Court is distinguishable from the present dispute. Indeed, the emphasis placed by the Court on difference between the reasons for the dismissal and the dismissal itself is fatal to the appellant's case in the present dispute.

Arbitrator's duty to assist parties

***Nkomati Joint Venture v CCMA & Others (JA 155/2017) [2018] ZALAC 53; (2019) 40 ILJ 819 (LAC) (12 December 2018)*.**

Principle:
An arbitrator commits a gross irregularity when under a duty to lend a helping hand to parties and then fails to do so. Where the circumstances require, a commissioner must intervene in accordance with the CCMA Guidelines. Not to do so will invariably result in an unreasonable award. The purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues.

Facts:
The employee Mr Smith was employed by Nkomati Joint Venture as a shaft operations supervisor in February 2014. His appointment imposed certain obligations on him in terms of the Mine Health and Safety Act to ensure the safety of employees under his supervision. At disciplinary proceedings in March 2015, he was charged with four offences:

i. failure to comply with standard operating procedures relating to overtime and standby;
ii. failure to comply with an instruction that overtime requisitions be signed by the Engineering Section: Head of Department;
iii. failure to adhere to the induction booking process by not booking his subordinates for periodic induction before a specified deadline;
iv. failure to carry out instructions from his superiors that disciplinary steps be taken against one of his subordinates for alleged misconduct.

At the disciplinary hearing, Smith pleaded guilty to the first, second and fourth charges but not guilty to the third charge. The chairperson of the disciplinary hearing found him guilty on all four charges and dismissed him on the grounds that the charges were serious and that he was subject to a valid final written warning. Smith unsuccessfully appealed against his dismissal and thereafter referred an unfair dismissal dispute to the CCMA. The dispute was arbitrated on 7 October 2015. Neither party was legally represented - the Company was represented by its human resources superintendent and Smith was represented by a NUM organiser.

The employer's evidence at the arbitration relied on Smith's guilty plea at the internal hearing and confirmed during the 'narrowing of the issues' stage at the commencement of the arbitration, and the employer led no evidence about Smith having committed the offences. Smith's representative, in cross examining the employer's witness, did not dispute the guilty plea and instead focussed on the argument that the employer should have counselled Smith for poor work performance rather than disciplining him for misconduct. But when it was Smith's turn to give evidence, he said that whilst he had pleaded guilty, he had not fully understood the charges, had been coerced into pleading guilty, and had done nothing wrong.

Whilst a 'change of version' by a party during proceedings is cited in clause 21.3 of the CCMA Guidelines as an example of when an arbitrator may intervene and provide guidance to parties, the arbitrator did little more than record and highlight to the parties that Smith had effectively changed his guilty plea and for the first time had offered a justification for his conduct.

The Guidelines highlight the need for arbitrators to ensure parties are aware of the procedure to be followed and how evidence should be presented and tested, particularly when they are inexperienced (see clauses 11 and 32.5). The Guidelines provide that if it becomes evident that a party does not understand the nature of proceedings and that this is prejudicing the presentation of its case, the arbitrator should draw this to the attention of the party (clause 21). Examples of when it may be appropriate for an arbitrator to do this include if a party –

21.1. fails to lead evidence of its version;
21.2. fails to cross-examine the other party's witnesses or fails to put its version to those witnesses during cross-examination; and
21.3. changes its version of events or puts a new version during proceedings.

The Guidelines make it clear that arbitrators have a greater responsibility to question witnesses and test the evidence, when parties are inexperienced (clause 33). This is known as adopting an 'inquisitorial' approach, as opposed to the 'adversarial' approach in which the parties are primarily responsible for calling witnesses and presenting evidence. An arbitrator may suggest that parties lead evidence on a particular issue that is relevant or call a witness for that purpose (clause 40).

In her award the arbitrator, applying the principle that an arbitration is a *'hearing de novo'* (a new hearing at which the allegations must be proved), found there was no evidence of misconduct and that the employer had accordingly not shifted the onus of proving Smith's misconduct. As such, she found the dismissal was unfair and ordered Smith's reinstatement.

The employer brought an application in the LC to have the award reviewed and set aside, arguing that the arbitrator had failed to 'lend a helping hand' to the employer, as contemplated in clause 21.3 of the CCMA Guidelines, and advise the employer that it was required to re-open its case and lead evidence to rebut Smith's new version. This failure, the employer argued, was a gross irregularity that led to there not being a fair trial of the issues.

The LC rejected the review application. The Court said the 'helping hand' principle did not apply in this case, because it felt that what had transpired did not amount to changing a version. In any event, the LC said the ConCourt judgment in Sidumo v Rustenburg Platinum Mines Ltd and Others (Case CCT 85/06 Decided on 05 October 2007) required the court to uphold a reasonable award even when a helping hand was not provided.

On appeal the LAC did not agree with the LC and granted the employer's review application, ordering that the arbitration be reheard before another commissioner. The LAC found that the employee clearly had changed his version during the proceedings, and that the 'helping hand' principle established through the CCMA Guidelines should have been applied by the arbitrator. She should have advised the employer, in line with clause 21.3 of the CCMA Guidelines, that when Smith changed his version to not admitting guilt, it needed to consider re-opening its case to lead evidence on the merits of charges.

The LAC confirmed that an arbitrator commits a gross irregularity when under a duty to lend a helping hand to parties and then fails to do so. Where the circumstances and procedural fairness so require, a commissioner must intervene in accordance with the CCMA Guidelines. Not to do so will invariably result in an unreasonable award. The purpose of the 'helping hand' principle is to prevent a procedural defect

by ensuring that there is a full ventilation of the dispute and a fair trial of the issues. A commissioner commits a reviewable irregularity not only when the outcome of an award is unreasonable but also where the nature of the enquiry results in the issues not being ventilated properly.

The LAC did not agree with the LC that the *Sidumo* judgment dispensed with the 'helping hand' principle, and felt that the LC had overstated the effect of that judgment.

Extract from the judgment:
(Murphy AJA)
[18] The reasoning of the Labour Court that the Sidumo case dispensed with the helping hand principle is not quite correct and may overstate the effect of the judgment. An arbitrator may commit a gross irregularity, fail to fairly try the issues or render an unreasonable award where under a duty to lend a helping hand and then fails to do so. Where the circumstances and procedural fairness so require, a commissioner must intervene in accordance with the precepts set out in the CCMA Guidelines. Not to do so will invariably result in an unreasonable award. The purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues. A commissioner commits a reviewable irregularity not only when the outcome of an award is unreasonable but also where the nature of the enquiry has been misconceived, which may happen when the issues are not ventilated by proper lines of enquiry.

TRANSFERS

The test for determining whether there has been a transfer for the purposes of section 197.

Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation (CCT27/19; CCT86/19) [2020] ZACC 21 (4 August 2020).

Principle:
The test for determining whether there has been a transfer for the purpose of section 197 is whether the economic entity in question retained its identity after the transfer. Whether a transfer of a business as a going concern has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction.

Facts:
The Road Traffic Management Corporation (RTMC) is an organ of state with a statutory mandate to establish and run an effective road traffic management system. The Department of Transport entered into a Turnkey Agreement with *Tasima* Pty Ltd for the development of the eNaTIS system and the provision of related services. The eNaTIS is an essential facility used by the government in road traffic management. After the expiry of the Turnkey Agreement, the parties concluded an interim arrangement, followed by an unlawful five-year extension agreement. Subsequent disputes between the RTMC and *Tasima* regarding the eNaTIS system resulted in two previous judgments by the Constitutional Court.

In *Tasima* I, the Constitutional Court made an order on 9 November 2016 that the eNaTIS system and related services be transferred from *Tasima* to the RTMC within a period of 30 days. In terms of this judgment, the transfer was required to take place in accordance with the Migration Plan in the Turnkey Agreement in the event that the parties were unable to agree on an alternative plan.

In relation to the section 197 transfer, **the Labour Court** and **the Labour Appeal Court** both held that section 197 of the LRA applied to the transfer of the eNaTIS and found that *Tasima's* employees were automatically transferred to the RTMC.

The **majority decision of the Constitutional Court** held that the legal basis for the transfer determines the parameters for the application of the test in section 197. It further held that the legal basis for the transfer was the Court's order in *Tasima* I - not the expired Turnkey Agreement. The first judgment found that the operation, maintenance and management of the eNaTIS was *Tasima's* sole business and that it was this business that was transferred to the RTMC.

The RTMC took over buildings, assets, information and intellectual property previously used by *Tasima*, but maintained that it had no duty to absorb their employees. The Constitutional Court ruled against the RTMC over its refusal to absorb 68 employees previously employed by *Tasima*, not accepting RTMC's contention that the term 'business' must be interpreted to exclude the RTMC because it is a state entity. The Court held that RTMC's argument, if accepted, would undermine the applicability of the Labour Relations Act to state entities.

Although this case turned on its complicated facts and the prior litigation, it was confirmed that the test for determining whether there has been a transfer for the purpose of section 197 is whether the economic entity in question retained its identity after the transfer. Whether a transfer of a business as a going concern has occurred is a matter of fact, which must be determined objectively in the light of the circumstances of each transaction.

Extract from the judgment:
(Theron J)

[85] Section 197 requires that there must be a transfer of the business. A transfer entails the movement of the business from one party to another, and is a concept that was intended to be widely construed. A transfer under section 197 can take the form of a myriad of legal transactions, including mergers, takeovers, restructuring within companies, donations and exchanges of assets. In *NEHAWU*, this Court held that the substance rather than the form of the transaction is relevant to the determination of whether a transfer has taken place. The mode of transfer is irrelevant, and it is of no consequence whether there is a contractual link between the transferor and the transferee.

[86] The test for determining whether there has been a transfer for the purpose of section 197 is whether the economic entity in question retained its identity after the transfer. There is no dispute in this matter that, when the RTMC took over *Tasima's* business, it assumed full control of the premises from which *Tasima* had operated the eNaTIS, as well as the operational system and the extensive infrastructure installed there. This included the assets, information and intellectual property previously used by *Tasima* to render the same services that were now rendered by the RTMC. The eNaTIS and related services, in their entirety, transferred from *Tasima* to the RTMC. The RTMC itself recorded in correspondence that "*since [the RTMC's] take-over . . . there has been no disruption to the eNaTIS*". There has thus been no change in the identity of the undertaking - it is simply in different hands. What the employees were doing the day before the transfer continued to be done the day after, subject only now to RTMC's management and oversight. It follows that for the purposes of section 197, *Tasima's* business was *transferred* to the RTMC.

…….

[95] In determining whether there has been a transfer as a going concern, a primary consideration is the nature of the business. A distinction is generally drawn between labour intensive and asset-reliant services. This consideration arises because the transfer of employees alone, without the transfer of any assets, may not necessarily give rise to the

transfer of a business as a going concern.

[96] Where services are involved, this Court has held that what must be transferred is the business that supplies services - not the service itself. That being so, the mere termination of a service contract would not, without more, constitute a transfer within the contemplation of section 197. There must be "other indicators", such as whether assets and customers were transferred to the new owner and whether employees were taken over by the new owner. In *Aviation Union*, this Court was confronted with the question of whether a clause in an outsourcing contract contemplated the transfer of a business or simply the outsourcing of a service. This Court considered the fact that both the premises from which the business was conducted and the assets with which it was conducted were transferred as being indicative that there had been a transfer of a business which supplied services as a going concern, rather than a mere outsourcing of a service. On this basis, it concluded that section 197 applied in that matter.

RETRENCHMENT & RESTRUCTURING

The right to restructure

National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another (CCT178/19) [2020] ZACC 23 (27 October 2020).

Principle:
In applying the automatically unfair dismissal provision in Section 187(1)(c) of the LRA, courts are required to interrogate what the cause of the dismissal is, and determine the *probable* cause of the dismissal by examining the facts before them and assessing whether that cause is the main or most likely cause of the dismissal.

Facts:
During 2014, as a result of harsh economic conditions, Aveng experienced a decline in sales and profitability. To maintain its profitability Aveng had to reduce its increasing costs in relation to labour, electricity and transport. Aveng initiated a consultation process in terms of section 189(3) of the LRA. In the notice, it indicated that about 400 jobs might be affected, and hoped that some employees would agree to work in the redesigned positions to avoid the necessity of initiating retrenchment proceedings. At that stage, Aveng had a total workforce of 1784 permanent employees.

NUMSA proposed, as an alternative to the redesigning of job descriptions, a five-grade structure. At that time, Aveng had a thirteen-grade structure in place. NUMSA and Aveng concluded an interim agreement in terms of which employees agreed to work in accordance with Aveng's redesigned job descriptions until the five-grade structure was finalised. The employees worked under the proposed new structure for a period of six months. However NUMSA reneged on the interim agreement and informed Aveng that its members would no longer perform the redesigned jobs.

It became clear to Aveng that NUMSA had no desire to engage in a meaningful consensus - seeking consultation process to resolve the five - grade structure issue, but rather sought to use the consultations to demand wage increases. Aveng then addressed a letter to NUMSA informing it that Aveng was unable to accommodate its demands any further and could not increase its costs. NUMSA was further informed that the consultation process had been exhausted. They were further informed that Aveng would continue to implement its new redesigned job descriptions structure to address its operational requirements, as the jobs that existed prior to the

consultations had become redundant. As employees of NUMSA had been performing the redesigned jobs, Aveng offered them an opportunity to remain in those jobs, but "should they reject it, they [would] unfortunately be retrenched".

71 employees accepted Aveng's offer. However, approximately 733 employees rejected it and they were subsequently retrenched by Aveng on 24 April 2015 based on its operational requirements. NUMSA referred an unfair dismissal dispute to **the MEIBC for conciliation**. The dispute could not be resolved and a certificate of non-resolution was issued. Thereafter, NUMSA approached the Labour Court.

At the Labour Court NUMSA argued that the dismissal of the applicants was automatically unfair in terms of section 187(1)(c) of the LRA. This section says that a dismissal is automatically unfair if the reason for the dismissal is "a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer."

This section has featured in several prominent cases. The interpretation of s187(1)(c) was considered in National Union of Metalworkers of South Africa v Fry's Metals (Pty) Ltd (SCA) and more recently in BEMAWU obo Manley Mohapi v Clear Channel Independent (Pty) Ltd (2010) 31 ILJ 2863 (LC). The legal position stated in these cases is this: Only conditional dismissals can constitute automatically unfair dismissals under s 187(1)(c) of the LRA. Dismissals intended to be and operating as final - not, in other words, reversible on acceptance of the demand - can never have as their reason "to compel the employee to accept" that demand. They will not be automatically unfair. For further discussion of these earlier cases, see our January 2018 Newsflash.

Aveng argued that the dismissal of the applicants was for operational requirements in terms of the LRA. The Labour Court in NUMSA obo members v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) (JS596/15) [2017] ZALCJHB (13 December 2017) agreed, and held that the individual employees were not dismissed for refusing to accept any demand, but for operational requirements - after rejecting the alternative to dismissal proposed by Aveng during the retrenchment consultation. Aggrieved by the outcome, NUMSA appealed to the Labour Appeal Court.

The LAC in NUMSA and Another v Aveng Trident Steel (A Division of Aveng Africa Proprietary Limited) and Others (JA25/18) [2019] ZALAC 36 (13 June 2019) upheld the Labour Court judgment and agreed with Aveng that no demand was made as envisaged under section 187(1)(c). It held that Aveng made a proposal to NUMSA, the primary purpose of which was to facilitate Aveng's restructuring for operational reasons, in order to ensure that it survived its economic distress. It further held that NUMSA took advantage of the economic plight of Aveng and sought to convert the consultative processes into a collective bargaining opportunity for increased wages. Consequently, the LAC held that the applicants were dismissed as a result of Aveng's operational needs, and not as a consequence of their refusal to accept a demand in respect of a matter of mutual interest. In reaching its conclusion, it held that section 187(1)(c) does not preclude an employer from dismissing employees, provided that the dismissal is for operational reasons. The question of whether the section is contravened does not depend on whether the dismissal is conditional or final, but on the true reason for the dismissal of the employees.

Aggrieved by this outcome, NUMSA approached the **Constitutional Court** for leave to appeal. NUMSA argued that the Labour Court's interpretation of section 187(1)(c),

which was endorsed by the LAC, was inconsistent with the literal, purposive and contextual interpretation of that section.

In the majority judgment of the Constitutional Court it was held that the dismissal of the applicants was not automatically unfair in terms of section 187(1)(c). It held that in an ever-changing economic climate characterised by increasing global competition, operational reasons not only relate to the downsizing of the workforce, but also to restructuring the manner in which an existing workforce carries out its work. Restructuring entails a number of possibilities, including shift system duties; adjusted remuneration; and merging of jobs or duties. Generally, businesses that adapt quickly will survive and prosper. Those that do not will decline and fail.

Realising its predicament, Aveng had engaged with its employees through NUMSA in a structured consultative process regarding a re-organisational plan. NUMSA's intransigence played a major role in making it impossible to save jobs. The ConCourt said that to prohibit Aveng from invoking the provisions of the LRA and retrenching employees under these circumstances would undermine the Act's objectives in ensuring the viability and vitality of businesses.

This judgment agreed with the LAC that the proposals were the only reasonable and sensible means of avoiding dismissals and entailed no adverse financial consequences for the employees. Therefore, the dismissal of the employees for operational reasons was the main or dominant cause for the dismissals, and constituted a fair reason for the dismissals. In respect of the interpretation of section 187(1)(c) of the LRA, the majority judgment found that the section requires courts to interrogate, among various factors, what the cause of the dismissal is and determine the *probable cause* of the dismissal by examining the facts before them and assessing whether that cause is the main or dominant, or proximate, or most likely cause of the dismissal.

Our summary above refers to the ConCourt's majority judgment, but there were actually 3 judgments handed down by the Court. Whilst they all agreed that the dismissals were operationally justified and did not constitute automatically unfair dismissals, the Court was divided about the appropriate test to be applied in ascertaining what the true reason for the dismissals was.

The primary lesson from this case is that in applying the automatically unfair dismissal provision in Section 187(1)(c) of the LRA, courts are required to interrogate, among various factors, what the cause of the dismissal is and determine the probable cause of the dismissal by examining the facts before them and assessing whether that cause is the main or dominant, or proximate, or most likely cause of the dismissal.

Extract from the judgment:
(Mathopo AJ)

[66] A closer look at section 187(1)(c) reveals an inescapable need to determine the real reason for the dismissal. The provision sets out the salient requirements that need to be met before an automatically unfair dismissal can be triggered. The question that arises is whether section 187(1)(c) permits an employer to dismiss employees for rejecting a demand that arises as a result of the employer's operational requirements.

[67] A careful analysis of the wording of the section, alongside the explanatory memorandum, demonstrates that the interpretation contended for by NUMSA is incongruous with the section. What that contention boils down to is that an employer considering

operational requirements may never resort to retrenchments without contravening the section. This, in my view, would undermine an employer's right to fair labour practices as entrenched in section 23(1) of the Constitution, since it would take away its right to resort to retrenchments where operational requirements render them necessary…….
.....
[69] The sole enquiry under section 187(1)(c) is whether the reason for the dismissal is the refusal to accept the proposed changes to employment. A proper interpretation of the section requires a careful analysis. The wording of section 187(1)(c) does not suggest that simply because a proposed change is refused and a dismissal ensues thereafter, the reason for the dismissal is necessarily the refusal to accept the proposed change. On the contrary, the true reason for the dismissal, irrespective of whether a proposed change is rejected, stands to be determined.
……
[71] Turning to the specific text of section 187(1) of the LRA, the wording of that section provides that "[a] dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, *if* the reason for the dismissal *is*. . . ." This requires courts to interrogate and determine, among various factors, what the cause of the dismissal is. In this matter, the key enquiry is whether it is the refusal by employees to accept the proposed changes to the terms of employment or Aveng's operational requirements...
.....
[97] Although it is probably true to say that the refusal to accept the proposed changes to employment accelerated the decision to dismiss, it seems to me that it cannot be said to be the main, proximate, or dominant cause for the dismissal. The need to ensure that the business was economically viable and remained sustainable was the most pressing consideration. Aveng could no longer compromise in light of its circumstances. Importantly, it was not in a position to bind itself any further to more than it could offer.
.....
[99] In an ever-changing economic climate characterised by increasing global competition, operational reasons not only relate to the downsizing of the workforce, but also to restructuring the manner in which an existing workforce carries out its work. Restructuring entails a number of possibilities, including shift system duties; adjusted remuneration; and merging of jobs or duties. Generally, businesses that adapt quickly will survive and prosper. Those that do not will decline and fail. Realising its predicament, Aveng engaged with its employees through NUMSA regarding a re-organisational plan through a structured consultative process. NUMSA's intransigence played a major role in making it impossible to save jobs. To prohibit Aveng from invoking the provisions of the section and dismissing employees under these circumstances would undermine the LRA's objectives in ensuring the viability and vitality of businesses.

[100] It is in the best interests of society that an employer remains economically viable. The owners and managers of the business are best placed to run the businesses. Sight should not be lost of one of the primary purposes of the LRA - to advance economic development…….

[101] Nothing in the section, read in the context of the LRA as a whole, precludes employers from dismissing employees for operational requirements. This is subject to the requirements that the dismissal is substantively fair (for *bona fide* operational requirements) and procedurally fair (after a satisfactory consultation process).
……
[103] I am satisfied that, on the facts of this case, the applicants were not dismissed for rejecting a demand in respect of a matter of mutual interest. The dominant or true reason for their dismissal was the employer's operational requirements. It follows that the dismissal of the second to further applicants was not automatically unfair in terms of section 187(1)(c) of the LRA.

Consulting minority unions over retrenchments

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

Principles:

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

Facts:

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

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

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

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

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

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

Persons who take the time and trouble to read the ConCourt's full judgment may be surprised to discover there are in fact 4 judgments: the majority judgment supported

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

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

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

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

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

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

As commented in the ConCourt's minority judgment, this is exactly what happened in this case: AMCU members were not permitted to be represented by their own union in the consultation process. Instead, they were forced to accept representation by

NUM and UASA, after the collective agreement was extended to cover workers who were not members of those two unions. The ConCourt's minority judgment attempts to show that majoritarianism is, or should be, compatible with the existence of minority unions, and allowing those unions to organise and represent their own members in competition with the majority union.

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

Extract from the majority judgment:
(Froneman J)

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

.....

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

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

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

[121] By contrast, it can only be near-futile to afford individual consultation. This emerges from the very benefits of the inclusive approach that the first judgment argues for and accepts - a necessary acceptance - that a retrenchment agreement can lawfully be extended across the workplace, affecting even unconsulted employees. So whilst an individual might have been a consulting partner, it will still be the majority union's implication in the agreement that is decisive. An employer has no obligation to reflect minority representations in the agreement.

[122] And this is for good reason. An individual employee, or even a group of individual employees, has or have scant bargaining clout, particularly where the employer is preoccupied with processing dismissal for operational requirements. A majority union, by contrast, wields coercive power, by immediate or future threat of industrial action. It is this

power that may sway an employer to agree to benefits on retrenchment, or better yet, fewer or no dismissals. The first judgment does not seek to unsettle this age-old labour reality. Instead, it creates a burden with very little boon.

.....

[126] There is no procedural unfairness in the consultation process under section 189. We have seen that dismissal for operational reasons involves complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits. The process involves a shared attempt at arriving at an agreed outcome that gives joint consideration to the interests of employer and employees. Because it is not dependent on individual conduct and requires objective selection criteria, it is pre-eminently the kind of process where union assistance to employee members will be invaluable. The choice made for the pre-eminence of collective bargaining in section 189 is not only rational: it is sound, it is fair and it is based on international practice and standards.

INDUSTRIAL ACTION

Can an employer compel non-strikers to take annual leave?

***UASA obo Members v Impala Platinum Limited (JS409/18) [2020] ZALCJHB 116 (21 January 2020)*.**

Principle:

1. Section 20(10)(b) of the BCEA gives an employer a discretion to determine the time when employees take annual leave under the Act, when this hasn't been agreed, but the BCEA does not give the employer that same discretion in respect of additional leave granted over and above the statutory minimum entitlement.
2. To establish an agreement having been concluded by 'quasi-mutual consent', the employer must show that the union's conduct made the company to reasonably assume that the union had agreed.

Facts:

Impala Platinum's operations experienced a 5 month wage strike by AMCU members during 2014, which at times led to violence, intimidation, breaches of picketing rules and other unlawful conduct. UASA members did not participate in the strike and at all times tendered their services. During the second week of the strike, the employer advised that all non striking employees would be sent on paid leave until further notice and that the position would be reviewed on a weekly basis. At the time nobody expected the strike to last 5 months. None of the employees applied for leave and they were all compelled to take leave.

The affected employees were entitled to 35 days' leave per annum in terms of their contracts of employment, made up of 21 days' compulsory leave ("CL") as required by the BCEA, and an additional 14 days' accumulative leave ("AL") or contractual leave. **It is important to note this judgment concerns only the AL**.

The employer's notice to employees explained that the leave would be *"issued from your current portion of AL"* and that if they did not have sufficient AL, it would be advanced *"from your next leave cycle"*. Employees questioned the forced leave policy during the strike, and were told by managers to wait for the strike to end before taking the matter up with senior management.

By the time the strike ended, the employees all had negative AL balances as a result of leave having been advanced from future leave cycles that had not yet accrued. The employer gave the employees various options to reduce their negative AL

balances, including using current CL due, reducing their CL entitlement from 21 to 14 days, transferring long service award leave, sacrificing their holiday leave allowance payment, or making use of unpaid leave. If none of these options were acceptable, a 'default rule' of reducing the negative AL balances by approximately 1 day per month (being the rate at which it accrued) would apply.

The employer made application to the Minister in terms of section 50 of the BCEA to reduce the minimum statutory annual leave entitlement under the Act from 21 to 14 days until the negative AL balance had been cleared, which was granted. UASA supported this application, *provided* that it would only be implemented by agreement with the affected employees.

When the employer unilaterally applied the 'default rule' of reducing the negative AL balances by approximately 1 day per month for those employees who had not chosen other options, UASA declared various disputes in its attempt to oppose management's actions, which were unsuccessful.

Thereafter the Union brought an application to the Labour Court in terms of section 77 of the BCEA, seeking an order that the employer was not entitled to deduct any leave from employees' AL leave entitlement without their agreement, and an order crediting them with that leave that was deducted.

The Court took note that the employees' employment contracts specified that leave would be regulated by company policy and procedures. These provided that CL must be taken in each leave cycle, but AL may be accumulated, cashed in or taken together with CL with the company's consent. A witness testified that in the past employees were sometimes directed to take CL but not AL.

The Court confirmed that an employer has a discretion under section 20(10)(b) of the BCEA to determine when employees take their minimum statutory leave entitlement (ie the CL), if this hasn't been agreed between the parties. But the BCEA does not afford that discretion to additional leave that may be granted (ie the AL). Neither does the company's leave policy afford that discretion, said the Court: the wording of the policy, which entitles the employee to accumulate the AL, take it as leave, or cash it in, militates against any discretion on the part of the employer to direct employees to take AL. And past practice showed that the employer had on occasion only required employees to take CL, not AL.

Although the employer claimed that the Union and consequently the employees had tacitly, as shown by their conduct, agreed to the employer's leave regime, the Court found on the facts of this case that this was not so. The Court also rejected the employer's argument that it had concluded an agreement with the Union by 'quasi-mutual consent'. To establish this, the employer would have to show that the Union's conduct made the Company reasonably assume that the Union had agreed to the leave regime, and this had not been proved.

The Court granted an order to the effect that the employer was not entitled to deduct any AL from the employees' leave entitlements, and must credit the employees with the leave deducted from them during the strike.

Employers should be wary of assuming blanket rules may be applicable across all forms of annual leave. Those who grant more leave than the statutory minimum in the BCEA should be aware that different conditions may apply to different categories of annual leave. Whilst it is clear that employers have the right under section

20(10)(b) of the BCEA to determine when employees take their minimum statutory leave entitlement if this hasn't been agreed, the employer's leave policies and practices will determine whether the same rules apply to additional leave granted.

Employers would do well to scrutinise their leave policies to ensure firstly that they understand what their rights are, and secondly to ensure they are adequately protected in emergency situations such as prolonged strikes or Covid-19 pandemics.

Extract from the judgment:
(Coetzee AJ)

The defence that the employer has a discretion to determine the time when the employees may take leave and that the employer exercised that discretion lawfully.

[51] There can be no doubt that the employer had such a discretion regarding the CL. This discretion derives from section 20 (10) (b) ("the statutory discretion"):

> *"If there is no agreement in terms of paragraph (a), at a time determined by the employer in accordance with this section."*

[52] It is common cause that this statutory discretion by law only applies to the CL. The employer submitted that consistent thereto was an entitlement to the employer to treat the AL similarly.

[53] The BCEA does not clothe the employer with such a discretion in respect of the AL simply because it does not apply to the AL. Secondly, the leave policy does not clothe the employer with such a discretion. The leave policy provisions entitled the individual applicants to accumulate the AL, to take days as leave or to cash in on accumulated AL. These provisions militate against any discretion on the part of the employer to direct the individual applicants to take some or all of the AL, whether accrued or still to accrue.

[54] The policy therefore does not clothe the employer with a discretion unilaterally to compel the individual applicants to take any of the AL without their consent. The submission that the employer had such a discretion in respect of the AL because it is similar to the statutory discretion is without merit.

.....

The employer's defence that the union concluded an agreement by quasi-mutual consent

[82] The employer relies upon the same facts for the submission that the individual applicants through their union concluded an agreement through quasi-mutual consent.

[83] To establish an agreement having been concluded by quasi-mutual consent the employer must show that the union's conduct, as pleaded, made the company to reasonably assume that the union had agreed to the leave regime and the default rule.

[84] Again, the employer wishes to go much wider than the pleaded grounds for such an agreement. Again, there is an absence of evidence on the part of the employer to show how it regarded the conduct of the individual applicants for the union in respect of those matters the employer relied upon for the submission that an agreement had been concluded by quasi-mutual consent.

[85] A holistic approach on assessing the evidence led in the trial and the documentary evidence makes it clear that the individual applicants, and for that matter the union, never explicitly or tacitly agreed to the leave regime or the default rule. While it took more than a year, the process resulted in litigation where, initially, various individual aspects of the leave regime and the default rule were challenged until eventually both aspects ended up before the Labour Court in this trial.

The employer's obligation to consult a union prior to dismissing striking employees.

Roberts Brothers Construction v NUM & Others (PA08/18) [2020] ZALAC 15 (18 May 2020).

Principle:
An employer's obligation in terms of Item 6(2) of the Dismissal Code of Good Practice to consult a union prior to dismissing striking employees, is restricted to a union granted organisational rights under the LRA or that has contractual rights under a recognition agreement.

Facts:
The employees were all construction workers employed in building a bridge, and resided in huts on site. In August 2013 they participated in an unprotected strike over the inadequate supply of electricity that resulted in them not having heating, lighting and a means to prepare food.

They were given three ultimatums on the same day, calling upon them to return to work by a specified time. All the ultimatums informed the employees that they had embarked on an unprotected strike causing severe prejudice to the company. They were instructed to resume their normal duties, failing which they would be dismissed. They were *'called upon to seriously consider the consequences of (their) actions and the effect of (their) actions on their continued employment with the company.'* The employees did not comply with the ultimatums and were eventually dismissed on 25 September 2013.

The Labour Court held that the employees, over the course of 3 ultimatums, had time to consider their decision to persist with a strike and understood the threat of dismissal. Whilst the LC accepted that the strike was based on a legitimate demand, it was not provoked by unreasonable management conduct, as management could not provide the kind of electricity supply demanded. The employees had failed to engage senior managers on the issue the day before the strike when they visited the site, and the strike was carefully timed to cause maximum inconvenience by interrupting the pouring of concrete. Employees were aware that similar grievances had been resolved at a different site through the use of a grievance procedure and with the union's assistance, but they did not attempt to use either of these avenues.

Despite the above, the LC was critical of the employer's failure to contact the union and seek its involvement, even if it did not have a majority presence in the workplace and was not recognised (only approximately 7% of employees were members). Item 6(2) of the Dismissal Code of Good Practice states as follows:

> *"Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt".*

The LC held that whilst the dismissals were substantively fair, they were procedurally unfair due to the lack of compliance with Item 6(2) of the Dismissal Code. The Company was ordered to pay the employees compensation of six months' salary each.

On appeal the LAC overturned the LC's decision. The LAC found that the duty of the employer to contact a trade union in terms of Item 6(2) of the Code is restricted to contacting a trade union that has been granted organisational rights under Chapter

III of the LRA or enjoys contractual rights under a recognition agreement concluded with the employer. The duty obliges the employer to contact an appropriately recognised bargaining agent.

Extract from the judgment:
(Murphy AJA)

[16] The issue that arises in the present appeal is whether an employer is obliged in terms of Item 6(2) of the Code to contact a trade union official of any trade union regardless of its representative status at the workplace. Although the representative status of the union is not discussed in the judgment in the *CBI Electric African Cables* case, it is evident that the employer and the union had been engaged in ongoing negotiations about a shift system, thus suggesting that the union, in that case, enjoyed representative status. That is not the case in this appeal. Here the union had only a handful of members, making up about 7% of the workforce, and did not enjoy recognition or organisational rights granted in terms of Chapter III of the LRA.

[17] Item 6(2) of the Code is a guideline which ought to be followed, but is not strictly binding in that Schedule 8 is not a legislative part of the LRA. Nevertheless, in its application, it should be interpreted to give effect to the primary object of the LRA to promote orderly collective bargaining. The LRA provides for industrial pluralism but favours majoritarianism in collective bargaining and does not compel employers to bargain with trade unions in good faith; instead, in addition to protecting procedural industrial action, Chapter III of the LRA grants representative trade unions organisational rights such as access to the employer's premises, stop-order facilities and relevant information. These rights are conferred only upon unions that represent a majority of members or which are "sufficiently representative". Unions who have minimal membership can act on behalf of their members in other capacities, but will be denied an organisational presence or role as a bargaining agent until they become sufficiently representative.

[18] The concept of "sufficiently representative" is not defined in the LRA. In determining representivity and the concomitant rights that follow, regard must be had to the history of the bargaining relationship in the workplace, the growth potential of the union and whether the union can make a meaningful impact on collective bargaining in the workplace. A minority union with significant representation thus may be entitled to organisational rights. The trade union contemplated in Item 6(2) of the Code is a union of this kind. The duty of the employer to contact a trade union in terms of Item 6(2) of the Code is restricted to contacting a trade union that has been granted organisational rights under Chapter III of the LRA or enjoys contractual rights under a recognition agreement concluded with the employer. The duty obliges the employer to contact an appropriately recognised bargaining agent.

[19] In this case, the union did not enjoy any organisational rights under Chapter III of the LRA, and it is likely that it was not entitled to them on grounds of it not being sufficiently representative, nor was it party to a recognition agreement with the employer. In the premises, there was no duty on the appellants to contact the union in terms of Item 6(2) of the Code before issuing the ultimata or dismissing the employees. It follows that the dismissal was not procedurally unfair. The appeal must succeed for that reason. This is not a case in which equity demands an award of costs.

Strike ballots no longer required?

NUMSA & Others v Mahle Behr & Another; NUMSA & Others v Foskor & Another (DA08/2019; DA09/2019) [2020] ZALAC 30 (8 June 2020).

Principles:

1. Interpretation requires consideration of language used, ordinary rules of grammar and syntax, context and purpose, with a sensible meaning preferred.

Statutes must be interpreted consistently with SA's Constitution, promoting the spirit and purpose of the Bill of Rights.

2. The protection under s 67(7) of the LRA that precludes an attack on the legality of a strike over the failure to hold a ballot, only applies to those unions that comply with the requirements of s 95(5) by including balloting requirements in their constitutions.
3. A union's obligation to conduct a secret ballot in terms of section 19(2) of the 2018 LRA Amendment Act, arises only once the Registrar has consulted with the union and given it a directive to amend its constitution within a specified period.

Facts:
The 2018 LRA Amendments that came into effect on 1 January 2019, amended certain sections of the Act dealing with strike ballots. Since then, there has been much confusion over whether unions are required to conduct a secret strike ballot before a protected strike can be held.

The LC in Mahle BEHR SA (Pty) Ltd v NUMSA & Others; FOSKOR (Pty) Ltd v NUMSA & Others interdicted Numsa from engaging in a strike without first conducting a secret ballot. The LC found that the purpose of the LRA is clear - before a union may engage in a strike it should conduct a secret ballot of its members. This decision was taken on appeal to the LAC.

S 95(5)(p) of the LRA requires a registered trade union's constitution to provide for a strike ballot before calling a strike, but s 67(7) precludes an attack on the legality of a strike over the failure to hold a ballot. The effect of this is that whilst it is a legal requirement for a union's constitution to provide for a strike ballot, there is no legal consequence or penalty if the union does not do so.

Importantly, the above s 67(7) was not amended by the 2018 LRA Amendment Act and remains as is. What the 2018 LRA amendments did do, was to add a new s 95(9) that states that a 'ballot' as defined under s 95(5) *"includes (our emphasis) any system of voting by members that is recorded and in secret"*. Our reading of this is that it then may be a secret ballot, but does not have to be.

The only time when a secret strike ballot appears to have been made compulsory was under limited circumstances described in the transitional arrangements in s 19 of the 2018 LRA Amendment Act. This section required the Registrar, within 180 days of the commencement of the Amendment Act, to consult with those unions whose constitutions did not comply with s 95, and give them a directive to amend their constitutions within a specified period. S 19(2) of the LRA Amendment Act then made it compulsory for such a union to hold a secret ballot before going on strike, if that union had been given a directive but had not yet complied with it.

The LAC focussed on interpreting the intended meaning of s 19 of the LRA Amendment Act. In doing so, it summarised useful principles of interpretation to be applied. The LAC said -

- Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; and its apparent purpose. A sensible meaning is to be preferred to one that leads to insensible results or undermines the apparent purpose.
- Statutes must be interpreted consistently with SA's Constitution. If a provision affects a right in the Bill of Rights (such as the right to strike), s 39(2) of the

> Constitution obliges courts to adopt an interpretation which better promotes the spirit and purpose of the Bill of Rights, and to adopt a meaning that does not unduly limit that right.

It was not disputed that Numsa's constitution did not provide for a *"recorded and secret ballot"* and as a result did not comply with the requirements of s 95(5) of the LRA. The LAC also found that there was no evidence that the Registrar had consulted with Numsa in terms of s 19 of the LRA Amendment Act about amending its constitution, or had given the Union a directive to amend its constitution within a specified period.

The LAC said that it was clear from the wording of s 19(1)(b) that until the required consultation had taken place with a union and a directive issued, no obligation arises for the union to amend its constitution in the manner contemplated. A union's obligation to conduct a secret ballot of members in terms of s 19(2) before going on strike, arises only once the required directive had been issued by the Registrar.

It is important to note that the LAC also confirmed that the protection under s 67(7) of the LRA that precludes an attack on the legality of a strike over the failure to hold a ballot, only applies to those unions that comply with the requirements of s 95(5) by including balloting requirements in their constitutions.

The LAC granted the appeal and overturned the LC judgment. The LAC found that the LC wrongly concluded that prior to engaging in a strike, NUMSA was obliged to conduct a secret ballot of members in order to comply with s 19. The LC's interpretation was inconsistent with the plain language of s 19(1) and unjustifiably limits the right to strike. NUMSA had not had an opportunity to engage with the Registrar on the content, form and timeframe of any amendment to its balloting procedures and requirements.

Against the backdrop of this LAC decision on the amended LRA, it is useful to consider the Strike Balloting Guidelines and the Code of Good Practice on Collective Bargaining, Industrial Action and Picketing gazetted in December 2018. **The Balloting Guidelines** begin by correctly stating in clause 4 that a ballot in terms of s 95(5) *includes* a secret system of voting, but thereafter appear to continue on the created assumption that a ballot has to be secret eg -

- clause 9 sets out procedures to follow for a secret ballot;
- clause 9.12 states the union must provide ballot boxes for a secret ballot, and that members must be able vote, without their vote being observed by any other person;
- a model clause for unions to insert into their constitutions is set out in Annexure A, and provides that a strike may only be called after a secret ballot has been conducted.

In our view, the **Industrial Action Code of Good Practice** also gets the law wrong by stating in clause 19(2) that strike ballots in terms of a union's constitution must be secret.

We think it is unfortunate that the **Balloting Guidelines** and **Industrial Action Code of Good Practice** do not reflect the correct legal position regarding strike ballots. Parties would be ill advised to take action based on a Code and Guidelines that are not consistent with the law.

Extract from the judgment:
(Murphy AJA)

[6] Section 67(7) of the LRA applies only to trade unions or employers' organisations that have complied with the requirements of section 95(5) of the LRA by including balloting requirements in their constitutions.

.....

[9] It is common cause that NUMSA's constitution does not provide for a "recorded and secret ballot" and did not comply with the requirements of section 95(5)(p) and (q) of the Labour Relations Act ("the LRA").

[10] This appeal, therefore, requires interpretation of the provisions of section 19 in order to ascertain their scope and application. The proper approach to interpretation is well settled in our law. Consideration must be given 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. A sensible meaning is to be preferred to one that leads to insensible results or undermines the apparent purpose.

[11] Statutes must be construed consistently with the Constitution of the Republic of South Africa, 1996 (Constitution) and where reasonably possible to preserve their constitutional validity. Section 39(2) of the Constitution obliges courts to adopt an interpretation of a legislative provision which better promotes the spirit, purport and objects of the Bill of Rights and to adopt a meaning that does not unduly limit a right in the Bill of Rights. Legislative provisions that limit fundamental rights should be interpreted in a manner least intrusive of the right, if the text is reasonably capable of bearing that meaning.

……

[13] Section 19(1) of the LRA imposes an obligation upon the Registrar to perform two tasks in respect of registered trade unions and employers' organisations that do not provide for recorded and secret ballots in their constitutions. Firstly, he is obliged to consult with the national office bearers of those unions and employers' organisations on the most appropriate means to amend their constitutions so as to comply with the requirement of section 95 of the LRA to provide for a recorded and secret ballot in its constitution. And, secondly, once having held the consultations in question, to issue a directive to those unions and employers' organisations as to the period within which an appropriate amendment to their constitutions must be effected in compliance with the procedures set out in the amended constitution. The directive must tell the union or employers' organisation how its constitution must be amended and must state the period within which the amendment must occur. In this regard, it is important to note that section 101 of the LRA imposes certain formalities in respect of changes to the constitution of trade unions and employers' organisations.

[14] It is clear from the wording of section 19(1)(b) of the LRAA that until consultation has taken place with a trade union's national office bearers and a directive is issued no obligation arises on the part of unions or employers' organisations to amend its constitution in the manner contemplated. The duty cast upon the trade union is not to amend its constitution in a manner it deems fit in order to comply with the new definition of "ballot" in section 95(9) of the LRAA, but to comply with the Registrar's directive as to the appropriate means, period and procedures to amend the constitution.

[15] Section 19(2) of the LRAA provides that until a registered trade union or employers' organisation complies with the directive made by the Registrar in terms of section 19(1)(b) of the LRAA and the requirements of section 95(5)(p) and (q) of the LRA, the trade union or employers' organisation must, before engaging in a strike or lockout, conduct a secret ballot of members. Hence, it is clear, the obligation to conduct a secret ballot of members in terms of section 19(2) of the LRAA arises only once a directive in terms of section 19(1)(b) of the LRAA has been issued by the Registrar, pursuant to consultations as envisaged in terms of section 19(1)(a) of the LRAA…….

.....

[17] .....There is no evidence on record indicating that the Registrar

has consulted with the national office bearers of NUMSA and other trade unions on the most appropriate means to amend their constitution and has issued a directive directing NUMSA and other trade unions to effect specified amendments within a stipulated time period in compliance with the procedures set out in the amendments.

[18] On the basis of its incorrect assumption, the Labour Court wrongly concluded that in order to engage in a strike, NUMSA was obliged to conduct a secret ballot of members in order to comply with the transitional provisions of the LRAA. Its interpretation is inconsistent with the plain language of section 19(1) and unjustifiably limits the right to strike. NUMSA has not had an opportunity to engage with the Registrar on the content, form and timeframe of any amendment to its balloting procedures and requirements

Mob-power to ventilate grievances

WBHO Construction (Pty) Ltd v Hlatshwayo N.O and Others (JA66/2018) [2020] ZALAC 28 (29 May 2020).

Principle:
Naked displays of power, bereft of respect for labour relations norms, ought not to be rewarded. The resort to mob-power to ventilate grievances is utterly unacceptable. Only a zero-tolerance stance by the courts can bring such conduct to an end.

Facts:
WBHO, a construction business, dismissed 41 of its workers on a charge of intimidating subcontractors and management, and engaging in activities that led to the shut-down of its site. The workers referred their dismissal to the CCMA, where the arbitrator concluded that no intimidation had been proved and ordered their retrospective reinstatement.

On review the Labour Court found that the arbitrator had committed irregularities and that the award was unreasonable. The LC found that the workers were guilty of intimidation but not to the extent that justified dismissal, and changed the outcome to reinstate the workers from the date of the award. This effectively meant they forfeited about 1 year's retrospective wages.

The employer took the LC judgment on appeal. The LAC disagreed with the LC's approach, noting that both the CCMA Commissioner and the LC overlooked that the workers were not only charged with intimidation but also with conduct that brought the site to a standstill. The LAC found that the LC's assessment of mitigating factors in relation to the intimidation charge was flawed, and that the misconduct was far more serious.

The events in question were preceded by a 3 week protected strike in the construction industry that was not peaceful, and which resulted in the employer obtaining an interdict to prevent the intimidation of sub-contractors. The day after the end of the strike was a Saturday - a day on which workers would normally work and earn overtime. However, due to the lateness of the strike ending and the fact that for operational reasons sub-contractors had already been arranged to work, workers were informed they would not be required to work that Saturday. Notwithstanding this workers arrived on the Saturday and locked the gate, denying access to all and preventing work from taking place. Management's evidence was that workers were shouting and screaming and some persons were seen carrying a reinforced iron rod, pipes or sticks. The body language of the workers was aggressive and the

perception was that subcontractors were shepherded off the site by force, although nobody was injured.

The LAC had this to say about the intimidation (para 56):

> *"Naked displays of power, bereft of respect for labour relations norms, ought not to be rewarded. To do so, achieves no more than to exacerbate the decline of respect for those norms. The Courts have repeatedly held that the resort to mob-power to ventilate grievances is utterly unacceptable. Only a zero-tolerance stance by the courts can bring such conduct to an end."*

The LAC set aside the LC order and found that the dismissals were not unfair.

Extract from the judgment:
(Sutherland JA)

[49] Lastly, the Commissioner's finding that there was inconclusive evidence of intimidation of the subcontractors to leave the site is untenable and the Labour Court's conclusion that the finding was not unreasonable is incorrect. Again, there is no sound reason to reject the eye - witness accounts of the managers. The inherent probabilities are also relevant. I have addressed above, the implausibility of the subcontractors thinking the notice about no overtime could apply to them. Whether the workers and the subcontractors intermingled on the way to the gate is unimportant. The plain fact is that the workers were the sole cause of the departure of the subcontractors from the site. The subcontractors had immediately before then, either been working or in a state of preparation to work: their self-interest was wholly at odds with walking off site and losing time, just as they had suffered during the strike at the instance of these very workers. If the subcontractors were intimidated at the gate to stay out, the overwhelming probabilities are that they were intimidated to get out too. The fact that no-one was injured is merely evidence of their submission to the force that could be exerted by the workers. The evidence of bricks, sticks, pipes and robars being carried about cannot be excluded from the mix of relevant facts.

[50] The upshot is that the failure to find that the subcontractors and the managers were intimidated to get off the site was unreasonable, and the Labour Court should have found that to be the case, in addition to the intimidation that occurred at the gate.

[51] Over and above these considerations, as alluded to above, there was a failure to take into account the deliberate shutting down of the site, part of the misconduct alleged by the appellant and an undisputed proven fact. The Commissioner and the Labour Court focussed on too narrow an issue. The intimidation is itself serious but it must be measured in the context of its functionality - to bring all work on the site to a halt; an action they had previously engaged in during the recent strike and had thereby provoked the appellant to obtain an interdict.

[52] To sum up, the Commissioner ought to have found the charge as framed was proven and that the misconduct extended to the intimidation of management and subcontractors to leave the site, as well as the blocking of the gate to prevent any subcontractors gaining entry, thereby illegitimately bringing work to a halt by the use of force.

.....

[56] The Labour Court acknowledged that the misconduct, even on the lesser scale that it held, was serious. However, an order of reinstatement does not reflect the weight to be given to that perspective. Naked displays of power, bereft of respect for labour relations norms, ought not to be rewarded. To do so, achieves no more than to exacerbate the decline of respect for those norms. The Courts have repeatedly held that the resort to mob-power to ventilate grievances is utterly unacceptable. Only a zero-tolerance stance by the courts can bring such conduct to an end.

[57] The appropriate sanction is dismissal.

MISCELLANEOUS

When a fixed-term contract overruns the end date

Department of Agriculture, Forestry and Fisheries v Teto and Others (CA8/2019) [2020] ZALAC 19 (28 May 2020).

Principle:
If an employee is allowed to work beyond the end of a fixed-term contract, the contract is tacitly converted into a permanent one of indefinite duration, terminable on reasonable notice. In assessing whether an employee remains an employee after the expiry of the fixed-term contract, factors such as continuity of work, control and direction, reporting lines, and place of work should be taken into account.

Facts:
The employees were initially employed by the Department of Agriculture, Forestry and Fisheries (DAFF) on a one-year fixed-term contract from 15 July 2013 to 14 July 2014. When their fixed-term contracts expired on 14 July 2014, they continued working in their positions performing the same tasks - until they were dismissed on 26 August 2016.

After their dismissal, the employees referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council for conciliation and arbitration. At **arbitration**, DAFF contended that beyond the expiration of the fixed-term contracts, the employees ceased to be employed by it and that 'Management for Excellence', a temporary employment service and one of its implementing agents, had taken over as their employer. DAFF challenged the jurisdiction of the commissioner to determine the dispute. DAFF's argument that they were not DAFF employees was based on the fact that they were not paid directly by DAFF and that they were not on DAFF's Persal system.

The arbitrator held that this could not be the only determining factor. The employees continuously performed their work under the sole control of DAFF. Their workplan and performance agreements were signed for by DAFF. They were responsible to DAFF in their daily duties. The role of implementing agents like 'Managing for Excellence' was simply to administer their salaries. The arbitrator found that DAFF remained their sole employer.

The arbitrator then referred to the established principle that if an employee is allowed to work beyond the end of a fixed-term contract, the contract is tacitly converted into a permanent one of indefinite duration, terminable on reasonable notice. On that basis, he concluded that the employees had remained employed with DAFF until their dismissal. He held that he had jurisdiction in relation to the dispute because there was a "dismissal" as contemplated in s186 of the LRA. The employer, DAFF, had terminated their employment. The arbitrator ordered they be reinstated.

On review the **Labour Court** held that the terms and conditions of the respondents did not remain the same after the expiry of their fixed-term contracts as they were not on the Persal system and received less remuneration. However, it accepted that an employment relationship existed between the employees and DAFF - but not one that was permanent. The LC held that the arbitrator erred in awarding reinstatement, but that the sudden manner of their dismissals justified some form of *solatium*. The Labour Court set aside the reinstatement award and awarded payment of compensation in an amount equal to 12 months' remuneration.

On appeal the **Labour Appeal Court** confirmed that the contention by DAFF that the employees were not its employees was not sustainable for the reasons accepted by the arbitrator. The employees were subject to the control and direction of DAFF in all their work activities and received remuneration from DAFF although their payment was channelled through the implementing agent. There was no evidence of any kind that the employees concluded contracts of employment with the implementing agent. After the expiry of their fixed-term contracts with DAFF, the employees continued to work at the same workplace performing the same functions under the direction of DAFF.

Turning to the appropriate remedy, the LAC relied on s 193(2) of the LRA which provides that unless the employee does not seek to be reinstated, or the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or it is not practicable for the employer to reinstate the employee, or the dismissal is only found to be procedurally unfair, the commissioner must reinstate the employee. Thus, the employer bears the onus to prove that there are exceptional reasons not to afford the primary remedy of reinstatement. The Labour Court made no reference to s 193(2) of the LRA in deciding to set aside the award of reinstatement. DAFF presented no evidence that reinstatement was not practicable or that the continuation of an employment relationship was intolerable. DAFF's own witness had stated that the employees' skills were still needed and their posts had not been filled. Accordingly, there was no evidentiary basis for the Labour Court to interfere with the commissioner's decision to award reinstatement. The LAC set aside the LC's order, and ordered reinstatement.

This LAC judgment confirms that if after the expiry of a fixed-term contract, an employee continues to render services to an employer and receives remuneration for rendering those services, the contract is deemed to be tacitly "novated" (ie replaced with a new contract). The new contract may be on varied terms and its duration period must be determined in the light of the circumstances of each case. **Unless a contrary intention can be inferred from the facts, it will generally be assumed that the parties intended the new contract to be of indefinite duration, terminable by reasonable notice given by either party**.

In assessing whether an employee remains an employee after the expiry of the fixed-term contract, factors such as continuity of work, control and direction, reporting lines, and place of work should be taken into account.

Extract from the judgment:
(Murphy AJA)
[20] ……..If after the expiry of a fixed-term contract, an employee continues to render services to an employer and receives remuneration for the rendering of those services, the contract is deemed to be tacitly relocated or novated. The new contract may be on varied terms and its duration period must be determined in the light of the circumstances of each case. Unless a contrary intention can be inferred from the facts, it will generally be assumed that the parties intended the new contract to be of indefinite duration, terminable by reasonable notice given by either party. The commissioner correctly held that this is what happened in this case. His reference to the new contract as a "permanent" contract was perhaps a mischaracterisation, but he clearly meant that the new contract was one of an indefinite nature terminable by reasonable notice. His finding that the respondents were employees of DAFF, and thus that he had jurisdiction to determine the unfair dismissal dispute, was unassailably correct; as was his finding that since DAFF failed to lead any evidence justifying the dismissals it did not discharge its onus to prove their fairness.

……
[22] ……Section 193(2) of the LRA provides that unless the employee does not seek to be reinstated, or the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or it is not practicable for the employer to reinstate the employee, or the dismissal is only found to be procedurally unfair, the commissioner must reinstate the employee. Thus, the employer bears the onus to prove that there are exceptional reasons not to afford the primary remedy of reinstatement. The Labour Court made no reference to section 193(2) of the LRA in deciding to set aside the award of reinstatement. DAFF presented no evidence that reinstatement was not practicable or that the continuation of an employment relationship was intolerable. Indeed, DAFF's own witness, Mr Marinus, stated during his testimony that the respondents' skills were still needed and their posts had not been filled. Accordingly, there was no evidentiary basis for the Labour Court to interfere with the commissioner's decision to award reinstatement.

When is a service provider a TES?

***David Victor & 200 Others v Chep South Africa (Pty) Ltd & Others (2020) JA55/2019 (LAC)*.**

Principles:

1. To decide whether a relationship is a service provider or TES arrangement involves considering various relevant factors, with no single factor being decisive. It requires a 'purposive interpretation' to give effect to the aims of the protective provisions in the legislation.
2. Where a client contractually controls the overall work process of persons who work at its premises, as well as their conduct and behaviour, such persons ordinarily will be deemed to work for the client

Facts:
Chep South Africa (Pty) Ltd hires out pallets which are used for the storage and transportation of goods in the logistics industry. The pallets require conditioning, repairs and refurbishment. David Victor and 200 others were employed by a TES named C-Force to repair wooden pallets for Chep.

In 2014, when amendments to section 198 of the LRA which aimed to limit TES activities were in the pipeline, Chep and C-Force concluded a service level agreement (SLA) along the same lines as the prior TES agreement between them, but specifying that C-Force was appointed as an independent contractor and that neither C-Force nor any of its employees were deemed to be an agent, employee or partner of Chep. The SLA effectively aimed to change the nature of the relationship between Chep and C-Force from that of a TES to being a service provider.

After section 198 was amended in 2015, David Victor and the 200 other employees attempted to be made Chep's employees. When they were unsuccessful they referred a dispute to the CCMA. The arbitrator found that C-Force is a TES as defined under section 198. As he saw it, there were 3 critical issues:

- the nature of the SLA;
- the degree of control exercised by Chep over C-Force; and
- the degree that C-Force is integrated into Chep's workplace.

The arbitrator noted that there was no evidence that C-Force owned a fully equipped service facility to repair pallets using its own raw materials, plant and equipment. On the face of it, C-Force merely provided employees to Chep in the same way a TES would do. The repair of pallets was an integral part of Chep's operations and there was no "arms-length" relationship between Chep and C-Force. C-Force had no

discretion as to how the work was to be performed - the SLA prescribed not only the required results but also the manner in which those results were to be achieved.

When the Labour Court overturned the CCMA award on review, finding that the commissioner had applied the wrong criteria in deciding whether C-Force was a TES, the employees referred the matter on appeal to the LAC.

The LAC noted that in terms of the definition of a TES under section 198(1), the issue to be decided was whether C-Force provided employees to perform work for Chep, as opposed to providing a service to Chep. The LAC said this involved a consideration of various relevant factors, with no single factor being decisive, and it required a 'purposive interpretation' to give effect to the aims of the protective provisions in the legislation.

The LAC concluded that C-Force was operating as a TES, and agreed with the finding made by the CCMA commissioner. The LAC noted that Chep's payments to C-Force were based primarily on the labour costs of refurbishing the pallets. The LAC said the commissioner was correct in taking the following factors into consideration:

i. the required raw materials, plant and equipment were supplied and maintained by Chep;
ii. pallet conditioning formed an integral part of Chep's business;
iii. C-Force had no discretion as to how the work was to be performed;
iv. The SLA prescribed the results to be achieved during hours prescribed by Chep and in accordance with Chep's policies and instructions;
v. Chep exercised overall control over the employees' activities, setting production targets and providing detailed rules of conduct;
vi. In terms of the SLA, Chep reserved the right to request that any C-Force employee be removed from the site;
vii. Chep had the right to instigate disciplinary proceedings against the employees.

The LAC set aside the LC's review decision. The effect of this was that the CCMA commissioner's findings in 2015 that C-Force was a TES, and as a consequence that the employees had rights to be deemed Chep's employees, then had to be implemented.

It must also not be forgotten that the second aspect to the dispute, namely the equalisation of the terms and conditions of employment of those deemed employees with other Chep employees doing similar work, would now have to be arbitrated. It will be interesting to see whether any order granted will be made retrospective to 2015.

Extract from the judgment:
(Murphy AJA)
[34] As explained earlier, section 108 (1) of the LRA defines a TES as any person who for reward, procures for or provides to a client other persons who perform work for the client and who are remunerated by the TES. It is common cause that C-Force remunerated the appellants. The question to be decided therefore, is whether C-Force for reward procured or provided the appellants to perform work for Chep. This involves consideration of various relevant factors. Ultimately, no single factor is decisive. A purposive interpretation giving effect to the objects of the legislative policy and the protective provisions is required.

.....
[40] The requisite element that the persons procured for reward and provided to a client "perform work for the client" entails an examination of the substance of the relationship between the client and the workers. The commissioner understood this to oblige him to consider (i) the nature of the SLA; (ii) the degree of control exercised over C-Force and the workers by Chep; and (iii) the degree that the workforce is integrated into Chep's workplace and organisation. These are legitimate and relevant factors, the consideration of which is essential to determining the substance of the relationship and whether (in fact and in law) work is performed for the client rather than the TES. They related directly to the preconditions of section (198(1) of the LRA and the Labour Court erred in holding otherwise.

[41] Questions of control and integration, including the manner in which the workers work; the authority to which they are subjected; the degree they are integrated into the functioning of the organisation; and the provision of the tools of the trade and work equipment are relevant (possibly the only) factors in deciding if procured persons "perform work for the client". Where a client contractually controls the overall work process of persons who work at its premises, as well as their conduct and behaviour, such persons ordinarily will be deemed to work for the client. While the SLA requires C Force to attend to the staffing and management of the plant and the workforce, as mentioned earlier, other provisions of the SLA give Chep an overriding oversight, supervisory and disciplinary authority.
.....
[43] In finding that C-Force was a TES and not a service provider the commissioner therefore replied appropriately on the following key considerations: i) the requisite raw materials, plant and equipment are supplied and maintained by Chep; ii) pallet conditioning forms an integral part of Chep's business; iii) C-Force does not enjoy a discretion as to how the work is performed; iv) the SLA prescribes the desired results and the manner in which these results are to be achieved, during the hours prescribed by Chep and in accordance with Chep's policies and instructions; v) Chep exercises overall control over the worker's activities, sets production targets and provides detailed rules of conduct; vi) Chep may require a worker to immediately cease to provide services due to non compliance with its rules; and vi) Chep has the right to instigate disciplinary proceedings against the workers.

[44] The commissioner did not err in taking these factors into account. Indeed, he would have erred had he not done so. He rightly found on consideration of these factors and on the construction of the SLA that the workers perform work for Chep. The appellants were accordingly provided to Chep by C-Force for reward to perform work for Chep. Hence, C-Force was a TES. The commissioner's decision was correct and there was no basis to review it. The Labour Court thus erred in setting aside the award.