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AN UPDATE OF RECENT LABOUR LAW DEVELOPMENTS FROM SOUTH AFRICAN COURTS 2024

1 *Introduction*

Labour law is constantly evolving, with new cases and legal developments shaping how we understand and apply the law. This annual update, now in its sixth year, highlights and analyses significant labour law cases handed down between June 2023 and May 2024, focusing on their impact on legal science. Over the past year, courts have grappled with various complex issues related to employment rights. These cases have resolved disputes between parties and set important precedents that will guide future legal decision-making and scholarship. This update explores the key holdings and reasoning of these landmark cases and their implications for employees, employers and the broader legal landscape. The update aims to deepen our understanding of labour law and its practical application in the modern workplace. The cases discussed in this update have been carefully selected based on their potential to shape legal theory, challenge existing assumptions and spark new avenues of research.

2 *Basic conditions of employment*

2.1 Deductions

In *North West Provincial Legislature v National Education Health and Allied Workers Union obo 158 Members* (2023 44 ILJ 1919 (LAC)), the labour appeal court held that an employer is not allowed unilaterally to deduct monies accidentally paid to striking workers from future salaries. The employees engaged in an unprotected strike and the employer issued a communique stating that the principle of no-work, no-pay would apply to employees who did not attend work due to the unprotected strike (par 2). The employer inadvertently paid remuneration to all striking employees. As a result, the employer informed the employees that it would deduct the remuneration paid to them during the strike from their salaries over several months (par 3). The union approached the labour court urgently, seeking interim relief to prevent the employer from deducting remuneration based on alleged participation in an unlawful strike (par 4). The union argued that the deductions violated the Basic Conditions of Employment Act 75 of 1997. The labour court granted final interdictory relief, interdicting the employer from deducting any remuneration from the union members until it complied with section 34 of Act 75 of 1997 (par 4-5).

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The employer appealed to the labour appeal court, which determined that, in accordance with section 34 of the act, deductions from an employee's wages are prohibited unless one of the following conditions is met: firstly, the employee provides written consent for the deduction; secondly, the deduction is mandated or allowed by legislation, a collective agreement, a court order, or an arbitration award; or lastly, the deduction is made to compensate an employer for loss or damage, subject to certain stringent conditions (par 10). The court held that "[r]emuneration is paid in terms of a contract of employment as a *quid pro quo* for services rendered. Where services are not rendered by an employee, as a general rule, remuneration is not payable" (par 11). During a protected strike or lock-out, an employer is not required to provide compensation to an employee for work that the employee fails to perform (par 11; Mureinik "The contract of service: an easy test for hard cases" 1980 *SALJ* 246 249). Despite the fact that the employer was under no legal obligation to pay employees for work not performed during their unprotected strike, the employer chose to do so. Subsequently, the employer attempted to recover the remuneration paid by making unilateral deductions from the employees' salaries, without securing an agreement or obtaining an order through a judicial process (par 12). The conduct of the employer amounts to self-help (par 15). No agreement was reached with the employees to deduct the money (par 18). The principle of no-work, no-pay is not a "law" contemplated by section 34 of the act (par 19). The court also held that "[t]his submission has no merit. It fails to appreciate the clear distinction between an entitlement not to make payment of remuneration under certain circumstances, such as those that prevail in a strike and the entitlement to deduct under circumstances such as those specified in section 34" (par 19). The principle of set-off is not applicable as set-off operates only where two persons reciprocally owe each other something in their own right (par 20). In cases where there is an ongoing dispute regarding deductions made from an employee's salary, rather than the existence of mutual debts, the doctrine of set-off is not applicable as a matter of law and cannot be invoked (par 21). The appeal was dismissed (par 24).

Section 34(1)(*b*) does not recognise the common-law right of set-off as a "law" and an employer can offset an employee's debt against their remuneration only if the employee has provided written consent, as stipulated by section 34(1)(*a*). (See also *Naidoo v Careways Group* 2014 35 ILJ 181 (LC).) The principle of no-work, no-pay allows an employer not to pay employees, but this is an election. (See *Mpanza v Minister of Justice and Constitutional Development and Correctional Services* 2017 38 ILJ 1675 (LC).) Several employers choose not to deduct wages from striking employees' salaries in furtherance of industrial relations aims. This matter should therefore be distinguished from matters where the deduction concerns the repayment of an amount paid to the employee in error contrary to the provisions of relevant employment contracts. This does not mean employers who accidentally pay striking employees cannot reclaim such monies. However, the employer will have to reach an agreement with the workers or approach a relevant court with jurisdiction to be granted an order to do so. (See Grogan *Employment Rights* (2019) 101.)

2.2 Wages

In *Quantum Foods (Pty) Ltd v Commissioner Jacobs* (2024 45 ILJ 71 (LAC)) the labour appeal court considered whether contractual bonuses and provident fund contributions should be included within the definition of "wages" for purposes of the National Minimum Wage Act 9 of 2018 as the employer has no discretion in making these payments (par 28, 31). The act was enacted to protect the lowest-

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paid workers from exploitation and to improve their wages (par 1). To align its employees' wages with the act's requirements, the employer restructured its payslips to include a contractual bonus and the contributions it paid to a provident fund on behalf of its employees (par 2). Once these amounts were factored in, the wages met the minimum threshold prescribed by the act (par 2). The General Workers Union of South Africa (the union) challenged the employer's entitlement to factor in these payments (par 3). The matter was referred to the Commission for Conciliation, Mediation and Arbitration (the commission) for arbitration (par 3).

The arbitrator was tasked with determining whether the employer was paying its employees the prescribed national minimum wage and, specifically, whether the contractual bonus and provident fund contributions could be included in their salaries (par 4). The arbitrator, relying on the dictionary definition of a "bonus", found that it was "something one receives over and above your normal salary" (par 5). He concluded that the bonus and provident fund contributions should not be factored into calculating the normal hourly rate (par 5). As a result, he ordered the employer to comply with the act's provisions and pay its employees the national minimum wage (excluding the contractual bonus) (par 6). Unhappy with the award, the employer initiated review proceedings in the labour court (par 7). The labour court agreed with the arbitrator's reasoning and dismissed the employer's application (par 8-9). The employer then appealed against the labour court's findings in the labour appeal court (par 10).

The labour appeal court held that section 5(1)(*c*) of Act 9 of 2018 outlines what can and cannot be included in the wage calculation. According to the section, the wage calculation excludes "gratuities including bonuses, tips or gifts" (par 17). A "gratuity" is a payment characterised by the giver's discretion and the receiver's anticipation, but it does not establish any legally binding or contractually enforceable right to receive such payment (par 22). The word "bonus" can be used to describe two distinct types of payments: one that is discretionary and given voluntarily by the employer or another that is a contractually obligated payment stipulated in a legally binding agreement. A bonus payment does not depend on the employer's whim but is an enforceable contractual obligation (par 19). The labour appeal court found that the bonus referred to in section 5(1)(*c*) is indeed the type of gratuitous payment (par 24). The nature of the bonus the employer was contractually obligated to pay its workers did not fit this definition (par 25). It had no "gratuitous" characteristic and was founded on a covenantal duty instead of discretional largesse (par 25). The labour appeal court held that the employer's incorporation of the contractual bonus and provident fund contributions in wage calculations complied with the provisions of the act (par 28, 31).

The judgment is questionable. The act aims to improve the wages of the lowest-paid workers and protect workers from unreasonably low wages (s 2 of the act). The effect of the judgment is to allow workers to be compensated in real terms on a monthly wage, which is below the minimum wage. Instead, it would be better for employees to receive monthly payments that can meet their needs. Similarly, it seems to serve little purpose in forcing workers to save for retirement when they can hardly survive each month leading up to their retirement. (See Du Toit *et al Labour Relations Law – A Comprehensive Guide* (2023) 687.)

3 *Collective bargaining*

3.1 Interdicts

In *Economic Freedom Fighters v Brightstone Trading 3 CC t/a Gordon Road Spar* (2023 44 ILJ 2679 (LAC)) the labour appeal court considered whether the labour

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court had erred in issuing an interdict against the Economic Freedom Fighters (the party) where the actions against which the interdict was directed were not those of the party but of a rogue individual within the party (par 15). An employee was employed as a floor manager at the Gordon Road Spar when she was demoted to cashier. Thereafter, a certain Mr Sono addressed a letter to the employer on the letterhead of the party local branch and requested a meeting with management to discuss the matter (par 4). After the employer did not respond to the letter, Mr Sono arrived at the employer's premises. He issued an ultimatum, insisting that the employee be reinstated to her former role and warning of the store's closure if his demand was not fulfilled. When the demand went unmet he, along with a group of protesters, took action to forcibly shut down the store. They intimidated the cashiers by shouting at them, threatened the shoppers and ordered everyone to vacate the premises. The protesters then proceeded to obstruct the entrance to the shopping centre, compelling the store to cease operations for the remainder of the day (par 5).

Two weeks after the initial incident, a comparable situation unfolded, resulting once again in the store's closure (par 6). The employer's attorneys demanded that the party and its members cease all illegal conduct and interference with its business operations. The protest action intensified. The employer approached the labour court for an urgent interdict (par 6). The labour court granted an interim order interdicting and restraining the party from engaging in unlawful action which disrupted the business operations of the employer (par 2). The party took a stance against the interdict application, asserting that the party was not involved in the protest action or any associated illegal activities. The party maintained that Mr Sono, an official from a local branch who was not named as a party in the application, lacked the authority to represent the party (par 3). On the return date, the labour court upheld its previous interim order and additionally ruled that the party would be responsible for covering the legal costs associated with the proceedings. The labour court held that the enquiry was not whether the party, "through the provisions of its constitution or otherwise, conferred authority on Mr Sono and its members to protest at the applicant's premises" but whether the court could conclude that "Mr Sono and the protesters created the appearance that they had the power to act on behalf of the EFF" (par 7). The party approached the labour appeal court.

The labour appeal court held that the main question is whether the doctrine of ostensible authority applies to the case in question (par 9). Ostensible authority differs from actual authority; the former is the appearance of authority, while the latter is explicitly or implicitly granted by the principal (par 9). The principal's conduct is crucial in establishing ostensible authority. The agent cannot claim authority for themselves; it must flow from the principal's actions (par 10). The principal must make representation to establish ostensible authority (par 11). For a principal to be liable, a representation by them must be reasonably expected to be acted upon, relied on and cause consequent prejudice to the other party (par 12). In the current case, the principal was a voluntary association and a national political party (par 13). Correspondence between Spar and the party's region led Spar to contend that the party had ostensible authority over the protesters (par 14). The labour appeal court found that the labour court had erred in its judgment. There was no evidence that the party had created an appearance that the protesters were authorised to act on its behalf (par 15).

The court's judgment that the party did not have ostensible authority is questionable for several reasons: The party, as the principal, was notified of Mr Sono's actions and demands via correspondence from Spar's attorneys (par 6). The party was informed about the situation yet did not explicitly disavow Mr Sono's actions or halt

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the protest. Mr Sono initiated contact with Spar on the letterhead of the party local branch (par 4). This gives the impression that he was acting on behalf of the party, thus fulfilling the first condition of ostensible authority, which is a representation by the principal. The protest intensified despite receiving a legal notice to cease all illegal activities (par 6). If the party did not authorise these actions, they had ample opportunity to disassociate themselves from Mr Sono and the protesters but did not do so. Mr Sono is identified as a local party branch official (par 3). This is not a random individual claiming to represent the party but someone with a formal relationship with the organisation. His actions could reasonably be seen as reflecting the party's stance unless explicitly contradicted by the party. Spar suffered business disruptions, fulfilling the criteria of consequent prejudice based on the assumption of ostensible authority (par 5). The party's failure promptly to disavow the actions of Mr Sono and the protesters could be seen as an implicit endorsement or at least acceptance of their actions, thereby giving them ostensible authority. The party is not a loose-knit group but a well-organised political body. Any action taken in its name without explicit disavowal could reasonably be attributed to the organisation. The labour court examined two key factors: first, whether the party's constitution granted Mr Sono the official authority to act on the organisation's behalf and second, whether the actions of Mr Sono and the protesters gave the impression that they were operating with the party's approval and authorisation, regardless of what was formally spelled out in the constitution (par 7). Given the party's failure to disassociate from the protests after being legally notified, the labour court's reasoning seems sound. (See also *Khumalo v Industrial Development Corporation of SA* (2024 45 ILJ 123 (LC) par 51-62), where the labour court dealt further with the issue of ostensible authority.)

3.2 Organisational rights

In *Association of Mineworkers and Construction Union v United Association of South Africa* (2023 44 ILJ 2479 (LAC)) the labour appeal court had to consider whether a commissioner in granting organisational rights may override agency shop agreements (par 45). The case concerns a legal dispute involving the Association of Mineworkers and Construction Union (AMCU), other trade unions, an employer association and the labour court. The primary issue is the "agency fee" that members of AMCU, a minority union and bargaining agent, must pay according to an agency shop agreement (par 6). AMCU challenged this arrangement, arguing that since they participate in collective bargaining, their members should not be required to pay the agency fee (par 10). In the initial agreement, other majority unions (FAWU and UASA) and the employer's association (SMREA) had concluded that agency fees could be deducted from employees' wages without their consent (par 5). The money would go into a separate account administered by the majority unions. AMCU, which gained enough members to be part of the National Bargaining Council for the Sugar Manufacturing and Refining Industry (NBCS), contended that this arrangement was unfair to its members (par 4-6). AMCU members were subjected to double deductions – ordinary union levies and agency fees (par 6). Despite negotiations and a draft agreement, no resolution was reached. AMCU then took the case to the CCMA and later to arbitration, seeking to stop the agency fee deductions from its members (par 7-8). The labour court and the commissioner both sided with the majority unions, stating that the law and the agency shop agreement did not give any special dispensation to minority unions that become bargaining agents (par 12, 15). AMCU appealed, arguing that this interpretation was unjust,

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unfair and not in line with the principle of fairness that underlies agency fees (par 14). They argued that their members were not "free riders" and should not be subjected to agency fees (par 10, 14).

The labour appeal court found that the members of the minority union should not be required to pay the "agency fee" (par 45). Agency fees are generally intended to cover the costs of collective bargaining, usually carried out by a majority union (par 26). Since AMCU also participates in collective bargaining, the fee is unjustified for its members (par 32). The principle of "fair play" underlies the concept of agency fees, which are designed to prevent "free-riding" by those who benefit from collective bargaining without contributing to its costs (par 23-25). The labour court and the commissioner misconstrued AMCU's case (par 45). It argued that a contextual interpretation of the agency shop agreement and the implication of a fair term would lead to the same outcome: the agreement was unfair to AMCU members (par 36, 41). All agency fees deducted from AMCU members should be refunded. A mechanism should be designed and implemented to facilitate these refunds (par 46). The majority unions should not receive agency fees from AMCU members, as they are not "free riders" and are represented in collective bargaining by their union, AMCU (par 32, 40).

The judgment is wrong. Previously, in *Municipal and Allied Trade Union of South Africa (MATUSA) v Central Karoo District Municipality* (2020 41 ILJ 1918 (LAC)) the labour appeal court held that an agency fee is due under statute (s 25 of the Labour Relations Act 66 of 1995) (par 28). A union agency fee is a payment collected to support the union's efforts to further the collective interests of workers through the process of negotiating with employers. In contrast, a union membership fee, also known as a subscription fee, is a payment that individual union members are obligated to make based on the contractual arrangement between the member and the union. This membership fee grants the member access to the various services and benefits provided by the union. There is no double payment because union membership fees are distinct from agency fees. It seems problematic that the court did not even consider its previous jurisprudence, let alone justify its departure therefrom (par 28). A judge of the labour appeal court should be familiar with the jurisprudence of that court, especially in a case that is not yet three years old. The court seems to have been overly concerned that the purpose of agency shop agreements is to prevent free riders from benefitting from the activities of majority unions (par 21-24). It does not follow that because minority trade unions have obtained organisational rights, the members of those unions will not benefit from the activities of the majority union. The court was overly enthusiastic with interpretative and jurisprudential principles. Still, it seemed to have cherry-picked specific values and ignored substantive legal principles and values such as the "majoritarianism principle" (par 28).

3.3 Political party involvement

In *CCI South Africa (Pty) Ltd v African National Congress Youth League* (2024 45 ILJ 969 (LAC)) the labour appeal court considered whether Act 66 of 1995 exclusively governs labour disputes and whether the involvement of a political party is permitted in labour relations. CCI South Africa as employer obtained an interim interdict from the labour court against the African National Congress (ANC) Youth League, the ANC and some of its members, prohibiting them from interfering with CCI's business operations. This action followed CCI's discovery of a leaflet and subsequent communications, including a WhatsApp voice note and Facebook posts,

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calling for a shutdown of CCI's operations along with a list of employment-related demands (par 5). Despite the initial interdict, a proposal for a new march to CCI's premises surfaced, which was to end at CCI's location. The eThekwini Municipality granted permission for this march under the Regulation of Gatherings Act 205 of 1993, albeit based on misrepresentation by the ANC Youth League, the ANC and its members (par 7). In response, CCI launched a second interdict application to prevent the march (par 8). The labour court initially granted the interim interdict based on concerns over potential interference with CCI's business but later faced jurisdictional challenges due to the nature of the protest and the parties involved (par 9). The court found it lacked jurisdiction to hear the matter because the march was neither a strike, protest action nor conduct in furtherance of either, as defined under Act 66 of 1995 (par 12).

The employer referred the matter to the labour appeal court, which held that, according to the principle of mootness, courts typically do not address cases that no longer present a live controversy. There are exceptions where it would be in the interests of justice to proceed (par 17-18). In assessing whether to grant leave to appeal on a moot matter, factors such as the practical effect of a potential order, the issue's importance and whether conflicting judgments exist should be considered (par 18). None of these factors warranted proceeding with the appeal, as the requirements for mootness were not met (par 29). Act 66 of 1995 exclusively deals with labour disputes involving employees and a union, and political parties can participate only in an advisory capacity (par 24). Since the protest did not involve employees and a union but was a political party's action, the labour court lacked jurisdiction and the Regulation of Gatherings Act applied instead (par 26). The labour court correctly ruled that it lacked jurisdiction to hear the matter because the actions in question were governed by the Regulation of Gatherings Act, not Act 66 of 1995 (par 29; see s 14 of the Regulation of Gatherings Act). The specialised nature of labour law should be considered and the clear demarcation of jurisdiction between different courts (par 24). The appeal was dismissed (par 31).

CCI contended that the ANC's conduct was directly linked to labour relations. This was based on the premise that the march and associated actions were either a strike or protest action or conduct in furtherance of such, which directly impacted upon the applicant's operations by obstructing or retarding work at their premises (par 10). This claim was supported by evidence such as a leaflet calling for shutdowns and employment-related demands, a WhatsApp voice note and Facebook posts reiterating these calls (par 5). The ANC had misrepresented itself as a trade union when it applied for permission to march, further suggesting that the actions were intended to be within the realm of labour disputes governed by Act 66 of 1995 (par 7). CCI believed that this misrepresentation and the nature of the protests suggested that the labour court was the appropriate forum for the dispute (par 10). The judgment may have severe consequences for industrial relations in South Africa, as it allows political parties to circumvent laws limiting their involvement in labour matters by denying participation in strike or protest action under the guise of protesting under different sections of the constitution (par 20). Act 66 of 1995 regulates labour relations and disputes, including strikes and industrial action by employees and unions.

In contrast, Act 205 of 1993 governs public protests that may have socio-political objectives. Determining the appropriate framework is challenging when an action has elements of both (par 26). Decisions that strictly categorise disputes as industrial or political can set challenging precedents, potentially limiting the scope for addressing complex issues spanning both realms. The fact that the judgment

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may have severe consequences for industrial relations in South Africa means that the matter was not moot. In any event, it seems axiomatic that the labour appeal court misdirected itself in finding that the matter was moot but then proceeded to find that the labour court lacked jurisdiction to hear the matter (par 29).

3.4 Strike misconduct

In *South African Commercial Catering and Allied Workers Union v Massmart Holding Limited* ((JA119/2022) 2024 ZALAC 13 (29 April 2024)) the key question brought before the labour appeal court was whether the provisions of section 68(1)(*b*) of Act 66 of 1995 empower the labour court to mandate the awarding of fair and reasonable compensation for damages resulting from illegal actions taken during the course of a legally protected strike. Massmart sought damages of R9 383 454,57 from the South African Commercial Catering and Allied Workers Union (SACCAWU) as compensation for losses suffered due to unlawful conduct that occurred during a protected strike by SACCAWU and its members (par 2). SACCAWU raised an exception that the labour court lacked jurisdiction to order payment of compensation for loss attributable to a protected strike. The key issue was whether such a claim falls under section 68(1)(*b*) or must be pursued under common law in the high court (par 3). The labour court dismissed SACCAWU's exception, finding it would be anomalous if an aggrieved party could claim compensation in the labour court under section 68(1)(*b*) for loss from an unprotected strike but not for loss due to unlawful conduct in a protected strike (par 12). On appeal to the labour appeal court, SACCAWU argued that for section 68(1)(*b*) to apply, the unlawful conduct must have occurred in an unprotected strike. Since the strike here was protected, Massmart's claim lies under common law in the civil courts, not under Act 66 of 1995 (par 14).

The labour appeal court dismissed SACCAWU's appeal, finding that a plain reading of section 68(1)(*b*) shows it applies to any unlawful conduct in furtherance of a strike, whether the strike is protected or unprotected (par 26). Act 66 of 1995 aims to promote collective bargaining and regulate the right to strike in conformity with the constitution. Statutes must be interpreted through the prism of the bill of rights (par 16). As specialist courts, the labour courts are best equipped to determine labour disputes and deal with complaints relating to labour practices and collective bargaining (par 17). A plain reading of section 68(1)(*b*), considering the ordinary rules of grammar and syntax, context and purpose, indicates that it refers to any unlawful conduct in the context of a strike or lock-out, whether protected or unprotected (par 23). Limiting the availability of remedies under section 68(1)(*b*) only to unlawful conduct in unprotected strikes would lead to an insensible result and unduly distinguish remedies based on whether a strike was protected or not (par 24). The amendment of section 68(1)(*b*) by the Labour Relations Amendment Act 12 of 2002 broadened its scope to include "any conduct" in contemplation or furtherance of a strike or lock-out (par 25). Restricting aggrieved parties to common-law delictual claims in civil courts for unlawful conduct in protected strikes would undermine the role of the labour courts as specialist courts best suited to handle labour disputes (par 29). In conclusion, the labour appeal court reached the determination that section 68(1)(*b*) grants the labour court sole authority to require the payment of fair and appropriate restitution for financial harm caused by illegal actions carried out in support of a strike, irrespective of whether the strike itself was sanctioned or unsanctioned.

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Section 23 of the constitution enshrines the right to fair labour practices for everyone, including employers (*National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC)). In light of this constitutional protection, the labour appeal court's judgment can be seen as balancing the rights of employees to engage in protected strike action with the rights of employers to be protected against unlawful conduct during such strikes. By allowing employers to seek just and equitable compensation under section 68(1)(*b*) for losses arising from unlawful conduct during protected strikes, the court acknowledges that while employees have the right to strike, this right does not extend to engaging in unlawful behaviour. The judgment also reinforces the role of the labour courts as specialist courts designed to handle labour disputes and ensure that the rights of both employees and employers are protected within the framework of Act 66 of 1995. Moreover, the judgment does not undermine employees' right to engage in protected strike action, as it deals only with the consequences of unlawful conduct during such strikes. This approach is consistent with the constitutional protection of employees' and employers' rights. The judgment balances the rights of employees to engage in protected strikes and the rights of employers to be protected against unlawful conduct during such strikes, ensuring that both parties' constitutional rights to fair labour practices are upheld.

3.5 Suspension of union members

In *NUMSA v Ntlokose* (2024 45 ILJ 495 (SCA)) it was decided whether various decisions taken by the National Union of Metalworkers of South Africa's (NUMSA's) central committee, including the suspension of members, the placement of a region under administration and the accreditation of delegates to a national congress, were in line with the union's constitution (par 1-3). The central committee had taken actions based on what they asserted as implied authority derived from past practices (par 35). The labour court found that the central committee had no constitutional authority to suspend members or take over regional administration (par 2). NUMSA appealed to the labour appeal court, arguing that their constitution empowers its committees to place members or officials on precautionary suspension pending disciplinary proceedings (par 3). They also asserted that the constitution permits the central committee to take over the administration of any of NUMSA's regions and to perform the accreditation of delegates to its national congress (par 3). They maintained that the NUMSA constitution sanctioned these actions and that they are therefore valid and binding (par 3). A member who had been suspended primarily contended that the decisions made were beyond the scope of authority granted by the NUMSA constitution (par 23). She asserted that the action taken to suspend her was not legally valid, as the constitution of NUMSA does not explicitly confer upon the central committee the power to impose precautionary suspensions on members (par 24).

The court held that a trade union's constitution should be interpreted as a contract between the union and its members, considering the text, context, purpose and factual matrix surrounding the constitution's formation and the knowledge of those who negotiated its terms (par 22). The interpretation should prefer a sensible meaning that aligns with the document's apparent purpose and avoids insensible or "un-businesslike results" (par 21). The court found that the suspensions by the central committee were not under the NUMSA constitution and were invalid (par 60.1). The suspensions of other members were done properly and were valid and binding (par 60.2). The central committee acted properly when it assumed control of

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the Mpumalanga region (par 60.3). The central committee acted *ultra vires* when it exercised the powers of an accreditation committee for NUMSA's general congress (par 60.4).

The case highlighted how deviations from these contractual obligations could lead to legal challenges and the invalidation of union actions. The court relied on principles of contract interpretation, considering the text, context and purpose of the constitutional provisions (par 22). There are compelling reasons why unions should have sufficient guidelines in their constitutions regarding the suspension of members, including providing certainty and clarity, ensuring legal compliance, adhering to principles of fairness and due process, preventing abuse of power and aiding in the resolution of internal disputes (par 52-53). Clear guidelines for suspending members in a union's constitution are fundamental for legal compliance, fairness, transparency and effective governance, ensuring that actions are justifiable, consistent with democratic values and protecting members' rights. It also ensures that the courts are not drawn into union matters by having to give content to vague provisions (par 53).

3.6 Union constitutions

In *South African Clothing and Textile Workers Union v Bargaining Council for the Furniture Manufacturing Industry – KwaZulu-Natal* ((DA9/22) 2024 ZALAC 20 (2 May 2024)) the labour appeal court had to consider whether, on a proper interpretation of SACTWU's constitution, a resolution by SACTWU's National Office Bearers to extend the union's scope to the furniture industry amounted to a "change" or "amendment" to the constitution as contemplated by section 101 of Act 66 of 1995. The South African Clothing and Textile Workers Union (SACTWU) appealed against a labour court judgment that found that the union was not entitled to organise and recruit in the furniture industry covered by the Bargaining Council for the Furniture Manufacturing Industry – KwaZulu-Natal (the bargaining council) (par 1). The central issue was whether SACTWU was required to comply with section 101 of Act 66 of 1995 when it extended the scope of its membership to include employees in the furniture industry via a resolution passed by its national office bearers, relying on a clause in SACTWU's constitution (par 3). SACTWU did not amend or replace its registered constitution. Instead, on 1 October 2019, SACTWU's national office bearers passed a resolution extending SACTWU's scope to include "the furniture industry" (par 13). The national office bearers relied on clause 3.1.12 read with clause 3.2.12 of SACTWU's existing, registered constitution. These clauses allowed SACTWU's membership scope to cover "other" industries as defined by SACTWU's national executive committee or national office bearers from time to time (par 13).

The bargaining council refused to admit SACTWU as a party, contending that SACTWU had to comply with section 101 of Act 66 of 1995 before recruiting in the furniture industry, which SACTWU disagreed with (par 4). Later, SACTWU's national office bearers passed a resolution extending SACTWU's scope to include "the furniture industry", relying on clause 3.1.12 of SACTWU's constitution, which allowed its scope to cover "other" industries as defined by SACTWU's national executive committee or national office bearers from time to time (par 13). The bargaining council referred the matter to the labour court by applying for a declaratory order against SACTWU (the appellant) (par 4). The labour court found that registering a trade union's constitution, including any amendments, makes it available to interested parties and the public. The amendment of SACTWU's

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constitution merely created a mechanism to extend SACTWU's scope. Still, it did not exempt SACTWU from complying with section 101 of Act 66 of 1995, which required registering the amendment with the registrar of labour and certification by that official (par 14). SACTWU was therefore not entitled to organise and recruit members in the furniture industry covered by the bargaining council (par 14). Aggrieved by the outcome, SACTWU referred the matter to the labour appeal court.

The majority of the court held that the resolution to include the furniture industry did not amount to a change to SACTWU's constitution as contemplated by section 101(1), as it was permitted by the existing clause 3.2.12 which expressly allowed the relevant bodies to expand the scope to other industries from time to time (par 47, 50). Section 101(3) requires registration only of a "changed or new constitution" – as there was no change here, no registration was required (par 48-49). Act 66 of 1995 does not require an expanded scope resolution to be registered or published where this is done under an existing constitutional provision. Reading about such a requirement would unduly limit a union's right to determine its administration, activities and organisation (par 51). The resolution did not amount to a constitutional change, as it was already permitted by the existing clauses in SACTWU's constitution (par 47, 50).

The minority of the court held that the trade union and its members are bound by its constitution. While the law does not require a trade union to limit its scope to a specific industry, a union may choose to impose such limitations in its constitution (par 24). The union decided to define and limit its scope to specific industries. The "other" category in clause 3.2.12 was limited to only those industries the national executive committee or national office bearers may decide to include occasionally (par 26). When these bodies define an industry to fall under the "other" category, it adds to SACTWU's scope something that was not there before, thus amounting to a "change" or "amendment" to SACTWU's scope in its registered constitution (par 28). The rationale for registering changes to a union constitution in terms of section 101 is to ensure that the public and outsiders have access to the amended constitution, promoting transparency (par 30-32). SACTWU's constitution envisages that amendments shall take effect only once certified in section 101(3)(*b*). Thus, SACTWU's attempt to operate in the furniture industry without registering the change was non-compliant with its constitution and breached section 101 of Act 66 of 1995 (par 37). The resolution effectively amounted to a change or amendment to SACTWU's constitution as contemplated by section 101 of the act (par 28).

The decision of the majority is problematic. The minority's interpretation of SACTWU's constitution is more in line with the principles of constitutional interpretation. He emphasised that the constitution should be objectively interpreted according to its ordinary language and context and a sensible meaning should be preferred (par 23). His finding that clauses 3.1.12 and 3.2.12 allow only for a limited "other" category that must still be specifically defined gives effect to the constitution's clear structure and intention to define SACTWU's scope (par 26-27). The minority's approach better promotes the important constitutional values of transparency and openness (par 36). By requiring the resolution to be registered in section 101, his approach ensures that the public and outsiders can access SACTWU's effective scope (par 29-30). The majority's approach would extend SACTWU's scope without the public being aware of such changes. The majority's judgment is more faithful to the rationale for section 101 as articulated by the constitutional court in *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)* (2020 41 ILJ 1846 (CC)). The constitutional court emphasised that registration of union constitutions and amendments is crucial for public access, awareness and effective

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collective bargaining (par 30-33). The majority did not sufficiently engage with this binding precedent.

4 *Contract of employment*

In *RFS Administrator v Samons* ((JA114/22) 2024 ZALAC 10 (11 April 2024)) the labour appeal court was called upon to consider whether employees owed their employer a fiduciary duty. The employer claimed contractual breach and disgorgement of profits because additional employee payments were made. The employer instituted proceedings against Sean Lindo Samons, Marinett De Fortier and Marie Jansen Van Rensburg (the employees) in the labour court, claiming contractual damages or disgorgement of profits relating to payments the employees received from the National Pension Fund for Municipal Workers (NPFMW) and the National Fund for Municipal Workers (NFMW) (collectively referred to as "the funds") (par 1-2). RFS performed administration services for the funds. Initially, the employer's chief executive officer acted as principal officer of the funds until 2007, when Samons assumed the function of the National Pension Fund for Municipal Workers on behalf of the employer (par 3). Samons, De Fortier and Van Rensburg were all employed by RFS in terms of oral employment contracts, with Samons and Van Rensburg being seconded to the funds in 2001 and De Fortier in 2016 (par 4-6). The dispute concerns additional payments the employees received from the funds over and above their usual RFS remuneration during 2015/2016. The employees argue they were no longer employed by RFS then but had been employed directly by the funds (par 9-10). In 2011, Samons took steps to be used directly by the NPFMW (par 12-15). RFS and the funds entered into new administration agreements effective 1 September 2011 (par 16-18). There were various communications between the parties from 2013 to 2015 regarding the employees' roles, transfers and remuneration arrangements with RFS and the funds (par 21-27). The contested bonuses and additional salaries were paid to the employees using funds from 2015-2016. The employees argue RFS had full knowledge of the payments (par 27). De Fortier and Van Rensburg tendered written resignations from RFS on 29 January 2016 (par 28). On 19 February 2016, the NFMW approved entering employment agreements with them (par 29).

RFS instituted proceedings against the employees in the labour court, claiming contractual damages or disgorgement of profits (par 1). The labour court dismissed RFS's action with costs (par 1). The labour court found that when the employees commenced working for the funds, they served only the interests of the funds and consequently ceased to be employed by RFS (par 37). RFS failed to establish the terms of the employees' oral contracts of employment (par 39). The labour court concluded that the employees did not fall within the definition of "employees" in the Basic Conditions of Employment Act 75 of 1997 because they received or were entitled to remuneration from the funds when they commenced performing the statutory functions of a principal officer (par 40-41). The court held that since there was no privity of contract between RFS and the employees when they earned the extra income from the funds, there could not have been any contractual prohibition against them receiving the money (par 42). As a result, the court found RFS failed to establish that the employees owed it a fiduciary duty and that the extra income constituted profit that would have accrued to RFS. Therefore, the disgorgement remedy was unavailable to RFS (par 42). RFS then appealed to the labour appeal court.

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The labour appeal court held that the employees were employees of RFS for purposes of Act 75 of 1997 at the relevant times because they worked for RFS and received or were entitled to receive remuneration from RFS despite their secondments to the funds (par 43-46, 54, 60). This was based on the definition of "employee" in section 1 of Act 75 of 1997 (par 40). RFS's claim for disgorgement of profits cannot succeed because, although the employees owed RFS a fiduciary duty as employees, the additional payments were not made in secret but with RFS's knowledge and acquiescence (par 65-68). For a disgorgement claim to succeed, the claimant must establish a fiduciary relationship, a conflict between the fiduciary's duties and personal interests and the fact that the profits were made secretly (par 62-64). RFS's claim for contractual damages cannot succeed because RFS did not establish which employees had allegedly breached contractual terms (par 69-70) and failed to prove a causal connection between the alleged breach and the damages suffered (par 71). RFS's appeal is dismissed with costs, as RFS was pursuing a purely financial interest in instituting the proceedings (par 72-73).

The remedy of disgorgement is an equitable remedy that requires a person who has breached their fiduciary duty to account for and surrender any profits obtained because of that breach to the person to whom the duty was owed (par 62). It is based on the principle that a fiduciary should not be allowed to benefit or profit from their breach of duty. The remedy is distinct from contractual remedies in the following ways. First, disgorgement arises from a breach of fiduciary duty imposed by law or equity rather than a breach of contractual terms agreed between parties. Second, the primary purpose of disgorgement is to prevent unjust enrichment of the wrongdoer and to deter future violations of fiduciary duty. At the same time, contractual remedies aim to compensate the innocent party for losses suffered due to the breach. Third, disgorgement requires a fiduciary relationship, such as that between an employer and employee, while contractual remedies require only a contractual relationship between the parties. Fourth, disgorgement focuses on the profits gained by the wrongdoer, irrespective of whether the innocent party suffered a loss. At the same time, contractual damages aim to compensate for losses suffered by the innocent party because of the breach.

Disgorgement and contractual remedies are related in that they both arise from a breach of legal obligations and aim to address the consequences of such breaches. In some cases, a violation of fiduciary duty may also constitute a breach of contract, allowing the innocent party to seek disgorgement and contractual damages. According to section 77(3) of Act 75 of 1997, the labour court has "concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment". It is therefore clear that the court was entitled to consider if the employees breached the terms of their employment contracts. Ostensibly, the fiduciary duty that the employer alleged the employees had violated does not arise out of the employment contract but under the relationship between the parties. The court overextended its reach in hearing about the fiduciary duty.

In *Randwater v Stoop* (2013 2 BLLR 162 (LAC)) the labour appeal court held that "[t]he words 'concerning a contract of employment' mean about or in connection with an employment contract" and that "[t]he words 'any matter' in section 77(3) are broad and the literal interpretation does not limit the claims, concerning a contract of employment, to a specific category" (par 39). In *NUMSA v Micromega (Pty) Ltd* (2018 39 ILJ 2048 (LC)) the labour court interpreted the *Randwater* case to mean that section 77(3) does not require "a direct or indirect link between the contract of employment and the claim" and that "the issue in dispute must in some way be linked causally, whether directly or indirectly, to an employment contract"

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(par 17). Although the fiduciary duty does not in itself arise from the contract of employment, there is an indirect relationship between the fiduciary duty and the contract of employment.

5 *Dismissal*

5.1 Academic misconduct

In *National Tertiary Education Union on behalf of Ngwane against Durban University of Technology* (2023 6 BALR 670 (CCMA)) the CCMA was called upon to consider if the dismissal of an academic for committing plagiarism and not acting against students who had committed plagiarism was fair. A senior academic (the employee) at the Durban University of Technology (the employer) was dismissed for alleged misconduct, specifically plagiarism and failure to properly supervise students (par 9). The employee was charged with two main allegations. First, the employee was accused of "copying and pasting" borrowed material into an academic article without acknowledging the sources and attributing it to "oversight" (par 9, 58). Second, the employee was charged with failure properly to supervise students (par 9). The employee was also charged with not checking the work of students they were supervising to ensure that they had not copied the work of others without advising them on referencing borrowed work and how to avoid plagiarism (par 9). The employer conducted a disciplinary hearing where the applicant was found guilty of the charges (par 10). The dismissal was upheld on appeal (par 10). The employee argued that the delay in charging him affected the proceedings' fairness but the employer's explanation was deemed reasonable and justifiable (par 70-82). In response, the employer stated that there was difficulty in filling the employee's position at that stage, so they allowed the employee to complete their tenure while awaiting the outcome of the inquiry (par 81). The university considered the complexity and seriousness of the allegations, which required extensive investigations, as a reason for the delay (par 79). Aggrieved by the outcome, the employee approached the CCMA (par 2). The employee also argued that the brief period in which the appeal committee had considered the matter meant that its members had not properly applied their minds (par 118).

The CCMA held that the university's finding that the employee was guilty of plagiarism and failure to supervise students properly could not be faulted (par 117). The employee acknowledged the importance of the university's plagiarism policy and that including copied and unacknowledged material was an "oversight" (par 88). This explanation was insufficient, given the employee's experience and role as a supervisor of student work (par 91). The brief period it had taken the committee to dispose of the appeal did not mean that its members had not applied their minds (par 119). The explanation tendered by the university for the delay in charging the employee was reasonable and justifiable in the prevailing circumstances (par 82). The employee was guilty of not complying with the university's plagiarism policy and not properly supervising students' work and the dismissal was fair (par 117).

Labour matters must be addressed expeditiously (*CUSA v Tao Ying Metal Industries* 2009 2 SA 204 (CC) par 63). This is a key objective of the Labour Relations Act. Swift action is crucial to ensure that grievances are resolved promptly and to prevent prolonged injustice. It is important to acknowledge that reasonable delays in dealing with these matters should not automatically render the outcomes unfair (par 74). Complex labour issues often require thorough investigation, meticulous analysis of evidence and thoughtful deliberation (par 79). Allowing for a reasonable amount

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of time ensures a comprehensive understanding of the situation and promotes a fair and just resolution. Balancing expediency with fairness is key to upholding the principles of justice and maintaining trust in the labour relations system. Plagiarism is an especially heinous form of misconduct in the tertiary education system due to its severe ramifications on academic integrity and intellectual growth (par 87). It undermines the fundamental principles of honesty, originality and critical thinking that lie at the core of higher education. Honesty also lies at the core of the employment relationship. The employee also failed to educate and evaluate his students' work for plagiarism adequately (par 114). This task is essential to every teacher and therefore a severe dereliction of the employee's duties (par 113-117).

5.2 Disability

In *Gugwini v National Consumer Commissioner* (2023 44 ILJ 2237 (LC)), the labour court considered whether dismissing an employee who had become physically incapacitated was substantially fair where the employee refused to be accommodated in lower positions. The employee experienced difficulty with his eyesight and was later diagnosed as legally blind. He underwent three operations and used eye drops. During this time, he was on incapacity leave. The employee disclosed his blindness to the employer and sought guidance on proceeding (par 2-3). In an effort to prolong his leave, he submitted a request, asserting that with the assistance of visual aids designed for individuals with impaired vision, he would be capable of performing tasks. The employee's doctor confirmed his permanent incapacity (par 4). There were issues with obtaining further sick notes and the employee applied for incapacity leave after his services were terminated (par 5-7). He received full remuneration for his absence without approved leave (par 7). The employee was willing to work and requested assistance finding alternative employment (par 8). The employer provided options for vacant positions to the employee (par 17). The employee expressed interest in the position but was unsure about his ability to perform. He considered the offer to work in the call centre "insensitive, dehumanising, inconsiderate" and ultimately accepted the decision to terminate his service (par 20). The employee disputed that he applied for ill-health retirement (par 24). The employer terminated his employment due to his inability to meet the requirements of the position and his refusal to consider lower positions (par 26). The employee claimed discrimination, stating that another visually impaired employee was accommodated in the call centre (par 27) but he conceded that his vision posed challenges for reading and writing (par 28). The employee approached the labour court with two claims: an automatically unfair dismissal claim based on discrimination and an unfair discrimination claim due to discrimination based on his disability (par 43). The employer argued that the dismissal was fair because the employee could not fulfil the core responsibilities of his position after becoming legally blind (par 44).

The labour court held that the employee alleges that the employer did not provide reasonable accommodation for his disability. In contrast, other employees with visual impairments were given appropriate tools and equipment (par 88). The employee's complaints lack merit and are not supported by evidence or applicable authorities (par 74). The employee could no longer perform the core responsibilities of his position due to his visual impairment and "the ability to read and write was an inherent requirement" for the roles (par 83). Requiring employers to accommodate employees who cannot meet the inherent requirements of a job is "incompatible with the very nature and purpose of reasonable accommodation" (par 85). The

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employer did not discriminate against the employee based on his disability, as accommodating him in positions with reading and writing requirements would contradict his doctors' advice. The employer offered the employee a position in the call centre, where visually impaired employees were accommodated but he rejected it. The employer treated the employee similarly to its other visually impaired employees and there was no evidence of discriminatory treatment (par 89). Dismissing an incapacitated employee is fair if the employer cannot accommodate them or if they refuse reasonable accommodation. Terminating the employment of a worker with a disability who is still capable of performing their duties is unfair. If the primary factor motivating the dismissal is the individual's disability, rather than their ability to fulfil job requirements, the dismissal is inherently unfair and contravenes principles of fairness (par 92). The employee was dismissed based on incapacity rather than discrimination related to their disability (par 119).

Notably, the court outlines a four-stage inquiry for fair dismissal due to incapacity, which includes assessing the employee's ability to perform their work, the extent to which their disability affects their work, the possibility of adapting their work circumstances or duties and the availability of suitable alternative work (par 94). When providing appropriate accommodations proves to be either impractical or would impose an excessive and unwarranted burden on the employer, any differential treatment resulting from the inability to accommodate the employee's needs would not be considered unjust or discriminatory (par 79). The employee accepted that the ability to read and write was an inherent requirement of the jobs he wanted to be accommodated in. Inherent requirements are an absolute defence against a discrimination claim (par 80; s 2(2)(*b*) of the Employment Equity Act).

The obligation of employers to attempt to accommodate incapacitated employees is not unbridled and would depend on the circumstances of each case and factors such as the burden such accommodation places on the employer. Courts must, in their final determination, also act fairly towards employers (par 110). It would be unfair towards employers if they were expected to employ employees in positions where they could not adequately perform the tasks. Although it is undoubtedly true that there exists an intrinsic relationship between work and human dignity, this does not mean that certain types of work are demeaning. It is degrading to those who perform those forms of work to make such a claim. The judgment also affirms that disability does not equal incapacity. An employer can dismiss an employee for incapacity if they cannot perform their job, especially if the incapacity is permanent (par 92).

5.3 For participating in an unprotected strike

In *Mlondo v Electrowave (Pty) Ltd* (2023 44 ILJ 1751 (LC)) the labour court had to consider whether the dismissal of several employees for participating in an unprotected strike was fair. Several employees participated in unprotected strikes over seven months (par 19) despite knowing their employer was commercially vulnerable due to its reliance on a single client (par 4, 27). The employer had proposed a job grading scheme but it had been rejected (par 4, 24, 26). When employees went on strike, management met with shop stewards and a union official to discuss their differences (par 9). Management could not do so and issued final written warnings for the first strike, which prompted another strike (par 4). Ultimatums were given and ignored (par 7-8, 10). The employees were eventually dismissed and they claimed the dismissals were procedurally and substantively unfair in the labour court (par 12-13).

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The labour court differentiated between protected strike action and unprotected strike action. Protected strike action is immune from dismissal and civil liability, whereas unprotected strike action is not. Participation in unprotected strike action carries with it an automatic penalty of dismissal. The substantive fairness of a dismissal must be determined in light of all relevant facts, including the gravity of the violation of the Labour Relations Act, efforts made to comply with the act and whether or not the strike was in response to unjustified employer behaviour. To be procedurally fair, the employer must discuss the ultimatum in unambiguous terms before dismissal and employees must be given adequate time to reflect on and respond to the ultimatum. Furthermore, before dismissal, the employer should contact a trade union official as soon as possible to discuss the course of action it intends to take (par 21).

The court emphasised the importance of differentiating between protected and unprotected strike actions. Parties often seek to justify their non-compliance with the carefully designed procedures intended to maintain industrial harmony by claiming provocation. While courts should give due consideration to any employer behaviour that may mitigate employees' failure to adhere to statutory dispute resolution mechanisms, the threshold for such consideration is high. To avoid the typical ramifications of engaging in an unprotected strike, the employer's actions must be particularly egregious and employees must provide compelling justification for their failure to follow proper procedures (par 23). The court found that the employees' breach of the Labour Relations Act was significant as they made no attempt to comply with its provisions. Furthermore, their strike was not a response to any unjustified conduct by the employer. The employees were fully aware that participating in an unprotected strike constituted misconduct for which they could face disciplinary action and they knew they had previously received final written warnings for the same offence. Moreover, they were given an opportunity to present their case before being dismissed. In light of these factors, the court concluded that the dismissal of the employees was both substantively and procedurally fair (par 32).

The judgment is partially incorrect. Participation in a strike that does not comply with the provisions of the act or conduct in contemplation or furtherance of such strike amounts to misconduct (item 6 of the Code of Good Practice: Dismissal). It may constitute a fair reason for dismissal. As with all misconduct cases, it does not follow that dismissal is always the most appropriate sanction. Sanctions are determined based on the totality of evidence placed before a decision-maker. The court was therefore incorrect to find that participation in unprotected strike action carries with it an automatic penalty of dismissal (par 21). This does not mean the court was wrong in dismissing the employees who participated in the unprotected strike. The court's findings on substantive and procedural fairness pass muster and it is clear that the seriousness of the infringement by the employees warrants the sanction of dismissal (par 32). It should also be noted that another option available to the employer was to retrench the employees, especially since the employer was under financial constraints (par 4).

5.4 Incarceration

In *Ndzeru v Transnet National Ports Authority* (2023 44 ILJ 1307 (LC)) the labour court considered whether the dismissal of an employee after being absent from work due to police incarceration for seven weeks was fair (par 7). The employee was granted a day's leave but did not return to work (par 4). The employer later established that the employee had been in police custody in another province after

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being involved in a shooting incident and had been refused bail twice (par 5-6). The employer notified the employee's wife that an incapacity hearing would be scheduled (par 6). The hearing occurred in the absence of an employee represented by a union representative and he was dismissed for being absent without leave for nearly two months (par 7). The employee wrote to the employer, expressing his satisfaction with the outcome and requesting that management process his pension payment (par 8). After being released on bail, one of the conditions was that he stay in the other province. The employee claimed he wrote the letter on human relations' advice because he needed money (par 9). The employee referred a dispute to the bargaining council after engaging in aggressive correspondence with management (par 13). The arbitrator reasoned that the employer could not be expected to keep the job open indefinitely and that he could not complain about procedural unfairness because he had endorsed the outcome (par 14.4-14.5). The employee approached the labour court, claiming that he had been inconsistently treated and that his dismissal was procedurally unfair because he had not been afforded a hearing (par 15).

The labour court found that the comparison case was different because the other employee, who was also incarcerated, had been absent for only two weeks before reporting for duty (par 16). The argument that the other employee was given a hearing in prison was irrelevant because it had not been raised before the arbitrator and, in any case, the other employee was incarcerated in the same province (par 17). The arbitrator's decision on the employee's acceptance of the hearing outcome could not be questioned (par 18). The employee knew how long he would be in prison when he wrote the letter and he had not requested an opportunity to present his case, so the employer had no reason to believe he would challenge his dismissal (par 18). Concerning the failure to provide the employee with a "post-dismissal hearing", while several decisions had dealt with hearings held after absent employees returned to work, none established a right to a post-dismissal hearing (par 25). The employee's dismissal *in absentia* was procedurally fair because of the adequacy of the hearing at which he was represented by a shop steward (par 26). Employers in the position of the employer could not be expected to wait until some indefinite future date for the employee to appear (par 27). Employees who could not be present should be allowed to submit their defence in writing after being provided with the facts available to the employer and then to make representations on sanction (par 27). The court therefore found that the arbitrator was correct in concluding that the employee's dismissal for incapacity was substantively and procedurally fair (par 29).

The employee's right to a pre-dismissal hearing was examined alongside the employer's right not to keep the position open indefinitely (par 27). While employees have a legitimate expectation of being afforded a fair hearing before being dismissed, employers cannot be expected to wait indefinitely for an absent employee to return (par 27). The employee's right to a pre-dismissal hearing was acknowledged and the adequacy of the hearing where a shop steward represented the employee was deemed fair (par 26). On the other hand, the court recognised the employer's right to take reasonable steps in the absence of the employee, such as providing an opportunity for the employee to submit a written defence and make representations on the proposed sanction (par 27). Balancing these rights, the court emphasised that employers should not be burdened with an indefinite obligation to keep a position open, especially when an employee's absence is prolonged (par 27). The employee was represented at the hearing by a union representative, who allowed the employee to state his case (par 26).

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5.5 Insubordination

In *Mgaga v Minister of Justice and Correctional Services* ((DA 17/21) 2024 ZALAC 8 (11 April 2024)) the labour appeal court considered whether the dismissal of a prison head for failing to report a severe assault incident between inmates promptly and for insubordination after refusing to attend a meeting with his supervisor. The department of justice and correctional services employed the employee as the head of Waterval Prison since 1985 (par 2). In 2012, two inmates were involved in a fight at the prison, resulting in one inmate being stabbed and later dying from his injuries (par 3). The employee was required to report the assault incident to the area commissioner within one hour, at least telephonically but filed a report only four days later (par 4). While on suspension for failing to report the incident promptly, the employee was instructed to meet with the regional commissioner on the same day at a location 300 km away. Despite being informed at 7 am, the employee refused to attend, citing his suspension and short notice as reasons (par 6). The employee later came to the prison at 10 am to sign a register. The area commissioner informed him again about the meeting and provided a letter temporarily lifting his suspension for the day. The employee refused to attend unless his suspension was lifted altogether (par 7). A disciplinary inquiry was held – one for not reporting the assault and another for insubordination for refusing to attend the meeting. The employee was found guilty and dismissed (par 8). The employee approached the General Public Service Sectoral Bargaining Council, which agreed that the dismissal was fair (par 9-13).

The matter was referred to the labour court, which made the following key findings: The evidence was insufficient for the arbitrator to have reasonably found the employee guilty of misconduct for failing to report the incident (par 14). Since the employee conceded that he failed to comply with the procedural guidelines, he was guilty of that charge (par 15). There was clear evidence that the employee consciously defied the instruction to attend the meeting with the regional commissioner and thus committed insubordination (par 16). The employee committed two serious acts of misconduct and the arbitrator's decision to dismiss him was one that a reasonable decision-maker could have arrived at (par 17).

The employee approached the labour appeal court, which found that the argument that the instruction to attend the meeting was unreasonable due to distance and lack of agenda were without merit. The employee had sufficient time to attend the meeting if he had accepted the instruction when it was first communicated at 7 am (par 18, 20). The employee's justification for failing to report the assault incident to the area commissioner was irrelevant, as the charge was based on his failure to report according to the rules, which he conceded he did not do (par 22). The failure to report the assault incident within an hour to the area commissioner was severe misconduct, given the dangerous nature of assaults within a prison environment (par 25). The employee's refusal to attend the meeting with the regional commissioner displayed insolence and a disregard for authority, which are unacceptable in the prison service (par 26, 27). Cumulatively, the employee's conduct (failing to report the assault and insubordination) warranted the sanction of dismissal despite his 29 years of service without previous disciplinary issues (par 28).

The judgment does not specify why the employees did not immediately report the incident to the area commissioner. It mentions only that the appellant conceded he did not comply with the reporting procedures (par 11) and that he attempted to justify this failure by claiming he had reported the incident to the inspecting judge and entered it in a diary, which the court found irrelevant to the charge against

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him (par 22). The court noted that the appellant knew the rule that he was required to report telephonically within an hour but did not do so without providing an apparent reason for this failure (par 22). The importance of immediately reporting the assault incident is explained by the court as follows: "Assault within a prison environment and between inmates must constitute a dangerous incident not only to those involved in the assault but to other prisoners. The seriousness and danger of the assault incident that took place were manifest by the fact that the assault resulted in the death of an inmate" (par 25). Prisons are volatile environments and those responsible for running them must follow the rules to maintain discipline and peace. The employer considered an assault between inmates as a grave matter, which is why it required the head of the prison to inform the area commissioner within an hour of such an incident taking place. The fact that the assault ultimately resulted in the death of an inmate underscores the gravity of the situation and the need for prompt reporting.

5.6 Intoxication

In *Samancor Chrome Ltd (Western Chrome Mines) v Willemse* (2023 44 ILJ 2013 (LC)), the labour court was tasked to consider whether breathalyser tests may be adequate for workplace disciplinary actions where blood test results were available. The employer had a "zero tolerance" drug and alcohol policy (par 2). According to the policy, any employee with a breath alcohol level exceeding 0 per cent would be considered unfit to enter the premises (par 2). The policy stated that any employee who tested positive for alcohol or drugs would face disciplinary action, including possible summary dismissal on the first offence (par 3). Upon arriving at work, the employee was asked to take a breathalyser test (par 4). He tested positive on a breathalyser machine and upon retesting with the same result, he requested another test (par 4). This time, he tested positive on a different machine, indicating an alcohol content of 0.013% (par 4). Despite denying alcohol consumption, the employee was dismissed a few days later for breaching the zero-tolerance rule after working for the company for over nineteen years (par 4).

During arbitration, the employee presented evidence from a chemical pathologist and his family medical practitioner (par 5-6). He consulted his medical practitioner immediately after being accused of alcohol consumption. He had a blood sample taken, which was tested by an Ampath laboratory and returned a negative result (par 6-7). The chemical pathologist testified that the blood test was more accurate than a breathalyser test and could provide more reliable results (par 5). He explained that the test used by Ampath could not detect alcohol below 0.010g/dl and that the negative result meant the blood alcohol content was below that threshold, not necessarily zero (par 5). The arbitrator considered this expert testimony and found that the employee had been unfairly dismissed (par 9). As a result, the employee was reinstated (par 1).

The company sought a review of the arbitration award (par 1). They argued that the arbitrator had misinterpreted the expert evidence by concluding that the employee had no alcohol in his system (par 10). The company contended that the term "negative" in the pathologist's report did not mean zero alcohol but indicated a level below the detection threshold (par 11). They further argued that the employee had tested positive on multiple breathalysers and the pathologist's report was inconclusive. The arbitrator should have found him guilty of misconduct based on the balance of probabilities (par 12). The company also questioned the likelihood of the employee being the only employee who had eaten yeast-containing bread or not

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eaten that morning, as it seemed improbable among a workforce of approximately 1,000 employees who underwent testing (par 12).

The labour court held that there was no misdirection on the arbitrator's part in assessing the evidence and reaching a decision (par 18). The blood test, which showed a negative result, was more reliable than a breathalyser test prone to false positive results (par 17). The absence of a blood alcohol result up to 0.009g/dl did not automatically mean the arbitrator had misdirected himself (par 17). The burden was on the company to establish the presence of alcohol in the employee's bloodstream. Still, they failed to provide evidence regarding the number of positive or negative test results among other employees tested that day (par 17). The testimony of the medical doctor who stated that the breathalyser could have produced a false positive result (par 17). The court found the arbitrator's unfair dismissal decision fell within the range of reasonable decisions based on the available evidence (par 18). The application to review the arbitration decision was dismissed and the employer was ordered to pay costs (par 19).

The court's approach to breathalyser testing may cause concern for employers but it is essential to consider the approach that has been adopted to deal with review applications and the "reasonable arbitrator" test that has been adopted (par 14). Arbitrators must use their sense of justice and fairness when deciding whether an employer's decision to dismiss is fair or unfair, taking into account various factors such as the totality of circumstances, the importance of the breached rule, the reason for imposing dismissal, the employee's challenge, the harm caused, potential training, the effect on the employee and the employee's service record. Employers should avoid a knee-jerk response and consider all relevant factors before relying solely on a zero-tolerance rule to dismiss an employee. Fairness must consider the specific facts and circumstances of each case. (See Van Niekerk and Smit (eds) *Law@work* (2024) 316-317.)

5.7 Marijuana use

In *Enever v Barloworld Equipment South Africa, A Division of Barloworld South Africa (Pty) Ltd* ((JA86/22) 2024 ZALAC 12 (23 April 2024)) the labour appeal court had to consider whether the dismissal of an employee for using marijuana outside of working hours was fair. Central thereto, the court had to consider whether "zero-tolerance" policies, which imposed a blanket prohibition on the use of marijuana, were constitutional. The employee, who held the position of category analyst, was dismissed after testing positive for cannabis during a routine medical check (par 4, 12). Her dismissal followed the company's zero-tolerance policy towards the use and possession of drugs and alcohol in the workplace, as outlined in the "Employee Policy Handbook", which the employee had signed (par 5, 12). The policy required employees to undergo random and scheduled drug testing (par 6). Despite being informed that cannabis use remained prohibited at work according to company policy, the employee tested positive for cannabis multiple times in early 2020 (par 8, 10). The employee argued that she used cannabis for medicinal purposes to alleviate severe anxiety symptoms and that her use did not impact upon her work performance, as she did not operate heavy machinery or engage in safety-sensitive activities (par 9, 12). She primarily used cannabis in the evenings and on weekends (par 9). The employer proceeded with disciplinary action due to continued positive tests. Despite pleading guilty, the employee was dismissed for failing to cease her use as per company policy (par 12). The employee approached the labour court, claiming unfair discrimination (par 13). The court held that the

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employee was aware of the consistently applied policy and that it was reasonable considering the dangerous environment (par 15, 19). The labour court further held that the absence of impairment does not absolve an employee (par 19). Aggrieved by the outcome, the employee approached the labour appeal court, which found that the employer's alcohol and substance abuse policy was irrationally applied (par 59). Although the policy intended to maintain safety and discipline, it failed to consider the specifics of the appellant's non-safety-sensitive role as an office worker (par 46). Zero-tolerance policies must be rationally connected to their objectives and applied proportionately, considering "the nature of the job" (par 47-49).

The employer subjected the employee to unfair discrimination under section 6(1) of Act 55 of 1998 (par 52). The policy unfairly impacted upon cannabis users by not differentiating between the effects and detectability periods of different substances (par 29). The policy violated the employee's right to privacy, protected under section 14 of the constitution, by penalising legal activities conducted in the privacy of one's home (par 45). This overbroad application was deemed not justifiable as the appellant's cannabis use did not impact upon her ability to perform her job duties (par 46). The dismissal was automatically unfair under section 187(1)(*f*) of the Labour Relations Act (par 55). The court stressed that the dismissal was substantively unfair as it was based on a policy application that did not consider the nature of the appellant's work or the absence of risk presented by her off-duty cannabis use (par 58). The employer must compensate the employee for 24 months of remuneration (par 61).

The constitutional court in *Minister of Justice and Constitutional Development v Prince* (2018 6 SA 393 (CC)) declared the criminal prohibition against the private cultivation, possession and use of cannabis by adults in their homes unconstitutional (par 19, 33). This landmark decision acknowledged the right to privacy and autonomy in personal choices that do not harm others. The labour appeal court aligned its findings with the constitutional court's emphasis on the right to privacy (par 45). By extending the implications of the *Prince* decision, the court recognised that an employer's zero-tolerance policy must respect the legal activities an employee engages in privately, significantly when these activities do not impair their work performance or pose a safety risk (par 45). The court's judgment stressed that while employers may maintain drug and alcohol policies to ensure safety and discipline, these policies must be rational and proportional (par 48). The court pointed out that the employer's policy failed to differentiate between the impact of different substances and the nature of various job roles (par 29, 46). The court upheld the principle that policies should not extend so far as to infringe on the rights of employees where no reasonable justification exists (par 45). The court's decision to deem the dismissal unfair was firmly rooted in the constitutional principles of privacy and fairness, ensuring that employment policies are legally compliant, just and reasonable in their application (par 58). Some employees, especially those engaged in safety-sensitive role tasks, may still legitimately be prohibited from marijuana use (par 49). Employees who operate heavy machinery, drive vehicles, or perform tasks that require high levels of concentration and coordination must maintain optimal mental and physical conditions while on the job (par 43). The effects of marijuana, such as impaired motor skills, altered perception and slowed reaction times, can significantly increase the risk of accidents and injuries not just to the user but also to colleagues and the public (par 43). In these contexts, the application of zero-tolerance policies for marijuana use among employees in high-risk roles is considered not only appropriate but necessary (par 49).

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5.8 Remedies

In *Mathebula v General Public Service Sectoral Bargaining Council* (2024 45 ILJ 979 (LAC)) the labour appeal court considered whether an employee who was unfairly dismissed should be reinstated, as the employer presented no evidence to justify why reinstatement was inappropriate under the circumstances (par 27). The employee was dismissed for alleged wilful or negligent mismanagement of the state's finances, in breach of section 42 of the Public Finance Management Act 1 of 1999 (par 5). The employee was accused of failing to disclose a personal interest in various entities and conducting irregular financial transactions involving significant sums of money (par 7). The dispute was referred to the General Public Service Sector Bargaining Council (GPSSBC) for arbitration, where the commissioner found the dismissal to be both procedurally and substantively fair (par 9). Disagreeing with the arbitration award, the employee pursued review proceedings in the labour court, which concluded the dismissal was both procedurally and substantively unfair, ordering compensation but declining reinstatement due to the employee's belief in being the victim of a conspiracy, suggesting a compromised trust relationship with the employer (par 11).

The employee appealed to the labour appeal court, which held that reinstatement is the primary remedy for substantively unfair dismissal, as prescribed by section 193(2) of the Labour Relations Act (par 14, 17). The bar to prove that a continued employment relationship would be intolerable is high, requiring more than merely suggesting that the relationship is difficult or strained; there must be "weighty reasons, accompanied by tangible evidence, to show intolerability" (par 18). The burden lies on the employer to provide reasons and evidence demonstrating that reinstatement would be intolerable (par 19). "Merely reproducing evidence deemed insufficient to justify the dismissal cannot meet this high threshold" (par 19). Protecting the "security of employment" is vital and aligns with the constitutional right to fair labour practices (par 20). This includes the notion that "it is grossly unfair to punish an employee with unemployment without finding him or her to be guilty of the wrongful conduct" (par 21). The decision to reinstate an employee must be based on an objective test, considering the fairness and circumstances of the case rather than being influenced by subjective perceptions or statements made by the parties involved (par 24). The labour appeal court found that the court erred in its decision not to reinstate the employee after finding that his dismissal was unfair (par 28). The appeal was upheld and the labour appeal court ordered the employer to reinstate the employee retrospectively, excluding the period of delay caused by the employee's attorney (par 31).

5.9 Retrenchments

In *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* ((CCT 192/22) 2024 ZACC 3 (17 April 2024)) the constitutional court considered whether the retrenchments carried out by Coca-Cola Beverages Africa were in violation of the merger conditions, or whether they were resultant from the merger but were due to external economic pressures such as the sugar tax and adverse economic circumstances. Coca-Cola underwent a merger subject to conditions that prohibited any retrenchments resulting directly from the merger (par 13). Following the merger, Coca-Cola conducted several retrenchments. They attributed the retrenchments to a need to reduce costs due to economic pressures, including the impact of a sugar tax and adverse macroeconomic circumstances, rather than as a direct result of the merger itself (par 18). This position was central to their defence against the

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allegations that they had breached the merger conditions prohibiting retrenchments due to the merger (par 13). The Food and Allied Workers Union (FAWU) raised concerns about these retrenchments, claiming they violated the merger-specific conditions to protect jobs. FAWU filed a complaint with the competition commission, which, upon initial review, agreed that the retrenchments might breach the merger conditions (par 16). The competition commission issued a notice of apparent breach to Coca-Cola (par 22). In response, Coca-Cola sought a review of this notice by the competition tribunal, arguing that the retrenchments were not a result of the merger but were necessitated by external economic factors (par 54). The tribunal initially sided with Coca-Cola, finding that the company had substantially complied with the merger conditions and that the retrenchments were unrelated to the merger (par 29). Dissatisfied with this outcome, the competition commission appealed the tribunal's decision to the competition appeal court. The competition appeal court overturned the tribunal's decision, ruling that the retrenchments were indeed merger-specific, contradicting the conditions of the merger (par 33). This led Coca-Cola to escalate the matter to the constitutional court, seeking further review and clarification on applying the legal standards and interpreting the merger conditions related to employment (par 2).

The constitutional court held that the appropriate test for causation in determining whether retrenchments were merger-specific should be determined; there is a need for a direct and substantial link between the merger and any adverse employment effects (par 63-67). First, a causation analysis should start with the "but-for" causation test, which asks whether the retrenchments would have occurred if the merger had not happened. This factual determination establishes a logical connection between the merger and the retrenchments (par 65). Following the establishment of factual causation, whether the merger was the legal or proximate cause of the retrenchments should be considered. This involves evaluating whether the merger was a "dominant or significant factor" leading to employment changes rather than a background condition (par 66). Merely showing some relationship between the merger and the retrenchments (a minimal nexus) was insufficient. There needed to be a direct and substantial link to deem the retrenchments as merger-specific. This approach guards against attributing changes in employment to a merger when they are driven by external economic factors or other operational requirements unrelated to the merger (par 60). The drivers cited by Coca-Cola (economic downturn and sugar tax) were significant enough to be considered the true causes of the retrenchments, thus breaking the causal chain that would link the retrenchments directly to the merger (par 79). For retrenchments to be considered merger-specific, there must be a direct and substantial link between the merger and the retrenchments (par 31). The competition tribunal was correct in its application of causation, determining that the retrenchments were not a result of the merger but due to external economic pressures (par 92).

Mergers aim to create more efficient and competitive entities. If a company cannot adjust its workforce in response to changing market conditions, economic downturns or technological advancements, it may struggle to remain competitive. This inflexibility can lead to inefficiencies, reduced productivity and diminished competitiveness. Maintaining a larger workforce than necessary can impose financial burdens on a company, mainly if the merger was partly aimed at achieving economies of scale. These additional costs might include salaries, benefits, training and other employment-related expenses, potentially leading to financial instability or reduced capacity to invest in critical areas like research and development or infrastructure improvements. Although the protection of jobs is an important goal, in cases where a

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company is prohibited from making adjustments to its workforce post-merger, there might be a higher risk of the entire business becoming unsustainable. If economic conditions worsen or the company needs to shift its business model significantly (as often happens in tech-driven industries), being stuck with an outdated or oversized workforce could lead to business failure. This may ultimately lead to more job losses. The constitutional court recognised that the effects of mergers on employment are significant considerations under South African law, particularly in the context of high unemployment rates in the country. The merger conditions, including those prohibiting retrenchments directly resulting from the merger, reflect a "legislative intent to protect jobs and mitigate the negative impacts of corporate restructuring on employment" (par 68). The constitutional court therefore acknowledged the broader economic and social implications of job losses and emphasised the need for careful consideration of public interest in merger evaluations. This reflects an understanding of the delicate balance that must be maintained between allowing businesses the flexibility to operate efficiently and protecting employment, which is often a key concern in merger regulations (par 68). Thus, while the court ultimately found that the retrenchments in question were not merger-specific and allowed Coca-Cola to proceed with them, it did so within a framework considering the importance of job preservation in merger conditions (par 29).

5.10 Sanctions

In *Pep Stores v Commission for Conciliation, Mediation and Arbitration* (2023 44 ILJ 2786 (LC)) the labour court considered whether an arbitrator's decision to replace dismissal with a final warning was reasonable when the misconduct included an element of dishonesty (par 13). Per their employment contracts, employees received staff discounts, with certain conditions. The employees violated these terms by creating lay-bye accounts and using false information for these accounts (par 3). The employees were dismissed and referred the matter to the CCMA. During the arbitration hearing, the employees did not deny their guilt. They argued that dismissal was too severe a punishment (par 4). The employer stated that the discipline code labels misconduct as category D offences, which can lead to dismissal (par 5). The arbitrator believed that the employees' actions were related to non-compliance with policies, not necessarily causing financial loss. He suggested the employees should have been charged with a lesser category C offence, meriting a final written warning. He reinstated them with a final warning (par 6). Aggrieved by the outcome, the employer referred the matter to the labour court for review. The employer insists the arbitrator's decision was unreasonable, especially considering the employees' prolonged misconduct and lack of remorse. They argue that the arbitrator ignored significant evidence, misclassified the offences and treated deliberate falsification as mere negligence (par 7).

In the labour court, the employer challenged the admission of the answering affidavit. Although the document lists one of the employees, Ms Ramatse, as the deponent, it was signed by Ms Bella Mashiane (par 2). This discrepancy in the answering affidavit breaches the oath regulations, rendering the affidavit inadmissible (par 2). The court found that, in a penalty review, the arbitrator should consider complete circumstances. They should evaluate the reason for the employer's dismissal and the employee's reasons for challenging it (par 10). The dispute isn't about the penalty's severity but whether relevant factors were appropriately considered or ignored when deciding on the penalty (a "process-related penalty review") (par 11). The employees were charged with a severe violation. They deliberately broke a rule

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for two years, preventing permanent employees from having lay-by accounts using false information. The arbitrator should not have reclassified the charge as mere neglect, especially without evidence or claims from the employees (par 12). The charge had clear dishonesty implications. The court held that the "Labour Courts have … consistently adopted a strict approach to dishonest conduct" (par 13). The arbitrator's decision to replace dismissal with a final warning was unreasonable (par 13). The award is reviewed and set aside (par 14). Employment relationships are fundamentally based on trust. When an employee engages in dishonest conduct, it erodes the employer's trust in the employee. The prolonged nature of their misconduct amplified the breach of trust and the employees showed little remorse. The judgment serves as a cautionary tale to legal practitioners to ensure that court documents are properly presented.

5.11 Unlawful dismissal

In *Acting National Commissioner for the Department of Correctional Services v Ndara* (2023 44 ILJ 2665 (LAC)) the labour appeal court had to consider whether the termination of a contract of employment without any proper procedure being followed was unlawful and warranted full reinstatement (par 28). The employer informed the employee in writing that he would be terminated with one month's notice. The employee had previously requested a transfer within the department but did not apply, so the transfer option was no longer available (par 3). The employee then initiated urgent proceedings in the labour court against the employer, seeking an interim order to prevent the employer from terminating the respondent's employment and to reinstate his contract immediately (par 5). The employee also sought a declaration that the decision to terminate his contract was unlawful and null and void, along with other claims regarding his employment status and appointments (par 6). The employee also requested an order declaring certain salary deductions unlawful and seeking repayment (par 7). The employee claimed he had been appointed as head of office and then appointed special advisor (par 8). The employer denied this and stated that the head of office contract had been cancelled by mutual agreement and the employee was employed as a technical specialist (par 9). There was a dispute regarding the employee's employment status and the validity of his contracts. The employee admitted to signing a contract but argued that the person who signed on behalf of the department was not authorised to do so (par 12).

In the labour court, the employee requested permission to amend his pleadings to reflect his employment as a technical specialist. The court denied the amendment, which deemed it would cause prejudice to the employer. Despite this, the court rejected the employer's argument that the urgent application should fail because the relief sought by the employee was based on his claim of being employed as either the head of office or the special advisor. The court concluded that the employee had a clear right to relief since the contracts for the head of office and technical specialist positions were "identical in essentialia" (par 13). The labour court determined that terminating the employee's employment was unlawful as it did not comply with the contract's terms and did not meet the requirements set out in the Labour Relations Act. The court found it perplexing why the termination was issued without following the necessary procedures. It noted that the employee had attempted to negotiate a mutually agreeable termination and resolve the salary deduction issue. Still, the appellants did not reciprocate these efforts. Consequently, the court ordered the "restoration of the status quo" to allow the parties to consult on the early termination of the employee's five-year contract (par 14).

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The employer brought the case before the labour appeal court, which determined that since it was undisputed that the employee held the position of technical specialist, it was challenging to imagine any detriment the appellants might have experienced if the amendment had been approved (par 25). The court found that the notice of termination of the employee's employment from the technical specialist role was unlawful, as it was not preceded by an appropriate process. The termination notice was issued without consultation and was not based on any other grounds outlined in the Labour Relations Act (par 28). The labour court exercised its discretion to restore the situation to its original state (par 29). Despite this order, the labour court erred in stating that the purpose of the order was to ensure that "*due consultation can take place as to the early termination of the five-year contract between the parties*" (par 30 – emphasis in the original).

The employee was entitled to unconditional reinstatement as the primary remedy. By seeking an alternative solution, the labour court arrived at a decision that could not reasonably have been reached by a court properly considering all the relevant facts and principles (par 30). The case involved unlawful termination and not unfair dismissal. If the employee's employment contract explicitly provided for the incorporation of the provisions of the Labour Relations Act, failure to comply with the provisions of the act also meant that the employer was in breach of the employment contract (par 27). The finding of the labour court to remedy reinstatement so that "due consultation can take place as to the early termination of the five-year contract between the parties" was incorrect. The effect of this order would merely have been to allow the employer to fix procedural inadequacies in terminating the employee's contract – in other words, to follow the correct procedure to dismiss the employee. This is not the purpose of the remedies available to the courts. Compensation in procedural unlawfulness (and unfairness) is aimed at offering a *solatium* for losing the employee's right to a fair procedure before dismissal and not necessarily compensating for actual losses suffered due to the dismissal. It also functions as a deterrent for procedurally unfair and unlawful dismissals. Referring a matter to an employer to comply with a lawful and fair procedure does not serve these purposes.

6 *Dispute resolution*

6.1 Commissioner powers

In *Mohube v CCMA* (2023 44 ILJ 1683 (LAC)) the labour appeal court was called upon to consider whether commissioners can dismiss matters when the referring party fails to appear. The employee was dismissed for financial and tender irregularities following a public protector report (par 5-6). The employee referred an unfair dismissal dispute to the CCMA and the matter was set down for con-arb. Con-arb is the procedure in which arbitration immediately follows conciliation and the matter is therefore not referred to a later date. On the date of the hearing, the employer failed to show up. The CCMA certified that the matter was unresolved and proceeded to set the matter down for arbitration later (par 8). On this date, the employee failed to show up. The commissioner found that the parties had been given adequate notice of the date of arbitration and dismissed the case because of the non-appearance of the employee (par 9). After being informed of the commissioner's ruling, the employee promptly filed a petition seeking to have the decision rescinded and requested that the CCMA prioritise the arbitration proceedings concerning the alleged wrongful termination by expediting the hearing on an urgent basis (par 10). The employee claimed he was not wilful in not showing up on the arbitration date, as he was unaware of the date and

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had not received any notice of the hearing date (par 11, 29). The employee claimed that, despite having indicated the email address on the CCMA referral form to which the notice was sent, the email address to which the notice was sent was unattended, a secondary address and that notice was therefore not received (par 26-28). The employer responded to the rescission application but did so late and applied to the CCMA to condone its late filing of the opposing affidavit (par 12-13). The CCMA condoned the late filing of the opposing affidavit by the employer and refused to rescind the order, finding that the CCMA's records did show that all notices were correctly sent out to the correct email address (par 14). Aggrieved, the employee brought an application to the labour court to review and set aside the rescission finding of the CCMA (par 16). The labour court rejected the application, finding no basis to interfere with the order (par 18). The employee appealed the decision of the labour court to the labour appeal court (par 20).

Section 144(*d*) of the Labour Relations Act states that "[a]ny commissioner who has issued an award or ruling, or any other commissioner, may on her own accord or, on the application of any affected party, *inter alia*, rescind an arbitration ruling or award *made in the absence of any party on good cause shown*," (par 24). "Good cause" entails (a) an absence of wilfulness, (b) a reasonable explanation for the default, (c) that the application is brought in good faith and (d) that the applicant has a reasonable claim against the party (par 25). The labour appeal court found that the CCMA was obliged to send the notice of set down to the primary email address of the employee (par 30). The employee's explanation for not attending the arbitration was unassailable (par 31). The employee did not need to show that there was a good chance of success but that he had a bona fide claim (par 33).

> "A reasonable commissioner in the position of Commissioner Byrne would have found that the appellant's referral was bona fide, that his failure to appear was reasonably explained and was not wilful and/or intended to delay the resolution of the dispute which he referred to the CCMA. The court a quo's finding to the contrary is incorrect" (par 35).

The CCMA's rescission order was set aside and the original order was rescinded. The matter must be set afresh (par 37).

The purpose of section 144 of the Labour Relations Act is to provide a procedural step to correct an obvious mistake or ambiguity in the award. It seems patently unfair to have struck the employee's case from the roll for non-appearance when the employer was not present at a previous hearing date when con-arb was scheduled and arbitration was meant to go ahead (par 8). When the employer did not attend the con-arb proceedings, the matter was postponed for arbitration. The employee was not extended the same courtesy (par 8). The con-arb process is regulated by section 191(5A) of the act. Con-arb refers to a procedure where the arbitration hearing is set to take place immediately following the conciliation hearing on the same day, in the event that the parties are unable to reach a settlement during the conciliation proceedings. When commissioners are easily convinced to strike matters off the roll and loath to grant rescission applications in these circumstances, important and foundational purposes of the act such as the effective and competent resolutions of disputes are circumvented.

6.2 Contradictory versions

In *South African Revenue Service v National Education, Health and Allied Workers Union obo Kulati* (2023 44 ILJ 1929 (LAC)) the labour appeal court considered whether inconsistencies in the evidence presented by some justified the wholesale

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rejection of all evidence presented by such a witness (par 25). Four South African Revenue Service (SARS) employees were dismissed for dishonesty. Three customs inspectors were found to have falsified customs documentation and received a bribe of R60 000 from a clearing agent named "John" on behalf of Alcari 209 CC (par 2). Another employee was dismissed for failing to report the bribe (par 2). One of the employees who received the bribe disclosed the misconduct to SARS and later made a statement to the South African Police Service (SAPS) confirming the bribery scheme (par 3, 6). Attorneys for Alcari informed SARS that they had paid R60 000 to John, believing it was owed to SARS (par 8). The other three employees were dismissed and filed an unfair dismissal dispute with the CCMA. The CCMA determined that SARS had failed to prove any wrongdoing by two employees. The dismissals of both employees were deemed substantively unfair and they were retroactively reinstated into their positions with back pay. On the other hand, another employee's dismissal was substantively fair (par 9). Aggrieved by the outcome, SARS instituted review proceedings in the labour court but the court determined that the commissioner's findings fell within the boundaries of reasonableness (par 19). SARS appealed the matter to the labour appeal court (par 20).

The labour appeal court determined the CCMA's responsibility was to assess the fairness of SARS's decision to terminate the employees' contracts, taking into account all pertinent factors. To establish whether misconduct had occurred, a standard process of factual adjudication was employed, considering the entirety of the circumstances. The court noted that during cross-examination, if it is implied that a witness is being untruthful, the allegation should be directly communicated to the witness, providing them with an opportunity to offer an explanation and defend their integrity. Furthermore, if a disputed point is not challenged during cross-examination, the party who called the witness is entitled to presume that the unchallenged evidence is accepted as accurate (par 24). The court held that "[u]ntruthful evidence or a false statement does not always justify the most extreme conclusion and the weight to be attached to such evidence must be considered having regard to the circumstances of each case" (par 25). Deliberate lies on one point by a witness do not mean their testimony on another point cannot be relied upon (par 25). The commissioner's interjections negatively impacted upon the arbitration hearing but did not lead to irregularity in the proceedings (par 26). Although the evidence of some of the witnesses was inconsistent, that did not justify the wholesale rejection of all aspects without considering the totality of the circumstances, other evidence, credibility and probabilities (par 27). The dismissal of the employees was fair given the serious nature of the misconduct (par 38). As the court noted, "[d]ismissal is not an expression of moral outrage; much less is it an act of vengeance. It is … a sensible operational response to risk management in the particular enterprise" (par 38). The honesty and integrity of employees at SARS are crucial for the institution's credibility, justifying their fair dismissal (par 39).

6.3 Evidence

In *Numsa obo Mokase v Nissan South Africa Ltd* ((JA46/23) 2024 ZALAC 16 (23 April 2024)) the labour appeal court considered whether the commissioner's failure to make a timeous ruling on the admissibility of hearsay evidence was a material misdirection that led to a gross irregularity in the proceedings. In addition, the court was tasked to consider whether the labour court misdirected itself in finding that the commissioner should have relied on polygraph test results.

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The employee was involved in an altercation with his supervisors, where he pointed his finger at one of the supervisors and told him “you undermine me” and that Nissan was not his company (par 2). The next day, the employee brought scissors to a meeting and refused to hand them over when asked by his supervisors (par 3). Later, a senior supervisor received a call from someone named “Oupa” warning him that a hit had been placed on one of the supervisors by a fellow employee because he refused to let the employee visit his sick mother and was making life difficult for him at work (par 4). The employer believed the employee in question was the person with whom they had the altercation (par 5). The supervisor then received anonymous threatening calls referring to his “brother” whose mother was sick. The supervisors feared for safety and obtained protection orders against the appellant (par 6). Polygraph tests showed that the employee was deceptive while the supervisor was not (par 7). The employee was dismissed for gross misconduct for intimidating or threatening his supervisors (par 8).

The employee referred an unfair dismissal dispute to the CCMA. At arbitration, although no ruling was made on the admissibility of the hearsay evidence, the commissioner rejected the hearsay evidence in the award and found no reasonable suspicion that the employee was involved in the alleged threats or intimidation. The commissioner found the dismissal substantively and procedurally unfair and reinstated the employee (par 9). The employer sought a review of the arbitration award by the labour court. The labour court found the award unreasonable as the commissioner disregarded the polygraph results, which showed deception. The court found evidence that the employee had threatened and intimidated his supervisors. The court set aside the award and found the dismissal substantively fair (par 10).

The employee approached the labour appeal court, which held that the commissioner’s failure to make a timeous ruling on the admissibility of the hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988 “constituted a material misdirection on the part of the commissioner and led to a gross irregularity in the conduct of the proceedings” (par 17). In assessing circumstantial evidence, two cardinal rules of logic apply:

> “(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences. Then there must be a doubt whether the inference sought to be drawn is correct” (par 19).

Based on the undisputed facts, the inference that the employee caused the anonymous threatening calls to be made was “not only consistent with all the proven facts but the proven facts excluded every reasonable inference from them save the one sought to be drawn”.

Therefore, the commissioner’s finding that the calls were not proved to be made on behalf of the appellant was unreasonable (par 23-24). The labour court erred in finding that the commissioner should have relied on the polygraph test results, as no expert evidence was presented on how the tests were conducted or analysed (par 25). From the totality of the properly considered evidence, the employer proved that the employee committed the misconduct and his dismissal was substantively fair (par 27). The employee’s suspension did not render his dismissal procedurally unfair, as he failed to refer an unfair labour practice dispute on this issue to the CCMA (par 28).

The labour appeal court found that the commissioner should have made a timely ruling on the admissibility of the hearsay evidence to ensure fairness in the proceedings. The court held that “it was the task of the commissioner to ensure

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fairness in the approach to and treatment of the evidence and to make such a ruling timeously on the issue rather than adopt a passive stance and determine it for the first time in the arbitration award" (par 16). This was to allow the parties to respond appropriately. "The importance of a timeous ruling on the admissibility of the hearsay evidence is that it provides parties with the opportunity to make submissions on the issue and, if informed that such evidence is to be excluded, to consider whether it is possible to rely on other evidence or not" (par 17). The failure to make this ruling promptly "constituted a material misdirection on the part of the commissioner and led to a gross irregularity in the conduct of the proceedings" (par 17). The labour appeal court found that the labour court erred in holding that the commissioner should have relied on the polygraph test results because "no expert evidence had been put up pertaining to the manner in which such polygraph tests had been conducted or their results analysed" (par 25). The labour appeal court upheld the principle that expert evidence should be presented on how polygraph tests are conducted and analysed for their results to be relied upon. Without this expert evidence, the court held, "the commissioner cannot be faulted for disregarding the results of such tests" (par 25).

6.4 Improper obtaining of an award

In *Rand Refinery Limited v Sehunane NO* (2023 44 ILJ 2434 (CC)) the constitutional court was called upon to consider whether the fundamental right of access to courts was infringed by the labour court when it decided a case without reference to an answering affidavit (par 20). An employee faced disciplinary action related to the theft of gold bars. After his dismissal, he claimed unfair dismissal at the CCMA. The arbitrator deemed the employee's dismissal to be fair. The employee and his trade union sought to overturn the award, alleging that the arbitrator committed gross irregularities, such as accepting hearsay evidence. The employer disputed this (par 2-3). Shortly before the scheduled hearing, the employee attempted to add new evidence from a separate high court case between the employer and another employee. In that case, the other employee accused the employer of improprieties during disciplinary hearings, even claiming he was pressured into giving false evidence against colleagues, including the employee (par 4-7). The employee tried incorporating these documents into his review application. The employer countered this attempt and responded to the employee's claims (par 8). The labour court allowed the employee to amend his motion and file additional documents. The arbitration award in favour of the employer was annulled and the case was sent back to the CCMA for a new hearing with a different commissioner. The court held that despite having filed a notice of opposition, the employer "failed to file any answering papers" (par 9). The court believed that the evidence from the other employee might have been false, necessitating re-evaluation at the CCMA (par 9, 18). The labour court and labour appeal court refused leave to appeal (par 1). The employer referred the matter to the constitutional court.

The final decision hinged on whether the employer's response was officially filed with the labour court (par 11). The court questioned why the labour court believed the employer hadn't filed an opposing affidavit (par 11). The employer had filed a notice of opposition and served its opposing affidavit to the employee's attorneys before the hearing. The employer's claim that the opposing papers were filed and part of the record was supported by an email sent by the employer's attorneys to the court (par 11-12). The employer's attorneys confirmed that the papers were served and filed and mentioned that the virtual nature of the case made it uncertain

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what documents the court had. The case was argued as if opposed (par 12-13). The employee's union acknowledged the opposing papers were served but was uncertain whether they were filed with the labour court. The employee's attorneys didn't deny that the opposing papers were part of the indexed record (par 13-14). It's very likely that the employee's opposing affidavit was filed, possibly only electronically (par 15). Without a transcript, it's unclear whether the labour court was made aware during arguments. When writing the judgment, the court wasn't aware of or overlooked the opposing affidavit (par 15).

The labour court overlooked the employer's opposing affidavit, violating the employer's rights, including the fundamental right of access to courts (par 20). Even if the opposing affidavit wasn't filed, the labour court couldn't solely set aside the arbitration award based on that oversight. The court should have asked the employer whether it wanted time to answer the new material (par 21). The court considered the employee's allegations in the high court but ignored the employer's counter-affidavit (par 23). The employee could attach affidavits from others in high court litigation, which were "hearsay evidence in the labour court" (par 22). For the labour court to set aside an award, it must be certain it was improperly obtained, but the court did not make this finding (par 29). Setting aside an award based on the possibility of false testimony might not effectively reveal the truth (par 30). The labour court's judgment was nullified and the case was returned to the labour court for review (par 31, 34).

6.5 Pre-arbitration conference

In *Sibanye Rustenburg Platinum Mine v Association of Mineworkers and Construction Union obo Sono* ((JA32/2022) 2024 ZALAC 23 (2 May 2024)) the labour appeal court considered whether the labour court erred in considering the issue of sanction, which was outside the scope defined by the pre-arbitration agreement (par 9). Fifty-nine employees, represented by AMCU, were dismissed for submitting false sick notes (par 2). These employees were found guilty at a disciplinary enquiry, dismissed and their internal appeal was unsuccessful. AMCU then referred an unfair dismissal dispute to the CCMA on behalf of the employees (par 2). During the arbitration, a pre-arbitration conference was held and the issues in dispute were recorded in a pre-arbitration minute, limiting the commissioner to determine only whether the employees were guilty of the misconduct charges (par 3).

At arbitration, two witnesses testified for the employer and one witness testified for all the employees (par 5). The employer's witnesses testified that the sick notes submitted by the employees were fraudulent. They provided evidence that the sick notes were purportedly issued by Platinum Health but stamped at RPM Hospital. The investigation revealed that the employees did not visit Platinum Health as recorded in the medical certificates. The certificates were signed by the same unknown person without initials or surname and lacked serial numbers. The employer argued that the employees submitted these certificates with the intent to deceive the company and receive pay for days not worked (par 13). On the other hand, the witness for the employees testified that they had indeed consulted a professional nurse, sister, or medical practitioner who provided them with the sick notes. These sick notes were then submitted to the human resource department, processed and granted as sick leave. The employees' version implied that they followed the proper procedure and that the sick notes were legitimate (par 2). The commissioner ultimately found the

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dismissal to be substantively fair, leading the union, AMCU, to launch a review application in the labour court (par 6).

The labour court agreed with AMCU's argument that the commissioner had adopted a "one size fits all" approach to sanction, failing to consider the individual circumstances of each employee (par 8). The court determined that the commissioner's findings on sanction were based on the seriousness of the misconduct and lack of remorse, without considering mitigating factors (par 8). This failure was deemed an irregularity significant enough to vitiate the arbitration proceedings (par 8). Consequently, court reviewed the matter and remitted it to the CCMA for a hearing on the issue of sanction (par 8).

The employer referred the matter to the labour appeal court, which held that the labour court erred in its judgment regarding the issue of sanction (par 14). The parties had delineated the issues in dispute in their pre-arbitration minutes (par 10). The commissioner was correct in focusing on this limited issue, as agreed upon by the parties and the issue of sanction was not within the scope of the arbitration (par 12). Parties are bound by pre-arbitration agreements and it is not open to the courts to adjudicate issues outside the agreed scope (par 11). A pre-arbitration minute should be read holistically and not restrictively (par 11). The commissioner's finding that the dismissal was fair fell within the bounds of reasonableness required (par 14). The labour court's approach was incorrect in its remittal of the matter to the CCMA solely for the issue of sanction (par 14). The labour court's order was set aside (par 15).

The pre-arbitration conference is designed to narrow down the issues, reduce irrelevant evidence and focus on the actual issues for determination. The pre-arbitration minutes serve as a binding agreement between the parties, limiting the scope of the arbitration to the issues agreed upon. Parties are generally bound by what they have agreed or disagreed upon in the pre-arbitration minutes, making it difficult to raise new issues mid-arbitration. The pre-arbitration conference and the resulting minutes are intended to streamline the arbitration process by clearly defining the issues to be decided. Since the parties agreed in the pre-arbitration minute to focus solely on the guilt of the employees regarding the misconduct charges, the commissioner was rightfully limited to this scope. This approach ensures that the arbitration process is efficient and that the parties are held to their agreements, fostering consistency and predictability in the resolution of disputes.

6.6 Records

In *Minister of Police v Police and Prisons Civil Rights Union (POPCRU) obo Senti* (2023 44 ILJ 2685 (LAC)) the labour appeal court examined whether, where the record of original arbitration proceedings had been lost, the arbitration had to be conducted anew (par 28). Two employees were dismissed following accusations of extortion and corruption. Believing the dismissal to be unjust, they approached the safety and security sectoral bargaining council for mediation and later arbitration. The commissioner found the dismissal unfair and ordered their reinstatement in July 2017 (par 3). The South African Police Service (SAPS) contested this decision. They initiated a review application to reverse the award and argue the validity of the dismissal. They alleged that the commissioner's decision was flawed, influenced by external evidence and was unreasonable (par 5). Due to a delay in submitting their review application, the SAPS also had to seek permission for a late submission (par 6). As the SAPS prepared for the case, they encountered substantial challenges concerning missing records. Efforts to recover or reconstruct these records

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involved extensive interactions with the bargaining council and the labour court but these efforts were hampered because the audio recording was inaudible and the commissioner claimed that the records which had been in his possession had been lost due to a computer virus (par 9).

Central to the case was an incomplete record, especially concerning the cross-examination of the employees and a pivotal video recording showcasing the purported misconduct. The South African Police Service regarded the video as evidence of the employees' wrongdoing. In contrast, the employees argued the video was doctored, deeming it inadmissible. The content and implications of the video became a focal point of contention (par 11). The South African Police Service continually sought clarity and direction from the labour court, leading to court orders and applications (par 13-15). The labour court eventually favoured the arbitration award (par 21). Disagreeing with the outcome, the South African Police Service appealed to the labour appeal court, emphasising the missing video evidence. They asserted its "paramount importance" and questioned the commissioner's hasty rejection of it due to potential minor edits (par 23-24). Furthermore, the commissioner's handwritten notes on the case lacked comprehensive responses from the employees concerning the video, leaving the record "insufficient to arrive at a fair decision on the appeal" (par 25-26).

The labour appeal court noted the following: First, the persistent efforts of the South African Police Service to rectify the record should be noted (par 28). Second, all parties are responsible for ensuring a comprehensive review record (par 27). Third, it is essential for "the interests of justice" that the case be re-arbitrated due to the incomplete records (par 28). Fourth, the bargaining council should handle a fresh arbitration overseen by a different commissioner (par 28). Fifth, the bargaining council must urgently re-arbitrate the case (par 31).

The judgment raises some concerns. The Labour Relations Act's purpose is to provide fast and effective dispute resolution. The court took a year to deliver the judgment. This delay compounds the time since the original arbitration award 2017. Such prolonged periods can cause considerable uncertainty to the affected individuals and in particular the dismissed employees. Beyond the immediate concerns of the parties, these delays raise questions about the efficiency of the judicial system. Is it reasonable to expect individuals to wait years for a resolution? And more importantly, is it fair? The decision to re-arbitrate the case presents another set of challenges. Given that the events occurred years ago, it is valid to wonder whether the parties would recall what transpired. Memory is fallible and over time details can become distorted. Re-arbitrating a case with such a significant time gap might not only challenge the involved parties' memories but could also risk the possibility of evidence being lost, witnesses being unavailable, or the context of the events changing. It is also worth considering the emotional and psychological toll on the employees. Being subjected to the same arbitration processes for nearly six years can be mentally draining. The uncertainty of one's professional standing over such an extended period can harm an individual's well-being, career trajectory and financial stability.

7 *Employment equity*

7.1 Equal work for equal pay

In *Mkalipi v Minister of Labour and Employment NO* ((JS 257/2022) 2023 ZALCJHB 251 (25 August 2023)) the labour court considered whether a litigant was entitled to

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bring a claim for unfair discrimination and the "equal-work-for-equal-pay" provision of the Employment Equity Act even if the differentiation was not on one of the listed grounds in the act (par 1). The employee is the chief director: labour relations at the department of labour and employment. He has extensive responsibilities, including policy formulation and represents the government in various capacities. He manages 62 employees and is responsible for a budget of approximately R1.137 billion (par 5). The employee's co-employee, Mr Ndebele, was recently promoted to chief director and is responsible for a significantly smaller section and budget than the employee. Mr Ndebele manages fourteen employees and is responsible for a budget of approximately R50 million (par 8). The employee applied for a level upgrade in 2016, which was rejected without explanation (par 7). Mr Ndebele was promoted to a higher level despite having fewer responsibilities and less time in the role (par 7). The employee believes he is unfairly discriminated against compared to Mr Ndebele, citing differences in treatment. According to the employee, the discrimination is arbitrary and is against section 6(1) of the Employment Equity Act (par 11). In the alternative, the employee claims that, due to the differentiation, he was the victim of an unfair labour practice related to promotion. Further in the alternative, the employee invokes section 23 of the constitution and suggests that the court develop common law to uphold this right if necessary (par 2). The employee referred the dispute to the CCMA, resulting in a non-resolution certificate. The employee approached the labour court (par 10). The employer argued that the employee's claim was vague and lacked the necessary details to sustain a cause of action. The employer claimed that the applicant had not identified any arbitrary grounds that impair human dignity, thus failing to sustain a discrimination claim (par 3-4).

The labour court found that the main issue was whether the employee had sufficiently pleaded an unfair discrimination claim, according to the terms of section 6 of the Employment Equity Act (par 13). Section 6 of the act prohibits unfair discrimination against employees based on various grounds, including race, gender and so on. Different terms and conditions of employment based on these grounds are also considered unfair discrimination. It also prohibits discrimination on an arbitrary ground (par 14). To claim unfair discrimination on an "arbitrary" ground, the applicant must identify how that ground similarly impacts upon human dignity as the listed grounds do. To establish a valid complaint, it is insufficient for the alleged conduct to be simply erratic or random in nature. The behaviour in question must surpass a threshold of mere arbitrariness to warrant legal recourse or remedial action (par 19). The constitution prohibits unfair discrimination and emphasises equality before the law for everyone. Discrimination is rooted in the country's history and the constitutional framework aims to eliminate it (par 17). "Arbitrary grounds should also be connected to the impairment of human dignity" (par 31). The issue of unfair discrimination is complex and still a matter of ongoing debate. Treating arbitrary grounds as analogous to listed grounds could unintentionally limit the scope of what could be considered unfair discrimination (par 25). The court noted that the burden of proof for proving unfair discrimination lies with the person alleging it and that each case must be assessed based on its specific facts (par 28). The court explained that at this stage, the employee needs only to plead that the discrimination impacts upon his fundamental human dignity. The proof will be required during the trial phase (par 34).

Section 6(4) of the Employment Equity Act provides as follows: "A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is

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directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination." Section 6(1) of the act provides as follows:

> "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

The employee did not rely on a listed grounds but stated that the discrimination was arbitrary (par 11). There are differences of opinion as to the interpretation of the scope of the prohibition against unfair discrimination on an arbitrary ground. The court accepted that to qualify, the discrimination may not merely be inconsistent and must impact negatively on the human dignity of the complainant (par 31).

One's work is inextricably bound up with one's human dignity. For several reasons, being paid less than another employee for doing the same or similar work can impact upon an individual's dignity. Compensation is often seen as a direct reflection of an employee's worth or value to an organisation. Being paid less can convey that one's contributions are less valuable, which can be demeaning. The principle of fairness dictates that individuals who perform the same role with the same level of responsibility should be compensated equally. Unequal pay undermines this sense of fairness, harming an individual's dignity and self-worth (par 9). Employees often derive a sense of professional esteem and identity from their work. Being paid less can undermine this esteem, creating feelings of inadequacy or inferiority. The knowledge of being paid less can create stress, anxiety and lower self-esteem. This psychological toll impacts upon not just professional life but personal well-being, undermining the individual's overall sense of dignity. Pay discrepancies can lead to awkward and harmful dynamics in the workplace. Knowing that one is paid less can lead to resentment and tension between employees, affecting professional relationships and community within the workplace. Being paid less also has tangible impacts on quality of life, affecting the ability to afford necessities, save for the future and even the freedom to make life choices. This can lead to feelings of insecurity and instability, further impacting upon dignity.

Often, pay discrepancies are tied to systemic issues like gender, race or age discrimination. Being paid less under such circumstances impacts upon individual dignity and perpetuates broader societal inequalities. Knowing that one is paid less for the same work can also impact upon future career choices and progression, making the person less likely to seek promotions or new opportunities, trapping them in a cycle that is hard to break. Employers who maintain pay inequalities often lack transparency about compensation, undermining organisational trust. This lack of trust can make employees feel disrespected, impacting upon their dignity. Being paid less can make individuals feel that their legal rights are violated, further affecting their dignity. This does not mean to say that the employee will ultimately be successful. Pay differentials can amount to unfair discrimination only if (a) the lower-paid claimant and higher-paid comparator are performing the same work or work of equal value and (b) the reason for distinguishing between them is shown to be one of the prohibited grounds referred to in section 6 of Act 55 of 1998 (par 21). Thus, pay differentials will not amount to discrimination if it can be justified because employees have different levels of responsibility, expertise, experience, skills and the like. (See further Du Toit 820-823.)

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7.2 Fronting

In *M Schutte Contractors CC v Broad-based Black Economic Empowerment Commission* ((3800/2022) 2023 ZAFSHC 422 (24 October 2023)) the Bloemfontein high court examined whether a finding of fronting by the broad-based black economic empowerment commission was backed by objective facts. M Schutte Contractors CC, a corporation registered in 2009, specialised mainly in general pest and weed control. In 2010, Mr Mothuli was appointed by the corporation based on a verbal employment contract. He was required to complete a pest control operator's course within two years. In 2012, a written employment contract was concluded between the corporation and Mr Mothuli, appointing him as a supervisor and pest control officer with additional related duties (par 11). In 2013, due to Mr Mothuli's impressive performance, he was offered a member's interest in the corporation (par 12). A memorandum of agreement was subsequently entered into, whereby Mr Mothuli acquired 26 per cent of the interest for R300 000, payable in monthly instalments of R5 000. Mr Mothuli became a corporation member and continued as an employee with an increased income. He also enrolled in various courses and obtained a driver's licence (par 13). In 2017, Mr Mothuli's relationship with the corporation began to deteriorate. He was subsequently issued a notice of suspension pending an investigation into fraud and/or theft allegations. He received a notice to attend a disciplinary hearing, was found guilty of all charges and was dismissed (par 14). In 2019, Mrs Joubert, who was the sole member of the corporation before Mr Mothuli was offered a member's interest, brought an application to the high court seeking a declaration that Mr Mothuli would cease to be a member of the corporation and determining the value of his 26 per cent interest to be R116 638,58 (par 15). Mr Mothuli was subsequently removed as a corporation member (par 16). Mr Mothuli opened a case against the corporation with the broad-based black economic empowerment commission (the commission), alleging various grievances, including not receiving dividends, property and vehicle ownership issues and allegations of theft and fraud against him (par 17-19). In 2020, the commission issued its preliminary findings regarding the complaint (par 31). In 2022, the commission released its final report, which the corporation sought to review and set aside. The report found that the corporation was guilty of fronting, with Mrs Joubert being the corporation's sole member (par 32). The corporation and Mrs Joubert challenged the report in the high court.

The court found that the commission acted beyond its powers when it issued its findings in breach of the empowering provisions of regulation 15(4) of the Black Economic Empowerment Regulations. This regulation requires the commission to finalise its investigation within one year of receiving a complaint. The commission's delay in this regard was unreasonable (par 70). While the commission's actions may have been bona fide, its decisions were unreasonable. Public interest is served by arriving at justifiable and reasonable conclusions supported by facts (par 94). The commission failed to comply with time limits and acted unfairly by arriving at far-reaching conclusions and recommendations without affording the corporation an even-handed approach (par 94). The commission selected "what it deemed to be contraventions and ignored material and pertinent facts" (par 95). It made errors in analysing and interpreting documents and did not solicit the assistance of Mr Mothuli when confronted with answers (par 95). How the commission conducted its investigation and the subsequent findings were deemed unfair (par 83-84). The commission's version of events was not backed by objective facts (par 80). The commission committed several factual errors, including failing to appreciate the

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corporation's division of labour and responsibilities (par 86.1). If the commission had appreciated all the facts, it would not have found that there was fronting (par 89).

Fronting is a deceptive practice that undermines the objectives of the broad-based black economic empowerment framework (see Van der Rheede "The Broad-Based Black Economic Empowerment Act 53 of 2003 and the ways in which the commission of fronting practices affects the achievement of its objective" 2020 *African Journal of Democracy and Governance* 101). It involves businesses misrepresenting their broad-based black economic empowerment credentials, often by giving a false appearance of compliance without genuinely transferring meaningful ownership, control, or benefits to black individuals or entities. The practice is detrimental for several reasons. First, fronting prevents genuine economic benefits from reaching the intended beneficiaries, specifically black South Africans. Second, it erodes trust in the broad-based black economic empowerment framework and can lead to cynicism about empowerment initiatives. Third, businesses that engage in fronting can gain undue advantages, such as preferential procurement opportunities, which can distort the market. Given these negative implications, there is a clear and pressing need to combat fronting to ensure the broad-based black economic empowerment framework's integrity and achievement of its intended objectives. While combatting fronting is undeniable, the case highlights the equally crucial need for the commission's findings to be reasonable, fair and based on solid evidence.

Affected parties have a constitutional right to administrative action that is lawful, reasonable and procedurally fair (par 80). The commission's findings must be credible for the broad-based black economic empowerment framework to be effective. Unreasonable findings can undermine the commission's authority and the broader objectives of Act 53 of 2003. Adverse findings by the commission can have significant economic and reputational consequences for businesses. Such findings must be based on a thorough and fair investigation. While combatting fronting is essential to ensure the genuine empowerment of black South Africans, it is equally vital that the mechanisms used to identify and penalise fronting are fair, reasonable and transparent. The case serves as a reminder of the importance of due process and the need for regulatory bodies, like the commission, to act within their stipulated powers while ensuring that their findings are justifiable and based on solid evidence.

7.3 Harassment

In *La Foy v Department of Justice and Constitutional Development* (2023 44 ILJ 2731 (LC)) the labour court considered whether the imposition of managerial functions and activities amounted to workplace harassment and that a decayed relationship with political heads did not amount to harassment (par 69). The employee, a deputy director general in the department of justice, was embroiled in a legal dispute alleging harassment, victimisation and lack of support from her superiors. Appointed in July 2016, she faced immediate challenges related to staffing shortages and budget cuts (par 3). Despite these constraints, she felt unsupported in her efforts to fulfil critical roles, leading her to believe she was being deliberately undermined (par 6). She also faced disciplinary actions and was transferred to another branch, which she considered both a demotion and harassment (par 7). Her superiors, the director general and deputy minister, countered that the department grappled with broader issues, including cost-cutting measures that affected staffing (par 13). They also questioned the employee's performance and trustworthiness, which led to a strained relationship between the parties (par 16). The director general and deputy minister asserted that the employee was not singled out and that her challenges were part

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of larger departmental issues (par 45). The employee's complaint of harassment was based on the following: lack of administrative support and resources (par 44); failure to pay resettlement costs and benefits of transferring employee (par 49); refusal to allow international travel (par 51); cancellation and withholding of leave (par 57); taking away work functions, excluding her from meetings and taking away her reportees for them to report to the deputy minister (par 60); bombarding her with processes (par 61); "witch hunt" investigations (par 63); and transfer, demotion and probation (par 64).

The employee gradually developed the perception that she was being sidelined and isolated within the workplace. She felt that her responsibilities were being gradually stripped away, that she was being excluded from important meetings and that her probationary period was left unresolved (par 10). After attempting to address the issue through the CCMA, which failed to bring about a resolution, the employee escalated her case to the labour court (par 9). The employee asserted that her employer subjected her to unfair discrimination in the form of harassment, as outlined in section 6(3) of the Employment Equity Act. She maintains that this discriminatory treatment was based on arbitrary grounds, which are specifically enumerated in section 6(1) of the act (par 1). The labour court held that the employee's complaint was primarily about a hostile or intimidating work environment, including humiliation, sabotage of work performance, exclusion, unjust disciplinary actions and demotion (par 21). The term "harassment" is not specifically defined in the act. It generally refers to unwanted conduct that impairs dignity, creates a hostile work environment, or induces submission through actual or threatened adverse consequences (par 19). The Code of Good Practice on Prevention and Elimination of Harassment in the Workplace (the code) acknowledges that harassment is not defined in the act but provides guidelines on what constitutes a hostile work environment. The code was introduced after the incidents the employee complained about, but the code codifies the general understanding of harassment (par 18). The test for harassment must be objective. It should not be based solely on the feelings or perceptions of the individual employee (par 28). Actions that are part of normal managerial functions, even if they result in unpleasant consequences, do not necessarily constitute harassment (par 31). Lack of resources is not harassment, especially when other branches face similar issues (par 45). The lack of resources did not affect the employee's dignity. The employee never faced allegations of poor performance and highlighted the lack of resources during her performance assessment (par 46). Courts must be alive to the "idiosyncrasies and over-sensitivities of individual employees" (par 25). Failure to pay a benefit is an unfair labour practice, not harassment. It does not impact upon an employee's dignity or well-being (par 49). International trips are approved at an employer's prerogative and failure to do so does not amount to harassment (par 52). An employer has the legal right to question and even reject a sick certificate that doesn't fully justify an employee's absence. Annual leave must be taken per an agreement or as the employer determines. Employers can revoke leave for operational reasons, provided the days are not forfeited. Revoking leave is not considered harassment or discrimination (par 58). Employers have the right to discipline employees and the steps taken by the employer in this regard are justified. According to section 186(2)(*b*) of the Labour Relations Act, employees are protected against unfair disciplinary actions. The employee was well protected under this act. The employee should not have ignored the protections and remedies provided by the act (par 61). So, too, the employee had an unfair labour practice remedy concerning her transfer, demotion and probation (par 65). An employee claiming harassment "must do more than make bald allegations; they must set out why the

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harassment amounts to unfair discrimination" (par 33). The employee's complaints amount to unpleasant consequences of exercising management functions but do not constitute harassment that amounts to unfair discrimination (par 69). The employee has the onus to prove that she was unfairly discriminated against based on arbitrariness. According to section 11(2) of the Employment Equity Act, the employee must prove that the conduct is irrational, amounts to discrimination and is unfair. Failing to prove any of these points means she fails her claim. The employee failed to prove the conduct against her was irrational (par 33). Some incidents the employee complained about fell outside the prescribed six-month period for claims, questioning the jurisdiction of the court over those incidents (par 35). The alleged harassment was not ongoing; the incidents were once-off acts that did not have an ongoing character (par 37). The employee failed to discharge her onus to prove the conduct was irrational, discriminatory and unfair (par 37).

The employee threw everything but the kitchen sink to prove that she had been subjected to harassment (par 42). Courts are supposed to apply the law objectively. Being overly sensitive to individual idiosyncrasies could compromise the court's ability to make impartial judgments based on facts and legal principles. Legal systems rely on precedent for consistent decision-making. If courts were to consider individual idiosyncrasies too heavily, it could lead to inconsistent rulings that make it difficult for employers to know what legally acceptable behaviour is. It is impractical for courts to delve deeply into the personal sensitivities of every individual involved in a case. Doing so would slow legal proceedings and make the legal process more cumbersome. Taking individual sensitivities into account could introduce subjectivity that undermines the integrity of the legal process. Courts aim to make decisions based on objective facts and established legal principles.

Being overly sensitive to the peculiarities of one individual might be seen as giving that person preferential treatment, which could be unfair to other parties involved in the case. If courts are too sensitive to individual employee idiosyncrasies, it could place an undue burden on employers to accommodate a wide range of personal sensitivities, some of which may be unreasonable or impractical to address. If courts start accounting for individual sensitivities, it could open the floodgates for numerous claims based on personal idiosyncrasies, making it difficult to draw the line between legitimate grievances and frivolous claims. The court rightly pointed out that much of the conduct complained of could have been the subject of other legal remedies (such as unfair labour practice and constructive dismissal) (par 49, 57, 59, 61 and 65).

Harassment is notoriously difficult to prove. First, as the employee alleged that the harassment occurred on an unlisted ground (and was arbitrary), she has difficulty bearing the onus of proof. Suppose unfair discrimination is alleged on an arbitrary ground. In that case, the complainant must prove, on a balance of probabilities, that (a) the conduct complained of is not rational, (b) the conduct complained of amounts to discrimination and (c) the discrimination is unfair (par 33). It is important to note that there are overlaps between unfair labour practice and unfair discrimination disputes. An employee can refer an unfair labour practice dispute even if the alleged reason for non-promotion is discriminatory (Van Niekerk and Smit 217). Still, the existence of a discriminatory reason is not a requirement for an unfair labour practice dispute. Regarding unfair labour practice disputes, the employee must prove that the employer's conduct or omission was unfair. It seems unlikely that the employee would have succeeded in a constructive dismissal claim. For a constructive dismissal to succeed, an employee must show that continued employment would have been intolerable. Intolerability implies a situation which is

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insufferable and too great to bear. It means more than bad treatment and a difficult and stressful working environment or a superior who treats employees poorly; it refers to employer conduct that no reasonable employee could be expected to tolerate or put up with. Mere unhappiness is not sufficient to justify a claim of constructive dismissal. (See also Van Eck and Van Staden "Workplace bullying in the legal profession" 2023 *SALJ* 647.)

7.4 Mental health

In *Sanlam Life Insurance Limited v Mogomatsi* (2023 44 ILJ 2516 (LAC)), the labour appeal court had to consider the requirements for a constructive dismissal based on mental ill health to succeed (par 34). The employee was a senior penetration tester and played a crucial role as an ethical hacker, testing the employer's information technology systems for security vulnerabilities (par 3). A series of events led to a strained employment relationship. Initially, the employee had no issues with his colleagues, but tensions began when he took a vacation without proper approval after a late request, leading to disciplinary action, which was later dismissed due to inconsistencies in the colleagues' testimonies (par 4-5). The employee faced personal challenges, including his mother's illness, which his manager was aware of (par 5). The employee's absence due to gout was met with scepticism (par 6, 14) and he faced further challenges when denied funding for a course and reimbursement for a certification renewal (par 7, 15). Moreover, he wasn't chosen for a conference his colleagues attended (par 8, 16) and he faced disciplinary actions for project delays and perceived unprofessional behaviour (par 9, 17). A significant event occurred when the employee remotely addressed a security breach in Kenya. While he believed he had found a solution, his colleagues challenged his claim, asserting they'd already found it (par 11, 19, 22-23). This led to confrontations and accusations of dishonesty, culminating in his manager requesting the employee to apologise or resign. The employee chose neither (par 11, 20). In the wake of these events, the employee resigned and filed a constructive dismissal dispute (par 12). The manager confirmed the unauthorised leave at the arbitration and detailed the employee's performance issues (par 13-17). Another colleague focused on the Kenya incident, highlighting the team's efforts and the employee's lack of collaboration (par 22-23). The arbitration concluded with these testimonies, painting a picture of deteriorating trust and collaboration between the employee and his colleagues. The arbitrator concluded that the employee did not provide sufficient evidence of a constructive dismissal. Instead, the arbitrator determined that the employee had voluntarily tendered his resignation, rather than being forced out of his position due to intolerable working conditions or other factors that would constitute constructive dismissal (par 25).

The employee, dissatisfied with the outcome of the arbitration, initiated a review application in the labour court, arguing that the commissioner overlooked crucial evidence, including the ultimatum he received and his mental health state during his resignation (par 26). The labour court found that the employee's mental health, particularly his anxiety and depression, wasn't given proper consideration during the arbitration (par 27). It criticised the employer for neglecting the employee's mental well-being, emphasising that understanding their mental health is essential (par 19). The court concluded that the employee's resignation was a constructive dismissal, ordering the employer to compensate the employee with four months' salary (par 28). Aggrieved by the outcome, the employer referred the matter to the labour appeal court (par 29). The court found that constructive dismissal arises when employment ends due to an employer making it intolerable for the employee.

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Mere intolerability doesn't guarantee constructive dismissal; the intolerable conditions must be primarily the employer's fault. The employer's conduct must lack "reasonable and proper cause" (par 31). An employer should be sensitive to an employee's mental health vulnerabilities. For constructive dismissal claims based on mental health, evidence must show the employer knew or should have known about the employee's condition (par 34).

The employee's mental health was not a focal point in the arbitration and was introduced only later. The court held that "[t]he employee did not lead evidence during arbitration proceedings relating to his mental ill health. Evidence related to the employee's mental health was led for the first time in the review proceedings." The labour court "misdirected itself by taking into consideration evidence that was not before the arbitrator" (par 36, 38). The employer wasn't shown to be aware of the employee's mental health issues at the time (par 38). The labour court also conflated incapacity dismissal with constructive dismissal (par 39). The burden of proof that an employee must meet in order to establish constructive dismissal is substantial (par 44). In this case, the commissioner determined that the employee had not been constructively dismissed but had instead voluntarily resigned from his position. The court upheld the validity of the commissioner's finding (par 45).

7.5 Sexual harassment

In *AK v Right to Care NPC* ((JS597/21) 2023 ZALCJHB 205 (7 July 2023)), the labour court was called upon to consider if, although an employee was not obliged to report all instances of sexual harassment immediately, an employer could be vicariously liable in all cases of sexual harassment. The employee testified that she experienced sexual harassment incidents from a perpetrator co-employee who made inappropriate comments about her appearance and asked about her favourite sex position. She reported the incidents to her line supervisor, who had previously warned her about the co-employee's abusive behaviour towards women. Some years before, the co-employee had received a final written warning in 2015 for sexual harassment. The employee also rejected the co-employee's proposition to start dating and informed him of her preference for a professional relationship. The employee suggested sexual harassment training, but the other co-employee dismissed the idea and made a remark that she interpreted as a threat. The employee then reported the incidents to the company. The employer did not take immediate action and the employee felt unsupported and uninformed about the investigation process (par 2.4). The employee and the perpetrator were asked to submit to polygraph testing, and this led to the dismissal of the co-employee (par 3.2). She eventually filed a dispute with the CCMA due to the company's handling of her complaint and refusal to provide her with polygraph test results and the sexual harassment policy.

The employee remained dissatisfied with how her grievance was handled, even though she played a significant role in the disciplinary proceedings against the co-employee, which led to his dismissal (par 2.3). The employer disputed the employee's claims. The line supervisor denied warning the employee about the co-employee or receiving a formal complaint. Mr N stated that the company conducted an investigation and obtained statements from the involved parties (par 2.2). The polygraph test was used as evidence, leading to the co-employee's dismissal. The employer argued that a disciplinary hearing was preferred over a grievance hearing due to the seriousness of the allegations. The employer also denied that the polygraph test violated the employee's dignity and emphasised its role in securing the co-employee's conviction (par 3.3). In an effort to seek redress, the employee filed a claim with the labour court, seeking damages amounting to R3.5 million and compensation

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equivalent to 24 months' salary from the employer. The employee contended that the employer had breached its statutory obligations under sections 60(1) and (2) of the Employment Equity Act by failing to engage in consultation with all relevant parties and take the necessary steps to address and eliminate the alleged conduct of sexual harassment. The employee further asserted that the employer neglected to conduct proper investigations, consult with the employee and prepare a report on the sexual harassment allegations. Instead, the employer subjected the applicant to a lie detector test rather than conducting a thorough investigation and holding a grievance hearing (par 3.1). In response, the employer argued that the provisions of section 60 are triggered only when an employee promptly brings allegations of sexual harassment to the employer's attention. The employer maintained that the employee failed to report the harassment immediately, as required by section 60(1), and reported the matter only ten months after the alleged incidents occurred.

The labour court held that the requirement that conduct be reported "immediately" must be given a sensible meaning having regard to the purpose and section 5 of the act, which requires employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Although the delay of ten months in reporting the first incident is not insignificant, the employee's explanation that she thought the perpetrator would stop after she confronted him and he apologised should be accepted (par 2.1). The second incident was reported within two months from the date of the incident, which is not unreasonable. The employer acted against the perpetrator, which led to the employee's dismissal. It was an important factor for the court that "[t]he perpetrator was accordingly dismissed with the help of the applicant as a main witness and in line with the respondent's Sexual Harassment Code" (par 2.3). It could not be said that the employee was not consulted about the procedures followed when the employer dealt with the perpetrator swiftly (within three months) (par 2). It could not be said that the polygraph testing affected the employee's dignity when she consented to it and led to the perpetrator's dismissal (par 3.3). The employee could access the sexual harassment policy and, in any event, the policy was furnished to her following her application to the CCMA. Although the perpetrator had been issued with a final written warning previously for sexual harassment, the employer's sexual harassment policy provides for a disciplinary sanction short of dismissal for minor offences. The employer did not contravene section 60 of the Employment Equity Act.

The judgment does not imply that sexual harassment is not treated seriously by the labour court. The employer actively took steps against the perpetrator. Section 60 of the act is designed to deal with cases where employers do not deal actively with such cases. Vicarious liability is strict liability and, for an employer to be held vicariously liable, all of the requirements set out by the South African judiciary must be met (*Liberty Group Limited v M* 2017 38 ILJ 1318 (LAC) par 38). It did not impede the employee's case that the matter was reported only some ten months after it had been originally reported. The employee's claim fell short on several other grounds. Employers are liable in terms of section 60 of the act for having taken insufficient action to prevent harassment. The employer acted swiftly against the perpetrator, who was ultimately dismissed. It should also be noted that the employees in the situation of the employee are not without remedy, as common-law delictual damages could still be sought from the perpetrator directly.

8 *Resignation*

In *South African Medical Association Trade Union obo Dr H Rikhotso v MEC: Department of Health Limpopo Province* (2023 44 ILJ 1779 (LC)) the labour court

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had to consider if the resignation by an employee is a unilateral act which need not be accepted by the employer (par 8). The medical doctor employee resigned while under investigation for inciting a strike and was offered and accepted a position at another hospital (par 3). He was later informed that he had been found guilty and dismissed on the charge (par 3). He filed an appeal and was told that his dismissal from the payroll would be reversed and his notice period would be extended until the appeal was resolved (par 4). Following the rejection of the appeal, the employee's name was removed from the employer's human resource system (par 5). The employee filed an urgent application in the labour court for orders declaring his notice period extension unlawful and directing the department to update his personnel file to reflect his resignation (par 1).

The labour court held that although the employee had not identified the statutory provision on which he based the application, it could be accepted that the court had jurisdiction in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997 concerning a contract of employment (par 7). Since a resignation is a unilateral act that needs not be accepted, the department was not obliged to accept it. There was no legal basis for the extension of the employee's period of notice (par 8). By seeking the other orders, the employee effectively sought to delete any record of his dismissal from his personnel file (par 9). While it may be so that in public service the effective date of dismissal is when an appeal authority confirms a dismissal, it did not follow that it vanished from his personnel file because he had resigned before then. Nothing prevents employers from summarily dismissing employees during their notice periods – the employee had confused the existence of his dismissal with its implementation. The dismissal terminated his contract and there was no basis for an order to obliterate that fact from his file (par 11). The application was nothing more than an attempt to conceal the fact of the dismissal (par 12). That the employer had acted unlawfully by purporting to extend the employee's contract until the appeal, it was concluded, was immaterial, and the application is dismissed (par 13).

A contract of employment can be brought to an end if both the employer and the employee mutually agree to conclude their employment relationship at a specified point in the future. It is not legally permissible for one party to cancel the contract unilaterally without the consent of the other party. It requires the consensus of two parties to conclude, and it equally requires the consensus for its dissolution. Employees who know that they will be found guilty of acts of misconduct often resign to escape some of the consequences of dismissal. For doctors, the consequences of a dismissal may be detrimental to their careers. The case therefore reaffirms the principle that employers can still hold employees to account even if they choose to resign. The judgment is directly opposed to that of *Naidoo v Standard Bank SA Ltd* (2019 40 ILJ 2589 (LC)), where the labour court held that an employer may not discipline an employee after they have resigned with immediate effect. In that case, the court held that resignation ends the employment contract. In *Mthimkhulu v Standard Bank of South Africa* (2021 42 ILJ 158 (LC)), the labour court held that resignation with immediate effect does not end the employment relationship. (See Van Niekerk and Smit 263-264.)

9 *Temporary employment services*

9.1 Equal work

In *Bata SA (Pty) Limited v SACTWU obo Members* ((DA4/2022) 2024 ZALAC 15 (23 April 2024)) the labour appeal court determined the scope of the CCMA's

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powers under section 198D of the Labour Relations Act. The key question was whether section 198D only allows the CCMA to make declaratory orders about an employee's status and treatment or whether it also permits compensation orders. The court considered whether employees seeking relief must pursue separate claims under other labour law provisions or whether such relief could be granted directly under section 198D. The court was also asked whether the CCMA can make substantive orders (such as compensation) under section 198D, or whether employees must pursue unfair dismissal, unfair labour practice, or unfair discrimination claims under other provisions of the Labour Relations Act or Employment Equity Act to seek such relief. Bata used the services of Scribante Labour Consultants, a temporary employment service, to procure employees, including employees who were members of SACTWU (par 3). SACTWU referred a dispute to the CCMA on behalf of its members, arguing that those placed with Bata for over three months should be deemed Bata's employees under section 198A of the Labour Relations Act (par 3). SACTWU argued its members were treated less favourably than Bata's other employees regarding wages and conditions and the CCMA should quantify the monetary disparity and make an award (par 4). Section 198A(5) of the act provides that "[a]n employee deemed to be an employee of the client … must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment". Section 198D provides that "[a]ny dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration". Bata and Scribante argued that section 198D did not give the CCMA power to quantify financial disparities or make monetary awards as prayed (par 5). The parties disputed which employees should be covered – those employed at the date of the referral, those dismissed before finalisation of arbitration or only those still employed throughout arbitration (par 6-7).

Based on a previous case, the commissioner ruled that only employees still employed at arbitration could be a party to the dispute and relief under section 198D was only declaratory, not monetary (par 11-12). On review, the labour court set aside the award, finding the CCMA had jurisdiction under section 198D to determine whether the deemed employees were treated less favourably and to quantify and award backpay (par 16). The labour court ordered that the matter be remitted back to the CCMA, but the matter was appealed to the labour appeal court.

The labour appeal court held that section 198D allows disputes about the interpretation or application of sections 198A-C to be referred to the CCMA. It does not cover all disputes arising from these sections (par 33-34). Section 198D aims to determine the status of the employment relationship, *ie* whether employees are deemed employees of the client or remain employees of the TES. Once this is determined, aggrieved employees can refer further disputes (such as unfair dismissal) under the relevant Labour Relations Act or Basic Conditions of Employment Act provisions (par 35). Allowing substantive relief under section 198D without requiring proof of dismissal or unfair labour practice would undermine the objects and provisions of the Labour Relations Act (par 36). Nothing prevents employees from relying on section 198A-C in unfair dismissal or unfair labour practice claims (par 37). Under section 198D, the CCMA can issue a declaratory award confirming (i) the employee's status as a deemed employee and (ii) if relevant, that the employee was subjected to differential treatment without justification under section 198D(2). The deemed employee can then refer an unfair labour practice dispute to the CCMA based on this determination (par 38). Employees dismissed before the section 198D

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referral are not barred from a declarator on their status when their employment ends (par 39). Dismissed deemed employees subjected to unequal treatment are not barred from approaching the CCMA for compensation once declared deemed employees (par 40).

The labour appeal court relied on important principles of statutory interpretation when considering the proper meaning and application of section 198D of the Labour Relations Act. Firstly, the court emphasised that section 198D must be read in the context of the act as a whole and not in isolation (par 31, 34). This means that when interpreting section 198D, the court must consider how it fits into the broader framework and objectives of the act. The court should strive for a harmonious interpretation that aligns with the overall purpose and scheme of the legislation. The court noted that the act already provides dispute resolution processes for unfair dismissals and unfair labour practices (par 35). Interpreting section 198D as an all-encompassing provision that covers all disputes arising from sections 198A-C would overlap with these existing processes and potentially create confusion or inconsistency. Secondly, the court held that an interpretation of section 198D that avoids undermining the purpose of the act should be preferred. The act aims to provide fair and efficient dispute resolution mechanisms and balance employee and employer rights. An interpretation of section 198D that allows employees to bypass the normal requirements for proving an unfair dismissal or unfair labour practice would undermine these objectives. The court gave an example: if an employee could refer a dispute under section 198D and obtain substantive relief (like reinstatement) without proving a dismissal occurred, it would go against the established procedures and requirements for unfair dismissal claims under the act (par 36). This would be an untenable outcome that undermines the coherence and purpose of the legislation. Therefore, the court favoured an interpretation of section 198D that respects the existing dispute resolution framework of the act and does not create a parallel process that bypasses the normal requirements for proving an unfair dismissal or unfair labour practice. This interpretation best harmonises section 198D with the overall objectives and scheme of the act.

The court's approach of limiting section 198D to declaratory orders and requiring employees to pursue unfair labour practice or unfair discrimination claims under other provisions of the act may indeed be problematic in practice. Firstly, it is not clear what specific unfair labour practice an employee could rely on to challenge differential treatment in terms of wages and conditions of employment. The definition of unfair labour practices in section 186(2) of the act does not explicitly cover such disparities. This could leave employees without a clear avenue to assert their rights to equal treatment. Pursuing an unfair discrimination claim under the Employment Equity Act may be difficult in these circumstances. The act prohibits unfair discrimination based on listed grounds (such as race, gender, age, etc) or any other arbitrary ground. Differential treatment of deemed employees may not always be linked to a listed ground or may not be found to impair their dignity or cause comparable harm, which is required for discrimination based on an arbitrary ground. Additionally, the act places the onus on the employee to prove that the discrimination occurred and was unfair. This could be a heavy burden for employees who may lack access to comparative information about the treatment of other employees. Therefore, the court's approach may create practical barriers for deemed employees seeking to enforce their rights to equal treatment. By confining section 198D to declaratory orders and requiring separate unfair labour practices or discrimination claims, the court may have limited the effectiveness of the protections intended by sections 198A-C. A more purposive interpretation of section 198D that

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allows the CCMA to make substantive orders addressing unequal treatment could arguably better fulfil the objectives of the amendments to the Labour Relations Act, which sought to provide greater protections for vulnerable temporary and deemed employees. This would need to be balanced against the concerns raised by the court about respecting the existing dispute resolution framework and avoiding the bypassing of normal requirements for proving unfair treatment.

9.2 Separation agreements

In *Workforce Staffing (Pty) Ltd v Mjoli* ((JA 32/23) 2024 ZALAC 9 (11 April 2024)) the labour appeal court had to consider whether the employees employed by a temporary employment service were dismissed for reasons related to operational requirements as contemplated by section 186(1) of the Labour Relations Act, as the separation agreements they signed constituted a mutually agreed termination of employment. The employees contended they were permanent Workforce Staffing employees until their dismissal. They averred that Workforce Staffing failed to comply with section 189 (which regulated the retrenchment of employees) of the act before terminating their employment, making their dismissals substantively and procedurally unfair. Workforce Staffing averred that the employees were engaged on fixed-term contracts and had signed “separation agreements” agreeing their employment would terminate by mutual consent. Workforce Staffing thus denied the existence of a dismissal (par 2). Workforce Staffing is a temporary employment service and the employees’ services are at the disposal of Workforce Staffing’s client, Rema Tip Top (par 3). The employees testified that Workforce Staffing informed them that Rema Tip Top had no work due to structural changes, they should hand in their uniforms and boots and go to Workforce Staffing’s Benoni branch to collect relevant information (par 4). The employees went to the Benoni branch together, receiving letters stating their employment contracts had been terminated. They were surprised as they regarded themselves as permanent employees and expected to be placed with another client (par 4). The employees denied signing the disputed separation agreements put to them during the trial (par 6). Witnesses for Workforce Staffing testified that the employees had been on fixed-term contracts. When Rema Tip Top shut down its site, Workforce Staffing entered into mutual separation agreements with the affected staff, including the employees (par 8-9).

The labour court rejected the employees’ evidence that they were permanent employees, finding they had been employed on fixed-term contracts (par 10). The labour court found the employees’ version more probable regarding whether the employees signed the separation agreements. It held that no separation agreements were concluded (par 14). The labour court found that Workforce Staffing’s version of the separation agreements being concluded was a fabrication to escape the consequences of failing to comply with section 189 of the Labour Relations Act (par 15). The labour court found that Workforce Staffing’s human resources manager was a dishonest witness based on an apparent contradiction between his testimony and a CCMA ruling and rejected his version (par 16). The labour court concluded that the separation agreements were a fabrication and the employees had been dismissed without the appellant complying with section 189. The employees were entitled to be reinstated with retrospective effect (par 18).

Aggrieved by the outcome, Workforce Staffing referred the matter to the labour appeal court, which held that the labour court erred by failing properly to consider and apply the onus in section 192 of the Labour Relations Act, which requires employees claiming unfair dismissal first to prove the existence of a dismissal. Only

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if a dismissal is established does the onus shift to the employer to prove it was fair (par 20-22). There was no proper basis for the labour court's adverse credibility findings against Workforce Staffing's witnesses. The alleged inconsistencies relied on by the labour court did not amount to contradictions in their evidence (par 27-29). The labour court erred by making conclusions based solely on its flawed credibility findings without properly considering the probabilities. Proper analysis of the evidence and probabilities favoured Workforce Staffing's version that the employees signed the separation agreements (par 32-40). The employees had failed to prove that they were dismissed, as the separation agreements they signed constituted a mutually agreed termination of employment. There was thus no dismissal as defined in section 186(1) of the act (par 41). The labour court had erred in concluding the employees were dismissed and that their dismissals were unfair (par 42-43).

The decision of the labour appeal court is questionable. It is generally not possible to contract out of constitutional rights and protections. The constitution is the supreme law and any law or conduct inconsistent with it is invalid (section 2 of the constitution). Section 36 allows for the limitation of constitutional rights only in terms of laws of general application and only to the extent that the limitation is reasonable and justifiable in an open and democratic society. Contracting parties cannot agree to limit rights outside of this framework. Section 23 of the constitution provides for fundamental labour rights, including the right to fair labour practices. Employment contracts or waivers should not be allowed validly to override these protections. The founding values of human dignity, equality and freedom permeate the bill of rights. Agreements that violate these core values and rights could be constitutionally invalid. Contracts that are contrary to public policy are unenforceable. The constitution and its values inform public policy. Thus, agreements that egregiously violate constitutional rights and values may be invalid for violating public policy. So, while there is scope for contractual waiver and limitation of some legal rights, employers cannot contract out of the overarching constitutional framework and core constitutional rights and values. Any such provisions would likely be invalid and unenforceable. There are strong public policy and constitutional reasons why courts should carefully scrutinise mutual termination agreements, especially where vulnerable workers like those placed by temporary employment services are involved.

There is often a significant power imbalance between employers and vulnerable employees. Workers may feel compelled to sign termination agreements out of fear of losing their jobs or facing other repercussions without understanding the rights they are giving up. Courts should be aware of this inequality and the risk of economic duress. Termination agreements that deny employees protections like severance pay or the right to contest an unfair dismissal may violate this right. Courts should ensure that core labour rights are not undermined by contracts signed by workers unaware of the consequences. Parties must give informed and voluntary consent for an agreement to be valid. Where workers do not properly appreciate the nature and effect of a termination contract, their consent may not be legally effective. It is incumbent on courts to probe whether apparent consent to a waiver of rights was genuine and informed. Courts can assess its substantive fairness even if a termination agreement appears consensual. Agreements that are unreasonably one-sided, harmful to employees' welfare or destructive of the right to fair labour practices may be set aside as *contra bonos mores* or unconstitutional. So, while courts respect contractual autonomy and the enforceability of agreements, this is not absolute. Where mutual termination agreements with vulnerable workers undermine constitutional values and labour rights, courts should intervene to

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assert the primacy of fairness and public policy over strict contractual compliance. Scrutiny is required to ensure workers' consent is informed and the terms are not unreasonably prejudicial.

10 *Transfer of undertakings*

10.1 Termination by the effluxion of time

In *Mobile Telephone Networks (Pty) Ltd v CCI SA (Umhlanga) (Pty) Ltd* (2023 44 ILJ 1906 (LAC)) the labour appeal court had to consider whether the termination of a service agreement by the effluxion of time automatically triggers a transfer of undertaking. Initially, MTN provided all services to assist clients who called its helpline internally. Later, MTN initiated an outsourcing process to deal with increased customer needs (par 3). In 2018, CCI was contracted to provide call centre services to MTN (par 4). The contract was for a fixed period of five years. Although CCI was the sole service provider for MTN in the first year of the contract (in addition to MTN's in-house call centre), MTN was entitled also to contract with other service providers following the first year of the agreement, which it did with two additional service providers (par 4). Regarding the contract, CCI was to establish a unit that dealt only with MTN clients and was to be physically and organisationally separated from the rest of CCI's organisation. When activities fluctuated, CCI was entitled to deal with the employees as they deemed fit, including moving them to different units or retrenching them. All training was provided by CCI (par 5).

Before the contract lapsed, CCI and MTN negotiated to renew the contract, but no agreement could be reached (par 17). When the contracts between CCI and MTN lapsed, MTN transferred the calls to the other two call centres. These service providers didn't require that any staff or equipment be transferred to them for them to be able to deal with the additional calls (par 9). The additional call volumes did mean that the other service providers needed to increase their staff members to meet demand. 45 CCI staff members resigned to join one of the other service providers. The other service provider recruited entirely new staff (par 10). No CCI staff joined MTN (par 10). CCI approached the labour court, which held that the business transfer was a going concern. MTN appealed to the labour appeal court, which held that the test to determine whether a business has transferred as a going concern is as follows: Has the business which is alleged to be transferred retained its identity? What components of the old business are visible now in the hands of the alleged new owner? Has a critical mass of workers moved to the alleged new owner? What assets were transferred to the new owner? What influence does the agreement have on colouring the circumstances of the alleged transfer (par 12)?

Although several mechanisms of the Labour Relations Act are geared towards job security, the job protection mechanisms of section 197 of the act are substantially different. The protection is rooted in the existence of a commercial reality. The business as a going concern has been transferred (par 13). First, there must have been a discrete business (par 13.1). There was a discrete MTN business in the hands of CCI (par 15). Second, the business must have transferred from one owner to another (par 13.2). The lapsing of the contract between MTN and CCI could not constitute a transfer (par 17). The potential trigger for a transfer could have been the taking up of some of the work previously performed by CCI by the other service providers (par 18). No major assets of CCI had transferred to any other service provider or MTN (par 19). The other service providers merely increased their existing operations (par 20). Although some staff members had taken up employment with a different

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service provider, this was not necessary (par 25). Third, the business should have transferred as a going concern at the time of transfer (par 13.3). This was not the case here (par 21). Fourth, the business must retain the characteristics of the initial business (par 13). Again, this was not the case (par 20). The court therefore found that no transfer of the business as a going concern occurred (par 29). Under the common law, the sale of a business meant termination of the contracts of employment of existing employees and left it to the purchaser to decide whether to offer them re-employment (Du Toit 582). This does not mean to say that the protection afforded by section 197 of the act is absolute. To determine whether section 197 is applicable, three key criteria must be met. Firstly, the transaction in question must constitute a "transfer" in the legal sense. Secondly, the entity being transferred must represent either "the whole or part of any business, trade, undertaking or service". Thirdly, the transferred entity must be a "going concern", meaning it must be an operational and functional unit. If these three conditions are satisfied, the legal consequences are such that the new employer effectively steps into the shoes of the old employer. As a result, "all the rights and obligations" that existed between the old employer and its employees remain in full force and effect, with the new employer assuming the role and responsibilities of the previous employer vis-à-vis the employees.

10.2 Specific transferred business segment

In *Katiso Transport and Logistics CC v Eagle Liner Transport (Pty) Ltd* (2024 3 BLLR 255 (LAC)) the labour appeal court considered whether, in the case of a business transfer, only the employment of those individuals involved in the specific transferred business segment, the cross-border services, was subject to a transfer under section 197 of the Labour Relations Act. Eagle Liner Transport employed a group of employees (par 7). Katiso Transport and Logistics CC held 102 cross-border operating licences and agreed with Eagle Liner CC and Cream Magenta 326 for these employers to use these licences for cross-border bus services, particularly to Zimbabwe (par 2). Eagle Liner Transport acquired the business of Cream Magenta 326 and Eagle Liner CC but Katiso Transport and Logistics CC retained the licences (par 3). Ghalib Ismail, an employee and partial owner of Eagle Liner Transport, managed its operations (par 3). An agreement was made where Ghalib Ismail relinquished his share in Eagle Liner Transport and received ownership of vehicles and trailers worth R14 million, plus R2 million from shareholders who each held a 38 per cent interest in Eagle Liner Transport, who were unable to pay the full value of his shareholding (par 4). Following this, Ghalib Ismail transferred thirteen buses and trailers for cross-border services, while Eagle Liner Transport continued inter-provincial travel services (par 5). This separation led to a dispute by 88 employees, who were not informed about the termination of the cross-border services and sought monetary relief through the CCMA (par 7). The arbitration relating to this dispute was still pending at the time of the appeal (par 8). Eagle Liner Transport approached the labour court for a declaratory order, seeking clarification on whether the employment of these employees had transferred to Eagle Liner Transport or Ghalib Ismail under section 197 of the act due to the transfer of the cross-border services business (par 9). The labour court held that the cross-border service of Katiso Transport and Logistics CC, consisting of thirteen buses and drivers thereof, had been transferred as a going concern to Eagle Liner Transport (par 12) but it was appealed to the labour appeal court because the order did not clearly define the scope of employees covered, specifically excluding those involved in inter-provincial services which were not transferred (par 15).

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The labour appeal court held that the transfer was part of a larger agreement involving relinquishing shares and transferring assets (par 4). The court declared that the employment of individuals involved in the cross-border services transferred to the first or second appellant by section 197 of the act (par 12). Only employees involved in cross-border services were subject to the transfer of employment contracts under section 197. Other aspects of the business, like inter-provincial transport services, were excluded (par 17). Section 197 is triggered when there is a transfer of a business or a "part of any business" as a going concern (par 14). In this situation, the relevant part of the transferred business was the cross-border service, including its assets and operations (par 11). The transfer of the cross-border services included tangible assets like buses and trailers and the necessary operating licences (par 11). This transfer effectively meant that the part of the business responsible for these services was moving from the original employer to the new employer. Consequently, the employees specifically engaged in this business segment were transferred to the new employer, in line with section 197. This transfer did not include other parts of the business, such as the inter-provincial transport services (par 5). Therefore, employees engaged in these other aspects of the business were not subject to the transfer of employment contracts under section 197, as their area of work was not part of the business segment being transferred.

The court's decision aimed to clarify this distinction and ensure that only the employees directly involved in the transferred business segment were affected by the application of section 197 (par 17). Employees must know who is responsible for upholding their employment rights and providing benefits. A change in employer can affect terms and conditions of employment, including salaries, pensions, leave entitlements and job security. Knowing their employer ensures that employees can claim these rights effectively. Certainty about the employer helps maintain continuity of employment. It ensures that employees' tenure and associated rights, like seniority and accumulated leave, are preserved and recognised by the new employer. Understanding who the employer is lets employees know who holds the legal and contractual obligations towards them. This is vital for enforcing employment contracts, including resolving disputes or grievances. Knowledge of the employer is essential to protect employees from unfair dismissal. In cases of business transfers, employees should be aware of their status to challenge any potential unfair dismissals. For employees who are part of a union, knowing their employer is crucial for collective bargaining purposes. It helps determine who the union should engage with for negotiations or agreements. Uncertainty about employment can lead to anxiety and stress among employees. Knowing who their employer is provides security and stability, contributing to better mental health and workplace satisfaction. Employees need to know their employer for practical matters like payroll, tax deductions and benefit administration. This clarity facilitates smooth administrative processes and ensures legal compliance.

11 *Unfair labour practices*

In *Labuschagne v Minister of State Security Agency* ((44033/19) 2023 ZAGPPHC 622 (17 July 2023)) the high court considered whether an employee who is not covered by the provisions of the Labour Relations Act could rely directly on the protection of section 23 of the constitution (the right to fair labour practices) (par 21-23). Initially, the employee reported to Mr Strydom, the deputy divisional head, who left the organisation that same year. She was informed that she couldn't act in Mr Strydom's role as it had been eliminated (par 5). Subsequently, she reported

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to Mr Steyn, who, after Mr Strydom's departure, proposed the creation of two unit head positions in the division but the suggestion wasn't accepted (par 6). Two years later, Mr Bernard, the then acting manager of information systems, recommended the employee for the unit head position. This recommendation was also declined (par 7). Though the employee claims she undertook the duties of the unit head, she concedes "she was never formally appointed to that position and neither was she remunerated by the post level of a unit head and or by the functions and responsibilities she executed" (par 7). Shortly after, Mr Masango, the general manager of human resources, attempted to re-evaluate her position but she was unsuccessful (par 7). Following a merger at the state security agency, the employee sought a promotion. Mr Bam, her acting manager, denied this request. The director-general, Mr Dlomo, informed her that her lack of an NQF6 qualification (equivalent to a degree) prevented her appointment. She took his advice and pursued a BA degree in criminology. She also filed a formal complaint against Mr Bam, alleging victimisation, which reportedly went uninvestigated. She contested performance ratings Mr Bam gave but no resolution was communicated to her (par 8-9). By June 2015, Ms Maletswa was appointed unit head, to whom the employee was to report. Unhappy with this change and feeling her responsibilities were usurped, the employee requested a transfer. She viewed her move to the information technology stock department as a downgrade and filed another grievance regarding Ms Maletswa's appointment. Three years later, her grievance was addressed, revealing Ms Maletswa's appointment was unlawful. The employee was further advised that a consultation process would be undertaken with her regarding a possible transfer to another directorate (par 10-11).

The employee approached the high court to review the decision not to appoint her to the position and the decision about the performance ratings given by Mr Bam based on the Promotion of Administrative Justice Act 3 of 2000 (par 13). The matter was referred to the high court and not the labour court, as state security agency employees are explicitly excluded from the protection of the Labour Relations Act or the Employment Equity Act (par 21). Even though the provisions of the Labour Relations Act do not apply to litigants such as the applicant, section 32 of the constitution guarantees them a right to fair labour practices on which the employee could rely (par 22-23). The court held that the employee could not rely on the provisions of Act 3 of 2000, as promotion in the public sector does not constitute administrative action. The employee could rely on a claim of fairness based on the right to fair labour practices (par 20). There exists no inherent right to promotion. The employer has managerial discretion over whether or not to appoint an employee (Van Niekerk and Smit 215). This power must be exercised rationally and in good faith. Judicial intervention in the administration of public authorities should be minimal. Promotion is a privilege, not a right, unless specified in an employment contract (par 24). The employee's claim that she functioned as the unit head is questionable since she wasn't formally appointed or remunerated (par 25-26). The employee was informed she couldn't act in the post because it no longer existed. The employee never claimed an acting allowance despite allegedly acting as unit head for thirteen years, which contradicts her stance (par 26). The appointment of Ms Maletswa as unit head was unexpected to the employee, because the position wasn't approved or advertised. Ms Maletswa's appointment was declared unlawful and the position of unit head was not formally established. The employee can't be promoted to a non-existent position, negating her legitimate expectation claim (par 28). Following her transfer request, the employee's alleged demotion doesn't hold since there was no reduction in salary or benefits (par 30). Accusations of racial

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discrimination, based solely on the employee being white and Ms Maletswa being black, were unsupported and dismissed (par 31). Concerning the IPMS ratings, the court lacked adequate information on the rating system and its policies (par 32). The court held that the employee was not treated unfairly (par 35).

The court leaned on the absence of formal appointment letters, official designations and the non-receipt of acting allowances as evidence against the employee's claims. In many public sector environments, it's not uncommon for employees to take on roles and responsibilities without the corresponding formal recognition due to bureaucratic inefficiencies, resource constraints or strategic decisions. The departure of Mr Strydom left a void and it's logical to assume that someone had to shoulder the responsibilities of his post, even if only informally. The court's decision seemed to bypass the pragmatic aspect of day-to-day operations, favouring strict adherence to formal structures. By adhering strictly to formal criteria, the court potentially sidelines employees who have, in reality, taken on additional responsibilities and roles without formal recognition. Nevertheless, it is trite that even if the employee had acted in the post and had taken on some of the functions previously fulfilled by Mr Strydom, the employee still would not have had the right to have been appointed (Van Niekerk and Smit 214-217). The employee should instead have challenged the decision to have her fulfil, even informally, the tasks and responsibilities previously fulfilled by Mr Strydom using appropriate remedies. Even if the employee could not prove that she had been racially discriminated against, the employer was still bound to treat the employee fairly in their decision not to appoint her to any potential post. The fact that the employee had originally been advised that she could not be appointed because she did not have a degree, only to be informed later that she could not be promoted due to the non-existence of a post, seems to be potentially unfair.

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A RENEWED CALL FOR A WIDER RECOGNITION OF THE *PACTUM SUCCESSORIUM* IN LIGHT OF RECENT DEVELOPMENTS*

SAMEVATTING

'N HERNUDE OPROEP TOT WYER ERKENNING VAN DIE *PACTUM SUCCESSORIUM* IN DIE LIG VAN ONLANGSE ONTWIKKELINGE

Behoudens 'n vererwingsklousule in 'n geregistreerde huweliksvoorwaardekontrak en 'n *donatio mortis causa* wat aan testamentêre formaliteite voldoen, word alle ander vorme van erfopvolgingsooreenkomste (*pacta successoria* of *pactum successorium* as die enkelvoud) as onafdwingbaar beskou. Die vernaamste hedendaagse besware teen die erkenning van die *pactum successorium* is die beperking van testeervryheid waar die individu van die geleentheid om vererwing deur 'n testament te bewerkstellig ontneem word en die moontlike omseiling van testamentêre formaliteite soos voorgeskryf in artikel 2 van die Wet op Testamente 7 van 1953. Alhoewel verskeie outeurs oor die jare heen (veral in die 1980's en 1990's) vir 'n verslapping van die streng verbod op die erkenning van die *pactum successorium* betoog het, blyk dit dat die howe nie ten gunste van sodanige verslapping is nie.

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