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Legislation & Case Law Update

May 2023

LEGISLATION UPDATE

Amendments to EEA and new CCMA Rules

Changes to the Employment Equity Act

For years now the annual report of the Chair of the Commission for Employment Equity has commented on the slow pace of transformation of private sector workplaces in South Africa. Legislation is now imminent that aims to speed up change.

The Employment Equity Amendment Act 4 of 2022 was assented to by the President on 6 April 2023. *Please note the amendments are not yet in force*. They will take effect on a date fixed by the President by proclamation in the Government Gazette.

The **four main objectives of the amendments** are:

- to empower the Employment and Labour Minister to regulate **sector-specific Employment Equity (EE) targets;**
- to regulate compliance criteria to **issue EE Compliance Certificates** in terms of Section 53 of the EEA;
- to deregulate employers with less than 50 employees;
- To expand the definition of disability.

1. Sector-specific targets

The EEA, in section 15(2)(d), has always required designated employers to take measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce. The 'measures' include preferential treatment and numerical goals, but exclude quotas.

Until now, the targets were set by employers as a result of consultation with employees, after an analysis, and the preparation of an EE plan. The purpose of the plan is to measure "reasonable progress towards employment equity" (s 20(1)). Compliance is measured by taking into account the factors set out in section 42. The 2023 amendments add a new factor to section 42 as follows:

> *''whether the employer has complied with a sectoral target as set out in terms of section 15A applicable to that employer''.*

The new section 15A empowers the Minister, by notice in the Gazette, to identify national economic sectors. The Minister, after following a process of consultation with the relevant sectors and taking advice, may set numerical targets for any national economic sector "*for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce*". A notice may set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor. A draft of any notice that the Minister proposes to issue must be published in the Gazette, allowing interested parties at least 30 days to comment.

An amendment to section 20 of the EEA (which deals with employment equity plans) links the sectoral numerical targets to the numerical targets set by a designated employer in its employment equity plan. A designated employer will be required to set numerical targets in line with the applicable sectoral targets set by the Minister. An amendment to section 42 aligns the assessment of compliance with employment equity with the new requirements relating to sectoral numerical targets.

Acting deputy director-general of Labour Policy and Industrial Relations, Thembinkosi Mkalipi, noted that a new EE online assessment system would be created to monitor the implementation of sector targets, and the assessment will be done annually.

2. **Compliance criteria**

Companies seeking to do business with the state will be required to submit a certificate from the Department confirming that they comply with the EEA.

A new sub-section to section 53 says –

> *''(6) The Minister may only issue a certificate in terms of subsection (2) if the Minister is satisfied that—*
>
> *(a) the employer has complied with a numerical target set in terms of section 15A that applies to that employer;*
>
> *(b) in respect of any target with which the employer has not complied, the employer has raised a reasonable ground to justify its failure to comply, as contemplated by section 42(4);*
>
> *(c) the employer has submitted a report in terms of section 21;*
>
> *(d) there has been no finding by the CCMA or a court within the previous 12 months that the employer breached the prohibition on unfair discrimination in Chapter 2; and*
>
> *(e) the CCMA has not issued an award against the employer in the previous 12 months for failing to pay the minimum wage in terms of the National Minimum Wage Act, 2018 (Act No. 9 of 2018).''.*

This means that organisations doing business with the state will have to be in good standing when it comes to compliance with EE.

What is the **consequence of not meeting a sector-specific target**?

Even where an employer has no intention of doing business with the state its compliance is assessed by the Director-General of the Department of Labour (s 43 of the EEA), who can make a recommendation to an employer on steps that must be taken to become compliant with the sector target. If an employer fails to comply with the D-G's request, the Labour Court can make an order directing the employer to comply. If an employer fails to justify its failure to comply, a fine can be imposed. For

a first contravention the fine is the greater of R1 500 000 or 2% of the employer's turnover.

3. **Employers with fewer than 50 employees**

Previously a "designated employer" was an employer that employs 50 or more employees or an employer that employs fewer than 50 employees but has an annual turnover that is equal to or above the threshold determined by the EEA, depending on the relevant sector.

This designated employer definition has now changed so that **employers that employ fewer than 50 employees, irrespective of their annual turnover, will no longer form part of the designated employer definition** and, therefore, will be exempt from compliance.

This is quite a significant change as these companies will not be required to implement measures to ensure suitably qualified people from designated groups have equal employment opportunities and are represented at all occupational levels in the workplace. This exempts smaller employers from the development and implementation of employment equity plans and reporting to and submission of employment equity reports to the Department of Employment and Labour. This will significantly relieve the administrative burden on these employers.

While smaller employers will not be required to develop and submit employment equity reports, they will nevertheless be entitled to obtain a certificate of compliance under section 53 of the EEA.

4. **Changes in relation to people with disabilities**

The definition of "*people with disabilities*" is substituted to align with the definition in the United Nations Convention on the Rights of Persons with Disabilities, 2007. The amended definition includes "*people who have a long-term or recurring physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially limit their prospects of entry into, or advancement in, employment*".

This enhanced definition accords with a more expansive international understanding of what constitutes disabilities. Sensory impairment is the common term used to describe deafness, blindness, visual impairment, hearing impairment and deafblindness.

Afterword

The EEA with its amendments is likely to be caught up in litigation challenging different aspects. Solidarity is about to proceed with an ILO arbitration with the SA government on the race-based basis of the EEA. Sakeliga is challenging the Act as **it allows the government to prescribe demographic quotas to private employers – regardless of whether they do business with the state or not.** The DA is joining Solidarity in challenging the constitutionality of the amendments.

Changes to the CCMA Rules

The 2023 CCMA Rules have a number of changes, some minor and others more significant. In summary, the changes are as follows:

1. The way CCMA documents are delivered and served, particularly using online portals (Rules 1, 2, 5,7,10, 18, 37);
2. The way documents can be signed (Rules 4,18);
3. The way time is calculated, with the period between 16 December and 7 January no longer excluded from time calculations (Rules 3, 9);
4. How and when condonation can be applied for (Rules 9, 10(3));
5. CCMA jurisdiction to establish picketing rules before the issuing of a certificate of non-resolution in Rule 13(1A);
6. Changes to the postponement of an arbitration (Rule 23);
7. Changes where a party doesn't attend the arbitration (Rule 30, 31);
8. A new rule dealing with the application of POPIA covering the scenarios where a party serves or files documents on the CCMA or the other party, or processes documents that contain personal information (Rule 1A);
9. Many of the CCMA forms have been changed.

We have focussed here on what we regard as the three most important changes to the CCMA Rules.

Applying for condonation

An amended Rule 10(3) now provides that where a referral is made out of time and even if a condonation application has not been attached to it, the commissioner has the discretion to determine how condonation should be dealt with. The commissioner may deal with it at a hearing or by written submissions from the parties.

Rule 10(3) now states as follows:

> *(3) Despite Rule 10(2)(b), where a referral has been referred out of time and if condonation has not been attached to the referral, the Commission will decide whether the condonation will be determined at a hearing or by written submissions received from the parties.*

Postponing an arbitration

A new Rule 23(5) clarifies that parties may not presume that an arbitration has been postponed after making an application for postponement, and it confirms that the arbitration will proceed as scheduled unless the CCMA or a commissioner notifies the parties that the matter has been postponed.

Under the amended Rule 23(2), the commissioner is no longer obliged to postpone an arbitration when the parties deliver a written agreement to postpone it at least 7 days before the scheduled date, and now has a discretion whether or not to grant the postponement.

A further change provides that where a party has made a formal application under Rule 31 to postpone an arbitration, the commissioner is now given a much wider

discretion to determine the application in any manner he/she deems fit, and is no longer limited to the options of postponing the matter without convening a hearing, or convening a hearing to determine whether to postpone it.

Rule 23 now states as follows (new content underlined for emphasis):

> ***23 How to postpone an arbitration***
>
> *(1) Subject to sub-rules (2) to (6) an arbitration may be postponed –*
> *(a) if the Commission is satisfied that there is written confirmation to postpone by both parties;*
> *(b) by application to the Commission and on notice to the other parties in terms of sub-rule (3).*
> *(2) The Commission <u>may</u> postpone an arbitration without the parties appearing if –*
> *(a) all the parties to the dispute agree in writing to the postponement; and*
> *(b) the written agreement for the postponement is received by the Commission at least seven (7) days prior to the scheduled date of the arbitration.*
> *(3) If the conditions of sub-rule (2) are not met, any party may apply in terms of Rule 31 to postpone an arbitration by delivering an application to the other parties to the dispute and filing a copy with the Commission before the scheduled date of the arbitration.*
> *(4) After considering the written application, the Commission may –*
> *(a) without convening a hearing, postpone the matter; or*
> *(b) convene a hearing to determine whether to postpone the matter; or*
> *(<u>c) determine the application in any manner the Commission sees fit.</u>*
> *<u>(5) There is no right to postponement and arbitration will proceed as scheduled unless the Commission or commissioner notifies the parties that the matter has been postponed.</u>*

Consequences of failing to attend an arbitration

Where a referring party fails to appear at arbitration, Rule 30 has been changed from allowing a commissioner to “dismiss” the matter, to now “removing the matter from the roll”, and a new form is provided that caters for the re-enrolment of a matter. And where the referring party fails to appear, the amended Rule now requires the commissioner to attempt to establish the reason for non-attendance, and to reschedule the matter if there is good reason for that.

Rule 30 now states as follows (new content underlined for emphasis):

> ***30 What happens if a party fails to attend arbitration proceedings before the Commission***
>
> *(1) If a party to the dispute fails to attend or be represented at any arbitration proceedings before the Commission, and that party-*
> *(a) <u>was the referring party, the commissioner appointed to arbitrate must attempt to establish the reason for non-attendance</u>. <u>If there appears to be</u>*

good reason for the absence, the commissioner must direct that the matter be rescheduled for arbitration; or
(b) if the absence, on the face of it, wilful or unexplained, or the commissioner does not accept the explanation, the commissioner may remove the matter from the roll.
(c) had not referred the matter to the Commission, the commissioner may –
(i) continue with the proceedings in the absence of that party; or
(ii) adjourn the proceedings to a later date.
(2) A commissioner must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of sub-rule (1).

CASE LAW INDEX

1. The legality of unilaterally imposed lay-offs

***Aminto Precast and Civil Engineering CC v CCMA and Others* (JR 790/22) [2023] ZALCJHB 55 (17 March 2023)**

Principle:
A lay-off because of a shortage of work does not amount to an unfair suspension in terms of section 186(2)(b) of the LRA. Because a lay-off does not fall within the definition of unfair labour practice, the CCMA lacks the jurisdiction to arbitrate. A lay-off may be a unilateral change to the terms and conditions of employment regulated in terms of section 64(4) of the LRA.

Facts:
An employee was employed as a driver of heavy-duty vehicles. With the advent of Covid-19, like many other businesses, the employer faced a severe slump during the regulated lock-down period. As a result, the employer had no work for the employee during that period. The employee was considered for retrenchment, but after consultation with the employee it was decided that instead of dismissing him for operational requirements, he would be laid-off for a short duration. (The employee disputed any discussion having been held with him.)

The employee was given a written notice of lay-off effective from 12 November 2021. The lay-off was to be reviewed in January-February 2022. Aggrieved, the employee initially referred an unfair dismissal dispute to the **CCMA** but later changed the dispute to one of unfair labour practice relating to suspension.

The alleged unfair labour practice dispute was arbitrated, and the arbitrator accepted the lay-off was an unfair labour practice, defined in section 186(2)(b) of the LRA to mean "*any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee*". The arbitrator ordered the employer to reinstate the employee into his position on the same salary and benefits as they applied at the date of his suspension, with backpay.

On review, the **Labour Court**held that a lay-off because of a shortage of work does not amount to an unfair suspension in terms of section 186 (2)(b), which is limited to a disciplinary suspension. Because an 'economic' lay-off does not fall within the definition of an unfair labour practice, the CCMA lacks jurisdiction to arbitrate.

The Court commented that a lay-off may be a unilateral change to the terms and conditions of employment - but this too does not fall within the definition of an unfair labour practice. The Court saw potential in framing the dispute as a unilateral change to terms and conditions of employment in terms of section 64 (4) of the LRA, but did not consider the case of *Nhlapo-Mofokeng v Emfuleni Local Municipality and Another (J 943/2022) [2022] ZALCJHB 236; [2023] 1 BLLR 63 (LC) (18 August 2022)*which held that section 64(4) does not establish a substantive right for individual employees aggrieved at unilateral change to their terms and conditions of employment.

The case, finding that the CCMA had no jurisdiction to hear a matter which fell outside the definition of unfair labour practice, leaves an individual laid-off employee without apparent remedy. While a lay-off will often be a unilateral change to terms and conditions of employment, section 64(4) of the LRA can only be used as a remedy for collective disputes.

Individual employees may have to enforce their contractual rights through an order for specific performance, possibly via section 77(3) of the BCEA. Groups of employees not wishing to go the strike route, may also consider claims under this section.

Extract from the judgment:
(Moshoana, J)

[6] Like a dismissal, the existence of a suspension within the contemplation of the LRA agitates the question of jurisdiction. In the absence of a suspension contemplated in the LRA, the Commission for Conciliation, Mediation and Arbitration (CCMA) lacks the necessary jurisdictional power. The test for jurisdictional review is one of correctness as opposed to reasonableness. Similarly, a party alleging an error of law may attack the arbitration award on correctness or reasonableness grounds. The LRA does not define the word suspension, an unfortunate situation in my view. It only defines what a dismissal is. Therefore, the word suspension must be given its ordinary grammatical meaning. Grammatically suspension means a temporary cessation or prevention. In an employment context, a suspension must mean temporary cessation of work or prevention from performing work. When an employee is placed on a suspension, such an employee would be without work for the duration of the suspension.

[7] The term lay-off grammatically means discontinue; discharge (an employee) permanently or temporarily, especially owing to shortage of work. Indeed, there are some similarities between a suspension and a lay-off. In both, an employee becomes without work for a duration. However, what sets a lay-off apart is that it only happens in situations where there is a shortage of work. A suspension happens even in instances where there is no shortage of work.

……

[15] The power to arbitrate disputes arise in section 191 of the LRA. In terms of section 191 (5) (a) (iv) of the LRA, an unresolved dispute concerning an unfair labour practice may be referred to arbitration for resolution. Accordingly, if the dispute does not concern an unfair labour practice as defined; the power in section 191 cannot be invoked…….

……..

[19] I have no doubt in my mind that a lay-off does introduce a change that affects terms and conditions of employment as well as employment security. An employee who is laid off loses remuneration and or emoluments during the tenure of a lay-off. In our law, as it presently stands, an employer may not change the terms and conditions of employment unilaterally. However, a unilateral change of terms and conditions of employment does not amount to an unfair labour practice. It is regulated differently in the LRA (section 64(4) of the LRA). It is a matter that effectively falls under power play (strikes and lockouts). Although the lay-off in *casu* happened for what appears to be justifiable reasons – it was aimed at avoiding a dismissal for operational requirements, it does seem that the consultation and the proper selection was either not done or was done unfairly.

2. Employer liability for harassment (section 60 of EEA)

***Solidarity obo Oosthuizen v South African Police Service and Others* (JS1030/17) [2023] ZALCJHB 4; [2023] 3 BLLR 258 (LC) (10 January 2023)**

Principle:
For the employer to escape being vicariously liable, it must show that -
(i) it took reasonable precautions to prevent and promptly correct the inimical behaviour, and
(ii) that the employee unreasonably failed to take advantage of the employer's preventive or corrective opportunities.

Facts:
A colonel and human resources commander in the SA Police Force, a white female, alleged that two of her subordinates, both black males, racially abused her. There had been an altercation between her and the two warrant officers over corrective action she had taken against them, during which they alleged she called them "k…..s". The warrant officers opened a crimen injuria criminal case against her as well as lodging internal grievances. They demanded that the colonel be transferred pending an investigation, as they felt unsafe and intimidated by her presence at work.

A SAP intern reported that she overheard the warrant officers conspiring to falsely accuse the colonel of calling them "k….s". The colonel opened criminal cases of crimen injuria, defamation, perjury and intimidation and lodged an internal grievance against the warrant officers for making false allegations against her. The colonel was transferred pending the finalisation of the disciplinary investigation against her and before her grievance was dealt with, whereas the warrant officers remained in their positions. Solidarity wrote to the SAPS on the colonel's behalf questioning her transfer and demanding that disciplinary action be taken against the warrant officers.

Investigations into the matter recommended that disciplinary action be taken against the warrant officers, but this was never done as the Provincial Commissioner and POPCRU (the warrant officers' trade union) had agreed to suspend the disciplinary action against them. The criminal case against the colonel was not prosecuted as the chief prosecutor was of the view that there were no reasonable prospects of success.

The colonel lodged a second grievance over the SAP's failure to comply with their own internal procedures and their failure to take disciplinary action against the warrant officers, but to no avail. She then lodged a dispute with the CCMA that was not resolved at conciliation. She was also acquitted in the disciplinary proceedings against her for using the "k.." word.

After various correspondence between Solidarity and the SAPS the 2 warrant officers were charged with various allegations including conducting themselves in an improper, disgraceful and unacceptable manner, and intimidation or victimization of another employee. One of them was found not guilty due to a lack of evidence (the colonel was never called as a witness despite being the complainant) and the other

pleaded guilty and was given a sanction of a written warning and one-day leave without pay.

The incident led to the warrant officers being found guilty in the Regional Court on a variety of charges including assault, crimen injuria, and injuring, insulting and impairing the colonel's dignity and making her out to be a racist. As a result of their criminal convictions they were then again charged internally and dismissed.

The Labour Court noted that clause 10.3 of the Code of Good Practice on the Prevention and Elimination of Harassment states as follows:

> "*Failure to take adequate steps to eliminate harassment once an allegation of harassment by an employee has been submitted within a reasonable time, will render the employer vicariously liable for the conduct of the employee in terms of section 60 of the EEA. This is the case even if the harassment consists of a single incident*."

The Labour Court also noted that there is an emerging trend of false claims of racial or sexual harassment by subordinates against their superiors in order to circumvent being disciplined.

After analysing the facts of the case, the Labour Court found there was no evidence to show that the SAPS –

- consulted all relevant parties as required by section 60(2), once harassment was alleged. Worse still, the colonel was unjustly criticised for lodging grievances.
- took the necessary steps to eliminate the racial harassment. Instead, they acted in a partial manner by protecting the perpetrators at the expense of the victim.
- did all that was reasonably practicable to ensure the warrant officers would not racially harass the colonel. Tellingly, they persisted during the trial to vilify the colonel for vindicating her right to dignity and equality.

The Labour Court said the employer, to escape being held to be vicariously liable, must be able to show that it took reasonable precautions to prevent and promptly correct the wrongful behaviour. To achieve that, an employer is expected to go beyond "*superficial compliance and deal with historical ethos and systems that may have created a toxic environment which is susceptible to racial harassment*."

The Labour Court noted that the Constitutional Court had highlighted the constitutional imperative of rooting out racism, that required a very firm and unapologetic response. The Court ordered the SAP to pay her R300 000 compensation and to apologise in writing to her within one week of the court order for the indignity she suffered.

It is disturbing to note the Labour Court's comment that there is an emerging trend of false claims of racial or sexual harassment by subordinates against their superiors in order to circumvent being disciplined. It can also be difficult for employers to deal with "*he said / she said*" type cases in which conflicting versions are presented, each of which could result in serious action having to be taken, and with the employer at the outset having little idea which version will turn out to be the truth.

We suggest a few tips for employers to apply in these types of cases, which we think would assist in limiting the potential for liability under section 60:

- respond quickly to allegations of harassment and initiate the necessary investigations;
- take interim preventative measures that make allowance to the possibility that either version may be true;
- act impartially and guard against any inherent bias – eg favouring management's version over that of an employee;
- be seen to be guided by the facts as they emerge from the investigations, and then take the necessary follow up action required;
- ensure full compliance with the Code of Good Practice on the Prevention and Elimination of Harassment.

Extract from the judgment:
(Nkutha-Nkontwana,J)

[37] In *SAMKA v Shoprite Checkers (Pty) Ltd and Others* the Labour Appeal Court (LAC) endorsed the following requirements for the application of section 60 of EEA set out in *Mokoena and another v Garden Art (Pty) Ltd and another*
:

> '40.1 The conduct must be by an employee of the employer.
> 40.2 The conduct must constitute unfair discrimination…
> 40.3 The conduct must take place while at work.
> 40.4 The alleged conduct must immediately be brought to the attention of the employer.
> 40.5 The employer must be aware of the conduct.
> 40.6 There must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA, and
> 40.7 The employer must show that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA.'

[38] It is worth mentioning that these requirements were recently codified in terms of the Code of Good Practice on the Prevention and Elimination of Harassment which came into effect on 18 March 2022. Instructively, clause 10.3 provides that:

> *'Failure to take adequate steps to eliminate harassment once an allegation of harassment by an employee has been submitted within a reasonable time, will render the employer vicariously liable for the conduct of the employee in terms of section 60 of the EEA. This is the case even if the harassment consists of a single incident.'*

……

[45] In my view, for the employer to escape being held vicariously liable for the actionable discriminatory conduct of its employees, it must show (i) that it took reasonable precaution to prevent and promptly correct the inimical behaviour, and (ii) that the employee unreasonably failed to take advantage of the employer's preventive or corrective opportunities. To achieve that, the employer would be expected to transcend the confines of superficial compliance and deal with historical ethos and systems that may have created a toxic environment which is susceptible to racial harassment.

……

[52] In all the circumstances, I am satisfied that for a period of about a year, Col. Oosthuizen was disparaged and humiliated by the racial harassment that was perpetrated by the two WOs with impunity. SAPS is therefore vicariously liable for the actionable racial harassment. In my view, the compensation equivalent to R300 000 is just and equitable. Moreover, SAPS shall tender a written apology to Col. Oosthuizen for the indignity she had suffered.

3. Fixed term contracts

3.1 Continuing to work after expiry of a fixed term contract

***Gauteng Provincial Legislature v Commission for Conciliation, Mediation & Arbitration & others* (2022) 43 *ILJ* 616 (LAC)**

Principle:
The mere fact that an employee continues to work in the same position for the same employer after his fixed-term contract has come to an end does not mean that his fixed-term contract has 'morphed' into permanent employment. It may still be on a fixed-term basis, and depends on the facts of each case.

Facts:
Four employees were employed on fixed term contracts by the Gauteng Legislature on different dates between 2001 and 2010 in managerial positions. When those contracts expired they all continued to be employed by the Legislature on a fixed-term basis, although tacitly and without an express, written contract to that effect.

In accordance with a resolution to extend all fixed-term contracts of senior managers to 30 June 2015, the employees signed further fixed-term contracts terminating on that date. On 11 December 2015, it was resolved that the employment contracts of managers be extended by one year, that is, retrospectively, from 1 July 2015 to 30 June 2016 and to terminate the services of all senior managers by 30 June 2016. The positions were to be advertised and the affected persons, including the employees, were required to re-apply for the positions they occupied up to 30 June 2016. In March 2016, the managers were notified that their contracts would terminate at the end of June 2016 and they were urged to apply for their positions.

The employees referred an unfair dismissal dispute to arbitration at the **CCMA**, relying on s 186(1)*(b)*(ii) of the LRA. This section effectively says that if an employee on a fixed term contract has a reasonable expectation of continued employment beyond the fixed term, and the employer either doesn't offer this or offers less favourable terms of employment, this constitutes a dismissal under the Act.

The commissioner found that when the employees' extended fixed-term contracts expired, they continued to be employed by the Legislature in terms of a tacit agreement on an indefinite/permanent basis. The notice given to them that their contracts would terminate on 30 June 2016 constituted a dismissal in terms of s 186(1)*(b)*(ii), because the employees had a reasonable expectation that they would be employed on an indefinite/permanent basis.

The **Labour Court** dismissed the Legislature's application to review and set aside the award, but on appeal the **Labour Appeal Court** overturned it. The LAC said that the commissioner's and the Labour Court's finding that from 1 July 2015 the employees had been employed on a permanent/ indefinite basis pursuant to a tacit agreement between the parties, was not reasonable in the light of all the relevant facts.

The LAC noted that the mere fact that an employee continues to work in the same position for the same employer after his fixed-term contract has come to an end does not mean that his fixed-term contract has 'morphed' into permanent employment, or into employment of indefinite duration. It may still be on a fixed-term basis, albeit tacitly, and ultimately it depends on the facts, or the inferences that may be drawn from the facts.

The Court accepted that in order to prove a tacit contract one must show conduct and circumstances that are so unequivocal that the parties must have been satisfied that they were in agreement. This involves a **three-stage enquiry** — the first stage is to decide on a balance of probabilities what facts have been established. The second stage is to decide what conclusion, consistent with those established facts, is correct, and the third stage is to decide how the proved facts, including the conduct of each party and the relevant circumstances, was probably interpreted by each of the parties.

Applying this approach to the facts, the court found that the commissioner's conclusion that the employees automatically became permanently employed after 30 June 2015 could not be correct. In the circumstances, the court found that the employees had failed to prove that they had been dismissed. The Legislature's appeal was accordingly upheld. The Labour Court's order and the arbitration award were set aside and replaced with an order dismissing the employees' claims.

Whilst there are contrary decisions, based on different facts, such as *Department of Agriculture, Forestry and Fisheries v Teto and Others (CA8/2019) [2020] ZALAC 19 (28 May 2020)*, this judgment aligns with the previous LAC case of *Ukweza Holdings (Pty) Ltd v Nyondo and Others (PA2/19) [2020] ZALAC 7 (4 March 2020)* where it was held that if an employee renders services after a fixed-term contract has ended, this does not mean that that the contract automatically morphs into permanent employment.

Divergent outcomes are obviously influenced by the factual situations of each case. Both employers and employees would be wise to seek clarity before the termination of the fixed term contract.

Extract from the judgment:
(Coppin JA)
[49] The mere fact that an employee continues to work in the same position for the same employer after his fixed-term contract had come to an end does not mean that his fixed-term contract had now 'morphed' into permanent employment, or into employment of indefinite duration. It may still be on a fixed-term basis, albeit tacitly. Ultimately, it depends on the facts, or the inferences that may be drawn from the facts.

[50] Different and conflicting tests have been applied for inferring a tacit contract. It is trite that, in terms of one test, the 'preponderance of probabilities' test, in order for a party to prove a tacit contract, it is necessary not only to allege, but to prove unequivocal conduct that establishes on a preponderance of probabilities, usually by a reasonable inference drawn from the relevant admitted facts, that the parties intended to and did in fact contract on the terms alleged. Another test, which is referred to as the traditional or 'no other reasonable interpretation' test, had been formulated in *Ocean Commodities* as follows: 'In order to establish a tacit contact it is necessary to show, by a preponderance of probabilities,

unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem.'

[51] Because of the difference of emphasis in these two tests a synthesis of the two has been accepted and applied to infer the existence (and terms) of a tacit contract. It incorporates the best of the two tests. In *Christie's Law of Contract in SA* the synthesis has been summarised as follows: 'In order to establish a tacit contact it is necessary to prove, on a preponderance of probabilities, conduct and circumstances that are so unequivocal that the parties must have been satisfied that they were in agreement. If the court concludes on the preponderance of probabilities that the parties reached agreement in that manner, it may find that tacit contract established.'

[52] The synthesis, essentially, requires the court to embark on a three-stage, as opposed to a two-stage, process. The first stage would be to decide on a balance of probabilities what facts have been established. The second stage would be to decide, also on a balance of probabilities, what conclusion, consistent with those established facts, is correct, and a third stage would be interposed between those two, in terms of which the court has to decide how the proved facts, that is including the conduct of each party and the relevant circumstances, was probably interpreted by each of the parties. It is said that at the third stage the court is essentially looking at the matter 'through the eyes of the parties — at their conduct and the circumstances' and 'unless the conduct in those circumstances was so clear, so unequivocal, so unambiguous that the parties must have regarded themselves in agreement, there is no contract'.

3.2 Reinstatement into a fixed term contract

***Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (DA6/2021) [2023] ZALAC 5 (14 February 2023)**

Principle:
The remedy of reinstatement is confined to the situation where, at the date of the finding that the dismissal is unfair, the original employment contract would still have been in existence but for the unfair dismissal. Where the employee is employed on a fixed-term contract, the expiry of which precedes the unfair dismissal finding, reinstatement or re-employment are not legally permissible remedies. The arbitrator no longer has a discretion to choose between the three remedies contemplated in s193(1) of the LRA but is obliged in law to order the employer to pay the employee compensation in terms of s193(1)(c).

Facts:
The employee worked for Toyota since 21 March 2010 as a crane driver. He was employed on a three-month fixed-term contract. His contract was repeatedly renewed until his dismissal on 14 August 2015.

On 23 March 2015, the employer issued the employee with a final written warning relating to a charge of negligence. Within three months of receiving this final warning, the employee was again involved in an incident involving negligence where he purportedly failed to check that the clamping device between the tool and the moving bolster on the crane was removed prior to lifting the tool. As a result, the employer again charged him with negligence. On 18 June 2015, he was suspended and furnished with a notice to attend a disciplinary inquiry.

Three days before his suspension, the employee signed a further fixed-term contract commencing on 1 August 2015 and terminating on 31 October 2015.

On 14 August 2015, after the disciplinary inquiry, the employee was dismissed. He unsuccessfully appealed against his dismissal. The employee referred an unfair dismissal dispute to the **CCMA**. The arbitrator found that the employee's dismissal was substantively unfair as he was not negligent because the employer should not have expected him to check a clamp of which he had no knowledge. The employee sought reinstatement with backpay. The arbitrator exercised her discretion against reinstating the employee. In doing so, she reasoned that it was never the employee's case that but for his dismissal, his fixed term contract would have been renewed and no evidence was led to prove any kind of legitimate expectation either. In the premises the arbitrator believed that the only competent relief was compensation.

Another issue was whether, in terms of section 194 of the LRA, it was just and equitable to limit the compensation to be awarded to the employee to the balance of his fixed-term contract (i.e. 2.5 months). The arbitrator awarded the employee compensation in an amount equivalent to the amount he would have earned for the remainder of his fixed- term contract (two and a half months), which was R37 325.20.

On review at the **Labour Court** the employee sought that the compensation award be reviewed, set aside, and replaced with an order that the employee be reinstated with full retrospective effect. The Labour Court reviewed and set aside the compensation award of the arbitrator and substituted it with an order that the employer "*reinstate the employee from the date of his dismissal with no loss of earning or benefits as if he was not dismissed*". In making the order, the Labour Court reasoned that: "*it was the employee's suspension and subsequent dismissal that prevented him from being offered permanent employment and if there was any other reason, no evidence appears to have been led*". The Labour Court stated that the only exception from the provisions of section 193(2) of the LRA that could justify a failure to reinstate or re-employ the employee is under 193(2)(c) and that the question is whether it was reasonably practicable for the employer to reinstate or re-employ the employee. The Labour Court concluded that the employer did not adduce any evidence to discharge its onus to prove that reinstatement was not practical.

On appeal the **Labour Appeal Court** held that, because reinstatement on the facts of this case was not a competent remedy, section 193(2) did not apply. Thus, contrary to the finding of the LC, the employer was not required to prove that reinstatement of the employee was not practicable in terms of section 193(2)(c). The LAC found the LC had erred in ordering reinstatement as it was not established on the evidence that, but for the disciplinary process, the employee would have been offered permanent employment. What the LC ignored was that, at the time of his dismissal, the employee was on a fixed-term contract ending two and a half months later.

The LAC held that the LC's reinstatement order created a permanent contract of employment between the employer and employee, when no such contract existed. Since reinstatement involves the original contract of employment, which in this case

was one of limited duration that had terminated by the effluxion of time, it was legally impermissible for the LC to create a new contract through ordering reinstatement. The LAC confirmed the arbitrator's award.

Extract from the judgment:
(F Kathree-Setiloane AJA)

[21] Integral to the exercise of the arbitrator's discretion in terms of section 193(1) of the LRA in deciding whether to reinstate, re-employ or compensate the employee, is the nature of the employment contract and whether it is extant when an employee's dismissal is found to be unfair. The remedy of reinstatement is confined to the situation where, at the date of the finding that the dismissal is unfair, the original employment contract is still in existence. However, where the employee is employed on a fixed-term contract, the expiry of which precedes the unfair dismissal finding, as in this dispute, then reinstatement or re-employment are not legally permissible remedies. In the circumstances, the arbitrator no longer has a discretion to choose between the three remedies contemplated in section 193(1) of the LRA but is obliged in law to order the employer to pay the employee compensation in terms of section 193(1)(c) of the LRA.

[22] The arbitrator in this appeal found the dismissal of the employee to be substantively unfair and ordered the employer to pay compensation to the employee as provided for in section 193(1)(c) of the LRA. In making this order, the arbitrator took into consideration that at the point of the employee's dismissal on 14 August 2015, he was not a permanent employee but was on a fixed-term contract which would terminate some two and a half months later on 31 October 2015. She was also mindful of the fact that when she found the employee's dismissal to be substantively unfair, his fixed-term contract had already expired and that, in the circumstances, she was legally precluded from ordering the employer to reinstate the employee.

[23] Concerning the quantum of compensation awarded, the arbitrator ordered the employer to pay the employee compensation limited to the balance of his fixed- term contract as it was equivalent to the employee's actual loss of income. This was just and equitable as contemplated in section 194 of the LRA. Notably, the employee does not appeal the quantum of compensation awarded to him.

[24] Significantly, because reinstatement on the facts of this case is not a competent remedy, section 193(2) of the LRA has no application. Thus, contrary to the finding of the Labour Court, the employer was not required to prove that reinstatement of the employee was not practicable in terms of section 193(2)(c) of the LRA.

……

[26] The Labour Court's reinstatement order sought to create a permanent contract of employment between the employer and employee when no such contract existed. Since reinstatement involves the original contract of employment, which in this case was one of limited duration that had terminated by the effluxion of time, it was legally impermissible for the Labour Court to create a new contract through ordering reinstatement.

4 Disciplinary cases

4.1 The end of disciplinary hearings?

***Bidvest Protea Coin (Pty) Ltd v Myeni and Others* (JR1164/21) [2022] ZALCJHB 56 (15 March 2022)**

Principle:
The standard of procedural fairness described in item 4 of the Dismissal Code of Good Practice is the standard that the LRA establishes, and which must be applied by commissioners. Section 203 of the Act obliges them to do so.

Facts:
The employee, a security guard, was charged and dismissed for misconduct after a tow truck entered a client's premises where she was stationed, loaded a lighting plant valued between R80 000 and R150 000 and left the premises. She failed to report the incident to her superiors and was accordingly dismissed for dereliction of duty.

At the CCMA the commissioner found her dismissal to be substantively fair but procedurally unfair. The employer had processed the dismissal in terms of its policy, which was an exact replica of the requirements of item 4 of the Dismissal Code of Good Practice, and which states as follows:

> *"Fair procedure - (1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision."*

Aside from assessing the evidence presented at the arbitration and coming to the conclusion that the employer had not complied with its policy set out above, the commissioner clearly also took a dim view of this policy. He had this to say:

> "*I find that (the employer's) approach to procedural fairness is a sheer repulsive repugnant travesty of the principles of fair labour practices as enshrined in section 23 of the Constitution. I find it a bit baffling enigma (for the employer representative), with eighteen years of experience to formulate written misconduct enquiry*."

The commissioner found the dismissal to be procedurally unfair and awarded the employee compensation of R26 880, being 7 months' remuneration.

On review, the Labour Court concluded from the record of the arbitration proceedings that the employer had complied with its disciplinary policy. The written misconduct enquiry form and the employee's notification of suspension form clearly indicate what her rights are: there was written notice of the charges she faced: she

was advised of her right to submit documentary evidence and her right to be represented: she was provided with an opportunity to prepare a written response and the written outcome, and was further advised of her rights to refer the matter to the CCMA. In addition, there was evidence that a NUM official approached management regarding the charges, clearly indicating that she understood her rights, and there was no evidence to show that she was deprived of the right to call witnesses or to present material evidence.

The Labour Court also rejected the arbitrator's views about the unfairness of the employer's procedures, which complied with the requirements of the Dismissal Code of Good Practice. The Court referred to the authoritative case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others (2006) 27 ILJ 1644 (LC)* which stated that –

> *''when the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.''*

The Court noted that the *Avril Elizabeth Home* case stated that the standard of procedural fairness described in the Code is the standard that the LRA establishes, and which must be applied by commissioners in terms of section 203 of the Act. The Court concluded that the commissioner failed to correctly interpret and apply the prescribed principles in terms of the Code, and overturned the finding of procedural unfairness. The Court found that the employee's dismissal was both procedurally and substantively fair.

It is clear from this judgment that if an employer has disciplinary polices that provide for a procedure that aligns with item 4 of the Dismissal Code, this should not be found to be procedurally unfair if challenged at the CCMA.

Based on this judgment is Worklaw advising its subscribers to amend their disciplinary polices to do away with disciplinary hearings and provide for a system that allows employees to make written representations about whether there has been misconduct, and if so, what the sanction should be? No, we are not. Our reasons are as follows:

(a) We still think a hearing before an impartial chairperson that provides for management and employee witnesses to say what they saw, heard, observed etc, and to be questioned on their versions, gives management the best chance of arriving at the truth of what happened, thereby providing the best chance to decide disciplinary matters fairly – which surely is the fundamental aim of the whole exercise.

(b) Circumventing the process outlined in 1 above and merely allowing an employee to make written representations, we think is likely to lead to a greater sense of aggrievement by affected employees, leading to an increased number of disputes being referred to arbitration. And given that parties' versions may not have been fully canvassed internally, this may lead to an increased number of management decisions being overturned once the issues are fully canvassed at arbitration.

(c) It also may not be that easy for some employers to amend their disciplinary policies as suggested above, for example where these have been incorporated into a collective agreement with their unions.

(d) And lastly, it should be noted that the judge in the *Bidvest Protea Coin* judgment referred to above, in coming to his finding that the procedure was not procedurally unfair, did comment [para 19] that the evidence in this case did not show that the employee was deprived of the right to call witnesses or to present material evidence. Presumably this was not requested by the employee in this case. But this does beg the question of how a court would deal with a matter if the employer only allowed written representations but the employee asked for the opportunity to call witnesses and question the employer's witnesses? We think such circumstances could well affect a court's decision on procedural fairness.

Whilst we support the views expressed in the *Avril Elizabeth Home* judgment that do away with a formalistic, 'criminal justice' approach to disciplinary hearings, we nevertheless suggest that a simply run, fair hearing, gives the best chance of achieving both "*employment justice and the efficient operation of the business*'' – the objectives set out in item 1(3) of the Dismissal Code.

Extract from the judgment:
(Deane AJ)

[17] With regards to the *Avril Elizabeth Home* case, the Court stated that:

> *'In the absence of exceptional circumstances, the substantive content of this process as defined by Item 4 of the Code requires the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee. The employer should then communicate the decision taken, and preferably communicate this in writing. If the decision is to dismiss the employee, the employee should be given the reason for dismissal and reminded of his or her rights to refer any disputed dismissal to the CCMA, a bargaining council with jurisdiction…'*

[18] The Court further states that:

> *'The standard of procedural fairness that I have described above is the standard that the Act establishes, and which must be applied by commissioners. Section 203 of the Act obliges them to do so. That section requires, in peremptory terms, that any person who interprets or applies the Act must take into account any relevant code of good practice'.*

[19] In *casu*, the written misconduct enquiry form together with the notification of suspension form clearly indicate what the rights of the employee are. It is clear that evidence was presented that there was a written notice of the charges that Myeni faced, that Myeni was advised of her right to submit documentary evidence, evidence was submitted that Myeni was advised of her right to be represented, Myeni was provided with an opportunity to prepare a written response and that Myeni was provided with a written outcome and was further advised of her rights to refer the matter to the Commission for Conciliation, Mediation and Arbitration. In addition, Van Zyl testified that a NUM official approached him regarding the charges, clearly indicating that Myeni did understand her rights. In addition, the evidence provided does not show that Myeni was deprived of the right to call witnesses or to present material evidence.

[20] In the current circumstances, it would appear that the Applicant did indeed comply with the Code and with its disciplinary process. Faced with this evidence, this then begs the question of why the Commissioner would conclude that *"I find that the Respondents approach to procedural fairness is a sheer repulsive repugnant travesty of the principles of fair labour practices as enshrined in section 23 of the Constitution. I find it a bit baffling enigma for Manamela, with eighteen years of experience to formulate written misconduct enquiry*." The facts do not support this conclusion.

[21] Indeed taking into account the applicable legal principles as enunciated in *Sidumo* and *Avril Elizabeth Homes*, it is clear that the Commissioner failed to correctly interpret and apply the prescribed principles in terms of the Code.

4.2 Drafting disciplinary charges

***Engen Petroleum Ltd v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union and others* [2023] 1 BLLR 18 (LAC)**

Principle:
There is no need to try to label or compartmentalise a misconduct charge. All that needs to be done is for an employer to set out the facts and explain the complaint or the issue that arises from the facts, and which will be the subject of the enquiry or is the basis of the decision it has made.

Facts:
The employee, a truck driver who was a shop steward, was dismissed for assaulting a security guard and telling another to "voetsek". A **bargaining council arbitrator** found that the employee had been provoked by the guard he had assaulted, who had called him a "stupid old man", and that the employee had apologised for using an inappropriate expression to the other, and reinstated him without back pay.

The **Labour Court** held that although the arbitrator's reasoning was defective in some respects, the outcome 'fell within the band of reasonableness' and dismissed the review application. On appeal to the **Labour Appeal Court**, the employer contended that the arbitrator had applied the cautionary rule inappropriately to the evidence of its single witness, and had accepted the employee's defence of provocation even though it had not been raised. The employee denied that his conduct amounted to an assault and claimed that he had apologised for using the inappropriate expression.

The LAC held that the cautionary rule should not have been applied, as it has no application in civil proceedings, but found that in any event the arbitrator's misplaced reliance on the cautionary rule had no influence on the outcome. The Court noted that the arbitrator had found that the employee had merely pulled the shirt of one of the guards and had believed that this did not amount to an assault. However, regardless of the label given to the employee's actions, aggressively grabbing and pulling somebody's shirt amounts to unacceptable conduct in the workplace. Employers are not required to label charges of misconduct in a technical manner; all they need do is to set out the facts which will be the subject of the inquiry. The employee's reliance on that point accordingly failed.

Turning to the issue of provocation, the Court accepted that, although he might not have named it, the employee had raised provocation during the arbitration. His version, which was corroborated by two witnesses, was that the security guards had insisted that he repeat an induction which he had already completed, and he had reacted angrily. Whether the arbitrator approached the issue of provocation before or after finding that the guards had provoked the employee, was immaterial. What mattered was that he had to determine whether dismissal was an appropriate sanction. In doing so, the arbitrator had taken into account all relevant circumstances and had penalised the employee by denying him back pay. Furthermore, the evidence indicated that the incident was the result of a misunderstanding and that the animosity had been resolved.

The LAC said that while the Labour Court's judgment was not a model of clarity, its conclusion that the award fell within the band of reasonableness was unquestionable, and dismissed the appeal.

Extract from the judgment:
(Kathree-Setiloane AJA)
[15] On a proper evaluation of the employee's evidence, it is clear that he did not deny assaulting Mr Mudau in the legal sense of the term assault. As emerged from his testimony, as a layman he did not appreciate that the legal definition of assault extends beyond physical injurious conduct and includes the mere threat of physical harm. Notably in this regard, he admitted to pulling or grabbing Mr Mudau by his shirt (in the arbitration hearing as well as in the disciplinary proceedings) but was of the view that that did not constitute assault because he did not hit or attempt to hit Mr Mudau. The arbitrator was alive to this and found that the employee's denial was informed by a narrow definition of assault and that by pulling or grabbing Mr Mudau by his shirt, the employee had in fact committed assault.

[16] Thus, regardless of the label which is given to the employee's actions, it is manifestly clear that by aggressively pulling or grabbing Mr Mudau by his shirt, the employee engaged in inappropriate and unacceptable conduct in the workplace. In *Pilanesburg Platinum Mines (Pty) Ltd v Ramabulana*, Waglay JP stated that: 'It is not proper for employers in a labour relations environment to always label their action or even the charge they prefer against an employee for misconduct. There is simply no need to try to label or compartmentalise a decision or for that matter a misconduct charge. All that needs to be done is for an employer to set out the facts and explain the complaint or the issue that arises from the facts which will be the subject to the enquiry or is the basis of the decision it has made.'

But contra the following case:

Austin-Day v ABSA Bank Ltd and Others *(PA02/2020) [2022] ZALAC 6 (8 March 2022)*

Principle:
To substantiate allegations of misconduct, an employer needs to provide evidence that proves the employee is guilty of the specific allegations made.

Facts:
A Nedbank branch manager was charged and dismissed for misconduct involving dishonesty and failure to comply with the bank's policies and procedures in the execution of her duties. She had been employed at the bank for 33 years and had an unblemished record, and had been a branch manager for 15 years.

The disciplinary charges resulted from her deciding to deposit R100 of her own money into 10 inactive accounts, opened by 10 different customers, that were under her control at her branch. She deposited R10 into each of those accounts, without the knowledge or consent of the account holders. The effect of this was that those inactive accounts were then recorded as activated accounts in the branch's books, and constituted sales in terms of the branch's performance. Each of the bank's branches has sales targets, which are recorded when an account is activated.

When the bank's area head manager made a routine visit to the branch, she voluntarily informed him about these deposits, which resulted in the bank's forensics department investigating the matter. In its report, forensics confirmed that they could not detect any fraudulent conduct and made a recommendation that remedial action be taken. Further investigations were conducted into the bank's policies and procedures, and the operations consultant recommended disciplinary action against her. She was then charged with 2 counts of alleged misconduct:

- acting dishonestly in executing her duties by making irregular cash deposits into customer accounts;
- Failing to adhere to Company policies and procedures in executing her duties.

Following a disciplinary enquiry, she was found guilty and dismissed. The reason for her dismissal was recorded as – "*Guilty of charge of dishonesty…. ER do not have a lesser sanction that dismissal ZERO-TOLERANCE"*. She referred a dismissal dispute to the CCMA.

The arbitrator found that the branch manager has not acted dishonestly as charged, and that her dismissal was unfair. He said the second charge was irrelevant as it was clear she had been dismissed for dishonesty and not because she breached the bank's procedures. But even if she had, dismissal for this second charge would not have been a fair sanction. The arbitrator ordered her reinstatement.

The LC set aside the arbitrator's award and found the dismissal to be fair. The LC confined itself to the first charge (dishonesty) and said the arbitrator had ignored evidence before him, by concentrating on how the misconduct was perpetrated rather than on the reasons for it. The LC found that the award was unreasonable.

Dissatisfied with the LC's judgment, the bank manager took the matter on appeal to the LAC. In respect of the dishonesty charge, the LAC disputed the bank's contention that the bank manager stood to gain from her actions, and that she wanted to deceive the bank by boosting her branch sales. There was no evidence that she stood to gain any kind of reward through the 10 accounts. The LAC accepted she had voluntarily and freely mentioned her conduct to the bank's area head manager and to her staff, in the excitement of having thought of something which, to her, appeared like a good idea and innovative, with the hope of motivating staff performance. It appears she thought this was a good way of trying to motivate account holders to use their accounts.

The list of accounts into which she deposited the money were supplied to her by one of her staff, and she acted openly and with the knowledge of her staff. She had freely left a paper trail in respect of the deposits, entering her name and ID number on the

deposit slips. Had she intended to be dishonest, she could easily have deposited the money anonymously at an ATM.

In respect of the breach of procedures charge, the LAC said there was no specific clause of any specific policy or procedure that could be convincingly pointed out that she had breached. But even if it were to be accepted that she breached the bank's procedures and applicable legislation, the LAC found that this did not justify a sanction of dismissal under the particular circumstances. Forensics had not found she acted fraudulently, and her unblemished record of 33 years mitigated against dismissal.

The LAC took note that she was contrite and realised she had made an error of judgment in acting as she did. There was no evidence that the bank suffered any prejudice by her actions, and the LAC commented that the bank should have contacted the holders of the accounts in question, to advise them that their accounts had been accessed by a private person and activated, and for that reason had to be de-activated, or that they may open new accounts, or "*something to that effect*". Instead, the LAC said, the bank did none of that, "*but happily enjoyed the benefit of what they considered to be dishonest conduct*".

The LAC granted the appeal against the LC judgment, which effectively confirmed the arbitrator's unfair dismissal award.

The key learning from this judgment for employers, is to be clear that the alleged charges against an employee are based on the facts of the case. While she acknowledged she had acted foolishly and had made an error of judgment, she clearly had not acted dishonestly – which was the main charge against her.

Had the bank focussed on her lack of judgment from what could reasonably be expected from a branch manager (possibly incapacity: poor work performance?), leading to a breakdown in the trust relationship, we think the outcome of this case may have been different. Demotion to a less senior position may then have been an option. We would be surprised if any bank would be prepared to employ someone at the level of a bank manager, who used her judgment and thought it would be okay to privately deposit her funds into private accounts without the holders' knowledge or consent.

Extract from the judgment:
(Kubushi AJA)
[29] The Bank's submission that the appellant wanted to deceive the bank by boosting her branches sales and that she was in trouble with her performance, holds no water…….

[32] There is nothing on record that indicates that the appellant stood to gain any kind of reward on account of adding ten accounts. There was no performance bonus or other kind of incentive that was within reach at the time that could be achieved by the artificial addition of the ten savings account.

[33] Without any shred of evidence that suggest that the appellant was dishonest in her conduct, as I have already indicated here above, the acceptance of the appellant's explanation, in my view, was reasonable.
……

[36] There is undisputed evidence that she wanted to motivate her staff. This is indicated by her undisputed evidence that she voluntarily shared what she had done, freely with her staff. The evidence is further that the list of accounts into which she deposited the R10.00's was supplied to her by one of her staff members. She thus acted openly and to the knowledge of the staff at the branch.

[37] Even though, the commissioner made an error in finding that the appellant conceded in hindsight that her actions were foolish, it is quite clear from the record that the evidence of the appellant is that she acted with lack of judgment. This error by the commissioner cannot come to the assistance of the bank in any way. It cannot be said that due to such error the dismissal of the appellant was fair. To the contrary, the concession by the appellant as correctly captured in the record, goes to show contrition on the part of the appellant which is a further indication that she did not act with the intention to be dishonest.
……
[39] There is no evidence that the appellant acted in bad faith or that by her actions, she exposed the bank to any material risk.
……
[41] If there was any misconduct, it was not serious enough to warrant dismissal. The evidence on record is that when Mr Vallentyn and forensics learnt about this unfortunate incident, they did not give an indication that this was a serious transgression. It must have not been serious, for if it was so, forensics would have immediately, indicated as such to the appellant, and besides, forensics found no evidence of fraudulent conduct on the part of the appellant. It merely recommended remedial action after its investigation.

[42] The appellant's unblemished record of thirty-three years of service also speaks for itself and militates against the sanction of dismissal. The further unchallenged evidence that the appellant will never do it again and the fact that she conceded in evidence that in hindsight she realised that she made an error of judgment, also confirms in her favour that dismissal was unwarranted.

4.3 Testing positive vs being 'under the influence'

***Enever v Barloworld Equipment, a division of Barloworld South Africa (Pty) Ltd* (JS 633/20; JS 926/20) [2022] ZALCJHB 161 (1 June 2022)**

Principles:

1. An Alcohol and Substance Policy that applies to all employees, which they are aware of and which has been consistently applied, does not constitute unfair discrimination.
2. Drug intoxication is defined legally through testing, be it urine, breathalyser or blood samples, and proof of impairment by cannabis is not required.

Facts:

The employee challenged her dismissal in the Labour Court for regular cannabis use, arguing she had been unfairly discriminated against on arbitrary grounds.

The employee's case was that she suffered from severe migraines and anxiety which affected her general well-being and sleeping. She was prescribed medication by her general practitioner, but which had side effects. Following the Constitutional Court case which decriminalised the private use of cannabis, the employee gradually moved away from pharmaceutical pills to using cannabis oil and smoking cannabis as an alternative to achieve the same results. The employee also used cannabis recreationally every evening to assist with insomnia and anxiety. This improved her

bodily health, outlook and her spirituality. She testified that smoking cannabis made her feel closer to God, which assisted in addressing internal struggles.

In terms of the employer's Alcohol and Substance Policy, employees are tested before accessing the premises. The employee tested positive for cannabis and she was informed that she was unfit to continue working and directed to immediately leave the premises. She was placed on a 7-day "cleaning up process", with the test repeated on a weekly basis until she was cleared by testing negative. Because the employee continued to consume the cannabis for both medical and recreational reasons, she continued to test positive.

It was common cause that, at the time of undergoing the test, the employee was not impaired in the performance of her duties nor was she performing any duties for which the use of cannabis would be said to be a risk to her own safety or that of her fellow employees. The employee was also not in possession or suspected of being in possession of the cannabis whilst at work on the employer's premises.

The employee was charged with a breach of the employer's Alcohol and Substance Abuse Policy and required to attend a disciplinary hearing. She pleaded guilty to testing positive for cannabis but said she was never intoxicated or impaired at work, and reiterated her improved medical benefits from the cannabis use. The employer instructed her to undergo a (further) "cleaning-up process" and to be tested every seven days until negative in terms of its Alcohol and Substance Abuse Policy.

The employee was ultimately dismissed, with the chairperson being of the view that a final written warning would not serve any purpose, as the employee had unequivocally refused to give up the consumption of cannabis.

At the **Labour Court** the employee submitted that the employer's policies unfairly discriminated against her on arbitrary grounds and that her dismissal was automatically unfair. The Court however rejected her submissions, placing a lot of emphasis on the fact that she only raised her medical conditions after testing positive. The Court also felt that there was no persuasive evidence that the employee indeed had a medical condition, and noted that the employee presented no proper medical evidence to support her claims.

The LC found that all employees were treated in the same way under the Alcohol and Substance Policy, which the employee was aware of and which had been consistently applied. To have treated her differently would have created a dangerous precedent. The LC felt it did not matter that the employee was not impaired at the time of testing positive, and that she was obliged to comply with the employer's 'zero tolerance' policy which was justified by the employer's dangerous working environment.

The LC appeared to accept that, unlike alcohol which leaves an individual's blood stream within a few hours after consumption, cannabis may remain present in an individual's system for a considerable period and that one cannot determine a level of impairment based on cannabis test results. Whilst conceding that this may mean that a 'zero tolerance' approach may be unconstitutional, as it will result in an employee not being able to use cannabis at home in their private time, the LC

nonetheless was prepared to enforce the employer's policy. The LC appeared to accept that whilst the Occupational Health and Safety Act's requirements focussed on not allowing a person ''*under the influence*'' of an intoxicating substance to access the workplace, intoxication legally is defined according to a person's substance level which (currently) can only be determined through testing. The Court called for "*a scientifically validated test to assess if an employee is stoned at work and thus liable for disciplinary action*".

Notwithstanding having expressed the above reservations, the LC found that the employee, despite her use of cannabis not having affected her performance, was unfit to render her services as a result of testing positive for cannabis. She had made the conscious decision to continue using cannabis, partly for recreational purposes, and was more than aware that she would continue to test positive. The Court said what the employee was effectively asking was for the employer to set aside its safety rules and condone intoxication for medicinal purposes.

The Court agreed that a final warning would have served no purpose, given the employee's refusal to stop using cannabis, and that her misconduct justified dismissal. The LC rejected the employee's claim that the employer's policy was discriminatory.

Whilst this judgment appears to us confusing, seemingly at times to equate a positive cannabis test with intoxication, it does highlight the dilemma of how to deal with a positive drugs test in circumstances in which an employee is perfectly able to perform their duties without any impairment of their functions. Until such time as the "*scientifically validated test*" the Court called for is widely available to test levels of impairment, a distinction perhaps needs to be made between positive alcohol and cannabis test results. Whilst a positive alcohol test is clear proof of impairment, perhaps a positive cannabis test should trigger a second test of some sort, to assess actual levels of impairment?

Extract from the judgment:
(Ntsoane, AJ)
[26] There is further no question that, unlike alcohol which leaves an individual's bloodstream within a few hours after consumption, cannabis may remain present in an individual's system for a number of days. This may mean that a zero tolerance approach may be unconstitutional as it will result in an employee not being able to use cannabis at home in their private time. In addition, tests for cannabis do not demonstrate the degree of impairment of the employee's ability to perform her or his duties. Cannabis may remain detectable in the bloodstream for days after consumption. Cannabis can be detected for a few days after occasional consumption, up to weeks for heavy users and up to months for chronic users. Unlike alcohol, one cannot determine a level of impairment based on test results. **Proof of impairment is therefore not required as with alcohol, it is automatically assumed that one is under the influence of cannabis due to its intoxicating nature.** In this regard, the Applicant testified that she is a chronic user and she will thus never test non-negative to the Respondent's tests.

[27] The General Safety Regulation 2A of the Occupational Health and Safety Act, requires that an employer may not allow any person who is or who appears to be under the influence of an intoxicating substance, to be allowed access to the workplace. Neither may an employer allow any person to have intoxicating substances in his or her possession in the workplace. Whilst the general and practical theory of intoxication can be defined as the

negative behaviour and impaired physical effects caused by consumption of alcohol, drugs or substances, the legal theory on the other hand is different. Alcohol/drug intoxication is defined legally according to a person's blood alcohol/substance level which can only be determined through testing be it urine, breathalyser or blood samples.

[28] What about an employee who comes to work after using cannabis in private before or outside the workplace? How do you test if he or she is "stoned" at work? There is no question that employers such as the Respondent use biological blood and urine tests to assess if an employee has consumed alcohol or drugs. As already indicated, cannabis stays longer in the bloodstream than alcohol therefore employers have practical physical tests to easily assess if an employee is under the influence of alcohol or other intoxicating substances – bloodshot eyes, slurred speech, unstable etc. **But it's not so easy to assess if an employee who tests positive for using cannabis is "under the influence". This calls for a scientifically validated test to assess if an employee is stoned at work and thus liable for disciplinary action.**

…….

[31] The point is, the fact that one is not impaired to perform duties does not in itself absolve that employee from misconduct in terms of the employer's policy. The Applicant tested positive for cannabis and continues to test positive as a result of her repeated and daily consumption of cannabis. She will undeniably continue to test positive. The Applicant's performance had not been affected by her actions but the Respondent's issue was not one of performance. As discussed above, the issue was more properly classified as one of misconduct and her performance is an irrelevant factor. It is pertinent to note that on the day in question, the Applicant's performance was indeed affected by her actions, namely, she was unfit to render her services to the Respondent and was immediately instructed to leave the premises of the Respondent or had to be sent home.

***NUMSA obo Nhlabathi and 1 Other v PFG Building Glass (PTY) Ltd* (JR 1826 /2020) [2022] ZALCJHB 292 (1 December 2022)**

Principles:

1. Tests for cannabis do not demonstrate the degree of impairment of the employee's ability to perform her or his duties. Proof of impairment is not required (as with alcohol) as it is automatically assumed that one is under the influence of cannabis due to its intoxicating nature.
2. It does not matter that employees used dagga in private, that they posed no danger on the day they tested positive for dagga, that their period of employment was not insignificant or that they had a clean disciplinary record. Where the employer has consistently applied a 'Zero Tolerance' alcohol and drug policy due to its hazardous workplace and its duty to provide a safe working environment, dismissal will be fair.

Facts:

Two employees, manufacturing operators, were dismissed on the charge that they "*tested positive for dagga in your system whilst within the workplace (on duty)*", which they pleaded guilty to at their internal hearing. After an arbitrator appointed by the Chemical Industry Bargaining Council found their dismissals to have been substantively fair, Numsa referred a review application on the employees' behalf to the Labour Court in an attempt to overturn the award.

At the Labour Court Numsa argued that the dismissal was not valid as the Company did not have a rule or policy that states that a positive dagga test will warrant dismissal and that the Constitutional Court has decriminalised dagga because it *"is not a drug, it is just a plant or a herb".*

At the disciplinary hearing the employer's witnesses led evidence about the Company's disciplinary policy that stated being "*under the influence of alcohol or drugs within the workplace*" warrants dismissal as the prescribed sanction for a first offence, and outlined the workplace health and safety reasons for the rule being in place. The Company had a 'zero tolerance' policy regarding safety and testing for alcohol or drugs, as there is a high risk that employees cannot then perform their jobs to the required standard and within the required safety regulations. Evidence showed that the workplace was a dangerous and hazardous environment

The employees contended that whilst they were aware of the Company's policy on alcohol and drugs, they were not aware that if they were found to have dagga in their system, it would constitute misconduct. One of the employees testified that he had used dagga 3 days before reporting to work at home, which it is lawful to do.

The Labour Court rejected the review application. In doing so, the Court disputed Numsa's and the employees' interpretation of the Constitutional Court judgment in *Minister of Justice and Constitutional Development and Others v Prince* (CCT108/17) [2018] ZACC 30 (18 September 2018) that decriminalised the use of dagga in private, in claiming that dagga should no longer be regarded as a drug. The Court said they confused issues relating to the decriminalisation of the use of dagga in private with an employer's right to take disciplinary action against an employee who contravened a disciplinary code. The Constitutional Court did not interfere with the definition of a 'drug' nor did it declare dagga or cannabis to be a plant or a herb, as alleged.

The Court noted a difference between the effects of alcohol and cannabis and accepted that, unlike alcohol which leaves an individual's bloodstream within a few hours after consumption, cannabis may remain present in an individual's system for a number of days or weeks, and that tests for cannabis do not demonstrate the degree of impairment of the employee's ability to perform duties. Based on these views, the Court came to this conclusion [para 80]:

> *"Unlike alcohol, one cannot determine a level of impairment based on test results. Proof of impairment is therefore not required as with alcohol, it is automatically assumed that one is under the influence of cannabis due to its intoxicating nature".*

The Court said the employer is entitled to set its own standards of conduct, and given the hazardous nature of its workplace, was justified in applying a zero tolerance rule. Under the circumstances, the mitigating factors raised that the employees used dagga in private, that they posed no danger on the day they tested positive, that their period of employment was not insignificant or that they had a clean disciplinary record, did not matter.

For these reasons the Court found that dismissal was the appropriate sanction and rejected the review application.

We think Numsa's mistaken attempt to argue that the ConCourt's views in the *Prince* judgment meant that dagga should no longer be regarded as a drug, detracted significant attention from the key issue in this case, which was whether employees

who use dagga in their own time days or weeks previously and who are not "under the influence", posed any greater risk to the employer's health and safety standards than any other employee?

There is no dispute that, despite the Constitutional Court having declared the private use of cannabis legal, employers are still entitled to discipline employees being under its influence or using cannabis during working hours (*Mthembu and others / NCT Durban Wood Chips [2019] 4 BALR 369 CCMA*). But what if there is absolutely no evidence to show this? We are puzzled by the Labour Court's conclusion that because a positive dagga test doesn't prove this, proof is not required and it can be assumed that one is under the influence because of its intoxicating nature? Surely this cannot be right?

This not the only case in which this approach has been applied: the Labour Court in *Enever v Barloworld Equipment, a division of Barloworld South Africa (Pty) Ltd* (JS 633/20; JS 926/20) [2022] ZALCJHB 161 (1 June 2022) also accepted that proof of impairment by cannabis is not required. What was perhaps different about that case was that it involved an employee who was dismissed for repeatedly testing positive for cannabis and breaching the employer's alcohol and substance abuse policy.

A different approach was adopted in *Rankeng / Signature Cosmetics and Fragrance* (Pty) Ltd [2020] 10 BALR 1128 (CCMA) – albeit an arbitration award - in which the arbitrator found that if an employee is charged with being 'under the influence' of dagga/cannabis, the employer will need evidence to substantiate this and show that the employee's performance was likely to be impaired: a positive drug test would in itself be insufficient to substantiate this.

We also think the Court erred in not scrutinising the application of the employer's zero tolerance policy more closely. The LAC in *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others* (JA49/14) [2015] ZALAC 23 (24 June 2015) showed that an employer may not adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence: a zero tolerance approach will only be fair if the circumstances of the case warrant the employer adopting such an approach. If the rule breached can perhaps be shown to be unreasonable, zero tolerance of a breach of that rule will surely not be justified?

The Court in *Enever v Barloworld Equipment* had this to say about the application of a zero tolerance policy in these circumstances [para 26]:

> *"….unlike alcohol which leaves an individual's bloodstream within a few hours after consumption, cannabis may remain present in an individual's system for a number of days. This may mean that a zero tolerance approach may be unconstitutional as it will result in an employee not being able to use cannabis at home in their private time."*

Enever v Barloworld Equipment, whilst ultimately accepted that proof of impairment by cannabis is not required, also recognised very clearly the potential contradiction between testing positive vs being under the influence. The Court commented as follows [para 28]:

> "*As already indicated, cannabis stays longer in the bloodstream than alcohol therefore employers have practical physical tests to easily assess if an*

> *employee is under the influence of alcohol or other intoxicating substances - bloodshot eyes, slurred speech, unstable etc. But it's not so easy to assess if an employee who tests positive for using cannabis is "under the influence". This calls for a scientifically validated test to assess if an employee is stoned at work and thus liable for disciplinary action".*

Until such time as a "*scientifically validated test*" as suggested above is available to test levels of impairment through the use of dagga, employers may in some circumstances have difficulty in establishing that an employee is "under the influence", when that is the charge used. If the charge is that the employee "tested positive for the use of dagga", without it having been established that his/her faculties were in any way impaired, we anticipate that the reasonableness of such a rule and the application of a zero tolerance approach in such circumstances may well be successfully challenged.

Until such time as a "*scientifically validated test*" as referred to in the *Enever v Barloworld Equipment* judgment becomes available, perhaps a positive cannabis test should trigger a second test of some sort to practically assess levels of impairment. Evidence of this nature, together with the positive drugs test results, would greatly assist employers in these situations.

Extract from the judgment:
(Prinsloo, J)

[80] The court noted a difference between the effects of alcohol and cannabis and held that there is no question that, unlike alcohol which leaves an individual's bloodstream within a few hours after consumption, cannabis may remain present in an individual's system for a number of days or up to weeks and that tests for cannabis do not demonstrate the degree of impairment of the employee's ability to perform her or his duties. Unlike alcohol, one cannot determine a level of impairment based on test results. **Proof of impairment is therefore not required as with alcohol, it is automatically assumed that one is under the influence of cannabis due to its intoxicating nature.**

[81] In *SGB,* the LAC confirmed that an employer is entitled to set its own standards to enforce discipline in its workplace…….

[84] The mitigating factors raised by the Applicant in this review application are of no relevance where the employer consistently applied its policy with zero tolerance. In my view, it matters not that the applicants used dagga in private, that they posed no danger on the day they tested positive for dagga, that their period of employment was not insignificant or that they had a clean disciplinary record. It was undisputed that the Respondent applied the alcohol and drug policy with zero-tolerance for contravention thereof, due to its hazardous workplace and its duty to provide a safe working environment.

[85] Zero-tolerance means that a particular type of behaviour or activity will not be tolerated at all and a zero-tolerance policy is one that does not allow any violations of a rule. How many dependants an individual has or how many years of unblemished service he or she has rendered, or any other mitigating factor for that matter plays no role where a zero-tolerance policy is followed and consistently applied. The only factors that are to be considered are whether the employee was aware of the zero-tolerance policy, whether it was consistently applied and whether it is justified in the workplace. *In casu,* the applicants were aware of the zero-tolerance policy, it was applied consistently and it was justified due to the hazardous nature of the workplace and the Respondent's duty to provide a safe working environment.

***SGB Cape Octorex (PTY) Ltd v Metal and Engineering Industries Bargaining Council and Others* (JA 90/2021) [2022] ZALAC 118; (2023) 44 ILJ 179 (LAC); [2023] 2 BLLR 125 (LAC) (18 October 2022)**

Principle:
An employer is entitled to set its own standards and to determine the sanction with which non-compliance with the standard will be visited to enforce discipline in its workplace.

Facts:
The employee, a supervisor, was seen smoking dagga whilst on duty. The employee was confronted with the allegation, which he denied. With the employee's consent, tests were conducted to check the presence of drugs in his urine. The employee tested positive for THC. He was then taken to paramedics to conduct a second test of saliva. Again he tested positive for THC.

Following the tests, the employee was subsequently charged with having tested positive for THC. He was found guilty and dismissed. Dissatisfied with the outcome of the disciplinary process, the employee referred an unfair dismissal dispute to the **Bargaining Council**. The commissioner held that the dismissal was substantively unfair and ordered the reinstatement of the employee, but without back pay. The reasons for the commissioner's finding were based on his observations of the following: (a) The employee pleaded guilty after the test results; (b) He was in the employ of the employer for more than four years and had a clean record; (c) This was his first offence; (d) The employer did not suffer any prejudice; (d) Because of his prior good behaviour, the employee had been promoted to a supervisory position; (e) He did not believe that the employee would repeat the same offence in future; and (f) The relationship between the parties could still be restored.

The employer took the award on review to the **Labour Court**. The employer contended that the commissioner ignored its zero-tolerance approach on the use of drugs at work, and contended that the commissioner's decision was not a decision that fell within the band of reasonableness. The Labour Court dismissed the review application, saying the contention that the commissioner ignored the zero-tolerance approach had no substance, as no such evidence was presented at the arbitration. There was also no evidence that the employee had compromised the safety and integrity of other workers.

On appeal to the **Labour Appeal Court**, the employer submitted that although the employee was not charged with smoking dagga, the testing followed a tip-off that he was smoking dagga at the workplace. It was argued that there was an inference that he was smoking dagga because he tested positive. The false claim that he last smoked dagga in 2017 (two years prior to the incident) demonstrated his lack of candour. The employer argued that its policy on the use of drugs at work was concerned with the safety of workers and, therefore, any sanction short of dismissal would invite would-be offenders to break the rule.

The LAC noted that the employee initially denied the charges and only subsequently pleaded guilty when he had no choice after testing positive. Regarding the employee's clean record and it being his first offence, the LAC said he was aware of

the employer's rule that a first offence would result in dismissal, which had been consistently applied. Being a supervisor this also militates against a lenient sanction, as the employer placed trust in him to lead by example and ensure rules are not broken.

There was also no evidence to support the commissioner's belief that the employee would not repeat the same offence in future, and on the contrary his evidence was that he was addicted to drugs. There was also no evidence to support the arbitrator's view that the trust relationship could be restored.

Regarding prejudice to the employer, the LAC said that this lay in the fact that where an employer sets a code of conduct for employees, breaching the code undermines the employer's authority and is prejudicial to the administration of discipline. Furthermore, the employer was concerned about the safety of its employees since they were working at heights at the time. Consequently, the reasoning that there was no prejudice was unreasonable. The LAC said the Labour Court failed to appreciate the importance of the employer's policy, and it was not correct that there was no evidence of a zero-tolerance approach.

The LAC overturned the LC decision and found that the dismissal was fair, taking into account the nature of the employer's business and similar sanctions which had been imposed on other offending employees.

Unfortunately, the facts of this case did not lead the LAC to explore the relationship between testing positive and being 'under the influence' of dagga, something discussed extensively in Worklaw's *January 2023 newsflash*. The LAC also did not comment on the fairness of a test which could reflect historic use, nor did they comment on whether the saliva test reliably reflects recent use of dagga. Whilst the charge against the employee was testing positive for dagga, this case was coloured by the fact that the employee had been seen smoking dagga at work and it was probably assumed he was under the influence. Arguably the wrong charge was used, and a more accurate charge may have been smoking dagga at the work.

Extract from the judgment:
(Tokota AJA)
[17] It is permissible for the employer to adopt its own disciplinary rules that establish the standard of conduct required of its employees. The purpose of the adoption of these rules is to create certainty and consistency in the enforcement of discipline. These rules must be made clear and be readily available to employees in a manner that is easily understood. The employee conceded that inductions were held in this regard.
……
[21] In my view, the decision of the appellant to dismiss the employee was fair, taking into account the nature of its business and similar sanctions which have been imposed on other offending employees.

4.4 Team misconduct

***South African Commercial Catering and Allied Workers Union and Others v Makgopela and Others* (JA38/2021) [2023] ZALAC 8 (14 March 2023)**

Principle:
Our law does not allow a determination of guilt simply by association. Where team misconduct is relied upon, there must exist either a factual basis or sufficient grounds for inferring that all employees were indivisibly culpable as members of the team for failing to ensure compliance with the employer's rule. A reliance on generalised facts, arising from a scant investigation into the alleged misconduct, does not provide a sufficient basis to infer that collective responsibility exists.

Facts:
The employees in this case were employed at Cashbuild's Klerksdorp branch in various capacities such as cashiers, forklift drivers, general assistants, a sales assistant, a system supervisor, sales coordinators and as an assistant manager.

In January 2016, following a stock-take, stock losses of R21 871,00, equivalent to 0,47% of sales, were detected at the branch. This exceeded Cashbuild's acceptable shrinkage level of no more than 0,4% of sales. The following month, in February 2016, a further stock-take revealed stock shrinkage of R24 845,00, equivalent to 1.5% of sales. In March 2016 stock losses of R88 000,00, equating to 2.74%, were detected.

A "shrinkage workshop" was held with the employees. They were interviewed and given a questionnaire to complete in which they were asked to indicate the cause of stock losses. The employees were also encouraged to use an anonymous tip-off line. As a result of the continued stock losses, the employees were issued with final written warnings valid for 12 months for failing to control shrinkage collectively or individually.

After a June 2016 stock-take, stock losses of R106 848,00, equivalent to 3.63% of sales, were uncovered. The employees were chargedwith collective misconduct/ team misconduct in that:

> *"You on or during the period 28 March 2016 to 25 June 2016 as individual components of the group, each culpable, failed to ensure that the group complies with a rule or attains a performance standard set by the employer where shrinkage reaches unacceptable levels in the amount of R202 317,72.'*

After a disciplinary hearing, all employees were found guilty and were dismissed. Dissatisfied, they referred an unfair dismissal dispute to the **CCMA**. The commissioner found they had contravened the employer's rule, had failed to disclose the cause of stock losses and that had they done their duties as required they would have prevented the stock losses. Their dismissals were found to be fair.

On review the **Labour Court** found that the arbitration award fell within the bounds of reasonableness required, and dismissed the employees' review application.

On appeal the **Labour Appeal Court** held that no evidence had been presented by Cashbuild about the details of the systems and controls in place to prevent stock losses. There was no evidence of any attempt to ascertain through an investigation how stock was being lost or from which part of the large store this was occurring, including CCTV footage or available documentary evidence. There was also no evidence which indicated, given the size of the store, that employees in one section would have been aware of stock being lost in another. The result was there was no evidence that the proximity of employees to each other in the store and the varied nature of their work warranted an inference being drawn of their culpable participation in the misconduct.

No evidence had indicated why it was probable that all employees were aware of the stock losses, where and how these were occurring or why their responsibility should be indivisible. The employees performed diverse functions across the large area of the store and when they raised concerns and made proposals for system improvements to prevent such losses, these were not acted upon by Cashbuild.

The LAC set aside the arbitration award and found that the employees' dismissal was substantively unfair and ordered their retrospective reinstatement into the same or similar positions, with full back pay and all employment benefits restored.

Whilst one can sympathize with the employer's difficulty in dealing with the extent of the stock losses it was experiencing, the LAC's judgment makes it clear that an employer in such circumstances will have to provide sufficient evidence to establish grounds for inferring that all employees were indivisibly culpable as members of the team for the misconduct. A factual basis will have to be established to infer that collective responsibility exists.

Extract from the judgment:
(Savage AJA)

[18] The second form of collective misconduct discernable in our law is that of **team misconduct**, in which a number of employees are disciplined collectively as members of a team for the same misconduct, on the basis that the individual responsibility of individual employees in the team cannot be determined. Common purpose may be applied to cases of team misconduct but is not a necessity to prove the existence of such misconduct. As Grogan has stated:

> *'Team misconduct' is …distinguishable from cases in which a number of workers simultaneously engaged in conduct with a common purpose. In cases of 'team misconduct' the employer dismisses a group of workers because responsibility for the collective conduct of the group is indivisible. It is accordingly unnecessary in cases of team misconduct to prove individual culpability, derivative misconduct or common purpose- the three grounds upon which dismissal for collective misconduct can otherwise be justified. The essence of team misconduct …is that the employees are dismissed because, as individual components of the group, each has culpably failed to ensure that the group complies with a rule or attains a performance standard set by the employer.'*

……

[29] This case illustrates the caution to be adopted where reliance is placed on collective misconduct as a basis for dismissal. This is so given that workplace discipline must at all times be fair and just. As much is required by the Labour Relations Act in giving meaning to the constitutional right to fair labour practices. Our law does not allow a determination of guilt simply by association. Where team misconduct is relied upon there

must exist either a factual basis or sufficient grounds for inferring that all employees were indivisibly culpable as members of the team for failing to ensure compliance with the employer's rule. A reliance on generalised facts, arising from a scant investigation into the alleged misconduct, does not provide a sufficient basis on which to infer that collective responsibility exists.

[30] It follows that on the evidence before the commissioner, the most probable inference to be drawn from the facts in this matter was not that the employees were guilty of the collective misconduct alleged, in the sense that they failed to ensure compliance with Cashbuild's rule, were aware of the stock losses, did not halt such losses or alert Cashbuild to their continued existence. To find that the dismissal of all employees, one of whom had almost thirty years of service, was fair, was a decision to which a reasonable commissioner, on the material before him, could not reach. The Labour Court erred in finding differently.

5 Strike law

5.1 Common purpose

Numsa obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd (CCT 233/21) [2022] ZACC 30; (2022) 43 ILJ 2269 (CC) (22 August 2022)

Principles:

1. To establish common purpose, evidence is required that individual employees associated themselves with the violence before it commenced, or even after it ended. Presence at the scene is not required, but prior or subsequent knowledge of the violence and the necessary intention in relation thereto will still be required. For liability to attach, there must be proof on a balance of probabilities of an employee's complicity in the acts of violence.
2. It will be unfair to find an employee guilty of acts of violence who, although part of a group of striking workers, never took part in or associated with such acts. There is no obligation to dissociate oneself from acts of violence that one has not been shown to have participated in. Failure to give an explanation does not equal complicity.

Facts:

In July 2017 a wage increase agreement affecting the plastics industry was reached through sectoral level bargaining under the Plastics Negotiating Forum, which applied at the company. Unhappy with the increase, NUMSA members embarked on an unprotected strike on 14 July 2017. They gathered at the canteen waiting to be addressed by Mr Steffens, the head of human resources. When he did not arrive, they moved towards the administrative offices carrying placards calling for his removal. When he came out the striking employees surrounded him and assaulted him severely. As a result, he sustained injuries all over his body.

After a disciplinary process during July - August 2017 conducted by an independent chairperson, 148 employees were dismissed on two counts of misconduct - the assault of Mr Steffens and for participating in the unprotected strike. 136 employees were convicted of assault on the basis of common purpose, and the other 12 were found to have been involved in the actual physical assault. The employees, represented by NUMSA, referred an unfair dismissal dispute to the Labour Court.

At the **Labour Court** the employees pleaded that no assault or unprotected strike took place. Based on that, they contended that the dismissals were unfair. The respondent filed a counterclaim for compensation in terms of section 68(1)(b) of the LRA for losses incurred as a result of the unprotected strike, and, in the alternative, damages. The Labour Court was satisfied that the employees were guilty of misconduct. It upheld the dismissals and awarded damages.

NUMSA appealed to the **Labour Appeal Court** (*NUMSA obo Dhludhlu and Others v Marley Pipe Systems SA (Pty) Ltd (JA33/2020) [2021] ZALAC 13 (23 June 2021)*) on behalf of only 41 of the 148 employees. The appeal was unsuccessful. The LAC ruled that common purpose had been established because none of the 41 employees had "intervened to stop the assault" and should have "dissociated themselves (in some way) from the assault before, during or after it" so as to escape liability.

At the **Constitutional Court** NUMSA argued that the dismissals were substantively unfair. In particular, it disputed the approach adopted by the LAC in applying the doctrine of common purpose. In a unanimous judgment, the Constitutional Court took issue with the LAC's conclusion that the employees had not dissociated themselves from the assault. It held that mere presence and watching does not satisfy the requirements set out in in its earlier judgment in *Dunlop* and in an earlier judgment of the Appellate Division in *Mgedezi*. There must be evidence that individual employees in some form associated themselves with the violence before it commenced, or even after it ended. Employees cannot be required to intervene to stop the misconduct or dissociate themselves in some way from the misconduct, when they never associated with it in the first place. The Court further held that individual complicity in committing the acts of violence must be established. If it were to be otherwise, the law would be a cruel instrument that attaches guilt and imposes sanction on the innocent. Association in complicity for purposes of common purpose must include having "the necessary intention" in relation to the complicity.

Because the finding of guilt for participating in an unprotected strike was left intact, the Constitutional Court referred that matter back to the Labour Court for a reconsideration of an appropriate sanction in respect of that count. The Court took the view that, without the aggravating factor of a severe assault, the sanction might differ.

Extract from the judgment:
(Madlanga J)
[20] Sadly, acts of violence and intimidation by large groups of employees at the workplace during strikes – protected or unprotected – are not a rare occurrence. And I am quite mindful of the fact that an employer seeking to prove individual employee complicity in such acts for purposes of disciplinary proceedings faces formidable evidentiary difficulties. Some of the employees may successfully be caught within the net, but many who are most likely complicit may escape.

[21] Much as I understand this difficulty, there is a countervailing factor. Sympathy for employers must not result in innocent employees being sacrificed. It is not beyond the realm of possibility for employees to be mere spectators when other employees are committing acts of violence. It would be a travesty to charge, find guilty of acts of violence and dismiss an employee who – although part of a group of striking workers – never took part in or

associated with such acts. Take the evidence of Ms Crowie in this very case. She said some of the employees were "bystanders". A bystander is just that: "a person who is present at an event but does not take part".

……

[25] Mere presence and watching does not satisfy the requirements set by *Dunlop* and *Mgedezi*. There must be "[e]vidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended". The person concerned "must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others". So, employees cannot be required to dissociate when they never associated. An intention in relation to the violence is required. ……

……..

[34] On the other hand, it would definitely be a non-starter to suggest that an employee could be dismissed on the basis that – through common purpose – she or he was "involved" in acts of violence without linking that employee to those acts. A verdict of guilt cannot appropriately be returned for merely being where the acts of violence took place. An employee could simply have been there as a spectator or the acts could have happened so spontaneously or suddenly that the employee could not avoid being there. As was held in Polyoak, "[o]ur law knows no concept of collective guilt". *Maqutu* aptly puts it thus: "Employers find it particularly difficult to prove the participation of each individual in the impugned conduct where misconduct is alleged to be collective. Nonetheless, no one should be held accountable where no evidence can be adduced to substantiate the claim against individuals, solely on the basis of being part of the group."

……

[36] Sympathetic though I am to the difficulties facing employers, individual complicity in the commission of acts of violence must be established. That is what the principles on common purpose have always required. If it were to be otherwise, the law would be a cruel instrument that attaches guilt and imposes sanction on the innocent. Association in complicity for purposes of common purpose must include having "the necessary intention" in relation to the complicity.

5.2 Compensation during a protected strike

***Massmart Holdings Ltd and others v South African Commercial Catering and Allied Workers Union* Case no: JS 757/2021Judgment: 23 May 2022 (LC)**

Principle:

Conduct undertaken during a protected strike that constitutes an offence or otherwise fails to comply with the requirements of Chapter IV of the LRA, is capable of founding a claim for compensation under section 68(1) of the LRA.

Facts:

This case was about whether the Labour Court has jurisdiction to hear a claim for compensation for losses suffered as a result of misconduct during a protected strike.

Massmart sued SACCAWU for nearly R 9,4 million under section 68(1)(b) of the LRA, as compensation for losses suffered during the Union's strike action in 2021. Whilst the strike was protected, having met the procedural and substantive requirements under sections 64 and 65 of the LRA, Massmart contended that during the strike, the Union, its officials and members and/or supporters engaged in various offences; in particular, that their conduct did not comply with Chapter VI of the LRA, they did not strike peacefully, they failed to comply with OHSA and Covid-related directives, and failed to comply with picketing rules established by the CCMA.

At the **Labour Court** the Union excepted to Massmart's claim on five grounds, the main one being that the LC has no jurisdiction to entertain Massmart's claim, alleging claims arising out of protected strikes fall outside the ambit of section 68 of the LRA, and must be pursued as delictual claims in the High Court. Put another way, the Union contended that the LC's exclusive jurisdiction to order the payment of just and equitable compensation for any loss attributable to a strike or lockout under section 68(1)(b) may not be invoked when the strike or lockout is protected.

The LC did not agree with the Union's contentions and held that conduct undertaken during a protected strike that constitutes an offence or otherwise fails to comply with the requirements of Chapter IV of the LRA, is capable of founding a claim for compensation under section 68(1)(b) of the LRA. The Labour Court therefore has jurisdiction to hear the matter.

Extract from the judgment:
(Van Niekerk, J)
[19] These words must necessarily be read in the context of section 68 as a whole, the heading of which refers to 'Strikes or lockout not in compliance with this Act', and subsection (1), which makes reference to 'any strike or lockout, or any conduct in contemplation or in furtherance of a strike or lockout, that does not comply with the provisions of this Chapter.' Section 67 (6) extends immunity from civil legal proceedings to 'conduct in contemplation or in furtherance of a protected strike or a protected lockout'. However, unlawful conduct, or conduct in breach of Chapter IV of the LRA, cannot be construed as conduct that is a 'in contemplation or in furtherance of a protected strike or a protected lockout'. Congruent with this, the word 'conduct' in section 68 (1) (b) is not expressly linked to an unprotected strike or lockout, or qualified as being conduct in furtherance of an unprotected strike or lockout. As counsel for Massmart put it, the mere fact that a strike is protected cannot act as a shield for conduct that is committed during the strike, but which is not in furtherance of its peaceful and lawful aims. Section 68 (1) (b) thus applies to any conduct that falls outside of the immunity conferred by section 67 (6).
……..
[22] Finally, it would be anomalous if an aggrieved employer or union was entitled to pursue a claim for compensation in this court under section 68 for loss attributable respectively to a strike or lockout that does not comply with Chapter IV but not for loss attributable to conduct that constitutes a breach of the same Chapter, simply because the strike or lockout is protected. To limit an aggrieved party to the remedy of a common law delictual claim in the civil courts would undermine what the Constitutional Court and the Supreme Court of Appeal have consistently recognised as the role of this court in the determination of labour disputes…….

5.3 Unprotected picket vs protected strike

***Southern African Clothing and Textile Workers' Union obo Members v KZN Marketing (Pty) Ltd and another* - (2023) 32 LC 1.13.3 also reported at [2023] 1 BLLR 83 (LC)**

Principle:
An unprotected picket which does not comply with section69(6C)(b) of the LRA does not mean that a strike which does comply with section 64 is unprotected.

Facts:
SACTWU served KZN Marketing with a strike notice and shortly afterwards its members embarked on a strike. The commissioner who conciliated the dispute did not issue any picketing rules.

KZN Marketing does not own premises but uses sites and depots from which its employees take instructions and thereafter report to various retail stores where they are deployed. SACTWU argued that KZN Marketing was associated with Orange Grove Dairy (Pty) Ltd (Orange Grove) whose employees are also SACTWU members. The Orange Grove employees also embarked on a strike called by SACTWU at about the same time. Some of the striking employees of KZN Marketing joined the Orange Grove striking employees at their various picketing sites. The CCMA did issue picketing rules in relation to the Orange Grove strike.

KZN Marketing took a view that the strike was unprotected because no picketing rules had been issued by the CCMA. It then issued the striking employees with various ultimatums to return to work but to no avail. SACTWU was adamant that the strike was protected.

KZN Marketing took disciplinary action against all the striking employees whilst the strike was still underway. They were mainly charged for participating in and/or instigating an unprotected strike. At the commencement of the disciplinary proceedings, SACTWU's legal representative raised a point *in limine* to the effect that the strike was protected and therefore the disciplinary action against all the striking employees was impermissible. The chairperson dismissed the point *in limine* and proceeded with the disciplinary enquiry. The sanction at the end of the enquiry was dismissal, suspended on condition the employees returned to work by a specified date.

SACTWU approached the **Labour Court** on an urgent basis seeking an order declaring that the strike was a protected strike under s64 of the LRA; and declaring the chairperson's ruling to be unlawful, a nullity and of no force and effect. The LC held that it is not precluded from intervening in incomplete disciplinary proceedings provided there are exceptional circumstances and to prevent serious injustice. What these exceptional circumstances are, is left to the discretion of the Court.

The LC pointed to s69(6C)(b) which provides that no picket in support of a protected strike may take place unless picketing rules have been agreed or have been determined by the CCMA in terms of s69(5). It followed that the picket called by SACTWU was unprotected. But the Court said that it is clear a picket is not a strike. A picket is a peaceful demonstration in support of any protected strike or lockout. To enjoy protection from undue interference and disciplinary action, a picket must be lawful and peaceful. The Court conceded that if employees stop work in order to picket, the stoppage will very likely be a strike and its lawfulness or otherwise will depend on whether it complies with section 64. While it is true that a picket constitutes an action in furtherance of a strike, the two actions are regulated separately. The Court said that any interpretation that conflates the two must be rejected as it does not accord with the structure, context and purpose of sections 64 and 69 of the LRA.

The Court held that the Chairperson's ruling unlawfully interfered with the exercise of the right to strike and, in turn, the power play which is essential for a successful collective bargaining scheme. But the Court said that there was nothing preventing KZN Marketing from taking disciplinary action against the striking employees who participated in the unlawful picket. The Court was satisfied that SACTWU has made out a proper case for the grant of a declaratory relief.

This case confirms that an unprotected picket which does not comply with section 69(6C)(b) of the LRA does not mean that a strike which complies with section 64 is unprotected.

Extract from the judgment:
(Nkutha-Nkontwana J)
[23] That takes me to the crux of this matter which is whether the strike can lose its lawfulness because the striking employees participated in an unlawful picket. KZN Marketing contends that the securing of picketing rules prior to the commencement of a strike is a peremptory requirement. Therefore, SACTWU should have secured, or even reasonably attempted to secure, picketing rules prior to issuing the strike notice. I disagree. …….
……
[27] In the present instance, it is clear that a picket is not a strike. A strike is defined in section 213 of the LRA as "the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory".

[28] Conversely, a picket is a peaceful demonstration in support of any protected strike or lockout. In essence, a picket by the striking employees constitutes an exercise of the rights in terms of section 17 of the Constitution…….
……
[30] So, in my view, picketing does not in and of itself constitute a strike. Of course, if employees stop work in order to picket, the stoppage will very likely be a strike and its lawfulness or otherwise will depend on whether it complies with section 64. Tellingly, it is not KZN Marketing's case that there is non-compliance with section 64. Therefore, the contention that, because there is a nexus between a strike and picket, then a picket is tantamount to a strike is fallacious. Cleary, while it is true that a picket constitutes an action in furtherance of a strike, the two actions are regulated separately. Any interpretation that conflates the two stands to be rejected as it does not accord with the structure, context and purpose of sections 64 and 69 of the LRA.

[31] ……Put otherwise, the picket was unlawful. Nonetheless, the striking employees are assured of protection for the exercise of the right to strike simply because the strike complies with section 64.

6 Working past retirement age

***Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panel Beaters* (JA68/2021) [2022] ZALAC 103 (27 September 2022)**

Principle:
Section 187(2)(b) of the LRA affords an employer the right to fairly dismiss an employee based on age, at any time after the employee has reached his or her

agreed or normal retirement age. This right accrues immediately after the employee's retirement date and can be exercised at any time after this date.

Facts:
The employee entered into a written employment agreement which stated that the employer's retirement age was 60 years of age. When he turned 60 the employer did not retire him and the employee continued to render his services as usual, and the employer continued to pay him his usual salary. Nine months after the 60th birthday the employer wrote to the employee informing him that his services would terminate as he had reached the agreed retirement age of 60. It was common cause that the employer dismissed the employee due to his age.

The employee referred an automatically unfair dismissal dispute to the **Labour Court**, contending that his dismissal constituted unfair discrimination in terms of section 187(1)(f) of the LRA, because it was based on his age. The Labour Court confirmed that the principle established in previous cases that a dismissal based on age is not automatically unfair in circumstances where the employee "has reached" the normal or agreed retirement age. This wording in section 187(2)(b) of the LRA contemplates a dismissal on account of age that occurs after the retirement date and insulates that dismissal against any assertions of unfairness.

Additionally, the Labour Court held that since the employee had already reached the agreed retirement age of 60 at the time of his dismissal, section 187(2)(b) of the LRA applied. It also held that it was of no assistance to rely on the contract-based assertions that a tacit employment agreement was entered into after he turned 60; that the employer waived the right to rely on the retirement age stipulated in the contract; and that the employment agreement was tacitly amended to the effect that the second appellant would continue to work indefinitely or at least until age 65. The Labour Court accordingly dismissed the employee's automatically unfair dismissal dispute.

The **Labour Appeal Court** dismissed the employee's appeal against the LC judgment. The LAC confirmed that section 187(2)(b) affords an employer the right to fairly dismiss an employee based on age, at any time after the employee has reached his or her agreed or normal retirement age. This right accrues immediately after the employee's retirement date and can be exercised at any time after this date.

To be insulated against a claim of unfair discrimination on the grounds of age, the reason for, or proximate cause of the dismissal must be that the employee has already reached retirement age. If the most proximate cause of the dismissal is proven to be one based on operational requirements and not age, as contemplated in section 187(2)(b), then it will be open to the Labour Court to, *inter alia*, order the employer to pay the employee severance pay.

For the purposes of a dismissal in terms of section 187(2)(b), the employment contract does not terminate by the effluxion of time when the employee reaches his or her retirement age but is deemed to continue. Section 187(2)(b) does not contemplate a new tacit contract coming into existence between an employer and employee (by virtue of their conduct) which governs their employment relationship when the employee continues to work for his or her employer after reaching the

normal or agreed retirement age.

This judgment deals with the situation where there is an agreed retirement age and an employer allows the employee to carry on working. It would be different if the employer entered into a new fixed-term contract with a retired employee, as seen in the case of *Barrier v Paramount Advanced Technologies (Pty) Ltd (JA35/2020) [2021] ZALAC 6; (2021) 42 ILJ 1177 (LAC); [2021] 7 BLLR 643 (LAC) (18 February 2021)*.

Extract from the judgment:
(Kathree-Setiloane AJA)
[14] Section 187(2)(b) of the LRA is clear and unambiguous. On its ordinary meaning, once the employer proves that the dismissed employee has reached the agreed or normal retirement age, the dismissal is deemed fair. The use of the phrase "*if the employee has reached his agreed or normal retirement age*" is decisive in denoting that for the dismissal in terms of section 187(2)(b) to be fair, the employee must have passed his or her normal or agreed retirement age.

[15] Section 187(2)(b) does not prescribe a time frame within which the dismissal should take place, provided it is after the employer has reached his or her agreed or normal retirement date. Properly construed, section 187(2)(b) affords an employer the right to fairly dismiss an employee based on age, at any time after the employee has reached his or her agreed or normal retirement age. This right accrues to both the employee and the employer immediately after the employee's retirement date and can be exercised at any time after this date. The focus is not so much on when the employee reached his or her retirement date, but rather that the employee has already reached or passed the normal or agreed retirement age.

[16] For a dismissal in terms of section 187(2)(b) of the LRA to be insulated against a claim of unfair discrimination on the grounds of age, the reason for, or proximate cause of the dismissal must be that the employee has already reached retirement age……..

7 Can an ex-employee refer an unfair labour practice?

***Pretorius and Another v Transport Pension Fund and Another* [2018] 7 BLLR 633 (CC); (2018) 39 ILJ 1937 (CC)**

Principle:
Section 23 of the Bill of Rights refers to "everyone" having the right to fair labour practices. Unfair labour practices under the Act may extend beyond the termination of employment. There are strong policy grounds not to restrict the protection of section 23 to only those who have contracts of employment.

Facts:
The applicants, Mr Pretorius and Mr Kwapa, are acting in a certified class action on behalf of approximately 60 000 similarly situated former employees of Transnet who were now pensioner-members of the first two respondents, the Transport Pension Fund and the Transnet Second Defined Benefit Fund (collectively "the Funds") in a certified class action. The applicants brought three claims in the **High Court**.

The first claim related to a "1989 promise" allegedly made during the run-up to the establishment of Transnet. The applicants claim that they were promised that the

practice of annually increasing members' pensions by at least 70% of the rate of inflation, in addition to the annual 2% increase to which they were contractually entitled, would continue. They contended that there had been a breach of contract by the Funds since 2003 because the Funds' annual increase to the members' pensions was significantly lower than what they contend had been promised by Transnet's and the Funds' predecessors. The applicants also argued that the failure to keep the promise constituted unlawful state action and an unfair labour practice. They asked the High Court to declare that the Funds' failure to keep this "promise" was unlawful.

The second claim concerned Transnet's obligations to maintain the Funds in sound financial condition, paying into them if necessary. That obligation was said to have been inherited by Transnet from its previous transportation bodies. The applicants argued that Transnet did not fulfil its obligation and asked that Transnet be declared indebted to the Funds for the necessary payments.

The third claim related to an alleged "unlawful donation" made by one of the Funds to Transnet. The fund is said to have donated 40% of its members' surplus to Transnet. The applicants sought to have the donation declared unlawful and invalid and for the Fund to be reimbursed by Transnet.

The respondents raised various exceptions to these in the High Court.

The High Court dismissed some of the exceptions raised by the respondents but upheld three exceptions to the cause of action. The first upheld exception concerned the claim for "unlawful state action" on the basis that the claim ought to have been brought under the Promotion of Administrative Justice Act. The second was that the breach of contract claim was "vague and embarrassing" as the applicants' amended particulars of claim lacked the particularity necessary to sustain the cause of action based on breach of contract. The last exception related to the cause of action based on an unfair labour practice which was partially upheld on the grounds that it lacked particularity with respect to averring that an employment relationship had existed between the applicants and the Fund. The High Court, however, rejected the argument that such claim could only have been brought under the Labour Relations Act.

The Supreme Court of Appeal refused leave to appeal against the orders upholding exceptions, and refused conditional leave to cross-appeal against the orders rejecting exceptions. It did so on the grounds that there were no prospects of success, nor any other compelling reason to hear the appeals.

In the **Constitutional Court**, the applicants sought leave to appeal against the High Court order upholding the exceptions. They argued that the effect of the High Court order was to deprive them of the opportunity to pursue two constitutional causes of action in the class action proceedings as those causes of action were effectively dismissed on exception.

In a unanimous judgment written by Froneman J, the Constitutional Court granted leave to appeal and upheld the appeal against the order of the High Court upholding the exceptions. The Constitutional Court replaced the High Courts' main orders with

an order that the exceptions raised by the respondents are dismissed with costs. The cost order against the applicants in the SCA was replaced with a cost order in their favour in the Constitutional Court.

The second and third applications were conditional applications filed by the Funds and Transnet respectively for leave to cross-appeal against the High Court's order. The applications concerned exceptions raised by the respondents in the High Court which were not upheld. Those applications were only to be considered in the event that the Constitutional Court granted the applicants' leave to appeal.

The Constitutional Court did grant the applicants' leave to appeal and the conditional applications were considered and dismissed with costs. The dismissal of the conditional applications does not preclude the respondents from raising substantive defences to the applicants' claims to be determined at the trial in the High Court.

Extract from the judgment:
(Froneman J)
[46] The third cause of action pleaded as flowing from the 1989 promise was that the failure to pay constituted an unfair labour practice in breach of section 23(1) of the Constitution.46 The High Court upheld the exception to this leg of the respondents' application on the ground that it must be pleaded that there was and is an employer-employee relationship between the applicants and the respondents and that they failed to do so.

[47] That appears to be unnecessarily restrictive. The section refers to "everyone" having the right and its purpose is to protect persons from unfair labour practices that originated in an employer-employee relationship. Labour law jurisprudence under the Labour Relations Act (LRA) recognises that unfair labour practices under the Act may extend beyond the termination of employment.

[48] Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in section 23(1). Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the "twilight zone" of employment as supposed "independent contractors" in time-based employment subject to faceless multinational companies who may operate from a web presence. In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of formal employment – but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of section 23 to only those who have contracts of employment.

8 Arbitrator interference reviewable

Saldanha Bay Local Municipality v Mutusa obo R Hendricks and Others (C99/2020) [2022] ZALCCT 17; (2022) 43 ILJ 1872 (LC); [2022] 9 BLLR 834 (LC) (23 March 2022)

Principle:
An arbitrator disallowing proper questioning or interfering during cross examination constitutes an irregularity. If this deprives one of the parties of a fair hearing of their case, the arbitrator's award will be reviewable.

Facts:
The employee was employed by the Saldanha Bay Local Municipality and applied for promotion to the position Senior Manager: Human Resources. She was unsuccessful and referred an unfair labour practice dispute in relation to promotion under section 186(2)(a) of the LRA. The crux of her case was that the Municipality unfairly deviated from its recruitment policy and as a result she was not promoted.

The employee's dispute was referred to arbitration under the auspices of the SA Local Government Bargaining Council (SALGBC). The arbitrator agreed with the arguments advanced on the employee's behalf. He ordered that the appointment of the employee who was promoted be overturned, and that the recruitment and selection process be re-opened to give the aggrieved employee a fair opportunity to be interviewed.

The Municipality took the arbitrator's award on review, submitting that he committed gross irregularities in the manner in which he conducted the arbitration. He was accused of unfairly '*descending into the arena*' to the prejudice of the Municipality.

The Labour Court agreed with the Municipality. The Court found that the transcript of the arbitration proceedings showed instances where the arbitrator interfered with the cross-examination of witnesses, distorted evidence that was not in dispute, and cross-examined the Municipality's main witness.

The Labour Court referred to the Labour Appeal Court's decision in Satani v Department of Education, Western Cape and Others (CA10/15) [2016] ZALAC 38; (2016) 37 ILJ 2298 (LAC) (13 June 2016) which, while affirming an arbitrator's discretion to intervene and guide parties, was stern in its warning against overstepping the mark. The LAC said the following [para 18]:

> *'It is accepted that commissioners are not expected merely to sit back and allow the parties to present their cases and not guide them to the real issues that are to be determined. There will be instances where intervention on the part of the commissioner would be necessary, whether an adversarial or inquisitorial approach has been adopted. However, commissioners must guard against an intervention that is likely to suggest bias or a perception of bias in favour of a particular party to the dispute. He/she must refrain from assisting a party to the detriment of the other, cross-examining witnesses by, inter alia, challenging the consistency of a witness, expressing doubt about the credibility and reliability of a witness; putting leading questions to witnesses; answering questions for witnesses; showing disrespect to the parties' representatives; not allowing representatives to present their cases without undue interference…."(Underlined for emphasis)*

The LC came to the conclusion that the arbitrator's intervention exceeded the boundaries of an acceptable inquisitorial approach and created a perception of bias in favour of the employee. As a result the Municipality was denied a fair hearing, which justified the arbitrator's award being reviewed.

The Court referred the matter back to the SALGBC for the matter to be referred to arbitration again by another arbitrator.

Extract from the judgment:
(Nkutha-NkontwanaJ)
[11] It is clear from the above extracts from the transcript that the Arbitrator's intervention in the present instance exceeded the boundaries of acceptable inquisitorial approach and evoked a perception of bias in favour of Ms Hendricks. Mr Montzinger, counsel for MATUSA, attempted to make light of the Arbitrator's conduct by contending he was merely talkative, but in the end he arrived at a reasonable outcome. I disagree. The test in the present instance is not one of reasonableness but whether the Arbitrator misconceived the nature of the enquiry and consequently denied the parties a fair hearing……..

[12] I accept that Arbitrators are not necessarily obliged to follow the rules of procedure applicable to the Courts of Law as they are expected to 'determine the disputes fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities'. Even so, the Constitutional Court's decision in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others* shed light on the exercise of that discretion. It was stated that Arbitrators '…must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously, and, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do'.

[13] Notwithstanding the above, one cannot shy away from the reality of the fact that, in practice, the arbitration proceedings are generally conducted in line with the rules of civil procedure and the standard of proof is the same, that is the balance of probability. Even though the Arbitrators are allowed a degree of flexibility in terms of the process they adopt, the rules of civil procedure do provide valuable guidelines, at the very least.
……..
[15] Accordingly, disallowing proper questions or interference during cross-examination constitutes an irregularity. However, the Court must determine whether such irregularity was prejudicial. Put differently, the mere fact that the Arbitrator committed an irregularity does not necessarily vitiate the award unless it could be shown that failure to conduct the arbitration proceedings in a fair manner has deprived one of the parties a fair hearing of their case. That is precisely the case in the present instance.