Worklaw 2018 Labour Law Update

Contents

2018 labour law amendments update: NMW, BCEA, LRA, and others

Worklaw subscribers will be aware that at the time of writing, there are a host of labour law amendments in the pipeline. These include the –

- **National Minimum Wage Bill**;
- **BCEA Amendment Bill** – linked to implementing the Min Wage Bill;
- **LRA Amendment Bill**- including advisory arbitration for protracted/violent strikes;
- **Labour Laws Amendment Bill** - providing for parental leave;
- **Code of Good Practice:** Collective Bargaining, Industrial Action & Picketing.

We aim, in this article, to provide a brief overview of the key implications of each new piece of legislation. Please note this article is based on the last available versions of these Bills – further amendments could be made before these become law. We understand that priority will be given to first implementing the Minimum Wage Bill and the BCEA and LRA Amendment Bills, with the others being implemented later.

1. National Minimum Wage Bill

1.1 Minimum wage:

Schedule 1 to the NMW Bill provides for the implementation of a national minimum wage of **R20 per hour**, provided that (initially) the minimum wage for –

- farm workers shall be R18 per hour;
- domestic workers shall be R15 per hour;
- workers on an expanded public works programme shall be R11 per hour.

"***Wage***" is defined as the amount of money payable to a worker in respect of ordinary hours of work, and in terms of s5 excludes-

- any payment made to enable a worker to work, including any transport, equipment, tool, food or accommodation allowance;
- any payment in kind including board or accommodation;
- gratuities, including bonuses, tips or gifts; and
- any other prescribed category of payment.

Depending on the number of hours worked, the R20 hourly rate works out at a figure close to **R3500 per month** for many employees.

1.2 Date of implementation

Whilst no date of implementation has been announced and the Bill is currently still being processed through Parliament, the Dept. of Labour has said it is expected to become law around **August / September 2018**.

1.3 Application of the Act

The Act will apply to all workers and their employers, except members of the SANDF, the NIA and the Secret Service. Late amendments to the Bill will apparently seek to extend its application to cover independent contractors who personally undertake to perform work / services – ie not appointing other employees to perform these tasks.

1.4 Unfair labour practices

S4(6) prescribes that it is an **unfair labour practice** for an employer to unilaterally alter wages, hours of work or other conditions of employment, in implementing the national minimum wage.

1.5 National Minimum Wage Commission

A National Minimum Wage Commission is established in terms of s8 & s9, and the Commission is required in terms of s6(1) to review the national minimum wage annually, with adjustments to take effect on 1 May each year. S7 sets out the factors the Commission must consider each year in reviewing the minimum wage figure.

1.6 Exemptions

S15 creates a procedure to apply for exemptions from paying the national minimum wage. The Minister has made it clear in public statements that exemptions will not be granted to sectors, but may for example be available to new businesses starting up.

2. BCEA Amendment Bill

The BCEA is to be amended, largely to cater for the implementation on the national minimum wage. The following changes are proposed:

2.1 Basic conditions of employment are defined to include the national minimum wage, which will be enforced as such under the BCEA.

2.2 A new s9A provides that an employee who works less than 4 hours on a day, must be paid for 4 hours on that day.

2.3 S64 is amended to provide that labour inspectors, in enforcing compliance with the Act, may refer disputes to the CCMA over failures to comply with the Act. Their functions are expanded to include appearing at CCMA or Labour Court proceedings in this regard.

2.4 Amendments to s68(3) and s73 provide that if an employer fails to comply with a written undertaking or a compliance order, the Director General may now apply to the CCMA (and not the LC as previously stated) to give the written undertaking or compliance order the status of an arbitration award.

2.5 In addition to labour inspectors' powers to enforce the national minimum wage, a new s73A provides that any person may refer a dispute to the CCMA over a failure to pay him/her the required wage. It remains to be seen whether the CCMA has the capacity to cope with the potentially large number of such disputes to be referred. Whilst the process to be adopted by the CCMA in dealing with these disputes is not yet made clear under the current version of the Bill, it is anticipated that this will be a con/arb process.

2.6 A new s76A provides for fines for not paying the national minimum wage, being the greater of –

- twice the value of the underpayment, or
- twice the employee's monthly wage.

What is confusing is that s73(1)(c) retains the right of the CCMA to impose a fine in accordance with schedule 2 to the Act (eg maximum of 25% of the amount due, for a first offence), when making a compliance order an arbitration award.

2.7 S80 now refers disputes relating to employees' rights and protection against discrimination under the Act, to the CCMA for arbitration and no longer the Labour Court.

Late amendments to the Bill will apparently seek to retain sectoral determinations - in earlier drafts, chapters 8 & 9 dealing with sectoral determinations and the Employment Conditions Commission had been repealed.

3. LRA Amendment Bill

3.1 Advisory arbitration to resolve strikes/lockouts

In an endeavour to resolve strikes or lockouts that are intractable, violent or that may cause a local or national crisis, new sections 150A-D provide for the establishment of an advisory arbitration panel that will on an expedited basis investigate the cause and circumstances of the strike or lockout, and make an advisory award to assist the parties to resolve the dispute.

3.1.1 Appointment of the panel

The CCMA director can voluntarily appoint a panel or must do so in certain circumstances, as set out below:

(1) The CCMA director ***may*** (at any time) under s150A(1) appoint a panel on the director's own accord or on application by one of the parties, and after consultation with the parties.

(2) Once a certificate of non resolution of a conciliated dispute has been issued or a notice to strike / lockout has been given, the CCMA director ***must*** under s150A(2) establish a panel -

- (a) if so directed by the Minister; or
- (b) on application by one of the parties; or
- (c) if ordered to do so by the Labour Court; or
- (d) by agreement between the parties.

(3) The CCMA director can only appoint a panel under (2)(a) and (b) above if the director has *reasonable grounds to believe* that -

- (a) the strike / lockout is no longer functional to collective bargaining, having continued for a protracted period with no resolution imminent;

- (b) there is an imminent threat of constitutional rights being violated through violence or damage to property; or
- (c) the strike / lockout has the potential to cause a national or local crisis.

(4) The Labour Court may only order the CCMA director to appoint a panel under (2)(c) above on application by a party materially affected, and under the circumstances in (3)(b) and (c) above.

3.1.2 Composition of the panel

The panel will consist of a senior commissioner and 2 assessors. The employer and union party to the dispute each appoint an assessor; failing which the director appoints the assessor(s) from a prescribed list nominated by Nedlac.

3.1.3 Functioning of the panel

The chairperson of the panel, after consultation with the assessors, can conduct the arbitration in a manner he/she considers appropriate and with a minimum of legal formalities, to make an advisory award fairly and quickly. The chairperson is given the powers of a commissioner under s142 and has powers to order disclosure of relevant and necessary information.

The panel must issue an award within 7 days of the arbitration hearing or any reasonable period extended by the director, taking into account the urgency of the dispute. Note that the appointment of the panel does not suspend the right to strike / lockout.

If the panel cannot achieve consensus, the chairperson issues the award on behalf of the panel.

3.1.4 The arbitration award

The process of how the award is issued and its effect, is set out as follows:

- The award must report on factual findings, make recommendations to resolve the dispute, and motivate why it should be accepted by the parties.
- The parties are given time to consider the award before it is made publicly available by the Minister within 4 days of it being issued.
- The parties have 7 days to accept or reject the award, failing which they are deemed to have accepted it, provided that a party may apply to the chairperson to extend this period by up to 5 days.
- A party must consult with its members before rejecting an award, and must motivate any rejection of an award.
- A party may request the panel to reconvene, to seek an explanation of the award or to mediate a settlement of the dispute based on the award.
- The award is only binding on a party and its members if it has accepted the award or is deemed to have accepted it.
- A binding award is given the status of a collective agreement. Bargaining councils may extend such awards to cover non parties in terms of the LRA.

Our comment: We see this initiative as a mechanism that may play a positive role in resolving key future strikes. We do not agree that it unnecessarily limits the right to strike, as parties retain the right to prevent an award from being binding.

But we have 2 concerns:
Firstly, the process may extend strikes as much as curtail strikes. A union that perceives it is not going to achieve its demands through collective bargaining, may hold out on strike in an attempt to 'win the battle' through the arbitration process.
Secondly, whilst the process aims to be quick and flexible, in reality it could take 30 to 40 days for the process to be completed – and consider that this process may only commence after a strike has already been running for some time. At best, let's assume it takes 3 days for the chairperson and assessors on the panel to be appointed, a further 7 days for the arbitration hearing to be arranged and finalised, 7 days for the award to be issued after the hearing, a further 7 days (which can be extended to 12 days) for the parties to decide whether to accept or reject the award, plus any further delays asking the panel to reconvene and mediate. So one can quickly see how a month or more will have gone by before the process yields results.

3.2 Summary of other proposed LRA amendments

There is too much content to cover all the amendments, but here is a quick summary of the more relevant changes:

3.2.1 New s135(2A)-(2C) provide for the extension of the 30 day conciliation period by up to 5 days, to ensure a meaningful conciliation process.

3.2.2 S69 is amended to prohibit picketing unless there are picketing rules in place. A commissioner conciliating a dispute must determine picketing rules (using the default picketing rules in the Code as a guide), taking into account the parties' representations, if there are no picketing agreement in place.

3.2.3 S95 and s97 relating to strike ballots as required by a union's constitution, are amended to provide that any such ballot shall be secret, and what constitutes documentary evidence of proof of the outcome of the ballot is widened.

3.2.4 S127 & s128 are amended to provide that accredited bargaining councils or private agencies may only appoint persons to resolve disputes if that person has CCMA accreditation.

3.2.5 S72 & s75 are amended to provide for the ratification of minimum service agreements by a panel appointed by the Essential Services Committee, and the definition of minimum services; the appointed panel may also vary or rescind a designation of a maintenance service.

4. Labour Laws Amendment Bill

This new piece of legislation seeks to introduce parental leave in cases of birth, adoption and commissioning parents in a surrogacy situation, which to a significant extent are gender neutral. Do achieve this, it proposes amendments to the BCEA and the Unemployment Insurance Act.

The BCEA, whilst currently providing 4 months' maternity leave for employees who become mothers, and 3 days' family responsibility leave for employees who become fathers, does not explicitly mention adoption leave and cases where an employee becomes a parent through a surrogacy arrangement.

The Bill seeks to amend the BCEA by scrapping family responsibility leave on the birth of a child, and to provide the following:

4.1 An employee who is a parent *and presumably doesn't qualify for maternity leave* (this is mentioned in the Memorandum explaining the objects of the Bill, but appears to have currently been left out of the wording in the Bill by mistake) ie usually the father, will be entitled to **10 consecutive days' parental leave** when that employee's child is born or adopted (note: not defined as working days).

4.2 An employee who is an adoptive parent of a child younger than 2 will be entitled to **10 consecutive weeks' adoption leave** from the date of adoption. If there are 2 adoptive parents, one of them will be entitled to the 10 weeks' adoption leave and the other to the 10 days' parental leave.

4.3 An employee who is a commissioning parent in a surrogacy arrangement, will also be entitled to **10 consecutive weeks' leave**. As in the case of adoption, if there are 2 commissioning parents, one of them will be entitled to the 10 weeks' leave and the other to the 10 days' parental leave.

Our comments: The above provisions are gender neutral. It will be up to the parents in both dual sex and same sex relationships, to decide who takes what form of leave under 4.2 and 4.3 above. But assuming that in most cases the parents will not be working for the same employer, it may be very difficult for employers to check whether in fact both parents have not applied for the longer form of leave allowed.

It will be interesting to see whether this new legislation, whilst gender neutral in many respects, is attacked as being discriminatory. For example, the maternity benefits afforded a female employee under s25 of the BCEA are more favourable than any form of parental leave granted to a male employee in terms of this Bill who elects to be the 'nurturing parent'. In the case of M I A v State Information Technology Agency (Pty) Ltd *(D 312/2012) [2015] ZALCD 20 (26 March 2015)* the LC has already taken the view that a policy which denies male employees maternity leave discriminates unfairly against male employees who have either adopted a child or have entered into a surrogacy agreement to become parents of a child.

Regarding payment, the amendments do not require that any of the above forms of parental leave are to be paid by the employer although this can be agreed in terms of company policies. Amendments to the Unemployment Insurance Act propose that parental benefits will be paid at the rate of 66% of earnings for all the above forms of leave, subject to the maximum income threshold applicable

As previously stated, the current focus seems to be very much on bringing the Minimum Wage Bill and related BCEA and LRA Amendment Bills into law, and there is no indication when this Bill may be made law.

5. Code of Good Practice: Collective Bargaining, Industrial Action & Picketing

Worklaw provided a comprehensive report on the **The Nedlac Accord on Collective Bargaining and Industrial Action** and the **Draft Code of Good Practice: Collective Bargaining, Industrial Action and Picketing** in the workbook for its 2017 Labour Law workshops. Please have regard to that document for further details. Whilst the Accord was finalised and signed at Nedlac, sadly there has been no progress over the past year in implementing the draft Code of Good Practice. With the current focus very much on bringing the Minimum Wage Bill and related BCEA and LRA Amendment Bills into law, there is no indication when this Code may come into operation.

Given that we have covered this Code before, we do not intend here to provide any more than a quick summary of what it contains. The Code aims to be a practical guide to collective bargaining. It is divided into 5 Parts – Introduction (Part A); Collective bargaining (Part B); Workplace democracy and dialogue (Part C); Industrial action: strikes and lockouts (Part D); and Picketing (Part E).

5.1 Collective bargaining

Part B provides detailed guidelines on –
- good faith bargaining (*clause 7*);
- training and support for negotiators (*clause 8*);
- preparing for negotiations (*clause 9*);
- how to submit demands and responses (*clause 10*);
- how to start negotiations (*clause 11*);
- the use of facilitators (*clause 12*);
- disclosure of information (*clause 13*);

The **principles of good faith bargaining** set out in *clause 7* are a key aspect of the Code. These include a commitment to disclose relevant information, written demands and responses, no new demands during negotiations, no unilateral action prior to deadlock, rational and courteous behaviour, being prepared to modify demands, and respecting parties' rights to communicate with their constituency.

The Code provides for parties' negotiators to each sign a 'Good Faith Declaration' (Annexure A to the Code), committing themselves personally to comply with the Code and bargain in good faith.

5.2 Workplace democracy and dialogue

Part C aims to develop a culture of mutual respect and trust between those managing an organisation and those working for it, through consultation in the decision making process. In that sense, it has similar aims to the largely unused workplace forums envisaged by chapter V of the LRA, and it remains to be seen whether these objectives are any more successful. It is intended that any such initiatives should not undermine collective bargaining arrangements, and guidelines are provided in *clause 15(2)* on how they should co-exist.

5.3 Industrial action: strikes and lockouts

Part D spends much time outlining what the law is on the right to strike and recourse to lockout. It is interesting that the Code introduces the notion of a 'peaceful' strike or lockout, described in *clause 3(1)(d)* as one free of intimidation and violence. This then surfaces elsewhere in the Code, for example in *clause 22.2*, which requires a protected *and* peaceful strike to exist before an employer's obligations not to discontinue basic amenities for striking employees living on the employer's premises, arise. It will be interesting to see what the Courts make of a strike they deem to be protected but not peaceful, once this Code is in operation.

Clause 23(1) provides for the establishment of a 'peace and stability' committee comprising representatives of the union, management, any private security company involved, the SAP, and any facilitator appointed, with the aim of regulating and monitoring conduct during the industrial action.

Regarding strike ballots, *clause 19* restates the current law that a failure to hold a strike ballot as required by a union's constitution, will not invalidate the protected status of a strike. Disappointingly, the Code does not contain the need for a ballot under the principles of good faith bargaining – for example, it could have said that a failure to hold a ballot in terms of a union's constitution would be taken into account in any dispute over the fairness of the parties' actions in dealing with the conflict.

Clause 20 & *clause 21* contain useful guidelines on the content of strike notices and who may strike. It is however puzzling that the freedom of association principles requiring employees to respect other employees' rights to choose whether to strike or not, the right to freedom of movement in and out of premises, and the employer's right to continue to maintain production, are only stated in relation to employees residing on the employer's premises.

5.4 Picketing

Part E is to a large extent a rework of the existing Picketing Code which presumably will fall away. There are some interesting variations from the existing Code – for example, clause *32(4)(b)* will now prevent picketers from 'inciting violence, wearing masks and having any dangerous weapons or objects in their possession.' Far more attention is also given to the role of the SAP (*clause 33*) and the role of private security (*clause 34*).

Our comments: Overall, we think the Accord and draft Code make a significant contribution to promoting orderly collective bargaining and industrial action. If parties were to comply with the requirements of the Code, it would overnight radically change the South African labour relations environment. The Code is also a useful yardstick against which negotiating parties could measure their current practices and relationships.

Whilst there is much good stuff in the Code, a justified criticism is perhaps that it is short of remedies and penalties to rectify breaches that will inevitably occur. There are no obvious sanctions for non compliance. Nevertheless, the Accord and Code are likely to be used extensively by litigants in court proceedings dealing with the aftermath of industrial action in the form of disputes over the fairness of strike dismissals, claims for damages to plant and equipment, and other similar actions. They are also likely to be extensively referred to by our courts in developing a coherent jurisprudence around issues relating to collective bargaining and industrial action. That, it seems, may be the real price parties may pay for non compliance.

Bruce Robertson

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THE EMPLOYMENT RELATIONSHIP

Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo others (CCMA WECT12537-16, 7 July 2017)

Principle:
Even though there is no legal obligation on the part of any driver to drive any Uber registered vehicle or to use the Uber App, that driver is an employee. Under the "reality of the relationship" test, despite the form of the contract, the driver receives, or is entitled to receive remuneration and assists in carrying on or conducting the business of Uber.

Facts:
Uber represents the ultimate gig economy. For those who haven't taken a ride with an Uber driver, this is how it works: the service is controlled through an 'app', and drivers choose when they wish to offer their services by logging on and off the app. There is no minimum amount of time they should drive per day, week or month. Some drivers own their own vehicles and some 'partner-drivers' employ other drivers to drive their vehicles.

A rider requests a ride on the app and specifies the pick-up point. The rider is advised of the approximate fare and the estimated time of arrival. The rider receives the driver's name, a photo of the driver and the vehicle registration number. The closest driver is notified by the app of the ride requested and has the option to accept, reject or ignore the request. If the driver accepts, he/she collects the rider at the nominated pick-up point and drives the rider to the chosen destination. Through the app Uber deducts the fare from the rider's credit card (no cash changes hands), deducts its fee and pays the balance to the driver.

Each Uber driver receives a statement of income generated for the week, detailing the driving hours logged and the fares earned. Uber sets performance standards and drivers are required to maintain their ratings. From time to time, drivers are given suggestions on how to improve their ratings and they are warned if their rating starts to drop. If there is no improvement, the driver may be "deactivated" and he/she may go for top-up training to improve ratings and in this way be reactivated. Drivers' acceptance of trips is monitored and too many cancellations may also lead to deactivation.

This creative working arrangement came under scrutiny in this CCMA case. The respondents were previously Uber drivers who were all "deactivated" for one reason or another, and they referred unfair dismissal disputes to the CCMA. Uber objected to the CCMA's jurisdiction in the unfair dismissal cases, claiming that the drivers were not employees of Uber but were independent contractors who had contracted their services to Uber.

The arbitrator referred to Section 213 of the LRA that defines an employee as –

a. *any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and*

b. *any other person who in any manner assists in carrying on or conducting the business of an employer.*

The arbitrator concluded that part (b) above is broad enough to include Uber drivers, it being obvious that the drivers *"assist in carrying on or conducting the business"* of Uber.

Relying largely on the **'Code of Good Practice: Who is an employee?'** the CCMA commissioner ruled that the drivers are employees of Uber. The arbitrator commented that the Code effectively introduces a new comprehensive test, which she referred to as the **"reality of the relationship"** test. This requires that, despite the form of the contract, a person deciding whether someone is an employee or an independent contractor must consider the *real relationship* between the parties. Item 52 of the Code states:

"Courts, tribunals and officials must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering all relevant factors that emerge from an examination of the realities of the parties' relationship."

Considering various factors identified in the Code, the arbitrator noted that –

- Drivers render **personal services**;
- The relationship is **indefinite**, as long as the driver complies with Uber's requirements;
- Drivers are subject to Uber's **control**, in that Uber controls the manner in which they work by setting clear standards and performance requirements;
- Drivers are **economically dependent** on Uber.

The arbitrator ruled that even though there is no legal obligation on the part of any driver to drive any Uber registered vehicle or to use the Uber App, that driver is an employee. Under the "reality of the relationship" test, despite the form of the contract, the commissioner gave weight to the fact that the driver receives, or is entitled to receive remuneration and assists in carrying on or conducting the business of Uber. This makes the driver an employee under SA law.

Extract from the judgment:
(Commissioner Ms W Everett)
[36] Section 213 of the Labour Relations Act defines an employee as -
a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
b) any other person who in any manner assists in carrying on or conducting the business of an employer.

[37] Part b) of the definition is broad enough to include Uber drivers. It is fairly obvious that the drivers assist in the business of Uber, which has a worldwide reputation as a provider of lifts for people wanting a ride, and not vice versa.

[38] Part a) requires the payment of remuneration. Uber drivers receive the fare less the fee deducted by Uber and, in the case of drivers only, less the amount the partner deducts for the use of the vehicle. Importantly, the definition excludes independent contractors. It is the line between independent contractors and employees that our courts and arbitrators have grappled with.

[39] In so-doing, several tests have been developed to indicate the existence or not of an employment relationship. These include the control test, the organizational test, the economic dependence test and the dominant impression test. In my view, the tests used to distinguish between employees and independent contractors have become largely unhelpful, and in many instances key aspects of the tests point to employment, and others point to independent contracting.

[40] No single test is decisive, nor even consistently preferred by our courts, although control or supervision have repeatedly emerged as the most helpful determinants. The *Code of Good Practice: Who is an employee?* endorses the dominant impression test. The Code identifies various factors to be taken into account, and these factors are actually an embodiment of the various tests. Similarly, most of the factors in section 200A embody the same tests, and the presence of any one (along with earnings below the threshold) triggers the presumption of who is an employee in terms of the Labour Relations Act. [In this matter, the parties agreed that the presumption did not apply to each of the drivers and, as it is essentially a tool to determine onus rather than determinative of the relationship, the objection to the CCMA's jurisdiction was heard first, followed by the answering and replying heads of argument.] the drivers accordingly bear the onus of proving that they are employees for the purposes of the LRA.

[41] Although not stated in so many words, the Code introduces a new comprehensive test, which includes as factors the past tests. This is the "reality of the relationship" test. This requires that, despite the form of the contract, a person deciding whether someone is an employee or an independent contractor must consider the real relationship between the parties. Item 52 states: "Courts, tribunals and officials must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering all relevant factors that emerge from an examination of the realities of the parties' relationship."

[42] I proceed to consider and make findings on the various factors identified in the Code of Good Practice: Who is an Employee?

[43] Drivers render **personal services**. They must be on-boarded personally with the necessary personal details, licenses and applications. They drive in their own name and may not out-source driving to someone else. The relationship between Uber and the driver would terminate on death of the driver.

[44] The relationship is **indefinite** as long as the driver complies with requirements. For example, the driver is required to electronically sign new policies and contracts before she may drive. The relationship is not dependent on achievement of a specific outcome.

[45] Drivers are subject to the **control** of Uber. Drivers choose their hours of work and they may accept, decline or ignore a list request. However, Uber controls the manner in which they work by setting clear standards and performance requirements, (such as contained in the Deactivation policy. Uber has control in that it may suspend and deactivate access to the app, thereby depriving the driver of the opportunity to work and earn an income. Even though there is no direct or physical supervision, control is exercised through technology, to the point that even the movement of the cell phone can be detected, indicating reckless

driving.
.....
[48] These factors indicate that the driver is by no means independent or running her own transportation business. The driver is very much at the mercy of Uber, and **economically dependent** on the ability to drive for Uber, an infinitely more powerful juristic person than the individual drivers.

[49] Uber drivers are the essential part of Uber's service. The app is a tool to request and provide lifts but it is the drivers who provide the riders with what they want. Riders want rides, not technology, and app merely provides an extremely convenient and accessible tool for riders to get a lift and for drivers to provide one. As such, drivers are an essential part of the organisation which is Uber. If a customer complains, the complaint goes to Uber.

[50] The real relationship between drivers in South Africa is that Uber SA is the employer. Uber SA appoints them and assists them to obtain the necessary licenses. Uber SA approves the vehicle they will drive. The relationship between drivers and Uber BV is distant and completely anonymized. Uber BV provides the legal contracts, the technology, the collection and payment of monies, but it is Uber SA, the subsidiary and local company, that appoints, approves and controls drivers, and Uber'. It is at this point that drivers engage and occasionally negotiate.

[51] I reject Uber's argument that the partner is the driver's employer, or that the rider contracts the driver directly as an independent service provider. The partner or vehicle owner merely provides a vehicle for a driver to drive and takes a fee in return. This is akin to a lease agreement, and examples of vehicles being leased to potential drivers on Gumtree demonstrate that there is no employment relationship. Furthermore, the partner has no say over the driver's deactivation or other controls implemented by Uber.

[52] I am of the view that in applying the Code of Good Practice, in particular the realities of the relationship test, there is sufficient basis for finding that Uber drivers are employees of Uber SA. .....

***Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (C449/17) [2018] ZALCCT 1 (12 January 2018)**

Principle:
Uber drivers are not employees of Uber SA and therefore have no right to refer an unfair dismissal dispute to the CCMA as against Uber SA. Whether they are employees of the Dutch company Uber BV, is undecided.

Facts:
This LC judgment was a review of a jurisdictional ruling by a CCMA commissioner that Uber drivers in an unfair dismissal dispute were 'employees' for the purposes of s213 of the LRA. In this CCMA award a ruling was made against the entity 'Uber SA' in circumstances where the commissioner had earlier refused to join the international company 'Uber BV' to the proceedings. The commissioner nonetheless found, on the basis of a 'realities of the relationship test' that the referring parties were employees of Uber SA.

The Labour Court held that the referring parties had failed to discharge the onus to establish that they were employees of Uber SA. The CCMA commissioner had

applied the *'realities of the relationship test'* to see if someone is an employee. This test, according to the commissioner, requires that, *'despite the form of the contract, a person deciding whether someone is an employee or an independent contractor must consider the real relationship between the parties'.* The Labour Court said that this was inconsistent with prevailing authorities which support the *'dominant impression test'*. But the review judgment did not turn on as assessment of whether Uber drivers were employees or independent contracts.

This was because the commissioner, having refused to join Uber BV, proceeded to make a ruling on a basis that conflated Uber SA and Uber BV. The facts before the commissioner disclosed that Uber SA did no more than provide administrative and marketing support to Uber BV. The Labour Court said that the commissioner's decision was incorrect and was thus reviewable.

This judgment settles that Uber drivers are not employees of *Uber SA* and therefore have no right to refer an unfair dismissal dispute to the CCMA as against Uber SA. Whether they are employees of the Dutch company Uber BV, is undecided. At the moment then, the status of Uber drivers is that they are regarded as independent contractors.

The issue of whether Uber drivers are employees, has been controversial globally. In the United States, around fifty lawsuits were filed against Uber in U.S. Federal Courts in 2015 alone, but Uber is still operating in every major U.S. city. However, in Europe, the service has been banned in several countries or cities as a result of lawsuits in France, Germany, Belgium, and Spain, and accordingly suspended all or some of their services in these countries. In response, Uber filed complaints with the European Commission against France, Germany, and Spain alleging that they are in violation of article 49 (freedom of establishment) and article 56 (freedom to provide services) of the Treaty on the Functioning of the European Union (TFEU).

Extract from the judgment:
(Van Niekerk J)

[34] Uber SA submits that given the factual matrix described, there is no contractual relationship of any nature, much less a contract of employment, between Uber SA and the drivers, and that the parties to any contractual relationship relevant in the dispute are the drivers and Uber BV, which is not a party to the dispute. Further, Uber SA submits that the CCMA would in any event not have jurisdiction to entertain a dispute between Uber BV and the drivers, because the drivers are independent contractors to Uber BV and not its employees.

.....

[97] In summary, in relation to the facts that served before the commissioner, the commissioner erred by failing to distinguish between Uber SA and Uber BV as discrete legal entities. There was no dispute of fact before the commission regarding the delineation of functions as between Uber SA and Uber BV. Each of the building blocks of the drivers' case pertains to Uber BV and not Uber SA Given the nature of the enquiry before her, and in particular, the undisputed facts before disclosed on the affidavits, the commissioner was obliged to consider the respective roles of Uber BV and Uber SA in relation to the drivers. She failed to embark on this enquiry and, as I have recorded, simply conflated the two entities. Had the commissioner maintained the critical distinction between Uber BV and Uber SA and considered (as she was obliged to do), only whether the drivers were employees of

Uber SA, she would have come to the conclusion that on the drivers' own version, they had failed to discharge the onus they bore to establish the existence of an employment relationship with Uber SA.

[98] Finally, it warrants mention (and emphasis) that this judgment does no more than conclude that on the facts, the drivers were not employees of Uber SA, and that they therefore have no right to refer an unfair dismissal dispute to the CCMA as against Uber SA. Whether the drivers are employees of Uber BV (either alone or in a co-employment relationship with another or other parties), or whether they are independent contractors of Uber BV, is a matter that remains for decision on another day. It was not the question before the commissioner, and it is not the question before this court.

NON STANDARD EMPLOYMENT

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

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

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

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

The Constitutional Court in a majority judgment held that the purpose of section 198A must be contextualised within the right to fair labour practices in section 23 of the Constitution and the purpose of the LRA as a whole. The majority found that for the first three months the TES is the employer and then subsequent to that the client

becomes the sole employer. The majority found that the language used in s198A(3)(b) supports the sole employer interpretation.

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

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

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

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

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

Triangular relationship

[71] One of the main difficulties raised by Assign is: what happens to the contract between the TES and the placed employee if they are no longer the employer? Assign points out that a TES may continue in an employment relationship with a placed employee after the three-month period by virtue of their common law and residual legislative functions, even if the TES is no longer deemed to be the employer through section 198A(3)(b). This, they say, may lead to an employee losing the protections of the LRA in ongoing relationships with a TES.

[72] Ancillary to this is a second argument, that an employee contracts with a TES on very favourable terms and that all these benefits may be lost on transfer to a client company. Counsel relied, in part, on section 198(4C) of the LRA in support of this. Section 198(4C)

precludes employment by a TES "on terms and conditions of employment which are not permitted by this Act, any employment law, sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services".

[73] In evaluating these arguments, it is necessary first to consider the "triangular" nature of the TES/client/placed employee relationship. The triangular relationship exists to split the functions of the employer between the TES and the client for a fee. However, the functions for which the TES is responsible seldom relate to the actual work of the employee. Their primary responsibilities are to pay and manage the human resources component of employment, while the day-to-day management, work allocations and performance assessment in most circumstances are conducted by the client only. The client is also responsible for the employees' working conditions because employees are placed on the client's premises. Importantly, the client also has the power to discontinue the employee's services. In a sense, the TES is merely the third party that delivers the employee to the client. The employee does not contribute to the business of the TES except as a commodity. And, on a practical level, the contract between a TES and a placed worker seldom constitutes an employment contract.

[74] In *Lad Brokers,* the Labour Appeal Court held that the common law does not necessarily regard the TES as the employer of the placed workers. In truth, a TES can operate without concluding contracts of employment with the workers it places. All that is required for the TES to constitute a statutory employer in terms of section 198 of the LRA is that it places workers with clients for a fee and remunerates those workers. Of course, this is less onerous than the test for establishing conventional employment either at common law or in terms of the relevant definitions. It is therefore incorrect to contend that a TES is usually in an employment relationship with workers it places with clients.

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

.....

Conclusion

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

> (a) Section 198 deals with the general position with regard to TESs, while section 198(2) is a deeming provision creating a statutory employment contract between the TES and a temporarily placed employee.
> (b) Section 198A deals with the application of section 198 to a specific category of workers, being marginal employees employed below the BCEA threshold.
> (c) Section 198A(3)(a) provides that, when vulnerable employees are performing a temporary service as defined, they are deemed to be employees of the TES as contemplated in section 198(2).
> (d) Section 198A(3)(b)(i) provides that when vulnerable employees are not performing a temporary service as defined, they are deemed to be the employees of the client.

(e) The deeming provisions in sections 198(2) and 198A(3)(b)(i) cannot operate at the same time.
(f) When marginal employees are not performing a temporary service as defined, then section 198A(3)(b)(ii) replaces section 198(2) as the operative deeming clause for the purposes of determining the identity of the employer.

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

UNFAIR DISCRIMINATION

Sethole and Others v Dr Kenneth Kaunda District Municipality (JS576/13) [2017] ZALCJHB 484 (21 September 2017)[2018] 1 BLLR 74 (LC)

Principles:
There is a three level enquiry seeking to establish whether differentiation constitutes unfair discrimination. The **first stage** determines whether the differentiation that exists is of the kind that could give raise to a case of discrimination. The **second stage** decides whether such differentiation can be seen to be discrimination, and if so, the **third stage** investigates whether that discrimination is unfair.

Where discrimination on an arbitrary ground is alleged, it has to be shown that *dignitas* or right of equality of the complainant as a person, or that person's personal attributes and characteristics, have been impaired or prejudiced.

Facts:
The applicants, all environmental health practitioners (EHPs), complained that they were unfairly discriminated against because they were paid less than other employees employed by the municipality and by other municipalities who performed the same work. Their "comparators" were four pollution control officers (PCOs). The court raised the concern that the applicants had failed to identify in in their pleadings the ground of alleged discrimination on which they relied. The Labour Court held that the applicants bore the onus of satisfying the Court that they had made out at least a prima facie case. Where the allegation is based on an "unlisted" ground, the onus rests on the applicant to prove some recognised basis for a discrimination claim.

The court found that the applicants had simply relied on a "mystery" ground of discrimination and had failed to comprehend that the test for unfair discrimination entails a three-step inquiry. At the first stage only differentiation that is irrational, arbitrary and serves no legitimate purpose would be impermissible. Differentiation that does not fall within one of these categories would be permissible differentiation, the discrimination enquiry would be at an end there and then, and the discrimination claim must fail. They had simply assumed that all they had to prove was differentiation, as opposed to discrimination.

The Court held further that to constitute unfair discrimination a pleaded arbitrary ground must be such as to affect the complainant's dignity because it is based on some inherent characteristic. The applicants had failed to show that their dignity was

affected by the fact that PCOs were on a higher grade then theirs. The essence of the applicants' complaint was simply that they were unhappy about the grading of their jobs. There was also no suggestion that the respondent had acted in bad faith when grading the post of PCO. In short, the applicants had failed to show on their own evidence that they would pass any leg of the test for unfair discrimination.

Extract from the judgment:
(Snyman, AJ)

[64] The approach of the applicants in prosecuting their case thus bedevilled this matter from the outset. The Labour Court has been consistently saying that complainant parties must properly identify the unlisted arbitrary ground relied on, up front, and in the pleadings. In *National Union of Metalworkers of SA and Others v Gabriels (Pty) Ltd* the Court held:

> *'What is therefore required, is that a complainant must clearly identify the ground relied upon and illustrate that it shares the common trend of listed grounds, namely that 'it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparable manner ...*'

.....

[66] How the above case, even if taken on face value, can serve to establish the existence of unfair discrimination against the applicants, boggles the mind. It is simply not unfair discrimination based on an unlisted arbitrary ground as contemplated by the EEA. What the applicants simply seem unable to comprehend is that an enquiry into whether differentiation constitutes unfair discrimination is a three level enquiry. As will be discussed hereunder, all the applicants did was to seek to prove the first of the three levels of this enquiry, being the existence of impermissible differentiation, and then stopped on the assumption that unfair discrimination automatically follows impermissible differentiation being shown to exist. As I will now elaborate on, this approach is simply wrong.

[67] The three level enquiry seeking to establish whether differentiation constitutes unfair discrimination starts off by determining whether the differentiation that exists is of the kind that could give raise to a case of discrimination. In short, and even if there is differentiation, it does not mean that such differentiation per se would violate the right to equality. .....
.....

[85] Accordingly, discrimination contemplated in this context means that it has to be shown that dignitas or right of equality of the complainant as a person, or that person's personal attributes and characteristics, have been impaired or prejudiced. To describe it simply, the arbitrariness must be something akin or related to the kind of listed grounds in Section 6(1) of the EEA. As said in Stojce v University of KwaZulu-Natal and Another:

> *'The Constitutional Court and the Labour Court have considered unlisted grounds as acts of discrimination if they are analogous to the listed grounds'*.

.....

[89] The fundamental difficulty with the applicants' case is that they have simply dismally failed to prove any of the above considerations where it comes to establishing an arbitrary ground. They have failed to identify and plead the actual basis of the ground relied on. They have not shown, even if the testimony and documentary evidence is taken as it stands, how their fundamental human dignity or persona has been impaired or prejudiced. There is virtually no proper evidence of the impact the alleged discrimination would have on them. What the applicants have done, as I dealt with above, is to simply equate their complaint of irrational and unlawful behaviour by the respondent in creating and then grading the PCO posts (being the differentiation) as being discrimination, which, as illustrated, it is not. ....

***Simmadari v Absa Bank Limited* (C124/17, C728/16) [2018] ZALCCT 7 (6 March 2018)**

Principles:

1. Disputes about automatically unfair dismissals must in terms of s10(1) of the EEA be adjudicated under the LRA.
2. There is no bar to an applicant pursuing an automatically unfair dismissal claim under the LRA and an unfair discrimination claim under the EEA in the same case.
3. In deciding on what relief to grant, courts will not assess compensation claims separately under the 2 Acts - rather they will consider overall, what is a just and equitable amount that the employer should be ordered to pay as compensation for the indignity the employee has suffered, and will prevent 'double dipping'.
4. An employee's statement of claim must make out a valid cause of action.

Facts:

The employee was dismissed by the bank on charges of gross misconduct relating to the harassment and bullying of her subordinates. She allegedly referred to individuals as "monkeys"; handing out inappropriate gifts such as oversized playing cards (as a reflection of the employee's age) and gifts of a sexual nature; threatening employees' jobs; and making racist, ageist and other inappropriate comments. She referred to management as "old white men who do not know what they're doing" and "oxygen thieves"; and made comments about "boere".

The employee claimed she was treated differently and dismissed on account of her race, because she pursued transformation. Based on these allegations, she lodged a claim for automatically unfair dismissal under the LRA and unfair discrimination under the EEA. These claims were then consolidated into one case to be heard by the Labour Court. Before proceedings commenced, it was argued on behalf of the employer that both claims were fatally defective even before any evidence was led.

The LC found there was nothing wrong with an applicant, out of the same set of facts and in the same case, bringing a claim for unfair dismissal under the LRA and a claim for unfair discrimination under the EEA. But whether compensation should be awarded as a remedy under both Acts, is a different question. The LC referred to the LAC judgment in *ARB Electrical Wholesalers v Hibbert*, in which the LAC expressed a strong view against "double dipping". Where there has been both an automatically unfair dismissal and unfair discrimination, the LAC in that case said the court should not consider separate compensation under the LRA and the EEA, but what is just and equitable for the indignity the employee has suffered. The employer is not penalised twice for the same wrong, as a single determination is made as to what is just and equitable compensation for the single wrongful conduct.

But that was not the end of the matter - the LC then considered whether the employee's statement of claim on both issues disclosed a valid cause of action, and found that it did not.

Dealing with the employee's unfair discrimination claim, the LC drew the following principles from various judgments:

1. The mere allegation of discrimination is not enough - the applicant must substantiate that this discrimination is as legally defined;
2. The applicant must show that the differentiation is linked to the listed discriminatory ground - causation is a necessary element;
3. The coexistence of a listed ground - eg race - and differentiation, does not on its own establish discrimination;
4. Discrimination is unfair only to the extent that it is caused by a prohibited ground;
5. The discrimination must be relative to another person.

The LC found that the employee's statement of claim had not made out case in terms of the above factors. The employee had not made out a case that her alleged victimisation was because of her race, and she had not identified a comparator - ie another person in comparison with whom she had been discriminated against.

Dealing with the employee's automatically unfair dismissal claim, the LC found that the employee's statement of claim did not establish that she was dismissed on the grounds of her race rather than for misconduct; and she had not shown that she was treated differently to any other comparable person because of her race, gender or conscience.

For these reasons the LC disposed of this case even before any evidence was led.

Extract from the judgment:
(Steenkamp,J)

[27] In this case, the applicant did not claim damages. But that does not bar her claim for compensation under both the EEA and the LRA. This Court retains jurisdiction to hear both; whether it will award compensation on both claims, should both succeed, is a different question. In *Hibbert* the LAC expressed a strong view against "double dipping":

> *"Where there is a single action with claims under the LRA and the EEA based on the employee being discriminated against and the court is satisfied that there has been an automatically unfair dismissal and that the employer's action also constitutes a violation of the EEA, it must determine what is a just and equitable amount that the employer should be ordered to pay as compensation. In arriving at this determination, the court should not consider separate compensation under the LRA and the EEA but what is just and equitable for the indignity the employee has suffered. .....The importance of this is that the employee's right to claim under both the EEA and the LRA is recognised and given effect to while at the same time the employer is not being penalised twice for the same wrong as a single determination is made as to what is just and equitable compensation for the single wrongful conduct."*

.....

[41] The following principles stem from this passage, and other authorities.

[41.1] The mere allegation of discrimination is not enough. The employee must substantiate that this discrimination is as legally defined.

[41.2] It is not enough to merely allege that this discrimination is based upon race. The applicants must allege and prove that the disparate treatment exists *because* of race. Causation is a necessary element to uphold discrimination. The applicant must link the differentiation to a listed ground.

[41.3] The coexistence of race and differentiation does not, on its own, establish discrimination.

[41.4] The correct approach to causation is that the discrimination is unfair only to the extent that it is caused by a prohibited ground.

[41.5] The discrimination alleged must be relative to another person.....

[45.4] The applicant's claim under the EEA does not disclose a valid cause of action. The exception in this regard must be upheld.

Chowan v Associated Motor Holdings (Pty) Ltd and Others (22142/16) [2018] ZAGPJHC 40 (23 March 2018)

Principles:

1. The filing if a grievance, depending on its contents, may constitute a 'protected disclosure' under the Protected Disclosures Act, and disciplinary action taken against an employee for filing such a grievance may constitute an 'occupational detriment' in terms of that Act.
2. S157 of the LRA should not be interpreted to always exclude delictual claims for damages through the ordinary courts.
3. The Protected Disclosures Act provides that an employee who has been subjected to an occupational detriment may approach any court having jurisdiction, including the Labour Court, for appropriate relief.

Facts:

In a highly publicised case, Ms Adila Chowan, an employee of Associated Motor Holdings (AMH), sued AMH, together with Imperial Holdings and Mr Mark Lamberti, for damages. Ms Chowan claimed damages based on economic losses she said she suffered from their wrongful actions, and due to injuries to her reputation and sense of self-worth. AMH is a subsidiary of Imperial Holdings, and Mr Lamberti was at material times CEO of Imperial. Worklaw subscribers will be aware that the fallout from this case has been significant – Mr Lamberti has since resigned as Imperial CEO and from the Eskom Board.

Ms Chowan was employed by AMH as group financial manager from 16 March 2012 until she was dismissed with immediate effect in September 2015. She was also effectively acting chief financial officer for 3 months during 2014. At the time she was head hunted to be group financial manager at AMH in 2012, she had extensive experience in the corporate world and as a chartered accountant, having qualified in 2000. At the time of her appointment at AMH, she was assured there were ample career opportunities for advancement within AMH and the broader Imperial Group, and she was advised at one stage that she was being groomed for the position of chief financial officer (CFO).

When the incumbent CFO resigned in 2014, he recommended Ms Chowan for his position and asked her to undergo a psychometric test to establish if there were any 'gaps where she would need development'. Having undergone this test, she was not

advised of any shortcomings. He discussed with her a successor to her as group financial manager, should she be appointed as CFO.

She subsequently became aware that the CFO position had been advertised and that Mr Lamberti, Imperial CEO, had appointed a recruitment firm to find 'a top flight CFO'. She was interviewed by the recruitment firm and by Mr Lamberti. At the conclusion of her interview with Mr Lamberti, he informed her she would not be appointed as CFO, but that if she gave her full support to the CFO he appoints, he promised her a career path within one year and that she would be properly compensated. Mr Lamberti followed up on his interview, by sending her an e-mail the next day, in which he attempted to persuade her of the value of remaining within the Group and he gave her a personal commitment to help grow her leadership skills.

Three white males were subsequently identified and shortlisted for the CFO position, from which one was appointed. Ms Chowan felt 'let down' by these developments, believing she had been overlooked, and resigned in June 2014. A week later, the AMH CEO and Mr Lamberti met with her and persuaded her to withdraw her resignation, assuring her of advancement opportunities within the broader Imperial Group and that she would be appointed into a CFO position within the Group within a year.

A strained working relationship developed between Ms Chowan and the person appointed as AMH CFO, with her feeling he was not the 'top flight' CFO she had been told would be appointed. Ms Chowan also claimed that in one meeting between them, when she complained about the brown coloured company vehicle that had been given to her, that the CFO said "well, the colour of the car suits your skin". The CFO gave evidence, disputing this version of events, but the Court found that Ms Chowan's version of events was more probable.

Ms Chowan also testified that the AMH CFO returned from a meeting with Mr Lamberti during March 2015, and advised her that Mr Lamberti had asked him to convey to her that he did not believe she had what it takes to be a CFO within the Imperial Group and would never be appointed as such. She felt Mr Lamberti had reneged on his earlier promises to her and should have conveyed that message himself. Whilst the employer witnesses disputed these events, it is common cause that these engagements led to a further meeting in April 2015 attended by Ms Chowan, Mr Lamberti, the AMH CEO and CFO. At this meeting, it is not disputed that Mr Lamberti told Ms Chowan that she is "a female, employment equity, technically competent" and that she required 3 to 4 years to develop her leadership skills, and he made it clear he would not be having any more meetings with her.

Ms Chowan felt deeply upset by these comments, made in the presence of other senior executives, which she categorised as constituting racial and gender discrimination against her. She felt humiliated and degraded, and submitted there was no need to mention her race or gender in this context. In her evidence, she also said she felt discriminated against in the light of AMH's poor performance on diversity as far as its senior leadership was concerned. They were all white males, aside from one white female, and of the 14 executives appointed in the 2 and a half years preceding mid-2015, 13 were white males.

Ms Chowan testified that the AMH CEO apologised to her for Mr Lamberti's remarks, and further said he did not think she had a career within the Imperial Group because Mr Lamberti would be obstructive to it, and that he would give her a very good reference. She told him and the human resource manager at AMH that she intended lodging a grievance against Mr Lamberti, and was warned that this may be "a career limiting move".

Ms Chowan subsequently lodged a grievance of racial discrimination and unfair treatment against Mr Lamberti with the Imperial Group Chairman, seeking an apology for offending her human dignity and for him to honour his promises to her about future promotions. She also lodged a grievance against her superior, the AMH CFO. Ms Chowan was then advised she was suspended whilst these grievances were being investigated, without being given an opportunity to motivate why she should not be suspended. An investigation was subsequently conducted by a senior associate from a law firm that had apparently already given advice to Mr Lamberti on Ms Chowan's suspension. The report on the outcome of this investigation, which did not contain any findings or recommendations, was tabled at a meeting of Imperial's non-executive directors.

Ms Chowan was subsequently advised that it had been resolved that her allegations were "*completely without foundation....and are devoid of substance*", and her grievance was dismissed. Ms Chowan was further advised that her actions in lodging these grievances constituted misconduct and an abuse of the grievance procedures, and that disciplinary action would be taken against her as a result. A disciplinary hearing was conducted, chaired by an attorney, and Ms Chowan was dismissed.

As a result of these developments, Ms Chowan claimed damages based on economic losses she said she suffered from her employer's wrongful actions, and due to injuries to her reputation and sense of self-worth.

The judgment makes it clear that the Court was impressed by Ms Chowan as a witness and was equally unimpressed by some of the employer's witnesses; as a result the Court accepted Ms Chowan's version of most disputed events. Mr Lamberti elected not to give evidence in the matter.

The Court regarded Ms Chowan's grievance complaint as a 'protected disclosure' in terms of the Protected Disclosures Act, in that it was information that showed unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. Flowing from this, the Court regarded her employer's actions in suspending and then dismissing her as an 'occupational detriment' prohibited by the Protected Disclosures Act (PDA) - the Act defines an occupational detriment to include suspension, dismissal, harassment etc.

Whilst these findings were central to the Court finding the employer liable for Ms Chowan's damages, we question the applicability of the Promotion of Equality and Prevention of Unfair Discrimination Act to a labour matter. Section 5(3) of that Act makes it clear that Act does not apply to any person covered by the Employment

Equity Act, which is meant to deal with these matters in the employment situation. We are puzzled why the Court did not refer to the Employment Equity Act.

The Court rejected the employer's arguments that there were tailor made avenues available to her to process her claims through the LRA and EEA, and that s157 of the LRA should be interpreted to always exclude delictual claims for damages through the ordinary courts. The Court pointed out that s4(1) of the PDA provides that an employee who has been subjected to an occupational detriment may approach any court having jurisdiction, including the Labour Court, for appropriate relief. The Court felt this was a classic example of an appropriate case where delictual liability should be imposed.

The Court noted that the duty not to subject an employee to occupational detriments under the PDA rested with the employer. As such, the Court made AMH, as Ms Chowan's employer, liable for the payment of her economic losses, and not Imperial and Mr Lamberti.

Having regard to Ms Chowan's claims for damages based on injuries to her reputation and sense of self-worth, the Court found that Mr Lamberti's statements were not defamatory but did impair her dignity. Both a subjective and an objective test had to be satisfied in order for such a claim to be well founded – the person must have felt insulted, and a reasonable person would have to also feel insulted by this conduct. The Court felt this was the case in this instance, and ordered that Mr Lamberti and Imperial be jointly and severally liable for Ms Chowan's damages.

By agreement between the parties, the amount of damages to be awarded on both claims is to be determined at a later date. The Court also awarded costs to be shared between AMH (70%) and Imperial and Mr Lamberti (jointly liable for the balance).

Having regard to what can be learned from this judgment, what stands out in the sequence of events in this case is that under normal circumstances it is blatantly unfair to suspend and discipline someone for lodging a grievance. That appears to be the most important factor that led to the outcome of this case, even though most press reports focussed on what was said to Ms Chowan during various meetings. A grievance inevitably relates to how a person feels about how she/he has been treated within an organisation: we cannot see how this would justify suspension and disciplinary action, unless lodged with some ulterior motive. By her own evidence, all Ms Chowan was looking for was an apology and a commitment to honour career promises made to her, and yet in the end this case culminated in the CEO's resignation.

There was much speculation in the media about the significance of this case in relation to how employees appointed in terms of an organisation's affirmative action programme can thereafter be referred to: whether it would be discriminatory to refer to that appointment process in relation to that employee, once the appointment is made. When considering such remarks, it is crucial to recognise the *context* within which such comments are made. So, if made to belittle and undermine, this would clearly be discriminatory: on the other hand, we suggest that comments for example made positively in support of the success of an organisation's employment equity

policies, would cause no harm. For these reasons, we don't think this judgment creates any general principles limiting references to employees appointed in accordance with an organisation's affirmative action policies.

Taking a step back, this case shows how 'out of hand' a situation can become as it worsens. It highlights the need for someone (invariably an HR/legal person?) in many situations to stand up against a tide of opinion building within an organisation as to how a particular situation should be handled: in this case for example, to query, whether intended disciplinary action for lodging a grievance is a wise course of action.

Lastly, and not uncontroversially, this case shows that labour disputes can still end up in the high courts, despite views expressed in *Chirwa v Transnet Limited and Others* (Case CCT 78/06; 28 November 2007) and other related judgments. The High Court has now dealt with Ms Chowan's claims for damages based on economic losses she said she suffered from their wrongful actions, and due to injuries to her reputation and sense of self-worth. We are unaware whether unfair dismissal claims under the LRA have at any stage been lodged – time periods within which to lodge such claims will probably have expired, if it hasn't happened by now.

Extract from the judgment:
(Meyer J)

[45] The requirements for protection of a disclosure to an employer in terms of s 6 of the PDA, read with the definition of disclosure in s 1, are that it must be 'information' that the employee 'has reason to believe' shows or tends to show the commission of a listed impropriety, the disclosure must be made 'in good faith' and substantially in accordance with any prescribed or authorised procedure for the reporting of the impropriety, or to the employer where there is no such procedure.

[46] The procedure followed by Ms Chowan in reporting her grievance to the group chairman of Imperial's board of directors was, as I have held, consented to by the CEO of her employer, AMH. It thus follows that it was an 'authorised procedure' within the meaning of s 6(1)(a) of the PDA.....

[47] I am of the view that Ms Chowan also satisfies the requirement of 'reason to believe that the information concerned shows or tends to show' unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act. The test for determining whether an employee had the requisite 'reason to believe' is subjective and objective. The employee who makes the disclosure is required to hold the belief and that belief has to be reasonable.....
.....
[50] Ms Chowan's wish for an apology from Mr Lamberti for, as she viewed it, insulting her and offending her human dignity, and for him to honour the promise that he had made to her, do not seem to me to be sufficient reason to find that the disclosure had not been made *bona fide*. (Compare *Grieve v Denel (Pty) Ltd* [2003] 4 BLLR 366 (LC) para 12.) She reasonably believed in the truth of the content of her statement and made it with honesty and sincerity of intention aimed at remedying the wrong. She, in my view, has established that her disclosure to Mr Gcabashe was also made *bona fide.....*

[51] The disclosure made by Ms Chowan, therefore, is a protected disclosure and the occupational detriments - being suspended, subjected to disciplinary action and ultimately dismissed - to which she had been subjected by her employer, AMH, on account of having

made the protected disclosure are in violation of the provisions of s 3 of the PDA and unlawful.

.....

[60] The present matter, in my view, is a classroom example of an appropriate case where delictual liability should be imposed. There are ample public-policy reasons in favour of imposing liability. The constitutional rights to equality and against unfair discrimination are compelling normative considerations. There is a great public interest in ensuring that the existence of systemic discrimination and inequalities in respect of race and gender be eradicated.....

.....

[62] The duty not to subject an employee to occupational detriments on account of making protected disclosure as contemplated in Protected Disclosures Act, is one imposed upon an employer. AMH, and not Imperial nor Mr Lamberti, was Ms Chowan's employer. AMH, therefore, is liable for payment of the delictual damages proven by Ms Chowan.....

.....

[69] As to the subjective element, I have referred to Ms Chowan's evidence that she had never been addressed in that manner before, she was extremely upset, humiliated, degraded and objectified in terms of being a female empowerment equity candidate without recognition for the fact that she was a professional qualified chartered accountant with extensive experience and achievements, which evidence was corroborated by that of Mr de Canha, and is accepted my me. In this light the subjective element of the dignity claim is clearly established. The objective element, as was stated by Froneman J and Cameron J in *Le Roux* para 179, reflects 'outwardly', as opposed to the subjective element, which reflects 'inwardly'. The question is thus whether the reasonable person would conclude 'that objectively seen, the injury to [Ms Chowan's] feelings was palpable and reasonably felt, and hence actionable'. Such is the inevitable conclusion, in my judgment, which the reasonable person would reach about the injury to Ms Chowan's feelings.

[70] Ms Chowan has established the common law requirements for her dignity claim to succeed. Imperial and Mr Lamberti are liable, jointly and severally, for Ms Chowan's damages, as quantified in due course, as a result of the impairment of her dignity.

ULP: PROMOTION DISPUTES

Ncane v Lyster NO and Others (2017) 38 ILJ 907(LAC); [2017] 4 BLLR 350(LAC)

Principle:

An arbitrator's right to interfere with an employer's substantive decision to promote a certain person is limited to where the decision is irrational, grossly unreasonable or *mala fides*.

Facts:

The employee applied for promotion to the post of Captain in the SAPS. During interviews SAPS used a scoring system based on three criteria – (a) competency (based on the interview questions and answers), (b) prior learning, training and development and (c) a record of previous experience. On (b) there were points for matric and other subsequent qualifications. Another candidate was recommended and appointed. The employee challenged the decision in arbitration, where the arbitrator paid attention to the requirements for promotion including experience. He was satisfied that the employee had a fair opportunity to compete for the post and

that any errors were not such as to vitiate the process. He was satisfied that the appointment of the successful applicant was rationally justifiable, and he held that no unfair labour practice had been committed.

On review, the Labour Court awarded the employee an extra point for prior learning (it said that the applicant's LLB degree had not been scored correctly) but although unhappy with the score awarded by the panel for experience, awarded him compensation and not 'protective promotion' (ie the benefits but not the status of the new post). The LC did not rule that the employee should have been appointed.

On appeal in the LAC, the employee argued that as the procedure had been ruled unfair, he should have been granted 'protective promotion'. In the course of its judgment the LAC said that in the interests of good labour relations, employers must when considering candidates for promotion adhere to the law and apply objective criteria in accordance with a fair procedure. When it comes to evaluating the suitability of a candidate for promotion, an employer must act fairly. But the LAC also acknowledged that this is not a mechanical process and that there is a justifiable element of subjectivity or discretion involved. It is for this reason that the discretion of an arbitrator to interfere with an employer's substantive decision to promote a certain person is limited, and an arbitrator may only interfere where the decision is **irrational, grossly unreasonable or *mala fides***.

But the LAC did qualify this by saying that where an employer provides that certain rules apply to the decision to promote or to recommend a candidate for promotion (eg in this case, the employer's rules said the candidate who scores the most points must be recommended by the panel), an employer will be held to this. A failure to comply with the rules may result in substantive unfairness. Applied to this case, the apparent error in scoring could have resulted in unfairness, but the LAC pointed out that as the degree completed by the employee was at an undergraduate level, he had in fact been scored correctly. The LAC held that the decision reached by the arbitrator was a reasonable one, and the appeal was dismissed with costs.

The principle established by this case is clear: An arbitrator's right to interfere with an employer's substantive decision to promote a certain person is limited to where the decision is irrational, grossly unreasonable or *mala fides*. This principle, together with the court's endorsement that there is a justifiable element of subjectivity or discretion, may make it difficult for unsuccessful candidates to persuade an arbitrator to set aside an appointment.

Extract from the judgment:
(Landman JA)

[25] When it comes to evaluating the suitability of a candidate for promotion, good labour relations expect an employer to act fairly but it also acknowledges that this is not a mechanical process and that there is a justifiable element of subjectivity or discretion involved. It is for this reason that the discretion of an arbitrator to interfere with an employer's substantive decision to promote a certain person is limited and an arbitrator may only interfere where the decision is irrational, grossly unreasonable or *mala fides*. See on this *Goliath v Medscheme* (supra).

[26] But where an employer provides that certain rules apply as regards the decision to promote or to recommend a candidate for promotion, eg as in this case, the candidate who scores the most points must be recommended by the panel, good labour relations requires an employer to be held to this. A failure to comply with the rules may result in substantive unfairness.

[27] In the case where another person has been promoted to the post then the unsuccessful candidate must show that this is unfair. And as Wallis AJ (as he then was) said in *Ndlovu v Commissioner for Conciliation, Mediation and Arbitration and Others*:

> *'That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer is rational it seems to me that no question of unfairness arises.'*

.....

[37] The question is whether the decision of the arbitrator on this leg was one that a reasonable arbitrator would have reached? The arbitrator paid attention to the requirements for promotion including experience. He was satisfied that the appellant had had a fair opportunity to compete for the post and that any errors were not such as to vitiate the process. He was satisfied that the appointment of the fourth respondent was rationally justifiable. I am of the view that it cannot be said that the arbitrator's decision is one that a reasonable arbitrator would not reach.

CCMA PROCEDURES

September and Others v CMI Business Enterprise CC (CCT279/16) [2018] ZACC 4 (27 February 2018)

Principles

1. In terms of CCMA Rule 15 a CCMA commissioner is not bound by a party's categorisation of the nature of the dispute and has the right and power to investigate and identify the true nature of the dispute.
2. The CCMA referral form and certificate of outcome constitute *prima facie* evidence of the nature of the dispute conciliated but if it is alleged that the nature of the dispute is different from that reflected on such documents, the parties may adduce evidence as to the nature of the dispute.

Facts:

Three coloured employees left their jobs as a result of alleged racial discrimination which manifested itself in physical, verbal and mental abuse. In October 2011, they referred an 'unfair discrimination' dispute to the CCMA for conciliation, but it remained unresolved. They then instituted proceedings in the Labour Court, seeking an order that their resignations amounted to 'automatically unfair dismissals' based on racial discrimination.

The Labour Court found in their favour and said they had been constructively dismissed based on their race. The Labour Court also ordered the company to pay the employees 24 months' remuneration, the maximum permitted by the LRA.

The employer then appealed to the Labour Appeal Court, which held that the Labour Court did not have jurisdiction to adjudicate a dismissal dispute if that dispute had not been referred to conciliation.

The Constitutional Court found the Labour Appeal Court had erred. By relying only on the referral form and the certificate of outcome, the Labour Appeal Court essentially had held that no evidence from the conciliation proceedings may be led as evidence in subsequent proceedings.

In a lone dissenting judgment, DCJ Zondo said the Labour Appeal Court's decision was correct and in accordance with established precedent. He said the Labour Court had no jurisdiction to adjudicate a constructive dismissal dispute even if that dispute was referred to conciliation because 157(5) of the LRA provides that the Labour Court has no jurisdiction to adjudicate a dispute which in terms of the LRA is required to be arbitrated.

Extract from the judgment:
Theron J:
[43] In my view, the commissioner is not bound by a party's categorisation of the nature of the dispute. Rule 15 clearly intended the commissioner to have the right and power to investigate and identify the true nature of the dispute. The majority judgment in *Driveline* categorically held that the parties are not bound by the commissioner's description of the dispute in the certificate of outcome.

[44] The Labour Appeal Court adopted an overly formalistic approach as it held that to answer the question whether the real dispute had been conciliated necessitates a very narrow factual enquiry which entails only looking at two aspects, namely, "the characterisation on the referral form and the contents of the certificate of outcome". The Labour Appeal Court failed to take into account the purpose and context of the Labour Relations Act and the dispute resolution mechanisms for which it provides. By relying only on the referral form and the certificate of outcome the Labour Appeal Court essentially held that no evidence from the conciliation proceedings may be led as evidence in subsequent proceedings.

[45] The approach of the Labour Appeal Court is inconsistent with the jurisprudence of this Court in that it has "cautioned against a narrowly textual and legalistic approach". The Labour Relations Act provides that it must be interpreted "in compliance with the Constitution" and in such a way as "to give effect to its primary objects" which include giving effect to and regulating "the fundamental rights conferred by section 23 of the Constitution" and "to promote the effective resolution of labour disputes". By employing a narrowly textual or legalistic approach the Labour Appeal Court cannot be considered to have achieved these objects, especially as such an approach would not have led to the promotion of the effective resolution of the true labour dispute in this case.
.....
[51] The danger of adopting a formalistic approach is evident in this matter. This case involves allegations of racism and unfair labour practices. It involves applicants who were unable to receive legal advice and who did not know the law. They trusted the procedures of the CCMA and its officials. The applicants allege that the true dispute, automatically unfair constructive dismissal, was brought to their attention during the conciliation proceedings and that it was thoroughly canvassed.

[52] It would therefore be wrong to adopt the Labour Appeal Court's approach, which essentially precludes the courts from referring to evidence outside of the certificate of outcome and referral form, to determine the nature of the dispute conciliated. The general rule is that the referral form and certificate of outcome constitute prima facie evidence of the nature of the dispute conciliated. However, if it is alleged that the nature of the dispute is in

fact different from that reflected on such documents, the parties may adduce evidence as to the nature of the dispute.

.....

[55] The question that needs to be addressed on this aspect of the case is whether there was compliance with section 191 of the Labour Relations Act, before the matter was referred to the Labour Court. The question may be determined with reference to the purpose of a referral of a dispute to conciliation. In *Intervalve* this Court declared:

> *"The purpose of section 191 is to ensure that, before parties to a dismissal or unfair labour practice dispute resort to legal action, a prompt attempt is made to bring them together and resolve the issues between them. Resolving the issues early has benefits not only for the parties, who avoid conflict and cost, but also for the broader public, which is served by the productive outputs of peaceable employment relationships."*

[56] While it is true that the certificate of non-resolution here describes the dispute that was conciliated as "unfair discrimination", the uncontroverted evidence on record establishes that the commissioner who convened the conciliation meeting drew the parties' attention to the fact that the real dispute between them was a constructive dismissal. It is this dispute which the parties attempted to resolve but resolution eluded them. Consequently, the purpose of section 191 was achieved through the parties attempt to resolve the constructive dismissal dispute during conciliation.

[57] The attainment of the provision's purpose in turn establishes compliance with the Labour Relations Act. *Intervalve* outlines the test for compliance in these terms:

> *"This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved is of importance."*

[58] What remains for consideration is whether it is permissible to show compliance with section 191 by reference to evidence on what occurred during conciliation. Although section 157(4)(b) stipulates that a certificate of non-resolution issued by a commissioner constitutes sufficient proof that an attempt has been made to resolve the dispute, the Labour Relations Act does not exclude other means, including evidence on what happened at conciliation. In opposing consideration of such evidence in the enquiry for determining whether a constructive dismissal dispute was discussed during conciliation, the respondent laid much store on rule 16 of the CCMA rules

.....

[67] Evidence as to the nature of the dispute is, to my mind, not privileged. This evidence does not relate to the substance of the proceedings and is merely descriptive. There is nothing in the majority judgments in either *Driveline* or *Intervalve* which precludes approaching the question of what dispute was conciliated and what was referred to the Labour Court for adjudication as a question of substance that requires substantive adjudication. In order to determine whether a matter referred to the Labour Court for adjudication had first been referred to the CCMA for conciliation, the first point of reference is the referral documents. However, if there is a dispute as to the nature of the dispute referred to the CCMA then regard may be had to evidence outside of these documents.

***Food and Allied Workers' Union obo J Gaoshubelwe v Pieman's Pantry (Pty) Limited* (Case No CCT 236/16, 20 March 2018)**

Principle:
The provisions of the Prescription Act and those of the LRA are consistent and compatible with one another. A claim for unfair dismissal constitutes a debt as contemplated in section 16(1) of the Prescription Act and so can prescribe. The referral of disputes to the CCMA for conciliation constitutes the service of a process commencing legal proceedings which interrupts the running of prescription.

Facts:
During June 2001, FAWU and Pieman's Pantry (Pty) Ltd (Pieman's) were engaged in wage negotiations which resulted in an allegedly unprotected strike. On 1 August 2001, FAWU's members were dismissed for their alleged participation in the unprotected strike after a disciplinary hearing was convened. Upon the dismissal of its members, FAWU referred an unfair dismissal dispute to the CCMA for conciliation and arbitration. There were several legal missteps so it was only in March 2005 that FAWU referred the claim to the Labour Court for adjudication in terms of section 191(5)(b) of the LRA. Note: this happened more than 3 years after the dismissals.

In the LC Pieman's objected to FAWU's claims by contending, amongst other things, that FAWU's claim had prescribed in terms of the Prescription Act. The LC upheld the plea of prescription holding that the Prescription Act applies to labour disputes, including unfair dismissal claims. The LC also rejected FAWU's suggestion that the referral of a dispute for conciliation to the CCMA interrupted the running of prescription and, as a result, held that FAWU's claim had indeed prescribed. FAWU then appealed to the LAC against the LC's judgment upholding the plea of prescription.

The LAC held that the LRA and Prescription Act are compatible and therefore reconcilable. In dealing with FAWU's contention that a claim for unfair dismissal does not constitute a "debt" for the purposes of the Prescription Act, the LAC concluded that the "debt' in this instance could be described as the workers "claim of right", namely that their employment was terminated unfairly and that the unfairness should be remedied. As a result, the LAC concluded that the Prescription Act applied to all litigation proceedings under the LRA, specifically unfair dismissal referrals. In deciding whether FAWU's claim had prescribed, the LAC upheld FAWU's contention that the debt, which is the right not to be unfairly dismissed, arose upon dismissal and as such prescription began to run upon the dismissal of the employees. However the LAC rejected the contention that the referral of the dispute to the CCMA is a "process" which interrupts prescription. The LAC held that a referral to the CCMA is merely a functional requirement and is a condition precedent to approaching the LC. The LAC concluded that FAWU's claim had indeed prescribed as prescription began running from the date of dismissal.

The Constitutional Court heard the appeal against the judgment and order of the LAC granted against FAWU. The Constitutional Court, in ***Food and Allied Workers' Union obo J Gaoshubelwe v Pieman's Pantry (Pty) Limited* (Case No CCT 236/16, 20 March 2018)**, gave three separate judgments but the majority judgment held that the provisions of the Prescription Act and those of the LRA are consistent

and compatible with one another. A claim for unfair dismissal constitutes a debt as contemplated in section 16(1) of the Prescription Act.The time periods in the LRA and the Prescription Act are not only reconcilable but can exist in harmony alongside each other.

Dealing with whether a referral of a matter to conciliation interrupted prescription, the court held that the referral of disputes to the CCMA for conciliation constitutes the service of a process commencing legal proceedings. In this case, although the debt became due on 1 August 2001, it was interrupted by the referral to conciliation on 7 August 2001 and continued to be interrupted until the review proceedings on 9 December 2003. When the dispute was referred to the Labour Court on 16 March 2005, it had not prescribed and for these reasons the appeal was upheld.

The significance of this case is that we now have certainty that the provisions of the Prescription Act and those of the LRA are consistent and compatible with one another. A claim for unfair dismissal constitutes a debt as contemplated in section 16(1) of the Prescription Act and so can prescribe. The referral of disputes to the CCMA for conciliation constitutes the service of a process commencing legal proceedings which interrupts the running of prescription.

The practical significance is that there is no tactical advantage in letting a matter remain unresolved and the courts are clear that conciliation is a decisive step in interrupting the prescription process.

Extract from the judgment:
(Kollapen AJ:)

[139] I have read the lucid and comprehensive judgments prepared by my colleagues Zondi AJ (first judgment) and Zondo DCJ (second judgment). I concur that leave to appeal must be granted and that the appeal must succeed. However, I do not agree that the provisions of the Prescription Act are inconsistent with those of the LRA, and on account of that, the Prescription Act is not applicable to litigation under the LRA.

[140] In my view, there is compatibility and consistency between the two Acts. Although they both deal with the issue of time, they focus on different aspects of its application in the litigation process. The LRA deals with time periods that do not necessarily result in the extinction of a claim in the event of non-compliance with them, while the Prescription Act deals with time periods that will result in the extinction of the claim in the event of non-compliance. They are considerably different in the consequences they carry and for the reasons that follow; I conclude that the time periods prescribed in terms of the Prescription Act are consistent with both the time periods contained in the LRA and the general scheme of the LRA.

.....

[152] Section 16(1) of the Prescription Act deals with the applicability of the Act and prescribes that its provisions apply to "any debt arising after the commencement of this Act". The preliminary enquiry must accordingly be whether what is being asserted is a debt. If not, that would be the end of the matter, obviating the need for a consistency enquiry.

.....

[156] If regard is had to this, then it must follow that a claim for dismissal is, as pointed out in the second judgment in *Myathaza*, a claim that seeks to enforce three possible kinds of obligations against an employer: reinstatement, re-employment, and compensation. All three obligations fit neatly within the definition of debt that *Escom* and *Makate* accepted, as they constitute either an obligation to pay or render something.

[157] I accordingly conclude on this aspect that an unfair dismissal claim activates proceedings for the recovery of a debt as contemplated in section 16(1) of the Prescription Act and that the first leg of the enquiry is answered in the affirmative.....
.....
[194] Section 15(1) of the Prescription Act provides for the interruption of the running of prescription "by the service on the debtor of any process whereby the creditor claims payment of the debt". The heading to the section is "[j]udicial interruption of prescription". The crisp question that follows from this is, whether the commencement of proceedings before the CCMA constitutes the service of a process the section contemplates. An associated question is whether, if the referral constitutes such a process, it subsumes features of a judicial process.
.....
[198] Is a referral to the CCMA a document commencing legal proceedings constituting judicial interruption of prescription? In both the first and second judgments in *Myathaza*, it was accepted that the CCMA is an independent and impartial forum of the kind contemplated in section 34 of the Constitution, where a dispute could be resolved by the application of law. Clearly the adjudicative processes of the CCMA function like courts of law in resolving labour disputes as was observed in the first and second judgments in *Myathaza*.

[199] If arbitration constitutes adjudicative proceedings, what then of the conciliation process? The scheme of the LRA makes a referral to conciliation a mandatory first step in the process that may ultimately lead to adjudication. While conciliation may not be adjudicative in nature, it is a necessary and mandatory part of the dispute resolution process that the LRA creates and it occurs within the operations of the CCMA, which is an independent and impartial forum. It is not possible to activate the adjudicative features of the CCMA without first resorting to conciliation. It is also so inextricably linked to the arbitration process that the LRA envisages, as part of a continuum as well as in terms of the connectivity in the subject matter of the two processes. I believe it does an injustice to the architecture of the LRA and the CCMA to see and characterise conciliation as anything other than the commencement of legal proceedings in an independent and impartial forum. For those reasons, I would conclude on this aspect that the referral of disputes to the CCMA for conciliation constitutes the service of a process commencing legal proceedings.....

***Bloem Water Board v Nthako NO and Others* (JA83/2016) [2017] ZALAC 42 (28 June 2017)**

Principle:
Where an arbitrator is late for a scheduled arbitration causing one of the parties to leave, the arbitrator may not continue with the arbitration with the other party on the basis that the parties were required to wait the whole day for the arbitrator to arrive.

Facts:
The Council scheduled an arbitration for hearing at 10:00. The employer's representatives, the employee and a union representative were in attendance. The arbitrator was not there at the appointed time. He had caused a previous arbitration to be postponed because of his unpunctuality. After 45 minutes, the arbitrator had still not arrived nor had he communicated with the parties. The employer's representatives then left the venue.

On the same day the employer's CEO directed a complaint to SALGBC that its representatives had waited longer than 30 minutes for the arbitrator and there was

no word from the Council whether a commissioner would be in attendance. The CEO also cautioned that the arbitration should not proceed it its absence.

The employee and his representative did not leave. They waited until the arbitrator arrived at some unspecified time. The arbitrator inquired whether the employer's representative had been in attendance at the venue. On receiving a positive answer, he took the view that they had left prematurely as the arbitration had been set down for the whole day. He heard evidence and issued an award dated 23 January.

The employer did not seek to rescind the award in terms of section 144 of the LRA but instead launched an application to review the alleged misconduct of the arbitrator. The Labour Court refused to condone the late delivery of the review application.

On appeal to the LAC, the Labour Court's decision was set aside, as was the arbitrator's award. The LAC ordered the matter to be remitted to the SALGBC for arbitration *de novo* before an arbitrator other than the first arbitrator.

Extract from the judgment:
(**Landman JA)**
[24] The arbitrator was confronted with the fact that the appellant's representative had arrived for the arbitration and had waited for the arbitrator without any information as to whether the arbitrator would be arriving late or not at all. This situation required the arbitrator to exercise a discretion to stand the matter down and attempt to secure the return of those absent or to postpone the arbitration or to proceed with the arbitration. In considering the issue, the arbitrator should have been mindful that his failure to attend at the appointed hour (regardless of the reason for this) was the proximate cause of the appellant's representative leaving when they did.

[25] Instead, the arbitrator put the blame on the appellant. He investigated whether the appellant had abandoned the arbitration ie waived its rights and found that it had done so. The fact that the appellant attended the arbitration and waited for the arbitrator even though he had not arrived timeously and also had previously arrived late for an arbitration, does not signify that the appellant abandoned the arbitration. In Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another, the Court remarked that:

> *'Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our Courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and it is difficult to establish.'*

[26] I am satisfied that there was no ground for the finding by the arbitrator that the appellant had abandoned its right to participate in the arbitration.

[27] There is nothing to show that the arbitrator even considered contacting the appellant that day. There is no merit in the submission that the parties were required to wait the whole

day for the arbitrator to arrive. It does seem that the arbitrator took into account that the second and third respondents were anxious to proceed with the arbitration in the absence of the appellant and to avoid a postponement. They must have known that any award that they secured would be challenged. This puts paid to their submission that they are innocent bystanders.

[28] I am of the view that the arbitrator did not exercise his discretion judicially and that he committed misconduct in the exercise of his powers.....

***Grindrod Logistics (Pty) Ltd v SATAWU obo Kgwele and Others* (JA53/16) [2017] ZALAC 60 (18 October 2017)**

Principles:

1. The test for bias is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias. Mere apprehensiveness on the part of a litigant or even a strongly and honestly held anxiety would not be enough.
2. A generalised allegation of inconsistency is not sufficient. A concrete allegation identifying who the persons are who were treated differently or preferentially and the basis upon which they ought not to have been so treated must be set out clearly.

Facts:

The employee, a driver of an articulated truck loaded with 8 vehicles, was driving to Walvis Bay on route C26. He realised along the way that he was driving on a gravel road. It was at night and it had been drizzling when he reached a "drift" or low-lying bridge with a heavy fast flowing creek traversing the road. He could not make a U-turn as the road was narrow and his carrier very long. He saw other vehicles passing through the drift. On the next morning, he took a calculated risk of crossing the drift but got stuck. He said:

> *'When I was trying to pass the trailer fell, I do not know, something stuck... That is when, after the trailer fell and then water started flowing and the sand and rocks as well towards the truck. I tried pressing the panic button, but there was no response.'*

This incident had serious consequences: out of the 8 vehicles that had been loaded on the hauler, 3 were salvaged and 5 were written-off. The repair costs of the hauler were approximately R1.2 million. The towing costs were in the amount of R204 014.

The employee was subjected to a disciplinary enquiry on two counts: (1) Unauthorised driving off-route and (2) Reckless and negligent driving. He was acquitted on Count 1 on the basis that he was not sufficiently briefed on the authorised route to Walvis Bay. He was found guilty of reckless and negligent driving and dismissed on 2 May 2012.

At the CCMA the commissioner found that the employee had driven the truck in a reckless and negligent manner, and found that the employee failed to exercise the standard of care and skill that could be expected of an employee in his position. The commissioner rejected the union's argument that the employer had been inconsistent in the application of discipline. The dismissal was held to be fair.

On review at the Labour Court it was held that the approach adopted by the commissioner created a clear basis for the perception of bias by the union and the employee. This was so because the commissioner enquired from the employer's representative if he wished to call further witnesses after he had made it clear that he was closing his case. The commissioner adjourned the arbitration for a short period and on resumption, the employer's representative changed his mind and stated that he would call a further witness.

The Court held that the postponement of the arbitration, at the instance of the commissioner, was to give the employer the opportunity to arrange the attendance of a witness it never intended to call but for the commissioner's intervention. The commissioner had advanced the employer's case and gave it an unfair advantage. The court held that objectively the employee reasonably perceived or reasonably apprehended bias on the part of the commissioner and that on this point alone the arbitration award should be reviewed and set aside.

On the substantive issues, the Labour Court found that the commissioner had not properly applied his mind to the facts. He ought to have found that the employer failed to discharge its *onus* of showing that there was a rule prohibiting drivers from driving on gravel roads. The LC held that, even assuming that the rule existed, the rule was not consistently applied and therefore it was unfair to dismiss the employee. The Court further held that the commissioner did not take into account that the employer failed to produce evidence of its actual loss. The LC concluded that the decision by the commissioner is not one which a reasonable decision-maker could have reached, and set aside the award. The LC substituted the award with an order that the employee's dismissal was substantively unfair, and he was reinstated retrospectively from the date of his dismissal without loss of benefits and issued a final written warning valid for a period of six months.

On appeal the LAC held that the LC was wrong in concluding that the employee reasonably perceived or reasonably apprehended bias on the part of the commissioner. The union and the employee did not discharge the burden resting on them to show their reasonable perception of bias on the part of the arbitrator. The test for bias is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias. Mere apprehensiveness on the part of a litigant or even a strongly and honestly held anxiety would not be enough.

On the issue of inconsistency the LAC confirmed that a generalised allegation of inconsistency is not sufficient - a concrete allegation identifying who the persons are who were treated differently or preferentially and the basis upon which they ought not to have been so treated must be set out clearly. The employee had led this evidence, and the employer did not respond by leading evidence to substantiate why the circumstances of other employees who were not dismissed for reckless and negligent driving differed significantly from those in this case. The LAC concluded that the LC had been correct in finding the employer had been inconsistent.

In assessing the sanction for reckless driving the LAC held that the employer was partly to blame for the unfortunate circumstances. All the extenuating factors

(including a clean disciplinary record) militated against the sanction of dismissal. The LC's order was confirmed.

Extract from the judgment:
Phatshoane AJA:
[34] To my mind, to establish that the commissioner acted irregularly in adjourning the proceedings thereby making room or affording Grindrod the opportunity to call further witnesses, the union and Mr Kgwele had to show that he acted mala fide and in breach of his duties so as to afford Grindrod an unfair advantage. That they did not do. It would serve no purpose to speculate on the possible reasons why the commissioner acted as described.
.....
[37] I am of the view that the Court *a quo* was wrong in concluding that Mr Kgwele reasonably perceived or reasonably apprehended bias on the part of the commissioner. The union and Mr Kgwele did not discharge the burden resting on them to show their reasonable perception of bias on the part of the arbitrator.

[38] Generally, a finding of bias on the part of the commissioner nullifies the arbitration proceedings which would have to commence de novo before a different arbitrator. Having concluded that the commissioner was biased it was not open to the Court *a quo*, as it did in this case, to determine the matter on the merits. This was a clear misdirection. It ought to have remitted the matter to the CCMA for a fresh arbitration.
.....
[47] The employer is required to apply the penalty of dismissal consistently in a precedent-setting system for essentially similar misdemeanours as employees who were sanctioned in the past as the misconduct under consideration. A generalised allegation of inconsistency is not sufficient. A concrete allegation identifying who the persons are who were treated differently or preferentially and the basis upon which they ought not to have been so treated must be set out clearly.....
.....
[52] In *SACCAWU and Others v Irvin & Johnson Ltd*, this Court held that if a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not 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 employees profit from that kind of wrong decision. With reference to *Irvin & Johnson Ltd*, this Court, in *Cape Town City Council v Masitho and Others* pronounced:

> *'While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency..., in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future.'*

[53] Needless to say, the outcomes of enquiries would differ due to various factors which ought to be thrown in the melting pot and taken into account. In this case, as testified to by Grindrod's witnesses, the degree of negligence, the types of damages incurred, the severity of the incident, the employees' mitigating factors, would have to be duly considered. Regrettably for Grindrod, while it knew of the case it had to meet, it did not adduce any evidence of the six employees' disciplinary records and/or demonstrate that their personal circumstances differed significantly from those of Mr Kgwele.

[54] In his six years of service at Grindrod, Mr Kgwele had a clean disciplinary record. It is common cause that, although he had been to Namibia prior to the incident, it was for the very first time that he drove to Walvis Bay. It was during a rainy night when he got lost. He was acquitted on Count 1 on the basis that he was not sufficiently briefed on the authorised

route to Walvis Bay. Mr Bhika was unable to say why Mr Kgwele was not so appraised by the control centre which, supposedly, monitors the vehicles en route that he was off-route and on a gravel road. In my view, Grindrod was partly to blame for the unfortunate circumstances. All these extenuating factors militated against the sanction of dismissal.

[55] The commissioner erred insofar as he concluded, without any reference to the employees' disciplinary records and/or personal circumstances, that the cases referred to by the Union to show that the employer was inconsistent in the application of discipline were not sufficiently similar to the case of Mr Kgwele. The Court *a quo* correctly found that Mr Kgwele provided sufficient information to enable Grindrod to investigate the cases of alleged inconsistency in the application of discipline. Its finding that Grindrod was inconsistent in the application of discipline cannot be faulted. In the premises, the dismissal of Mr Kgwele was substantively unfair. The corollary of this is that the arbitration award falls to be reviewed and set-aside.

[56] Although our finding that the dismissal was substantively unfair differs substantially from the finding of the Court *a quo*, it is not necessary to upset its order because same is in line with the order that we would have made. An appeal, by its very nature, is directed at a wrong order and not at incorrect reasoning. The upshot of this is that the appeal must be dismissed.

ASSESSING EVIDENCE

***Department of Health KZN v Public Servants Association of South Africa and Others* (DA4/15) [2018] ZALAC 6 (20 March 2018)**

Principle:
A Chairperson or commissioner faced with diametrically opposed versions must weigh up: (a) the **credibility** of the various factual witnesses; (b) their **reliability**; and(c) the **probabilities** of the parties. It must also be borne in mind that the onus rests on the employer to establish the commission of the misconduct on a balance of probabilities.

Facts:
At the heart of the dispute was a factual controversy as to whether two employees when transporting the patient from IALC Hospital in Durban to Murchison Hospital in Port Shepstone, left the patient alone in the patient compartment of the ambulance; whether they allowed one of the two who was not driving the ambulance to occupy the front seat of the ambulance leaving the patient unattended and finally, whether they abandoned the patient in the ambulance without making proper handover arrangements for the patient when they knocked off.

The arbitrator in a bargaining council was faced with two conflicting versions as to whether the two employees had handed over a patient or abandoned her in an ambulance and gone home, and whether one of the employees attended to the patient en route to their destination or both employees sat in the front part of the ambulance leaving the patient unattended in the patient compartment. The arbitrator found that employer’s version was more probable than that of employees.

On review to the Labour Court, the arbitrator’s award was set aside. The court held that the arbitrator failed to give reasons for rejecting the evidence of the employees

other than to say that they had reason to wear a mask, and as such, he failed to apply his mind to the evidence before him. The conviction on the two charges was found to be a conclusion that a reasonable commissioner could not reach.

On appeal to the Labour Appeal Court, it was held that the determination of such disputes needs an assessment of the credibility of the evidence and decision arrived at on a balance of probabilities. The question that needs to be asked is whether the arbitrator's preference for the employer's witnesses' version over that of the employees and their witnesses was a decision that a reasonable decision-maker could not reach.

The court found that the common cause facts and improbabilities put the employees' version to doubt. The events following the discovery of the patient in the patient compartment of the ambulance (such as the surprise by the shift supervisors when the report was made to them, the immediate telephone calls to the employees and report to the manager) are inconsistent with the conduct of persons who accepted a handover of the patient to them. Further that the version that the one employee was not in the patient compartment with the patient seems more probable than that of the employees because the security guard's statement of what he observed shortly after the incident and not being aware of the significance of what he observed, is corroborated by the fact that there were no patient's stats or data form. Further, he did not inspect the ambulance on arrival because of the fact that the two paramedics were sitting in front as was always the case when the ambulances came to the depot.

The Court found that the arbitrator was alive to the nature of the dispute and assessed the credibility of the witnesses and arrived at a reasonable decision. The Labour Court failed to analyse the approach of the commissioner in dealing with the mutually destructive versions of the witnesses. The LAC upheld the appeal, and the Labour Court's judgment was set aside and replaced with an order dismissing the review application.

Extract from the judgment:

(Tlaletsi DJP:)
[49] The commissioner correctly identified that he was confronted with diametrically opposed versions of the parties and had to establish which version was more probable, bearing in mind the onus resting on the appellant to establish the commission of the misconduct on a balance of probabilities. In Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others, it was held:

> *'[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and(c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i)*

the witness'scandour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[50] In my view, the commissioner was alive to what was expected of him. He considered the versions of the respective witnesses and gave detailed reasons why he preferred the version of the appellant's witnesses over that of the respondents. Therefore, the question that needs to be asked and answered is whether his preference of the appellant witnesses' version over that of the employees and their witnesses is a decision that a reasonable decision-maker could not reach. It needs to be mentioned that the court *a quo* did not undertake any analysis of the approach of the commissioner in dealing with much mutually destructive versions of the witnesses. Neither did it fault or approve of the findings made by the commissioner other than on two aspects that will be discussed below and which I find immaterial.

DOUBLE JEOPARDY / REHEARINGS

Mahlakoane v South African Revenue Service (JA118/13) [2018] ZALAC 1 (25 January 2018)

Principles:

1. The principle of 'double jeopardy' has, as its heart, fairness and means that an employee cannot, generally, be charged again with the same misconduct either found guilty or not guilty of. However, there are instances where breaches of this rule or principle can be condoned - the paramount consideration is fairness to both sides.

2. When it is apparent that the charges of misconduct in the first disciplinary hearing and those in the second hearing are not the same, the double jeopardy principle does not arise for consideration.

Facts:
In 2000 the employee was unemployed, living with her husband and two minor children. She applied for and was granted a child support grant for the two children in terms of the Social Assistance Act, which was repealed and replaced with a new Act (the SAS Acts). When she was employed by SARS in 2006 as a revenue administrator, her entitlement to the support grants ceased in terms of the SAS Acts. Notwithstanding this, she continued to draw the grants in breach of the Act. SARS became aware of this in 2008 and charged her with fraud, alternatively with breaching SARS' disciplinary code.

At her disciplinary hearing in 2008, (the first disciplinary hearing) her defence was that she had informed the South African Social Security Agency (SASSA), which is responsible for distributing the grants, that she no longer qualified for the grants, but they continued to do so. In her defence, she produced two letters purporting to be from SASSA dated 2 October 2006 (one in respect of each child), in terms of which SASSA confirmed that she was no longer entitled to the grants in terms of the social assistance legislation. She said these were in response to her having informed them of her changed employment status. As a result, the Chairperson of the hearing did not find her guilty of fraud, but only of continuing to receive the grants despite not qualifying therefor, which constituted an offence in terms of SARS' disciplinary code. She was given a final warning for this offence.

In 2010 her husband (they had separated by that time) informed SARS that the two SASSA letters she had relied upon in the first disciplinary hearing were forged, in that he and his wife had altered the date they were allegedly sent from October 2007 (the time when SASSA eventually stopped paying the grants) to October 2006. SARS then charged her with misconduct involving fraud, forgery and uttering, alleging essentially that she had forged the dates on the SASSA letters and had presented them as having emanated from SASSA in 2006, well-knowing that was not the case. She was dismissed after the second disciplinary hearing.

The employee lodged a dispute and referred it to arbitration at the CCMA. The CCMA commissioner found that it was unfair for SARS to have subjected the employee to a second disciplinary hearing, as this constituted double jeopardy for reasons including the following:

- the allegations in the second hearing were the same as those in the first hearing;
- SARS' disciplinary code made no provision for a second hearing;
- the first hearing gave the parties the opportunity to lead evidence about the authenticity of the two contested letters;
- the chairperson of the first hearing came to a *"definitive decision that the two contested letters were genuine"*.

The commissioner found that the employee had been unfairly dismissed and ordered her reinstatement with R84 600 backpay. Aggrieved, SARS took the award on review, and the Labour Court reached a very different conclusion on the double jeopardy argument. The LC found that the charges in the two hearings were distinguishable from each other, even though there were some common facts, and that the commissioner had *"conflated the two acts of misconduct into one."* The LC

also found that there was sufficient evidence in the second hearing to find the employee guilty of the offences alleged.

For these reasons, the LC found that the commissioner had failed to apply his mind appropriately to the proven facts, and that this amounted to a gross irregularity. The LC set aside the arbitrator's award and found that the dismissal was substantively fair. The employee then appealed the judgment to the LAC.

The LAC confirmed the principle that whilst an employee cannot generally be charged again for the same misconduct, there are instances where breaches of this rule can be condoned: the paramount consideration as determined by *BMW (SA) (Pty) Ltd v Van der Walt (2000) 21 ILJ 113 (LAC)* and *Branford Metrorail Services (Durban) & others (2003) 24 ILJ 2269 (LAC)* is one of fairness to both sides.

Notwithstanding the above, the LAC concluded that the double jeopardy did not apply in this instance, given that the charges of misconduct in the two enquiries were not the same. In the first, the employee was charged with fraud in relation to continuing to receive child support grants when she did not qualify for them. In the second, she was charged with fraud in relation to altering the dates on the SASSA letters. The LAC further agreed there was sufficient evidence to find the employee guilty of the charges at the second hearing, and that the dismissal was fair. The employee's appeal was dismissed with costs.

While the LAC distinguished between the misconduct that was dealt with at the two hearings, and on that basis concluded that the double jeopardy principle was not applicable, we suggest it would in any event not have been applicable even if the charges dealt with at the two hearings were the same. New evidence had come to light that the employer could not reasonably have been aware of at the time of the first hearing, that had a direct bearing on the trust relationship between the employer and the employee. On that basis, we suggest it would be fair to submit that new evidence to a further hearing.

Extract from the judgment:
(Coppin,JA)

[27] The principle of "double jeopardy" has, as its heart, fairness and this rule or principle simply entails that an employee cannot, generally, be charged again with the same misconduct that he or she was either found guilty or not guilty of. However, there are instances where breaches of this rule or principle can be condoned. The paramount consideration, however, is fairness to both sides.

[28] It is apparent that the charges of misconduct in the first disciplinary hearing in 2008 and those in the second hearing are not the same, so the double jeopardy principle does not arise for consideration. In the first disciplinary hearing, the appellant was charged with fraud, alternatively with a contravention of section 12(2) read with section 17 of the SAS Act, alternatively, with contravening clause 6.1 of the respondent's Codes of Conduct. The main allegations in that disciplinary hearing being that the appellant, well-knowing that she did not qualify for the child support grants in respect of her two children and in terms of the SAS Acts continued to take those grants. In the alternative, it was alleged that she received the grants knowing that she was not entitled to do so. It was also alleged that she failed to inform SASSA of her changed financial circumstances after she became employed by the respondent and as she was required to do by law.

[29] The record of that inquiry shows that the appellant pleaded guilty to the main charge of fraud, but was ultimately found not guilty of that charge on the basis that the evidence did not support that charge. According to the Chairperson in that inquiry, on the evidence *"Ms Mahlakoane made no representation causing a loss or a potential loss to the Department of Social Development"*. The appellant was however found guilty of the first alternative charge as she continued to receive the grants well-knowing that she was not entitled to them and because this constituted an offence, and accordingly, a contravention of the respondent's Disciplinary Code. The appellant was given a final written warning valid for one year on 5 September 2008.

[30] Those charges did not relate at all to the authenticity of the letters or the genuineness on the dates of those letters. Those issues were not part of the charges in the first inquiry and the letters were merely submitted by the appellant in that inquiry in substantiation of her defence that she had reported her changed financial circumstances to SASSA in 2006, but they nevertheless continued to pay the grants despite such notification.

[31] The charges in the second disciplinary hearing emanate from information supplied to the respondent by Mr Setshedi, her estranged husband, that the dates on the letters which the appellant had relied on, had been altered with his assistance. According to him, the date on the original letters from SASSA was 2 October 2007, but they had altered the year to 2006. Part of their *modus operandi* to make the date of 2006 appear authentic, was to rely on copies of the altered original letters and to have those copies certified as true copies of the original letters. The true original letters were discarded, and the appellant produced copies of the falsified letters at the first hearing. According to Mr Setshedi, even the certificates proclaiming the authenticity of those altered copies was also false. They purported to be certifications by a police officer, but the name of the police officer appearing on those certificates was made-up; such a police officer does not exist and the police have never seen the copies. According to Mr Setshedi, he obtained and applied the SAPS stamp himself. He also completed those portions requiring completion himself and had signed as if they had been signed by a member of the police services.

[32] The charges in the second disciplinary hearing, therefore, centred on the falsification of the dates on the letters

UNFAIR DISMISSAL REMEDIES

***Glencore Holdings (Pty) Ltd and Another v Sibeko and Others* (JA16/2016, 2013/JR2189) [2017] ZALAC 65; [2018] 1 BLLR 1 (LAC) (1 November 2017)**

Principle:
The words *'it is not reasonably practicable for the employer to reinstate or re-employ the employee'* in s 193(2) of the LRA refer to the core operational requirements of an employer and not to the conduct of the employee during the arbitration process.

Facts:
The employee was employed as a dozer driver, a hazardous job which required of him to wear protective safety gear, including protective ear muffs. An altercation took place in the course of which the employee refused to wear the usual muffs. He was charged with misconduct in which employer alleged a refusal to comply with a reasonable instruction, insubordination and dishonesty. His dismissal followed.

The arbitrator concluded that the employer had not proved misconduct and that dismissal was substantively unfair, but refused to order reinstatement as desired by the employee. The employee had accused the employer's representative of bribing witnesses, and accused not only the representative but the whole HR personnel in attendance and the Commissioner of 'talking to each other through legs' (ie nudging / signalling under the table). The commissioner had to stop the proceedings on numerous occasions due to his 'unbecoming conduct'. The employee said in his own words that this was just the beginning of a bigger battle between him and the employer. The arbitrator concluded that the employee had behaved badly during the arbitration proceedings and that this behaviour demonstrated a breakdown in the employment relationship to such a degree that reinstatement was an inappropriate remedy.

On review, the Labour Court set the decision aside and substituted an order of reinstatement. The court observed that CCMA arbitrations are litigious proceedings and thus adversarial in nature. During the course of such proceedings, it is not uncommon for parties to behave irrationally. Such irrationality can manifest in the show of emotions, a personal attack on an opponent, wild and unsubstantiated allegations, paranoia and defensiveness. Even seasoned legal practitioners in the course of the fray are known to vent. More so, inexperienced lay litigants can be caught up in litigious proceedings. It was apparent that both parties came out all guns blazing in promoting their cases. The employer stated that it would like to prove that the employee was a "habitual liar" whilst the employee ventured that all the allegations in the disciplinary process were a conspiracy against him. The Court concluded that the employee's conduct, even if deserving of reproach could not be construed to inhibit his reinstatement as a dozer driver, and thus his reinstatement was not, as imagined by the arbitrator, "impracticable" in the sense meant in s 193(2)(c) of the LRA. The court concluded that the award was one to which a reasonable arbitrator could not have come, and so ordered reinstatement.

On appeal, the Labour Appeal Court upheld the LC's judgment.

Extract from the judgment:
(Sutherland JA:)
[3] Sibeko wanted reinstatement. Consequently, the provisions of section 193(2) of the LRA applied. That section reads thus:

'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

a. *the employee does not wish to be reinstated or re-employed;*
b. *the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
c. *it is not reasonably practicable for the employer to reinstate or re-employ the employee; or*
d. *the dismissal is unfair only because the employer did not follow a fair procedure.'*

.....

[11] Hardie AJ, at [22] of the review judgment, correctly understood that (c) was relevant to the core operational requirements of an employer, a proposition made clear in Maepe. He concluded that Sibeko's conduct, even if deserving of reproach could not be construed to inhibit his reinstatement as a dozer driver, and thus his reinstatement was not, as imagined by the arbitrator, "impracticable" in the sense meant in (c). This conclusion is unquestionably correct because the role performed by Sibeko as a dozer driver did not embrace a dimension that a display of bad manners in the arbitration proceedings would render a reinstatement inappropriate. The true issue is not that Sibeko was justified in his outbursts, or that there is a degree of mitigation in the given circumstances for his poor manners, but rather that the functional role performed by a dozer driver within the employer's organisation, including the functional rapport or lack therefore with his superiors, was not adversely impacted by such conduct, within the meaning of (c).

***Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union and Others* (JA56/2015, JR1676/2012) [2017] ZALAC 80 (18 December 2017)**

Principle:
The decision of the arbitrator not to award compensation where there has been procedural unfairness is permissible in terms of s194(1) of the LRA which requires any compensation to be “just and equitable” in the circumstances.

Facts:
Seven employees had been subjected to a disciplinary enquiry. The enquiry was protracted and hopped along for several months. On the eighth occasion the enquiry had been convened before an independent chairman the enquiry broke up amidst violence, the chairman being assaulted, the recording device disrupted, and the chairman’s cell phone, with which he tried to record the fracas, being forcibly taken from him and thrown against a wall. As a result, the enquiry was abandoned. The employer then summarily dismissed all seven employees. Those who had physically engaged with the chair were reported to the police and a criminal charge laid.

An unfair dismissal dispute was referred to arbitration; it was held that the dismissal of an employee for participation in a violent disruption of a disciplinary enquiry was substantively fair, but because that dismissal was not preceded by an enquiry into the act of disruption *per se*, it was procedurally unfair. Because of the very serious conduct which justified the dismissal, in the exercise of a discretion, the arbitrator made no compensation order as contemplated by section 194(1) of the LRA.

One employee brought a review and the labour court concluded, on the basis that a collective agreement that was binding on the parties which prescribed an enquiry before a dismissal could be effected, had not been observed, the arbitrator had misdirected himself and set the award aside and remitted the matter for a fresh arbitration.

On appeal the Labour Court’s order was set aside and the award confirmed. The LAC held that the collective agreement argument was a red herring because the dispute referred was an unfair dismissal case as contemplated by section 186, not a dispute about a breach of a collective agreement, a species of dispute regulated by section 24. The LAC held that on the facts the dismissal was plainly fair and the finding that the dismissal was procedurally unfair solely because there had been no

prior hearing in the circumstances where the employee disrupted a disciplinary enquiry, had not been subjected to a cross review or cross appeal, and thus, it was not open to the appeal court to express a view on the propriety of that finding which had to stand. It was also held that the exercise of the arbitrator's discretion not to award any compensation was, on the facts, a wholly proper decision, fully consistent with the test in *Sidumo* that it could not be said that the decision was one to which a reasonable arbitrator could not come.

Extract from judgment
(Sutherland JA:)
[22] Section 194(1) of the LRA requires any compensation to be "just and equitable" in the circumstances. The subsequent decision of the arbitrator not to award compensation on the grounds that the riotous behaviour by Skhosana and her co-workers in the enquiry was so serious that it warranted a deviation from the usual response to procedural unfairness was, in the circumstances, a proper exercise of discretion and is not assailable. In addition, it may be mentioned that the respondent, when exercising her right to *audi alterem partem* in the arbitration proceedings persisted with a mendacious denial of the facts and therefore showed no remorse whatsoever when that opportunity was available to her. Also, no less important was the standing and role of the respondent in the appellant's employ, which if anything was rightly weighed as aggravation.

OPERATIONAL REQUIREMENTS

***National Union of Metalworkers of South Africa (NUMSA) v General Motors South Africa (Pty) Ltd* (P341/10) [2017] ZALCPE 26 (14 December 2017)**

Principle:

Failure to issue a s 189 (3) notice is not a mere omission to follow a procedural step in a retrenchment exercise. It is a violation of rights of employees to influence important aspects of a retrenchment through meaningful consultation.

Facts:
After the retrenchment of the individual applicants, NUMSA launched an application in terms of section 189A (13) of the LRA for an order declaring the dismissal to be procedurally unfair and concomitant relief. In the judgment handed down on 17 June 2009, the court found the individual applicants' dismissal procedurally unfair. The court left the determination of the amount of compensation (if any), due to the individual applicants to the court determining the substantive fairness of the individual applicants' retrenchment.

Eight years later the Labour Court finally resolved the matter of compensation. The union had conceded that there was an economic reason behind the retrenchments and so the court did not have to consider the substantive fairness of the retrenchments. The union alleged that the procedural unfairness lay in the failure to issue a notice in terms of s 189(3) of the LRA.

This section is integral to the obligation in s 189(2) on the employer and the other consulting parties to consult and engage in a meaningful joint consensus-seeking process and attempt to reach consensus on appropriate measures to avoid the dismissals; to minimise the number of dismissals; to change the timing of the

dismissals; and to mitigate the adverse effects of the dismissals; the method for selecting the employees to be dismissed; and the severance pay for dismissed employees.

The s 189(3) notice involves a disclosure in writing of "all relevant information", including, but not limited to the reasons, the alternatives considered, the reasons for rejecting each of those alternatives, the number of employees likely to be affected, and so on.

Although the employer argued that there was no prejudice in not issuing a s 189(3) notice, the Labour Court did not agree. The court outlined the important purposes of a s 189(3) notice and its role in empowering employees to consult and engage in a meaningful joint consensus - seeking process and attempt to reach consensus on a number of prescribed issues. The court held that being denied information robbed employees of the chance to influence important aspects of the retrenchment. The court ordered compensation of six months' remuneration to all applicants.

Extract from the judgment:
(Lallie J:)

[10] The applicant sought maximum compensation for the procedurally unfair retrenchment of the individual applicants. The respondent denied that the individual applicants should be compensated on the basis that notwithstanding its failure to issue the notice in terms of section 189 (3), there was sufficient interaction between the parties in the form of correspondence and meetings which preceded the retrenchment in which issues affecting the retrenchment were discussed. It was the respondent's further argument that the applicant led no evidence of the prejudice the individual applicants suffered as a result of its omission. I do not agree. I accept the applicant's argument that the purpose of issuing the section 189 (3) notice is clear. It is to afford the parties involved in a retrenchment exercise an opportunity to consult and engage in a meaningful joint consensus - seeking process and attempt to reach consensus on a number of prescribed issues. Before the individual applicants' dismissal, the applicant asked the respondent to issue the section 189 (3) notice but the respondent refused. The refusal had serious consequences because section 189 (3) creates rights and obligations for the consulting parties. The respondent did not fulfil its obligation to disclose to the applicant its anticipation of the retrenchment. The applicant was denied of information the respondent would have been obliged to disclose had the notice been issued. The power of having relevant information during a retrenchment exercise cannot be underestimated. The applicant was unable to influence important aspects of the retrenchment and was further denied of the intervention of an independent facilitator whose duty was to ensure the fairness of the retrenchment. The interaction between the parties that the respondent seeks to rely on does not constitute consultation as envisaged in section 189. Failure to issue the section 189 (3) notice was not a mere omission to follow a procedural step in a retrenchment exercise. It is a violation of rights of employees who faced the reality of losing their jobs through no fault on their part. I am therefore satisfied that compensation is due to the individual applicants.

[11] I have considered the applicant's argument that the individual applicants be awarded the maximum compensation prescribed in section 194 of the LRA as well as the authority that the applicant sought to rely on. I am not convinced that the circumstances of this case justify the amount sought by the applicant. Section 194 (1) of LRA requires compensation to be just and equitable in all the circumstances. When all those requirements are taken into account including of the existence of an economic rationale for the retrenchment by the applicant, it is just and equitable to grant each individual applicant compensation equivalent to six months' remuneration.

***South African Breweries (Pty) Ltd v Louw* (CA16/2016, C285/2014) [2017] ZALAC 63 (24 October 2017)**

Principle:
An employer, who seeks to avoid the dismissal of a dislocated employee, and who invites the dislocated employee to compete for one or more new posts, does not act unfairly. In a corporate restructuring, requiring an employee to compete for a post is not a method of selecting for dismissal; rather it is a legitimate method of seeking to avoid the need to dismiss a dislocated employee. A competitive process to seek to avoid retrenchment is not unfair.

Facts:
The employee was employed by SAB as the sales manager, Southern Cape Region, based in George. Owing to a restructuring of the business in 2013, the employee's post became redundant. The functions formerly performed by him in the sales field were subsumed into a newly created post of area manager, based in George. The new post embraced other management functions in addition to managing sales. It included operations, which functions were to be integrated with sales in the new business model. The new post was also pitched at a higher level of management.

SAB invoked section 189 of the LRA when the planning for a wide-ranging restructuring programme identified his post for abolition and absorption into the new post. The employee was notified of possible posts for which he could apply. He applied for the restructured area manager post but declined to apply for a similar post in Aliwal North. In the selection process his performance record was taken into account. He was not successful in his application for the area manager post.

When the employee was retrenched, he was aggrieved and alleged unfair retrenchment. The Labour Court found he was unfairly retrenched and reinstated him retrospectively. The two key findings of the LC were:

1. The retrenchment was *substantively* unfair because the employee should have been offered / appointed to the vacant post of area manager, based in Aliwal North, which would have discharged the employer's obligation to exhaust all reasonable measures to avoid a dismissal; and

2. The retrenchment was *procedurally* unfair because objectively unfair selection criteria were chosen; in particular, the past performance ratings of the candidates interviewed to fill the newly created post of area manager were used, and the employee did not accept that his own rating as "2" was correct or fair, which factor prejudiced his prospects of selection.

On appeal to the LAC, the Court found that because the employee did not apply for the Aliwal North position, the employer could not be required to offer it or appoint him to it. On the fairness of the interview panel taking into account past performance ratings as selection criteria, the LAC found that under the circumstances this was not unfair. The person appointed had in any event been rated higher than what the aggrieved employee felt he should have been rated, and the ratings were in any

event only one of several factors taken in to consideration and were not the determinative consideration.

The LAC found that an employer, who seeks to avoid the dismissal of a dislocated employee, and who invites the dislocated employee to compete for one or more new posts, does not act unfairly. In a corporate restructuring, requiring an employee to compete for a post is not *a method of selecting for dismissal*; rather it is a legitimate method of *seeking to avoid the need to dismiss* a dislocated employee. A competitive process to seek to avoid retrenchment is not unfair.

Unusually this decision of the LAC refers to no previous cases on restructuring for profit. If it had, it would have noted the trend that the criteria for appointment to the restructured position have to be clear and transparent. (There is often a tendency to use vague, subjective criteria, such as 'adding value to the company' and 'corporate fit'.) The vaguer the criteria, the more likely it is that in reality the selection committee is relying on each applicant's track record and reputation within the company, often viewed through the subjective lens of a supervisor or colleague. When this happens, the retrenchment crosses over from being a no-fault dismissal to one based on performance. And if in this transition, employees are not given notice of any allegations of poor performance or a perceived lack of corporate fit, they have no opportunity to defend themselves.

The use of subjective selection criteria can render a retrenchment unfair. The less capable the criteria are of measurement against objective standards other than the opinion of the person making the selection, the less likely they are to be fair. The less objective the proposed criteria for selection, the more important the obligation to consult over selection criteria becomes.

This judgment is a stark contrast to a previous attempt by SAB to restructure for greater profitability in FAWU & others v South African Breweries Limited (LC C1008/2001, judgment delivered 3 September 2004. In that case it was held that if there is a way in which the employer could have addressed the problems by using solutions which preserve jobs rather than which cause job losses (or which could lead to further job losses), the court should not hesitate to deal with the matter on the basis that the employer should have used that solution, rather than the one which causes job losses.

Extract from the judgment:
(Sutherland JA)

[21] In this matter, what has been inappropriately labelled as the "selection criteria" is the inclusion of past performance ratings in the assessment process for the competitive process to select an incumbent for the new job of area manager, George. This is not a method to select who, from the ranks of the occupants of potentially redundant posts, is to be dismissed and is not what section 189(2)(b) is concerned to regulate. The fact, as illustrated in this matter, that a dislocated employee, who applies for a new post and fails, and by reason thereof remains at risk of dismissal if other opportunities do not exist does not convert the assessment criteria for competition for that post into selection criteria for dismissal, notwithstanding that broadly speaking it is possible to perceive the assessment process for the new post as part of a long, logical, causal chain ultimately ending in a dismissal. Accordingly, in our view, it is contrived to allege that the taking into account of

performance ratings in a process of recruitment for a post is the utilisation of an unfair method of selecting for dismissal as contemplated by sections 189(2)(b) and 189(7).

[22] An employer, who seeks to avoid dismissals of a dislocated employee, and who invites the dislocated employee to compete for one or more of the new posts therefore does not act unfairly, still less transgresses sections 189(2) (b) or 189(7). The filling of posts after a restructuring in this manner cannot be faulted. Being required to compete for such a post is not *a method of selecting for dismissal*; rather it is a legitimate method of *seeking to avoid the need to dismiss* a dislocated employee.

***NUMSA obo members v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd)* (JS596/15) [2017] ZALCJHB (13 December 2017)**

Principles:

1. ***Fry's Metals*** and ***Algorax*** are still good law, to the extent that they allow dismissal for operational reasons in a situation where the employees did not accept changes to their working conditions aimed at addressing the employer's operational requirements.
2. It is only when all three elements exist - firstly, that there is clear evidence of a demand, secondly a refusal to agree to that demand, and thirdly that the ensuing dismissal, objectively viewed, was as a result of that refusal, that this would qualify as an automatically unfair dismissal under s187(1)(c) of the LRA.

Facts:

The Company decided during 2014 that it would have to restructure its operations in order to survive. It reviewed organisational structures and redefined job descriptions. The Company and NUMSA agreed to a process involving voluntary severance packages being offered and limited duration contracts not being renewed, which reduced employee numbers by around 500. But further remedial action was required.

Although an interim agreement for 6 months was reached in terms of which employees worked under redesigned job descriptions, no consensus was ultimately reached on the new structure. The Company then commenced retrenchment consultations under s189. Employees were offered positions under the new structure - 71 employees accepted the offer, but 733 declined and were then retrenched.

Whilst the Union did not challenge the Company's need to restructure and that job descriptions had to be redesigned for this purpose, it disputed that the employees were dismissed for operational reasons. The Union submitted they were dismissed for refusing to accept the Company's demand to sign new contracts of employment, which was automatically unfair in terms of s S187(1)(c). The Company submitted that the dismissals were for operational reasons and were fair in terms of s189.

The LC found that the principles laid down by the ***Fry's Metals*** and ***Algorax*** judgments continue to apply to the amended s187(1)(c), in the sense that where the reason for a dismissal is the refusal to accept the employer's demand, that is prohibited as automatically unfair. However a dismissal for operational reasons is *not* prohibited under s187(1)(c).

The LC said that of importance in all automatically unfair dismissal assessments, was the reason the employer used to dismiss. Even if there had been a demand, a refusal to agree to the demand and a dismissal, if the evidence shows that the true reason for dismissal was not because of the refusal, that dismissal was not automatically unfair.

Based on the evidence led, the LC found that the dismissals in this case were for operational reasons and not because of the employees' refusal to agree to a demand. The Court also commented that there is a difference between an offer and a demand. The fact that the employees were offered alternative employment as a means of minimising job losses, did not make the dismissals automatically unfair.

What becomes crucial is the *real* reason for the dismissal - if that is due to operational requirements, this is not outlawed by s187(1)(c). It is only when all three elements exist - firstly, that there is clear evidence of a demand, secondly a refusal to agree to that demand, and thirdly that the ensuing dismissal, objectively viewed, was as a result of that refusal, that this would qualify as an automatically unfair dismissal.

The LC found that the dismissals were substantively fair.

Extract from the judgment:
(Moshoana,J)

26. This is one of those matters where the true reason for the dismissal is being disputed. As pointed out elsewhere in this judgement, the first respondent contends that the second applicants were dismissed for operational requirements. Both the applicants contend that the true reason for the second applicant's dismissal is because they refused to accept a demand made by the first respondent to sign new contracts of employment. In the amended statement of case under legal submission, the applicants contended that the dismissals of the individual applicants were unfair in terms of section 187 (1) (c) of the LRA because they were dismissed for refusing to accept a demand in respect of a matter of mutual interest between them and the first respondent.....

27. .....In order to fall within the ambit of s 187(1)(c) a dismissal must have a purpose - the compulsion of the employees concerned to accept a demand in respect of a matter of mutual interest between employer and employee. If a dismissal is not for that purpose, it falls outside the ambit of s 187 (1) (c).

.....

36. .....A dismissal where the reason for it is the refusal to accept a demand is prohibited. However, a dismissal where the reason for it is the operational requirements is not to be precluded in the section.....

.....

44. .....Like any other automatically unfair dismissal, of importance is the reason the employer used to dismiss. Even if all the three elements (demand, refusal and dismissal) are present, if the evidence shows that the true reason for the dismissal so effected is not because of the refusal, a dismissal shall not be automatically unfair. In a situation where, as in this case, it is shown that the change is offered as an alternative to avoid retrenchment, it must follow that applying the two stage approach, the dominant reason would be the operational requirements. .....

61. For the provisions of section 187(1)(c) to obtain, there must be some credible evidence that shows that firstly there was a demand and secondly a refusal. Thirdly that the ensuing dismissal objectively viewed, was as a result of the refusal (casual connection). I struggled to observe the demand alleged in this case by the applicants.

62. Paragraph 16 of the letter refers to a request to indicate willingness to accept an alternative reasonable offer. An offer and a demand are two distinct things. The evidence which surprisingly the applicants sought to rely on does not credibly show that there was a demand and a refusal which led to a dismissal. .....
.....
66. In the circumstances I conclude that the second applicants were not automatically unfairly dismissed. I particularly conclude that the amended section 187(1)(c) does not outlaw, as argued, dismissal for operational reasons. All it does is to introduce as it were final dismissal if the reason is the refusal to accept the demand. *Fry's Metals* and *Algorax* are still good law to the extent that they allowed dismissal for operational reasons in a situation of not accepting change aimed at addressing the operational requirements of an employer.

***Woolworths (Pty) Ltd v SACCAWU and Others* (JA56/2016) [2017] ZALAC 54 (19 September 2017)**

Principle:
An operational requirements dismissal will be substantively unfair if the employer fails to show that it properly considered the alternatives to retrenchment.

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

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

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

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

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

On appeal at the LAC, the decision turned rather on whether the retrenchments were substantively fair. The decisive factor was the LAC's view that the employer had failed to show that it properly considered the alternatives to retrenchment, given that it had misconstrued that the union's last proposal was no different to its previous one. Had Woolworths properly understood the union's last proposal, the LAC believed it would have realised that the retrenchment of at least some of the employees could have been avoided.

But the Court did not agree with the LC's remedy that the employees be reinstated, given that the full time posts were redundant, and awarded each employee 12 months' remuneration as compensation.

Extract from the judgment:
Tlaletsi DJP, Landman JA and Phatshoane AJA

[42] The question, whether there was a proper consideration of alternatives, in the context where it is conceded that the employer was justified in restructuring its workforce, can only relate to alternatives to dismissal as there was no possibility of avoiding the restructuring. A proper consideration of alternatives is not necessarily linked to the alternatives that were raised by the employer or employee parties at the consultation but must be open to include the possibility that effect would be given to meritorious alternatives.

.....

[45] Woolworths did not understand that SACCAWU's last alternative proposal, set out in its letter of 30 October 2012, differed from its previous proposal regarding an alternative to avoid dismissal. When a proposal is misunderstood and therefore not explored it means that the employer has not shown that this alternative had been properly considered.

.....

[47] The sudden decrease in take home pay, which was a major concern for the full-timers, would have had a severe financial impact on them. Woolworths appreciated this and was prepared to make available an amount of R70 000 (it is not clear whether this would be fully taxable) during the voluntary stage as a sweetener or inducement and at the stage of the possible retrenchment. In the course of the consultation process it may have retained this character but it would also have served

as token compensation for the loss of the employees' full-time status and it could be regarded, in a sense, as an alternative to dismissal.

[48] The principle that compensation for the loss would be payable was established. It was on the table and the union could have pressed for more generous compensation as Woolworths would be making significant savings on its wage bill. Woolworths may have been reluctant to increase the amount of compensation and may have pointed to the fact that other full-timers had, during the voluntary process accepted the R70 000. But that was a separate process and the union was excluded. An increase in this amount was not explored and the union appears to have been agreeable to accept less compensation but of course this must be seen in the context of its related proposal.

[49] An alternative proposal that could have been considered would have been to have ring fenced the wages of the full-timers and to the extent that the law allowed this, to forgo wage increases until the corresponding flexi-time wage had risen, by sectoral determination increases or amendments and otherwise, to the level of the ring fenced wage.

[50] There could be many permutations of such an alternative and ways of funding it. For instance, the R70 000 could have remained or have been exchanged for the ring fenced option. Consideration could have been to accelerate the meeting of a ring fenced wage and an increasing flex-time wage, by gradually reducing the ring fenced wage. There is no way of knowing what the ring fenced alternative or inducement would have turned out had it been pursued but it is sufficient for purposes of this appeal to find that it was a reasonable alternative that was not considered.

***Kenco Engineering CC v National Union of MetalWorkers of South Africa (NUMSA) obo Members* (JA/29/16) [2017] (LAC) (1 August 2017)**

Principle:
The duty to show that the selection criteria used for retrenchment were both objective and fair rests on the employer. The employer must prove that it selected the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties, or failing that, criteria that are fair and objective.

Facts:
Kenco Engineering is an engineering company operating mainly in the mining industry. The expiry of its subcontract with an entity called Bateman heralded its financial woes. Following the expiry of this contract another company, Gauge Engineering (Pty) Ltd, stepped in and threw Kenco a lifeline by subcontracting some of its work to the embattled corporation. Gauge had set certain conditions to Kenco as part of the agreement, which included that Kenco employs skilled employees who could manufacture and install mining instruments (pipelines and valves) according to Gauge's standards.

But it appears there was still a need for Kenco to retrench some employees and it commenced a consultation process under s189 of the LRA, proposing that skills, work performance, attendance and safety records be applied as selection criteria. 23 employees were subsequently retrenched and paid severance packages, 19 of whom were included amongst the applicants in this matter. NUMSA challenged the

procedural and substantive fairness of the retrenchments in the Labour Court, arguing that LIFO should have been used as selection criteria.

At the commencement of the LC proceedings, the employer took the jurisdictional point that the union ought to have brought an application under s189A(13), if it wished to challenge the procedural fairness of the retrenchments. This section provides that if an employer does not follow a fair procedure, the LC may –

(a) compel the employer to do so;
(b) interdict the employer from retrenching prior to doing so;
(c) order the employer to reinstate an *employee* until it has done so;
(d) make an award of compensation, if appropriate.

S189A(17) requires any application under s189A(13) to be made within 30 days of the employees having been given notice of their retrenchment, and s189A(18) goes further and prevents the LC from dealing with procedural fairness in any subsequent dispute about the substantive fairness of a retrenchment under s191(5)(b)(ii).

Applying these provisions, the LC ruled that in the absence of an application under s189A(13), it did not have the power to determine the procedural fairness of the dismissals. This ruling again stresses the importance of parties following the prescribed LRA procedures in processing disputes.

With regard to substantive fairness, the case focussed on the criteria used for retrenchment and how they were applied. The selection criteria adopted by Kenco were based on skills, work performance, attendance records and safety records. 3 evaluators were used by the employer to assess these criteria, and evidence led gave a broad description of how the evaluation process worked. This involved the evaluators giving each employee a score on the identified criteria, and if there were differences of opinion amongst the evaluators, these were discussed.

This evidence was led from a manager who had not been directly involved in the evaluation process, and none of the evaluators gave evidence. The union challenged the objectivity of the selection criteria, why the retrenched employees were selected in particular, rather than others, and why the retrenchment didn't apply solely to those employees working on the Bateman contract, who it felt should have gone first.

Whilst the LC found that the employer did establish a general need to retrench and that there were no viable alternatives to retrenchment, it concluded that even if the selection criteria might be considered fair and could have been applied in a fair and objective manner, the employer did not prove that the selection of the individual employees for retrenchment, using those criteria, was done in a fair and objective manner. The onus is on the employer to prove the fairness of the dismissals, and there was no evidence from the employer that the employees retrenched had been evaluated and found to be wanting in terms of the chosen criteria.

Taking into consideration that there was no evidence that the business conditions which had led to the retrenchments had improved, or that the retrenched employees' skills could have been used in the restructured business, the LC did not order

reinstatement and awarded each of the retrenched employees 8 months' remuneration (in addition to the severance packages they had already received).

On appeal, the LAC agreed with the approach adopted by the LC. The LAC confirmed that the duty to show that the selection criteria used for retrenchment were both objective and fair rests on the employer. The employer must prove that it selected the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties, or failing that, criteria that are fair and objective. The employer in this case was required to place sufficient evidence before the court to enable it to assess whether or not it used and applied skills, work performance, attendance records and safety records in a fair and objective manner, thereby discharging the onus reposing on it. But it did not do so. The selection criteria used by the employer were simply not demonstrated to have been fairly and objectively applied.

This judgment highlights the clear distinction between procedural and substantive fairness in retrenchment disputes, and the need to follow the proper process in an attempt to challenge the fairness of any retrenchment.

Regarding criteria for retrenchment, this judgment recognises that LIFO is not the only possible criteria for retrenchment. But this judgment is a reminder that the onus is on the employer to prove the fairness of any selection criteria used and that they were applied in a fair and objective manner. This will inevitably require detailed evidence from the management team that applied the criteria and selected the employees to be retrenched. Cases will be won or lost on the strength of this evidence.

Extract from the judgment:
(Phatshoane AJA)

[26] The employer bears the *onus* to prove that the dismissal of the individual respondents was fair. The duty to show that the criteria used was both objective and fair in its application rests on the employer. The employer must prove that it selected the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties, or if no criteria have been agreed, criteria that are fair and objective. Kenco was required to place sufficient evidence before the Court *a quo* to enable the court to assess whether or not it used and applied skills, work performance, attendance records and safety records in a fair and objective manner, thereby discharging the *onus* reposing on it. It did not do so.

.....

[28] Without knowing what skills or special skills the employees who remained behind had; what skills the individual respondents had compared them to; what years of service they all had; what performance records, safety records and attendance records all the employees including the individual respondents had; the Court *a quo* was left unable to conclude on the basis of Kenco's mere *ipse dixit* that there was a fair reason for the selection of the individual respondents for retrenchment. The selection criteria were simply not demonstrated to have been fairly and objectively applied.

COLLECTIVE BARGAINING AND COLLECTIVE AGREEMENTS

Imperial Cargo Solutions v SATAWU and Others (JA63/2016) [2017] ZALAC 47 (1 August 2017)

Principle:
In the absence of any other agreement creating an obligation on employees to perform specific duties, the obligation to perform those duties falls away upon cancellation of the collective agreement in terms of which those specific duties were agreed.

Facts:
The appellant, Imperial Cargo, is a logistic company with a large fleet of trucks. It transports freight cargo, consumable goods and other goods on behalf of various clients throughout the country. Imperial employs drivers, many of whom are members of SATAWU.

The transport of freight cargo by truck requires safety measures to prevent goods falling off the truck. In the past, Imperial employed drivers' assistants whose duties were to assist the driver to load and offload the cargo, and also to perform the "tarping" duties. In 2007, Imperial abolished the position of drivers' assistants. A decision then had to be taken as to who would perform the duties previously done by the drivers' assistants.

Imperial and SATAWU concluded a collective agreement in 2007 known as the "Guard Fee Agreement" (the collective agreement). In terms of this collective agreement, it was left to the drivers to either perform the ancillary duties themselves or appoint assistants to undertake those ancillary duties. An agreed amount of money was in addition to their normal salaries paid in lieu of the ancillary duties. The drivers could keep the money for themselves if they personally performed the ancillary duties or pay assistants they employed specifically for such duties. The agreed amount was subject to an annual increase.

In 2015, SATAWU wanted to negotiate an increased guard fee above the agreed annual increase rate. When Imperial refused to meet the demand, SATAWU informed it that it was cancelling the collective agreement on one month's notice. SATAWU also informed Imperial that as from 01 February 2015, the drivers would no longer perform the ancillary duties as provided in the collective agreement. Imperial was advised to make the necessary arrangements to ensure that the ancillary duties be carried out by persons other than the drivers.

Imperial viewed the cancellation of the collective agreement and refusal to perform ancillary duties as unprotected strike action, being a 'partial refusal to work'. Imperial filed and obtained urgent interim relief directing the drivers to perform all ancillary duties on the basis that their refusal to do the work amounted to unprotected strike action.

At the Labour Court the dispute was whether the drivers' refusal to perform the ancillary function amounted to a strike action. The court concluded that refusal to perform the ancillary duties would not constitute strike action as the collective

agreement in terms of which it was performed was cancelled, and the duty to perform those duties accordingly fell away. Further, that there was no general refusal to work but only a refusal to work in accordance with the terms of the cancelled collective agreement.

On appeal at the LAC, the LC's judgment was upheld. The LAC held that in the absence of any other agreement creating an obligation on the employees to perform the ancillary duties, and since they were entitled to cancel the collective agreement on notice, the obligation fell away upon cancellation of the agreement. Similarly, the obligation of the employer to pay the employees in lieu of ancillary functions in terms of the collective agreement also fell away.

This judgment raises interesting questions about what happens when a long established collective agreement is terminated – what fills that void? Consider the facts of this case: for 8 years necessary functions (we think the word 'ancillary' used in the judgment is misleading) were done by drivers or their assistants. These were core functions, paid for in addition to basic remuneration, that were then withdrawn. Whilst the LAC concluded that these actions did not constitute a strike as a result of the cancellation of the collective agreement, we note that the definition of a strike under s213 of the LRA even includes the withdrawal of voluntary overtime.

Extract from the judgment:
(Tlaletsi AJP:)
[19] It is clear from the papers that there was no written or verbal contract of employment that set out that the employees were obliged to perform ancillary duties as their normal duties. The only agreement providing for the performance of the ancillary duties is the collective agreement which gave the employees the option to either perform the functions themselves or employ assistants to perform the said duties. In both instances, the appellant was obliged to pay for whoever performed these ancillary functions.

[20] In the absence of any other agreement creating an obligation on the employees to perform the ancillary duties, and since they were entitled to cancel the collective agreement on notice, the obligation fell away upon cancellation of the agreement. Similarly, the obligation of the employer to pay the employees in lieu of ancillary functions in terms of the collective agreement also fell away. It would make no sense to contend that the appellant's obligation to pay for the ancillary functions fell away upon cancellation of the agreement by the respondents but that the obligation to perform the ancillary functions survived the cancellation. Without deciding on the correctness or otherwise of the ratio in the *SAMWU* matter, its facts and circumstances are clearly distinguishable from this case.

***SACOSWU v POPCRU & others* (LAC JA87/2015, judgment 31 May 2017)**

Principle:
The LRA does not prohibit the bargaining with a minority union, nor does the employer breach an existing s18(1) collective threshold agreement in doing so.

Facts:
POPCRU concluded an agreement establishing representation thresholds with the Department of Correctional Services (DCS) for the acquisition of s 12, 13 and 15 organisational rights by minority trade unions in the workplace. Thereafter the DCS concluded a collective agreement with SACOSWU, a minority union which had not

attained the stipulated representativeness threshold, granting to the union stop order facilities for a limited period and the right to represent members in grievance and disciplinary proceedings. POPCRU referred a dispute concerning the interpretation and application of its collective agreement with the DCS to the GPSSBC for conciliation and then arbitration. The arbitrator dismissed POPCRU's application.

On review, the Labour Court (***POPCRU v Ledwaba NO & others*** **(JR 636/2012) [2013] ZALCJHB 244 (5 September 2013)**) found that the arbitrator's reliance on the *Bader Bop decision* constituted an error of law because in that matter no threshold agreement applied. Since the agreed threshold had not been achieved by SACOSWU, the Court found that the DCS was not entitled to conclude a collective agreement with SACOSWU. The award of the arbitrator was set aside and substituted with an order declaring the SACOSWU collective agreement invalid and setting it aside. The court declared that SACOSWU was not entitled to exercise organisational rights in the DCS or conclude a collective agreement with the DCS until the agreed representation threshold had been achieved.

On appeal to the LAC the decision of the Labour Court was set aside on the basis that s20 of the LRA provides that nothing in Part A of Chapter III, which must include a s 18(1) threshold agreement, precludes the conclusion of a collective agreement that regulates organisational rights. This accords with the recognition that minority unions are entitled to have access to the workplace so as to challenge the hegemony of majority unions, at least to represent their members. On the same basis, the deduction of trade union subscriptions for a limited period was permissible. The appeal was consequently upheld.

Extract from the judgment:
(Savage JA)

[33] It follows that the agreed threshold which may be the subject of a s18(1) agreement has the effect of giving meaning to what constitutes "*sufficiently representative"*, as provided in s11, in order for a union to be conferred ss12, 13 and 15 organisational rights in a workplace. Where a union has achieved the threshold agreed by way of a s18(1) agreement, ss12, 13 and 15 rights will then as a matter of right be conferred on the union. However, as was made clear in *Bader Bop,* there is nothing in Part A of Chapter III which expressly states that unions which do not meet the required threshold are prevented from using the ordinary processes of, as is relevant for current purposes, collective bargaining to persuade the employer to grant such rights to the minority union.

[34] Furthermore, since s20 provides that "*nothing"* in Part A precludes the conclusion of an agreement regulating organisational rights, on a plain reading of the provision "*nothing"* appears to me to mean nothing in the Part, including a s18(1) agreement. To find differently would amount to a narrow reading of s20, which *Bader Bop* found to be "*inappropriate"*. This means that even where a s18(1) agreement exists, this does not preclude the conclusion of a s20 collective agreement between an employer and a minority union which has bargained for the rights contained in that agreement. Were s18(1) to be interpreted so as to bar the conclusion of such an agreement under s20, this would, as was cautioned in both *Bader Bop* and *AMCU*, serve to disregard the "*internationally recognised rights of minority unions to seek to gain access to the workplace",* to organise within the workforce or to canvass support to challenge the hegemony of established unions.

[35] There is therefore merit in SACOSWU's contention that the minimum threshold agreed in a s18(1) agreement to obtain ss12, 13 or 15 organisational rights, establishes a minimum, which, once reached, permits the rights to be conferred by the employer on such a union with no need to bargain for them. Having regard to s20, and despite a s18(1) agreement having been concluded, a minority trade union is not barred from seeking to be granted ss12, 13 or 15 organisational rights and to conclude a collective agreement with the employer in order to record the grant of any such rights.

[36] While s 23(1) provides that a collective agreement is binding on the parties to it, a threshold agreed by an employer obliges the employer to confer ss12, 13 and s15 rights upon a union which had achieved the threshold agreed in the s18(1) agreement. It does not bar the employer from bargaining collectively with a minority union which seeks to have any organisational rights conferred on it, nor does the existence of a s18(1) agreement oblige the employer to deprive a minority union of any such organisational rights.

[37] That this is so is starkly highlighted by the issue of representation of members of minority unions in individual disciplinary or grievance proceedings. Since a majoritarian system can only operate fairly where a minority union is allowed to co-exist, including "…*to represent members in relation to individual grievances"*, to deny an employee a choice and impose on him or her representation by a majority union, of which that employee is not a member, is conceivably contrary to and in breach of the employee's constitutional rights to freedom of association and to join a trade union and the right in s23(1) to fair labour practices.

[38] An employer may determine whether it wants to bargain with a minority union, the extent to which it will do so and whether it will conclude a collective agreement with the minority union. This includes bargaining collectively on the grant of any organisational rights to that union. The LRA does not prohibit the bargaining with a minority union on such matters, nor does the employer breach an existing s18(1) collective threshold agreement in doing so. This is so, in that, the effect of the s18(1) threshold which has been agreed to, is to oblige the employer to confer ss12, 13 and 15 rights upon unions that had achieved that threshold, but not to constrain the employer's entitlement to bargain with those unions that have not.

INDUSTRIAL ACTION

National Union of Mineworkers v Impala Platinum Ltd and another **(J1022/16) [2017] 6 BLLR 628 (LC)**

Principle:
An employer is obliged to take action to combat labour unrest and any inter-union hostility that discloses a potential for violence and injury ,but absolute safety under all circumstances is not guaranteed to the employee by the contract of employment. The employer is not an insurer.

Facts:
After intense union rivalry that resulted in NUM being displaced by AMCU, the employer terminated its recognition agreement with NUM and concluded another with AMCU. In spite of agreements reached to guarantee their reintegration into the workforce, NUM's former shop stewards declined to resume work; claiming that it was unsafe for them to do so. When the employer informed NUM that no further external interventions would take place, NUM launched an urgent application for an

order compelling the employer to institute disciplinary action against AMCU members allegedly guilty of intimidating NUM shop stewards.

Having accepted with reluctance that the matter was urgent, the Court noted that employers are obliged to ensure that working conditions are reasonably safe. This includes taking action to combat labour unrest and inter-union hostility which threaten to become violent. However, employers are not required to ensure absolute safety.

Of the incidents on which NUM relied, the employer had failed to institute disciplinary proceedings because of lack of evidence, or the accused employees had been found not guilty, or the incidents had not been reported. The latest acts of misconduct occurred during a highly volatile period, and no disciplinary action had been instituted because to do would create further instability.

The onus rested on NUM to establish that the employer had breached the shop stewards' contracts by not instituting disciplinary action. For about four years, the employer had gone to great lengths to ensure a return to normality in the workforce, which had culminated in a memorandum of understanding being drawn up. No violent incident had occurred after the memorandum was signed, and a number of NUM shop stewards had resumed work without incident. The employer had, accordingly, taken reasonable steps to ensure a safe working environment, and had not acted unlawfully by failing to take disciplinary action against AMCU members.

The application was dismissed.

Extract from the judgment:
(Van Niekerk J:)

[10] The relevant legal provisions are well established. An employer is obliged at common law to take reasonable care of the health and safety of employees by providing them with areas on a safe system of work(see Freed land *The Personal Employment Contract* Clarendon Press 2003 at page 141). Consistent with this view of the nature and extent of the obligation, Brassey states that an employer is obliged to take action to combat labour unrest and any inter –union hostility that discloses a potential for violence and injury(see *Employment and Labour Law* Vol1 at E4:33).He goes on to say the following:
"But, it must be stressed, the standard is that of reasonableness, not excellence, still less perfection, and employers are not bound to make the workplace fool proof. The law seeks to do no more than strike an appropriate balance between the employer's interests in production and the employees in his self-preservation.

Absolute safety under all circumstances is not guaranteed to the labourer by the contract of employment. The employer is not an insurer. He is not bound to furnish the safest machinery, nor to provide the best methods for its operation, in order to relieve himself from responsibility."
.....

[13 .....NUM contends that the failure to take disciplinary action and to provide a safe working environment constitutes a breach of the employment contracts of the affected shaft stewards, and to this extent, it is incumbent on NUM to establish that Implats has indeed committed a breach of contract by failing to meet the required standard of reasonableness.

[14] I am not persuaded that NUM has succeeded in discharging this onus. First, the

facts disclose various interventions and the efforts to mediate between the parties conducted over a period of some four years prior to the filing of the present application.....

[15] For the above reasons, in my view, Implats took reasonable steps to ensure the safety of the individual applicants. The facts do not disclose that Implats acted unlawfully by failing to take disciplinary action against the 21 members of AMCU listed in Annexure"B", or that it sanctions constituted a breach of the contracts of employment of the individual applicants.

***SACCAWU obo Mokebe and Others v Pick'n Pay Retailers* (JA36/16) [2017] ZALAC 55 (26 September 2017)**

Principle:
An ultimatum is as much a means of avoiding a dismissal as a prerequisite to affecting one. It has a bearing not only on the procedural fairness of a dismissal, but also on the substantive fairness because it is aimed at avoiding a dismissal.

Facts:
The employees, who were members of SACCAWU, were all employed as so-called variable time employees (VTEs) at Pick 'n Pay's Woodmead store. At the time, SACCAWU and the Company were engaged in wage negotiations at a national level. A wage dispute was referred to the CCMA, but conciliation was unsuccessful. Following further unsuccessful mediation, the Union issued a strike notice informing the Company that a protected strike would commence at 7pm on 24 September 2010.

On 24 September, a public holiday, employees at the Woodmead store who were scheduled to work until the closure of the store at 4pm (and in some cases until 4,30pm to service remaining customers post closure), commenced their strike somewhere around 3pm. The strike at that time was accordingly unprotected, taking place before the strike notice period had expired at 7pm. There appears to have been confusion about the time the strike was meant to start. The Union's regional chairperson gave evidence that at a local shop stewards' meeting, they had been told the strike was to start at 3pm, although strike pamphlets were distributed at the stores mistakenly showing the starting time as 4pm. Whilst the Union had intended giving the Company the required 48 hour strike notice at 3pm on 22 September, it delayed this by a few hours in a last ditch attempt to settle the wage dispute – hence the notice was only given at 7pm, making the strike protected only from 7pm on 24 September.

Union attempts to advise its members at the Woodmead store of the changed strike times were apparently unsuccessful due to the shopstewards' phone not being in working order. Management gave evidence that they had met with the shopstewards and displayed copies of the strike notice at the premises, which clearly showed the commencement time for the strike as 7pm. Management also warned employees and supervisors that the strike would only be protected from 7pm and that they were already on final warnings for previous unprotected industrial action, but they responded by saying they had been told by the Union that if they went on strike from 3pm "nothing would happen to them".

The strike duly commenced at 3pm, and whilst replacement TES workers were brought in from 4pm, the Company estimated that it lost in the region of R190 000 as a result of customers abandoning their trolleys at till points due to delays caused by the unprotected strike.

The LC found the dismissals of the 61 employees for engaging in unprotected strike action to be substantively and procedurally fair. In summary, the LC's decision was based on the view that employees participated in the unprotected strike from 3pm *"in deliberate defiance of management"* as opposed to this being an innocent error, and that the Union and employees had deliberately attempted to mislead the court with an untrue defence.

The LC found that employees, already on a final warning for similar misconduct, had set themselves on a *"deliberate collision course with management"*, and had commenced the strike at the time when they knew the employer was vulnerable. They had been repeatedly warned not to strike and about the consequences of their actions. Although taking into account the short duration of the unprotected strike, the LC concluded that the aggravating factors simply outweighed the mitigating factors.

The LAC did not believe that the unprotected strike was deserving of dismissal, despite the employer's arguments that the employees –

- were already on a final warning for similar misconduct;
- deliberately went on strike on the last and busiest trading hour of a public holiday;
- deliberately defied management's instructions to return to work;
- deliberately attempted to mislead the LC with their defence; and
- showed no remorse for their misconduct, thereby rendering the employment relationship intolerable.

The LAC concluded that employees had not deliberately embarked on a collision course with management, and referred to the evidence that employees believed they were entitled to strike based on assurances given to them by the Union. The LAC found that dismissal was too harsh a sanction, and that the dismissals were procedurally and substantively unfair. In summary, these conclusions were based on the following:

<u>Lack of an ultimatum</u>

The LAC found that whilst management attempted to dissuade employees from striking before 7pm, they did not issue them with an ultimatum as required by clause 6(2) of the Dismissal Code. This was despite the Company having strike guidelines in place for handling unprotected strike action, and which contained a 'pro forma' ultimatum that could have been used. The LAC said it was particularly important for management to have issued an ultimatum in the circumstances, given that employees believed their strike was protected. The purpose of an ultimatum is to enable employees to reflect on the consequences of their actions and if necessary obtain advice, and the LAC submitted that it was unlikely employees would have proceeded with an unprotected strike had they received the required ultimatum.

Failure to provide a hearing

Following the unprotected strike action, management gave employees written notice of disciplinary proceedings to be taken against them, and undertook to provide each of them with an opportunity to submit written representations, in the event that it was not persuaded by the union that the sanction of dismissal was inappropriate. Yet, despite providing this undertaking, management did not do this and only held a disciplinary hearing in which union officials and shop stewards were permitted to participate.

The LAC said that whilst collective hearings may be utilised in a strike context where appropriate, individual hearings in the context of this case would have given management the opportunity to find out each employee's understanding of the time the protected strike was due to start and whether they were knowingly complicit in a scheme to cause damage to the company. The LAC found that management's failure to adhere to the process that it had undertaken to follow in the disciplinary notice issued to employees, rendered each employee's dismissal procedurally unfair.

Inconsistency

The LAC found that the Company had been inconsistent in how it dealt with the industrial action concerned. The final warnings previously issued to these employees effectively led to them being dismissed for the subsequent offence. Employees who were not on final warnings, were not dismissed and were issued with written warnings. But the LAC found that the previous action "differed materially" from the subsequent industrial action, in that it involved participation in a march from the canteen to the manager's office during time set aside for a weekly union meeting. As such, the LAC said it was unfair to impose "the next level of discipline" (being dismissal) for the subsequent offence of a different nature, and employees' action had only deserved a written warning (ie the same sanction that other employees not on final warnings were given). Importantly, employees at other Pick 'n Pay stores who also participated in the unprotected strike whilst on previous warnings for industrial action were not dismissed, and were issued with (further) written warnings.

On the basis of the above, the LAC referred to the need for consistency in terms of clause 3(6) of the Dismissal Code and concluded that the Company was inconsistent in both the historical and contemporaneous treatment of employees. The LAC concluded that it was "absurd" to conclude that the trust relationship with the dismissed employees had broken down, when other employees had been given a written warning for the same misconduct.

For all the above reasons, the LAC found the dismissals to be procedurally and substantively unfair and ordered the employees' retrospective reinstatement to their date of dismissal.

It has to date taken 7 years for our judicial system to deal with this matter, and it took the LAC 18 months from date of hearing to give its judgment. Taking the new national minimum wage as an example (we guess the employees were earning way above this), the backpay resulting from the retrospective reinstatement order will exceed R17 million. Aside from the merits of the court proceedings, we question

whether this can in any way be fair, given the prohibitive costs that appear to have resulted from the court's delays.

We think the court in this matter was determined to find that participation in an unprotected strike for approximately an hour, in circumstances in which employees may have thought that their strike was protected, was not deserving of dismissal. That aside, we think there are important learnings from the court's justification of its decision. Firstly, employers who fail to follow their own guidelines or rules, or who do not comply with undertakings they have given, can expect little sympathy from the courts.

This judgment again shows the importance of an ultimatum, both as a step in attempting to prevent a dismissal, and failing that, in making any subsequent dismissal fair. This judgment also shows that a 'one size fits all' approach to procedural fairness for collective dismissals is problematic, and where circumstances require it, individual representations on behalf of the affected employees will be required in order for the procedure to be fair.

Another learning: when the fairness of a dismissal is coupled with a previous final warning, the courts may investigate the fairness of that warning even though it may have been given a considerable time before, and also consider the extent to which the offences are sufficiently linked to justify the previous warning being taken into consideration.

Extract from the judgment:
(Kathree-Setiloane AJA)

[44] It was contended on behalf of the company that it could not reasonably have been expected to issue an ultimatum to the staff as it was given short notice that the strike would begin at 3pm. There is no merit in this contention as the company had strike guidelines in place for handling unprotected industrial action. These guidelines have, as annexure B, a *pro forma* ultimatum which is to be issued to employees in a strike situation, where it was "not possible to engage the shop stewards and/or address the employees personally". The *pro forma* contains the body of the ultimatum in it, and only requires the time, date and store name to be inserted in the spaces provided.

[45] The company was aware from 12h30 on 24 September 2010 that the strike may commence at 15h00. In anticipation of this, it took steps to arrange for replacement labour but did not deem it necessary to issue an ultimatum to the employees. As such, no ultimatum was issued to the employees either before or after the strike commenced; in circumstances where a number of the employees only "punched out" much later than 15h00 including, in some cases, approximately an hour later. There was nothing, in my view, which prevented the company from issuing a written ultimatum to the strikers, which it was obliged to do in the circumstances.

[46] The contention, advanced on behalf of the company, that there was no obligation to issue an ultimatum in circumstances where the employees were informed that the strike was unprotected, loses sight of the objective of an ultimatum, which was expressed by this Court in *Modise v Steve's Spar Blackheat* as follows:

> *'The purpose of an ultimatum is… to give the workers an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not.'*

This is precisely why an ultimatum in writing is so important – the employee concerned has a document in hand setting out what is required (and the consequences of non-compliance), and can reflect on the matter in those circumstances.

[47] The unique circumstances of the current dispute warranted the issue of a written ultimatum because the employees were seemingly of the belief that the strike was a protected one. It is unlikely, on the probabilities, that they would have proceeded to participate in the unprotected strike had they been furnished with a written ultimatum which expressly spelt out the consequences of doing so, such as no payment for the duration of the strike and disciplinary action that could result in the termination of their services.

[48] As previously held by this Court "an ultimatum is as much a means of avoiding a dismissal as a prerequisite to affecting one". It has a bearing not only on the procedural fairness of a dismissal, but crucially also on the substantive fairness because it is aimed at avoiding a dismissal.

.....

[50] The company held a disciplinary hearing and an appeal hearing in which only the union officials and shop stewards were permitted to participate. Contrary to the undertaking in the notice, the company failed to provide the individual employees with an opportunity to submit written representations to persuade it otherwise once the decision to dismiss them was taken. While I accept that in the context of a strike dismissal, a collective hearing may be utilised where appropriate, this does not give an employer *carte blanche* to use collective enquiries irrespective of the exigencies of a particular case. While in some cases collective hearings may be warranted, in others they may not. Van Rooyen's testimony in the Labour Court was that in cases of collective misconduct, the company always holds disciplinary hearings on a collective basis. This implies that the company does not tailor the process to meet the dictates of fairness based on the prevailing circumstances of a specific case.

[51] As contended for by the appellants, this was a case where individual hearings (or at least, collective hearings in which individuals could participate) were warranted because the employees appeared to be of the mistaken view that they were entitled to go out on strike at 3 pm, on the day in question, as the strike was a protected one. In *Modise and Others v Steve's Spar Blackheath,* where the dismissed employees were of the similar belief because the union had taken steps to make the strike legal, this Court held that:

> *'The last observation relates to the conclusion that it would have been a pointless and an unnecessary exercise for the employer in G.M. Vincent to afford the strikers a hearing. My difficulty with this conclusion is that this was a case where the union had taken various steps prescribed by the old Act for making a strike legal... Indeed, it appears from the judgement of the industrial court in the same matter that, when the matter was argued in the industrial court, it was the union's case that it (and, a fortiori, the strikers) believed that the strike was legal (see NUMSA V G.M. Vincent Metal Sections (Pty) Ltd (1993) 14 ILJ 1318 (IC) at 1320J-1321A)... In those circumstances I cannot, with respect, see how it could be said that a hearing would have been a pointless and an unnecessary exercise in such a case.'*

***National Transport Movement & others v Passenger Rail Agency of South Africa Limited* (PRASA)[2018] 2 BLLR 141 (LAC)**

Principle:
In establishing derivative misconduct, it is not sufficient that the employees may possibly know about the primary misconduct. The employer must prove on a balance of probabilities that each and every employee was in possession of information or ought reasonably to have possessed information that could have assisted the employer in its investigations.

Facts:
Derivative misconduct results if an employee fails to reasonably assist an employer to detect those responsible for misconduct. It violates the trust relationship (*RSA Geological Services Division of De Beers Consolidated Mines Ltd v Grogan [2007] JOL 20800 (LC)*).

The courts have supported the notion that an employee has a duty to assist the employer to bring guilty employees to book and a failure to assist in this respect amounts to misconduct (*South African Municipal Workers Union obo Abrahams and Others v City of Cape Town and Others [2011] ZALCCT 27 (17 June 2011)*). The leading case is regarded as *Western Platinum Refinery Ltd v Hlebela and Others (JA32/2014) [2015] ZALAC 20 (3 June 2015)* which held that an employee's duty of good faith towards the employer is breached by remaining silent about knowledge that undermines the employer's business interests. But the undisclosed knowledge must be deliberate and actual.

This LAC judgment tells the story of a breakaway union, National Transport Movement (NTM) which embarked on protected strike to assert organisational rights. During the strike three of the employer’s train coaches were burnt. The employer suspected that the burnings could be connected to the striking workers as a result of comments made by three union officials at meetings, allegedly inciting the burning of trains.

The employer called upon employees to make representations as to why they should not be dismissed. A union collective representation on behalf of its members was rejected by the employer while some individual representations were accepted. On the basis of an evaluation of these responses, 700 employees were dismissed.

The Labour Court found that the dismissals were substantively fair because the members of NTM who participated in the strike breached their duty of good faith owed to PRASA by remaining silent about their knowledge or information about the burnings, or about the identity of individuals who torched the coaches. In addition they failed to disassociate themselves from the arson when called upon to do so or to take reasonable steps to help PRASA to identify the individuals who torched the coaches.

The Labour Court found that the dismissals were justified on grounds of derivative misconduct. The preference of employees to make a general collective representation through their union rather than providing individual explanations as invited to do by PRASA, prevented PRASA from properly deciding whom to dismiss for the burning of its property. The Labour Court found that the dismissals were procedurally fair because they involved a large group of employees who were given an opportunity to be heard by being invited to make representations, and that PRASA decided to dismiss them after applying its mind to the representations submitted by individual employees.

On appeal to the LAC it was held that the employer had failed to prove that the train burnings were committed by the strikers or persons associated with the strikers. Nor was the employer able to prove that the dismissed strikers had any actual knowledge of the train burnings or the persons responsible for them. Moreover, the termination letter made it clear that the real reason for dismissing the employees was not their failure or refusal to disclose information about the train burnings. This demonstrated that the employer had invoked the principle of derivative misconduct as a means to justify the dismissals after they had taken place – and that it was not the true reason for dismissing the employees. It was therefore held that the employer's reliance upon the principle of derivative misconduct was misplaced and unjustified. In essence, the striking employees were dismissed not for derivative misconduct but rather for "collective misconduct", a notion which is wholly repugnant to our law, not only because it runs counter to the tenets of natural justice but also because it is incompatible with the established principle of innocent until proven guilty.

The appeal was upheld and the Labour Court's judgment set aside; the LAC found the employees' dismissals to be procedurally and substantively unfair and ordered the reinstatement of the employees.

Extract from the judgment:
Kathree-Setiloane AJA:

[28] PRASA's contentions are broadly that the dismissals were fair because at the workers' gatherings, during the strike, NTM leaders advocated the burning of trains and that, subsequent to this, trains were burnt. This, so it contends, meant that the workers were associated with the strike. PRASA argues, in this regard, that although it was unable to identify the culprits, it justifiably adopted the view that the train burnings were carried out by striking workers or persons acting in concert or association with the striking workers or both. It, therefore, called upon the strikers to identify the culprits and to make written representations on why they should not be dismissed, as all the striking employees were held to be jointly and severally responsible for the train burnings. The strikers were warned that they would be dismissed if they failed to provide persuasive reasons in relation to why they should not be dismissed.

[29] PRASA accordingly relied upon the concept of derivative misconduct as justification for the dismissals of the striking employees. The principle of derivative misconduct may be relied upon by an employer where there is no direct evidence that the dismissed employees committed the primary misconduct that led to them being charged and dismissed. In the case of derivative misconduct, the employee is liable for a separate and quite distinct offence from the primary misconduct. The derivative misconduct is the employee's failure to offer reasonable assistance to an employer to

disclose information about individuals who are responsible for the primary misconduct. The employee who is accused of derivative misconduct needs not associated with the primary misconduct.

Onus of proof

[30] Where the employer relies on derivative misconduct, the employer must prove on a balance of probabilities that the employee committed the misconduct. This would require the employer to prove the following main elements of derivative misconduct namely, the employee knew or must have known about the primary misconduct, but elected, without justification, not to disclose what he or she knew. The requirements of derivative misconduct were dealt with in *Western Platinum Refinery Limited v Hlebela (Hlebela)* where this Court held that the following considerations are relevant to derivative misconduct:

(i) The employee must have had actual knowledge of the wrongdoing, otherwise the blameworthiness cannot be attributed to him or her;
(ii) Non-disclosure must be deliberate;
(iii) The gravity of the non-disclosure must be proportionate to the gravity of the primary misconduct;
(iv) The rank of the employee may affect the gravity of the non-disclosure;
(v) While there is a general duty to disclose wrongdoing, the non-disclosure may also be affected by whether the employee was specifically asked for that information;
(vi) The employee needs not have made common purpose with the perpetrator;
(vii) An employee cannot be guilty of derivative misconduct on the basis of negligently failing to take steps to acquire knowledge of the primary wrongdoing.

[31] As was held in *Western Platinum Refinery v Hlebela*, it is not sufficient that the employees may possibly know about the primary misconduct. The employer must prove on a balance of probabilities that each and every employee was in possession of information or ought reasonably to have possessed information that could have assisted the employer in its investigations.....
.....

[43] The termination letter stated that the dismissed workers were dismissed "*due to the sabotage of trains and train coaches by striking members of the National Transport Movement*". This letter makes it clear that PRASA's real reason for dismissing the employees was not their failure or refusal to disclose information about the perpetration of the train burnings. This demonstrates that PRASA had invoked the principle of derivative misconduct as a means to justify the dismissals after they had taken place – and that it was not the true reason for dismissing the employees.

***KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & others* (2018) 39 *ILJ* 609 (LC)**

Principle:

A party is in contempt where it knows and understands the terms of the court order and what is required to be done to comply with the order, but then without any cause or justification deliberately does not comply.

Facts:
The Labour Court had granted an interim order interdicting the members of the trade union, who were participating in a protected strike, from engaging in unlawful and violent acts, including intimidating, harming, threatening or assaulting non-striking workers and subcontractors, blocking access to and egress from the employer's site, and blockading a portion of the national road leading to the employer's site. In terms of the interdict the union had 'to take all reasonable steps within its power' to persuade its members not to engage in such unlawful action. The order was served on the union and copies were given to striking employees. Despite this, the striking employees continued with their unlawful action, some openly and some clandestinely. The employer wrote letters to the union complaining of these incidents, but received no response. The employer launched an application for contempt of court shortly after the strike ended. An interim order was granted calling on the union and the employees to show cause why they should not be held in contempt for failing to comply with the interim order (which had, in the meantime, been confirmed as a final order).

The court first condemned the resort to unlawful conduct, violence and intimidation during the course of a protected strike and its detrimental effect on collective bargaining. Turning to the issue of contempt, the court noted that it had to be satisfied, beyond reasonable doubt, that there was a refusal to comply with the order; that this refusal was wilful (deliberate); and that the deliberate refusal to comply was mala fide, in other words there had to be a complete absence of any kind of bona fide justification for the refusal to comply.

In this matter it was conceded that both the union and the employees had proper service of the order, were aware of its contents and knew what they had to do to comply with it. The union contended however that the employer had failed to identify each and every individual perpetrator of the unlawful conduct constituting the breach, and that the employees could therefore not be held in contempt. The court disagreed. Relying on the approach adopted in earlier judgments, the court concluded that it was not necessary for the employer to identify each and every perpetrator. Where all the employees acted in concert, and with common purpose, as they did, they could all be held accountable for violations of the order, even if perpetrated by unidentified individuals. An individual employee who faced possible contempt of court sanction on this basis had the opportunity to come forward and provide an acceptable explanation to exonerate himself or herself, before being finally held in contempt. If employees however remained silent, it could be accepted that they associated themselves with the group, and they had to live with the consequences of being held in contempt as a result. A small number of employees had come forward to provide explanations exonerating themselves in this matter, and they could not be held in contempt.

Regarding its own conduct, the union argued that it had complied with the obligations imposed on it by the order. Although the court agreed that the obligations imposed on the employees by the order had to be distinguished from those imposed on the union, they could not be completely divorced, especially where the obligation imposed on the union was to take 'all reasonable steps within its power' to ensure that the employees did not participate in the unlawful conduct specified in the order.

The court considered earlier authorities on the concept of 'reasonable steps', and concluded that the conduct of the union in this matter fell far short of what could legitimately be considered to be reasonable measures to intervene and persuade the striking employees to comply with the order. Actual and positive intervention by the union was needed, including continuous marshalling of the striking employees, having a constant presence at the premises to deal with violations of the order and intervening urgently and immediately when instances of breaches were brought to its attention. However, all the union did was to convey the order to its striking members, tell them to comply, and then it washed its hands of what happened thereafter.

The court was, therefore, satisfied that the union had not complied with its obligations in terms of the order and was in breach of the order.The court was further satisfied that both the union and the striking employees had acted in wilful and mala fide breach of the court order.

Regarding the penalty to be imposed, the court agreed with earlier judgments that the principal aim of any order was to ensure compliance and not punishment. As the strike had ended the primary objective of ensuring compliance was no longer an issue, and the penalty of imprisonment was no longer appropriate. The court was therefore of the view that the imposition of a fine was appropriate, both as a deterrent and to serve the interest of society by ensuring the integrity of the rule of law and respect for orders of court. As the union's conduct had fallen far short of that expected of it, the court determined that a fine of R1million suspended for three years was appropriate. Regarding the employees, excluding those who had signed exculpatory affidavits, the court found that a fine of R1,000 each was appropriate. The employer was ordered to deduct these fines from their remuneration.

The court also ordered the union to pay the costs of the application.

Extract from the judgment
(Snyman AJ:)

[35] In deciding an issue of contempt of court, it must be reiterated that the existence of contempt of court must be established beyond reasonable doubt. The actual test to determine whether contempt indeed exists was dealt with in *Fakie NO v CCII Systems (Pty) Ltd* where the court said:

> *'[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed "deliberately and mala fide". A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*
>
> *[10] These requirements — that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt — accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or the authority that this evinces.'*

PROTECTED DISCLOSURES

John v Afrox Oxygen Limited (JA90/15) [2018] ZALAC 4 (29 January 2018)

Principle:
To qualify as a protected disclosure, an employee needs only have reason to believe that the information concerned shows or tends to show that the impropriety has been or is being or may be committed in the future. The employee does not have to show that the information is factually accurate.

Facts:
An employee was summarily dismissed because of 'incompatibility with colleagues'. Unhappy with her dismissal, she referred the dispute to conciliation at the bargaining council, alleging an automatically unfair dismissal because the real reason for her dismissal was that she had made a protected disclosure in terms of the Protected Disclosures Act (PDA).

The matter was then referred to the Labour Court where her case was that the re-grading of positions, without consultation, negatively impacted on the future salary increase of the affected employees and also distorted the accuracy of the employment equity report submitted to the Department of Labour. She showed that her belief in the inaccurate grading was reasonable, but did not show that it was factually accurate. The court took the view that a belief must be based on facts in order to enjoy the protection of the PDA.

On appeal to the Labour Appeal Court, the court confirmed that the enquiry is not about the reasonableness of the information, but about the reasonableness of the belief. This is so because the requirement of 'reasonable belief' does not entail demonstrating the correctness of the information, because a belief can still be reasonable even if the information turns out to be inaccurate. Because the employee had demonstrated a reasonable belief, her dismissal was held to constitute an automatically unfair dismissal and the employer was ordered to compensate the applicant in a sum equal to 18 months' salary.

Extract from the judgment:
(Waglay JP)

[18] In section 1 of the PDA, "disclosure is defined as"

> *'any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show that -*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed;*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;*
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;*
> *(d) that the health or safety of an individual has been, is being or is likely to be endangered;*
> *(e) that the environment has been, is being or is likely to be damaged;*
> *(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or*

(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.'

[15] Further disclosures made by an employee to its own employer is dealt with in section 6(1) of the PDA which provides:

'(1) Any disclosure made in good faith—
(a) and substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned; or
(b) to the employer of the employee, where there is no procedure as contemplated in paragraph (a),
is a protected disclosure.'

.....

[21] In the circumstances and in terms of the definition, an employee needs only have "reason to believe" that the information concerned "shows" or "tends to show" that the listed impropriety "has been" or "is being" or "may be committed in the future".

[22] In this matter, the appellant made the disclosure only to her employer and, as such, in my view, it is only section 6 of the PDA that is relevant…

.....

[25] In the circumstances, for the disclosures made by the appellant to qualify as protected disclosure as stated earlier, the appellant had to have reason to believe that the information she disclosed, at the very least, tended to show that an impropriety has, is being, or may be committed, or that the respondent has, is failing, or may in the future fail to comply with its legal obligation. Furthermore, that the appellant acted in good faith when she made the disclosures and in doing so followed procedures either prescribed or authorised by the employer.

[26] The court *a quo,* while accepting that the belief needs not be correct, took a contrary view that the belief must be based on facts in order to enjoy the protection of the PDA. Based on that the court *a quo* held that the appellant had "on the facts she presented, failed to show the existence of a reasonable belief that the respondent had engaged in conduct that falls within the definition of protected disclosure as envisaged in the PDA". This approach is misconceived. In *SA Municipal Workers Union National Fund v Arbuthnot*, the court held that "the enquiry is not about the reasonableness of the information, but about the reasonableness of the belief". This is so because the "requirement of 'reasonable belief' does not entail demonstrating the correctness of the information, because a belief can still be reasonable even if the information turns out to be inaccurate."

.....

[29] All that is required is for the appellant to reasonably believe that the conduct is unlawful. In this matter, the appellant's contention is that the discrepancies she noticed in the re-grading process would be detrimental to any future salary increase of the affected re-graded employees and that it would also affect the employer's employment equity reports, which it is legally obliged to make to the Department of Labour. The appellant reasonably believed that there were inaccuracies in the re-grading system. .....

***Mvoko v SABC* (1066/2016) [2017] ZASCA 139 (29 September 2017)**

Principle:
An independent contractor whose professional independence is threatened by irregular and unlawful conduct by the employer and who has his own and the public's interest at heart is not precluded from exposing irregular and unlawful conduct.

Facts:
Mr Mvoko, after a period as an employee of the SABC, was an independent contractor. His 2-year contract was to render professional television journalism services to the SABC. His functions when scheduled included covering breaking news items and conducting specialist interviews with, amongst others, Presidents and other heads of states. He also packaged news stories which included researching, analysing and commentating on news items and conducting interviews. Mr Mvoko was also responsible for anchoring, analysing and commentating during live broadcasts. In addition he was responsible for covering news in other countries.

After an incident of political interference with his editorial decisions, Mr Mvoko tweeted viewers that the program had been cancelled for reasons he was at that moment not willing to disclose. The SABC was displeased with this and informed him that he was liable to be subjected to disciplinary action unless he signed a letter accepting that his tweet was inconsistent with the provisions of the written agreement with the SABC. Mr Mvoko reluctantly signed the letter because he did not want to jeopardise the upcoming potential extension of his contract.

After several more incidents of political interference Mr Mvoko published an article in *The Star*, entitled 'My hell at the SABC' and it bore the subtitle 'In power mongers' grip'. Mr Mvoko was adamant that in writing the article he wanted to offer his reflections on what was happening at the SABC in relation to the erosion of editorial independence; to convey his own first-hand experience of that erosion; to dispel myths about the goings-on at the SABC; and to remind the public that there was still time to save the integrity of the SABC.

On the day following the publication of the article, Mr Mvoko was given a letter from the SABC alleging 'acts of non-compliance/contravention of your contract' constituting a material breach of the agreement and requesting him to submit written representations as to why the agreement should not be terminated. The letter also stated that the SABC had resolved not to schedule him to render services until the matter was resolved.

Mr Mvoko's legal representatives wrote to the SABC demanding that he 'be scheduled' in terms of his written agreement with the SABC. The SABC did not comply and Mr Mvoko then turned to the High Court. The SABC contended that it was misconceived in that the agreement on which he relied stipulated that it was the SABC's prerogative to engage Mr Mvoko's services 'as and when required' - ie Mr Mvoko had no right to insist on being scheduled. As a consequence he could not compel specific performance. The SABC also took the view that the termination of the contract was lawfully done since the agreement provided that in performing his services he was prohibited from engaging in any conduct, behaviour, utterances and the like that, in the reasonable opinion of the SABC, had the effect of bringing the

name of the organisation into disrepute. The publication of the article in *The Star*, in the view of the SABC, was a breach of that contractual provision entitling the SABC to suspend his services.

The High Court refused to order specific performance on the basis that Mr Mvoko's suspension was temporary and not permanent. Consequently, Mr Mvoko's application was dismissed with costs.

On appeal to the SCA, it was held that Mr Mvoko's contract required an investigation into irregularities on the part of the independent contractor before the contract could be terminated. Rather than bringing the SABC into disrepute, the courts said that the SABC's conduct is what brought it into disrepute. The court regarded the article in *The Star* as a form of a whistle blower exposing the ills at a national institution owned by all of us as citizens. The court recognised that the Protected Disclosures Act applies to employees and not independent contractors. However, the court asked why an independent contractor whose professional independence is threatened by irregular and unlawful conduct and who has his own and the public's interest at heart is precluded from exposing irregular and unlawful conduct.

The SCA ordered the SABC to comply with the written agreement and to schedule Mr Mvoko, as in the past, to perform his services as set out in the contract and to remunerate him accordingly in relation to the remaining term of the agreement.

It is important to note that the amended PDA has now been extended to cover independent contractors, and this opens the door to protection for others who aren't conventionally seen as employees if they make protected disclosures in terms of the PDA. The PDA defines 'worker' to include independent contractor, consultant, agent or any person who renders services to a client while being employed by a temporary employment service.

Extract from the judgment:
(Navsa ADP:)

[40] The highest standards of journalism and of integrity in public administration can rightly be expected of the SABC. The political interference complained of by Mr Mvoko is, as already pointed out, uncontested. It is inexcusable and rather than rendering Mr Mvoko liable to disciplinary action it calls for an enquiry into the conduct of the SABC in its role as public broadcaster. The article in *The Star* was in the form of a whistle blower exposing the ills at a national institution owned by all of us as citizens. The criticism allegedly directed at Ms Maseko as a person who was being politically manipulated by others and who responded to political instruction was based on Mr Mvoko's experiences at the SABC. His assertions in regard to management at the SABC being politically controlled were not challenged. This court, in *SABC v DA* described the SABC in much the same way as was done in the introductory paragraph of the article in *The Star*.

[41] The long title of the Protected Disclosures Act 26 of 2000 (the PDA) reads as follows:
'To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.'

Of course the PDA applies to employees and not independent contractors. However, one might rightfully ask why an independent contractor whose professional independence is threatened by irregular and unlawful conduct at a public broadcaster and who has his own and the public's interest at heart is precluded from exposing irregular and unlawful conduct.

BCEA

***Sekhute and Others v Ekhuruleni Housing Company Soc* (J1862/17) [2017] ZALCJHB 318 (5 September 2017)**

Principle:
Repayment of overpaid remuneration is a separate category of money lawfully recoverable by an employer from an employee and is a way of recovering undue remuneration without the employee's consent.

Facts:
On 1 July 2017, several employees (the applicants in this case) received letters indicating that an overpayment had occurred in February 2017 due to an error in the payroll processing. The amount of the alleged errors was substantial and the applicants were requested to complete a salary deduction form in terms of which they agreed to repay the amount over a period of seven months. The applicants refused to sign these. They contended that there was no error in the February payments and argued that the payments received were a result of giving effect to the new salary scale implemented on their revised job grading.

Although they failed to sign the forms, the employer proceeded to commence deductions when it paid salaries on 26 July 2017. On 28 July, the employees' attorney wrote demanding the reversal of the deduction and a cessation of future deductions on the basis that no salary calculation error had been made. This led to an urgent interdict application to prevent further salary deductions.

In dealing with this matter, the Labour Court was satisfied on the evidence that the employees had not established that they were entitled to the full amounts paid to them as part of their salary since February 2017. The judge was satisfied that a genuine overpayment error had occurred. The court said the employer was not obliged to perpetuate the overpayment error going forward. Section 34(5) of the BCEA was interpreted to mean that an employer can deduct the overpaid monies without the written consent of the employees.

Repayment of overpaid remuneration is a separate category of money lawfully recoverable by an employer from an employee, and s34(5) provides a way of recovering undue remuneration without the employee's consent. S34(5) is accordingly not subject to s34(1).

Extract from the judgment:
(Lagrange J:)
[12] The first thing to note is that, all the subsections except for s 34(5) are concerned with deductions made in terms of section 34(1). Section 34(1) identifies two classes of deductions which may be made. The first (s 34(1) (a)) is a deduction which may be made for an acknowledged debt and which specifically requires the employee to authorise the deduction

in writing. The second (s 34(1) (b)) is a deduction which does not require the employee to authorise the deduction personally in writing before it can be made. This second type of deduction may be mandated by other legal instruments such as a law, Court order or collective agreement. It is noteworthy, that this second type of deduction does not presume the existence of an acknowledged debt.

.....

[15] I believe the trend discernible from the judgments cited is that repayment of overpaid remuneration is a *sui generis* category of money lawfully recoverable by an employer from an employee and, on the same reasoning as that in the *Boffard*, is a way of recovering undue remuneration. At the very least, I believe s 34(5) was clearly intended to authorise a particular type of deduction for amounts due to an employer not arising from debts of the kind contemplated by s 34(1) and even if s 34(5) must be read as subject to s 34 (1), then s 34(5) is a provision of 'a law' contemplated in s 34(1) (b) which permits recovery without consent. At common law, the obligation of an employee to refund an employer for an overpayment made in error in essence would appear to be an obligation that could found an action based on unjust enrichment in the form of the *condictio indebiti.* It would serve little purpose if s 34(5) was included simply to reaffirm the existence of a common law right to recover payments made in error. The more plausible interpretation of the provision is that the legislature intended it to specifically authorise deductions for overpayments of remuneration.

Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd (JS706/14) [2017] ZALCJHB 404 (7 November 2017)

Principle:

Section 26(2) of the BCEA does not mean that suitable, alternative employment is guaranteed, in the event of a pregnant employee's work posing a danger to her health or safety or that of her child.

Facts:

The applicant in this case was employed by New Kleinfontien Gold Mine as a plant electrician. She claimed unfair discrimination over the way in which she was treated during her pregnancy. She alleged that the employer's policy on maternity and the way it was implemented, discriminated against her on the grounds of her pregnancy by placing her on unpaid leave for 5 months. She claimed R159 501 as damages, being the monetary loss she suffered as a result of her unpaid suspension. She also claimed compensation of R 79 750, and an order directing the employer to take steps to prevent this type of discrimination in future.

The employee's work area was considered hazardous due to the presence of chemicals such as cyanide, ionising radiation, hazardous gases, fumes etc. Once she disclosed to her employer that she was pregnant, the employer had a duty to find her "*suitable alternative risk free work (with necessary training) on terms and conditions that are no less favourable"* in terms of its Maternity Leave and Women in Risk Areas Policy. The policy provided that management could allow an employee to go on extended unpaid maternity leave if "*every endeavour*" to find suitable alternative work failed. Although various options were considered, attempts to find her suitable alternative work ultimately failed. She also declined an interview for the position of receptionist when told that the position would be offered on lesser terms and conditions to what she currently received. She was then placed on unpaid maternity leave for a 5 month period.

The LC confirmed that, whilst the employer's policy obliged it to make every endeavour to find suitable alternative work for its pregnant employees, it did not provide a guarantee that such alternatives would be found, and neither is there an obligation on the employer to create suitable alternatives. Similarly, section 26 of the BCEA also does not guarantee suitable alternative employment on no less favourable terms and conditions of employment, and neither does the Code of Good Practice on the Protection of Employees during Pregnancy and after Birth of a Child.

The LC highlighted that even if alternative work was available, it still had to ask whether those alternatives were '*suitable'* and whether it was '*practicable*' for the employer to offer this alternative employment on no less favourable terms and conditions. Whether alternatives considered were suitable, and whether it was practicable to offer this alternative employment on no less favourable terms and conditions, were questions of fact to be decided under the circumstances of each case.

On the facts of this case, the LC found that the employer had fulfilled its obligations under its policy and the BCEA. No suitable alternative work was available and the employer was accordingly justified in placing the employee on unpaid leave. On the basis of the evidence led, the LC also rejected the applicant's allegations that the employer had offered white pregnant employees suitable alternative employment whilst not offering black pregnant employees similar opportunities.

The LC noted that s26 of the BCEA, the Code of Good Practice and the employer's policy are in contrast to the ILO's Maternity Protection Recommendation 200(no183 & no191) that obliges an employer to provide the employee with paid leave in such circumstances.

The LC dismissed the applicant's claim.

Extract from the judgment:
(Tlhotlhalemaje,J)

[5] It is appreciated that the Labour Relations Act (LRA) covers instances of unfair labour practices where pregnant employees feel hard done by what may be seen as employer unfair practices. However, specific pieces of legislation that deal with pregnant employees such as the Basic Conditions of Emploment Act (BCEA) still fall short in addressing some of the problems highlighted as above. I am constraint to state that in my view, any unfair, unjust and unreasonable consequence flowing from a female employee's pregnancy is directly attributable to the shortfalls in legislation meant to protect them. The facts of this case highlight the inadequacies in our legislative measures that were meant to protect pregnant employees especially in the mining industry.

.....

[32] I will not burden this judgment with the interpretation of the Policy safe to state that as I understand the provisions, once an employee is found to be pregnant, the employer is obliged, (flowing from the word *'must'*), *to make every endeavour* to offer her suitable alternative risk free work on terms and conditions that are no less favourable than the ordinary terms and conditions of employment. Where necessary, training should be provided to the employee to perform the alternative work.

[33] I do not understand the above obligations to involve a meaningless box-ticking exercise. Thus, there must be a genuine endeavour to offer the affected employee suitable alternative risk free work in view of the adverse consequences for the affected employee if the employer is unsuccessful in that regard. Ultimately, whether such a genuine endeavour was made is a question of fact and evidence. Be that as it may, in the event that every endeavour made at securing 'suitable alternative risk free' work did not yield any positive results, the provisions related to extended unpaid maternity leave kicked in. Thus on its plain reading, the provision does not guarantee (reading from the word *endeavour*) that alternative work will be found, nor is there an obligation on the employer to create any such alternative suitable work.
.....
[47] Applying the above to the facts of this case, it follows that it cannot be read in the provisions of section 26 (2) of the BCEA that suitable, alternative employment is guaranteed in the event of a pregnant employee having to be moved from high risk or hazardous work area. A purposive interpretation of these provisions reveal that they were meant to protect pregnant employees by guaranteeing the right to be considered for alternative suitable employment in the event that they had to be removed from their ordinary duties. This is in line with the constitutionally guaranteed right to fair labour practices. These provisions however do not guarantee the right to alternative employment or guarantee that the employer will make that alternative employment available. .....