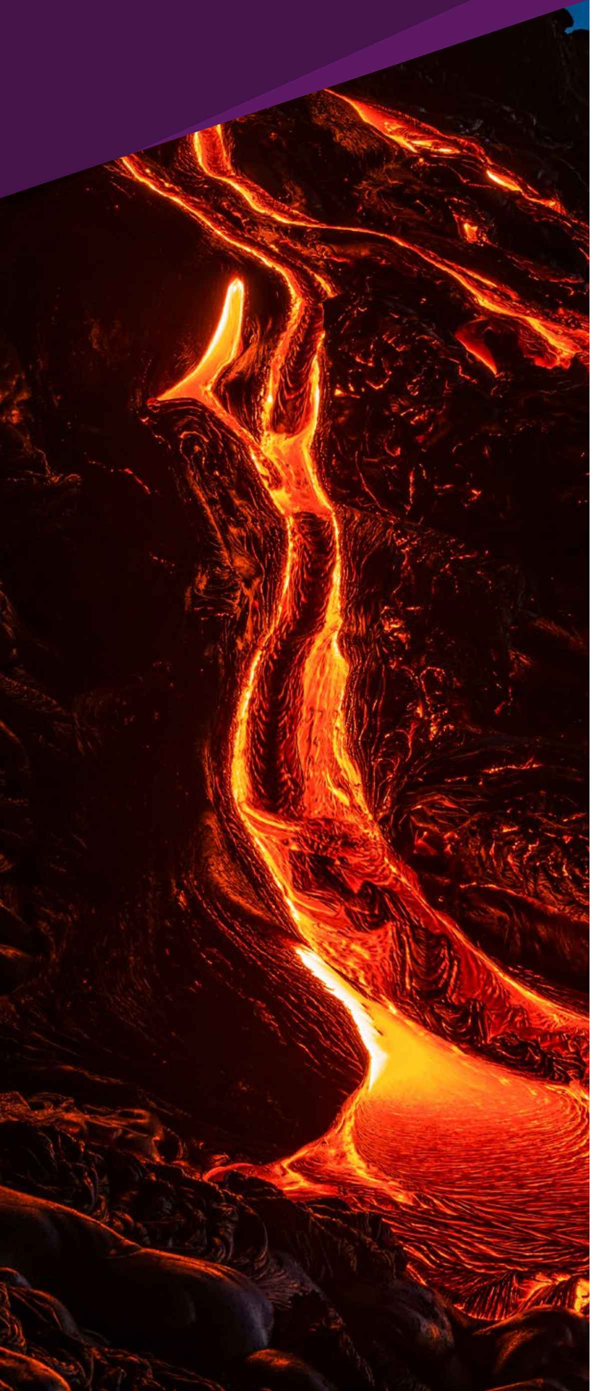
EMPLOYMENT

A CHANGING WORK ORDER

CASE LAW UPDATE 2020

CLIFFE DEKKER HOFMEYR

FOREWORD



Unprecedented: A strong contender – after COVID-19 and lockdown - for the word of 2020. This year has shifted almost every aspect of our lives, from the ways we socialise to how we shop; from how we exercise to where we work. These drastic changes have introduced, swiftly and almost universally, complex and novel employment law issues into the workplace. This booklet highlights recent South African case law, providing guidance into some of the difficult challenges currently confronting employers and employees.

To survive and even thrive within the new status quo, businesses need to *"pivot"* (yet another word that has earned significant market share in 2020's vocabulary). However, such an instruction over-simplifies the playing field. Some industries are well-suited to rapid evolution, others are not. The tech world, for example, met the new challenges, swiftly and relatively easily. Juggernauts such as Google and Facebook instructed employees to plan to work from home through 2020. Twitter went as far to tell their employees that those who wish to telework after the pandemic may *"do so forever"*. But it's one thing to instruct staff to work from home and it's another for those employees to perform at the same high level. With a complete disruption of work life balance, how do businesses ensure productivity? Recent studies attempt to tackle this conundrum suggesting that job complexity is one of several factors contributing to an employee's output from their home office. Our experts discuss some of the other determining factors in Chapter 2.

While some companies could adopt a *"business as usual"* approach - albeit while working at home – to the pandemic, an alarming number of businesses did not have this luxury due to the nature of their operations, products and services. Whole industries came to a standstill. With this stagnation, COVID-19 introduced further chaos into our lives, including an economic downturn the likes of which many of us have not seen in our lifetimes. While we admire the ingenuity of tech heavyweights to weather the crises, we simultaneously watch aghast as seemingly indelible leaders in other industries wobble and even topple completely. Inevitably, a wave of retrenchments is sweeping the globe. South Africa, already battling a weak economy pre-coronavirus, is no exception. But how do you go through the retrenchment process and its mandatory consulting process during a national lockdown – when face-to-face meetings are not possible? Chapter 3 addresses this novel employment law question, among others.

As though an ongoing health care pandemic and the knock-on economic collapse were not enough to deal with in a single year, 2020 has dealt several other devastating blows including a mental health crisis which WHO has defined as a *"second pandemic"*. Relatively unchartered territory for many employers, assisting employees with mental illness is nuanced and difficult at the best of times but it is made doubly so when remote working has become the norm for many. Collaboration and in-person interaction remain fundamental to the human experience. COVID-19 has robbed us of much of that connection, with dire consequences to our well-being. Is an employee's absenteeism and failure to carry out instructions due to a bad work ethic or attitude, or is the individual suffering from debilitating depression? This is the type of enquiry companies need to begin grappling with, if they aren't doing so already. As confirmed by our LAC, employers have a duty to deal with depression sympathetically and to investigate it fully, considering alternatives short of dismissal. Nevertheless, as discussed in one of the cases below, the mere existence of depression as a contributing factor to an employee's conduct is not enough to conclude that depression was the reason for dismissal.

In what seems to be an ever-shifting world and workplace, our experts offer a much-needed constant: An in-depth knowledge of South Africa's employment law landscape - a dedication to leverage that expertise to the benefit of our clients. This case law booklet, in its 7th year of publication, is one of many ways our exceptional team demonstrates this steadfast commitment.

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National Practice Head: Employment

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SUPERVENING IMPOSSIBILITY OF PERFORMANCE/ RECIPROCITY/ *FORCE MAJEURE*

SUPERVENING IMPOSSIBILITY OF PERFORMANCE

DOES THE REVOCATION OF AN ACCESS PERMIT TO THE WORKPLACE LEAD TO SUPERVENING IMPOSSIBILITY OF PERFORMANCE?

Swissport SA (Pty) Ltd v Seanego and Others (JR664/15) [2017] ZALCJHB 371 (10 October 2017)

SUMMARY OF THE FACTS

The employer and Airports Company South Africa Limited (ACSA) concluded a service level agreement which entitled ACSA to restrict entry to their premises should the need arise. In 2014, ACSA blocked two employees from accessing its premises on suspicion that they were intoxicated. As a result of this, their access permits were revoked. The employees were issued with a notice to attend an enquiry to answer to the following allegation: "*Incapacity hearing in that you were drinking alcohol at work and when they wanted to test you for alcohol you ran out of the premises, your permits were confiscated by ACSA and you are unable to perform your duties*".

The two employees' services were terminated on the basis of "*supervening impossibility of performance*", in that their access permits had been revoked and they could no longer perform their duties. At the CCMA, the commissioner, although finding that the dismissal was substantively fair, found that the dismissal was procedurally unfair because the employer made little or no effort to place the employees in a post outside the airport, in one of its other operations where no access permit was required. The matter went on review to the LC.

SUMMARY OF THE FINDINGS OF THE COURT

The LC referred to the case of *SA Private Security Workers Union on behalf of Nomavila and Bosasa Operations (Pty) Ltd* where the Applicant was a security officer working at OR Tambo International Airport. In that case, the employee was alleged to have committed an act constituting misconduct and ACSA withdrew her access permit. After discussing various authorities on the issue of incapacity arising out of a supervening impossibility of performance, the Commissioner went on to state that he was satisfied that the matter involves incapacity through a permanent impossibility of performance, and that what needs to be satisfied is that the supervening factor must not be caused or created by either the employee or the employer.

The uncontested evidence clearly indicated that ACSA was entitled to revoke the permits of staff members in its absolute discretion. There was nothing to suggest that the revocation was *mala fide* or for an arbitrary reason. ACSA in its own right was under a legal duty to ensure that its own policies were strictly upheld. Therefore, the LC found that there was a supervening impossibility of performance and the two employees were dismissed for a fair reason, and in compliance with a fair procedure.

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SUPERVENING IMPOSSIBILITY OF PERFORMANCE/ RECIPROCITY/ *FORCE MAJEURE*

RECIPROCITY

IS AN EMPLOYER ENTITLED TO LAWFULLY DEDUCT A RETENTION BONUS FROM AN EMPLOYEE'S TERMINATION PAYMENTS WHEN AN EMPLOYEE BREACHES THEIR RECIPROCAL OBLIGATION IN TERMS OF THE RETENTION BONUS SCHEME?

Solidarity obo Scholtz v Gijima Holdings (Pty) Ltd [2019] 8 BLLR 774 (LAC)

SUMMARY OF THE FACTS

In 2012, the employee concluded an agreement with the respondent in terms of which he would be paid an annual "*retention bonus*" equal to 50% of his annual salary in September of each year. The reciprocal obligation being, however, that the employee agreed to remain in the respondent's employment for 12 months following receipt of the retention bonus. If the employee was in breach of the bonus payment condition he agreed in terms of the scheme, that the respondent may deduct the amount of the bonus payment.

The employee received his retention bonus in September 2014. The respondent cancelled the scheme after the payment was made and the employee resigned in October 2014 with effect from the end of November of that year. The employee claimed that the employer's cancellation of the scheme compromised the employer's right to claim repayment of the bonus. However, the respondent argued that by resigning, the employee was in breach of his reciprocal obligation in terms of the scheme to remain in the employ of the respondent for 12 months following the bonus payment.

The respondent therefore deducted the amount of the last bonus from the employee's termination payments on the basis that the employee resigned prior to the completion of 12 months post the bonus payment.

The LC held that the employer was entitled to deduct the retention bonus because it had complied with the terms of the scheme while the employee was in breach thereof. The court held further that the deduction was not in breach of the provisions of the BCEA because it had been made by agreement.

The matter was taken on appeal to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC held that the purpose of the retention scheme was to encourage employees to remain in service for the period covered by the bonus. The retention bonus agreement created reciprocal obligations: the employee was not entitled to claim counter-performance (payment of the bonus) unless he has performed by working for the full year after receipt of the bonus. Reciprocity requires

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Solidarity obo Scholtz v Gijima Holdings (Pty) Ltd [2019] 8 BLLR 774 (LAC)*...continued*

the exchange of agreed performances. The terms of the scheme clearly stipulated that employees were to repay the whole of the bonus if they terminated their services before the end of the subsequent year.

The employee had failed to produce evidence to prove his claim that the respondent had compromised its right to claim counter-performance because the respondent had cancelled the bonus scheme.

The LAC held that in failing to perform his reciprocal obligation in terms of the scheme, the employee had exhibited bad faith by accepting the retention bonus and resigning a month later. The employee was aware that by accepting the bonus, he was obliged to remain in the respondent's service for a further year. The deduction was lawful as the employee had agreed thereto.

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SUPERVENING IMPOSSIBILITY OF PERFORMANCE/ RECIPROCITY/ *FORCE MAJEURE*

SUPERVENING IMPOSSIBILITY OF PERFORMANCE

DOES AN EMPLOYEE'S LOSS OF SECURITY CLEARANCE TRIGGER IMPOSSIBILITY OF PERFORMANCE? DOES IMPOSSIBILITY OF PERFORMANCE CONSTITUTE INCAPACITY?

Solidarity and another v Armaments Corporation of South Africa (SOC) Ltd and others [2019] 3 BLLR 248 (LAC)

SUMMARY OF THE FACTS

After 30 years of service with Armaments Corporation of South Africa (SOC) Limited (Armscor), the South African National Defence Force (SANDF) declined to renew the employee's security clearance, without providing reasons for their decision to do so. Armscor then terminated the employee's services because his contract of employment and the Defence Act 42 of 2002 (Defence Act) required all employees to have the appropriate security clearance. At the CCMA, the Commissioner found that the employee had been unfairly dismissed and reinstated him with retrospective effect.

On review, Armscor conceded that the dismissal was procedurally unfair and argued that the employee's dismissal was substantively fair on the basis of incapacity. The LC agreed with Armscor and held that the dismissal of the employee was substantively fair. The court held further that the Commissioner had erred by ordering reinstatement, because to reinstate the employee would be contrary to the behests of a statute. The employee was awarded compensation of eight months' salary for procedural unfairness.

The matter went on appeal to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

The question before the LAC was whether the employee's loss of his security clearance triggered impossibility of performance and whether impossibility of performance constitutes incapacity. Armscor's defence was based on supervening impossibility of performance, which it argued is a form of incapacity. Section 37 of the Defence Act makes it a prerequisite for an employee of Armscor to be issued with an appropriate grade of security clearance in order to be retained in its employ. It is axiomatic that the employee's termination of service was based on supervening impossibility of performance. The failure to have the requisite security clearance constituted a form of incapacity in that the employee was unable to fulfil his contractual obligations.

The employee had appealed against the refusal to renew his security clearance, as he was entitled to do, however that process had never been completed. The LAC held that because the supervening impossibility is as a result of no fault of either party, Armscor's could not succeed in using supervening impossibility of performance as a defence. The court held that it was impossible to determine the substantive fairness of the dismissal

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Solidarity and another v Armaments Corporation of South Africa (SOC) Ltd and others [2019] 3 BLLR 248 (LAC)*...continued*

while the grounds for refusing the security clearance remained unknown because it could not be established whether the employee's incapacity was permanent. The LAC found that the dismissal was substantively unfair for lack of a substantive reason for the dismissal. Furthermore, it was found that Armscor acted in an inconsistent manner as it had retained some employees in its service without security clearances. Armscor was unable to prove the impossibility of performance and the court held that the dismissal was substantively and procedurally unfair. The court ordered that the employee be paid compensation equal to 12 months' salary. The court refused to order re-instatement as re-instatement would result in unlawful employment.

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01

SUPERVENING IMPOSSIBILITY OF PERFORMANCE/ RECIPROCITY/ *FORCE MAJEURE*

> In order to determine whether or not there was an unfair labour practice, the CCMA had to determine the conduct of the employer and whether that conduct was fair.

SUPERVENING IMPOSSIBILITY OF PERFORMANCE

IS SUSPENSION UNFAIR WHERE EMPLOYEES ARE PREVENTED FROM ATTENDING WORK DUE TO A SUPERVENING FACTOR?

National Union of Hotel Restaurant Catering Commercial Health & Allied Workers on behalf of Mashabane & another and Kit Kat Group (2018) 39 ILJ 1877 (CCMA)

SUMMARY OF THE FACTS

The Kit Kat Group employed cashiers who were arrested on charges of fraud. They were released on bail a week later, however, in terms of their bail conditions they were prohibited from directly or indirectly contacting all *"current employees and managers of Kit Kat in Silverton"*. This condition effectively prevented them from tendering their services to their employer until such time as the case against them was withdrawn. The case against them was later withdrawn on 24 August 2017.

The union referred a dispute to the CCMA on behalf of the employees in terms of section 186(2)(b) of the LRA averring that the period in which the employees were not at work (16 February 2017 to 24 August 2017) constituted an unfair suspension. The union sought an award compelling the employer to pay the employees their salaries for the said period where the employees were prohibited from tendering their services as a result of a condition of their bail.

At the arbitration the employees conceded that the employer had not suspended or dismissed them and that the magistrate imposed the bail conditions on them in the criminal case. They had not returned to work when the criminal charges were withdrawn. The employer submitted that it had merely abided by the bail conditions imposed by the Magistrates Court and had not called the employees to return to work as it feared being held in contempt of court.

SUMMARY OF THE FINDINGS OF THE COURT

The question before the CCMA was whether or not the period during which the applicants were barred from reporting for duty by the bail conditions imposed upon them by the Magistrates Court amounted to a suspension.

In order to determine whether or not there was an unfair labour practice, the CCMA had to determine the conduct of the employer and whether that conduct was fair. However, the commissioner found that there was no conduct on the part of the employer that led to the employees not being at work. The bail conditions imposed prevented the employees from being able to report for duty. This, the CCMA held, was the supervening factor which subsequently made performance in terms of their contracts of employment impossible. It was a factor that was no fault of the employer and therefore, the supervening factor did not amount to unfair suspension of the employees.

The decision to impose such bail conditions was not taken by the employer and the employees' absence from work was due to a supervening impossibility of performance arising from a decision of the Magistrates Court pursuant to criminal proceedings against the employees.

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MENTAL HEALTH IN THE WORKPLACE AND OPTIMAL WORKING ARRANGEMENTS

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MENTAL HEALTH IN THE WORKPLACE AND OPTIMAL WORKING ARRANGEMENTS

FLEXIBILITY IN THE WORKING ENVIRONMENT: A LITERATURE REVIEW

TYPE OF WORK

There is no *"one-size-fits all"* approach when it comes to work arrangements.[1] In the current environment, everyone working from home faces challenges, from caring for children to adjusting to virtual collaboration with co-workers. Some will be more productive whilst working from home, some less so. One constant in academic literature is that the type of work matters when it comes to whether telework arrangements are successful.[2]

People with complex jobs that can be performed independently generally fare better in remote working arrangements than those with less complex jobs that require extensive interaction with colleagues. It is important to remember that most jobs cannot be done at home.[3] Only approximately 18% of workers globally work in occupations and live in countries with the infrastructure that would allow them to effectively perform their work from home. There are important differences across regions of the world reflected in economic and occupational structures of countries. Other variables include environmental factors, such as access to broadband internet and likelihood of owning a personal computer, whether the housing situation allows working from home, or whether the person has the necessary social networks, such as having fixed clients, for other types of home-based work.[4] There are also regional variations that closely follow income variations. According to estimates, around 30% of North American and Western European workers are in occupations that allow home-based work as opposed to only 6% of Sub-Saharan African workers.[5]

Google and Facebook are two examples of major employers who have told employees to plan on *"teleworking"* through 2020.[6] Twitter has told employees if they can telework and want to keep teleworking, they can *"do so forever."*[7] Long-term work from home arrangements will likely expand beyond the tech world and beyond the pandemic. Executives at approximately 1,750 firms from a variety of industries across the US expect 10% of full-time employees to telework every workday after the pandemic ends.[8] The executives expect 30% of their workforce to telework at least one day a week after the pandemic, triple the previous rate of 10%.

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1 *"Telework paradoxes and practices: the importance of the nature of work" Sebastian K. Boell, Dubravka Cecez-Kecmanovic and John Campbell. New Technology, Work and Employment (2016) Volume 31, Issue 2.*

2 *"Telework paradoxes and practices: the importance of the nature of work" Sebastian K. Boell, Dubravka Cecez-Kecmanovic and John Campbell. New Technology, Work and Employment (2016) Volume 31, Issue 2.*

3 *International Labour Organisation Policy Brief: Working from Home: Estimating the worldwide potential (April 2020).*

4 *International Labour Organisation Policy Brief: Working from Home: Estimating the worldwide potential (April 2020).*

5 *International Labour Organisation Policy Brief: Working from Home: Estimating the worldwide potential (April 2020).*

6 *"Big Tech was first to send workers home. Now it's in no rush to bring them back" Rachel Lerman and Jay Greene. Washington Post (18 May 2020).*

7 *"Keeping our employees and partners safe during #coronavirus" Jennifer Christie. (https://blog.twitter.com/en_us/topics/company/2020/keeping-our-employees-and-partners-safe-during-coronavirus.html, 12 May 2020.)*

8 *"Firms Expect Working from Home to Triple" Federal Reserve Bank of Atlanta. 28 May 2020.*

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> In organisations where after-hours communications, early meetings and weekend working are the norm, employees preferring segmentation will have difficulty establishing and maintaining boundaries between work and personal time.

FLEXIBILITY IN THE WORKING ENVIRONMENT: A LITERATURE REVIEW *...continued*

WORK–LIFE BALANCE

When work and home activities take place in the same physical space, physical, temporal and psychological boundaries between work and home can become blurred.[9] For example, after their workday was done, it was found that full-time teleworkers with dedicated office space at home had an easier time devoting their full attention to non-work responsibilities, compared with those without a home office.[10]

Teleworkers accountable for other responsibilities, like walking a dog or caring for children after school, had stronger work-home boundaries than those only accountable to themselves. Certain routine behaviours, like shutting down a computer at the end of the day, or turning off the ringer on a work phone, also helped establish boundaries. Those with children or spouses at home during telework time were most successful when they communicated clearly and consistently that they needed their workday to be free of household noise and interruptions.[11] In organisations where after-hours communications, early meetings and weekend working are the norm, employees preferring segmentation will have difficulty establishing and maintaining boundaries between work and personal time.[12]

Findings indicate a work from home divide between men and women. In a study by Eddleston and Mulki, about 62% of the interviewees were women.[13] Some women experienced benefits associated with working from home, ie: spending time with their families while also being able to step away for urgent deadlines. But more than half of women working remotely reported their spouse didn't respect boundaries between work and family. Eddleston and Mulki suggest that organisations should educate remote workers on the need to establish boundaries between work and family, and train these workers to resist temptations to perform work activities during family time.[14]

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9 *Strategies for Successful Telework: How Effective Employees Manage Work/Home Boundaries" Kelly Basile and T. Alexandra Beauregard. Strategic HR Review (June 2016).*

10 *Strategies for Successful Telework: How Effective Employees Manage Work/Home Boundaries" Kelly Basile and T. Alexandra Beauregard. Strategic HR Review (June 2016).*

11 *Strategies for Successful Telework: How Effective Employees Manage Work/Home Boundaries" Kelly Basile and T. Alexandra Beauregard. Strategic HR Review (June 2016).*

12 *Strategies for Successful Telework: How Effective Employees Manage Work/Home Boundaries" Kelly Basile and T. Alexandra Beauregard. Strategic HR Review (June 2016).*

13 *"Toward Understanding Remote Workers' Management of Work-Family Boundaries: The Complexity of Workplace Embeddedness" Kimberly Eddleston and Jay Mulki. Group and Organization Management (December 2015).*

14 *"Toward Understanding Remote Workers' Management of Work-Family Boundaries: The Complexity of Workplace Embeddedness" Kimberly Eddleston and Jay Mulki. Group and Organization Management (December 2015).*

FLEXIBILITY IN THE WORKING ENVIRONMENT: A LITERATURE REVIEW *...continued*

PRODUCTIVITY

The Bureau of Labor Statistics in the US defines labour productivity as *"a measure of economic performance that compares the amount of goods and services produced (output) with the number of hours worked to produce those goods and services"*.[15] For those who still have jobs and are working from home, productivity can depend on their personal motivation, type of work and home environment. Research indicates people who work from home can, overall, be as productive as employees who work at an office. Researchers found that call centre workers at a large Chinese travel agency who were randomly assigned to work from home four days a week for nine months increased performance by 13% compared with those who stayed in the office.[16] Attrition also halved among teleworkers. The authors noted that the job of a call centre employee is particularly suitable for telecommuting as it requires neither teamwork nor in-person face time.

Ravi Gajendran, David Harrison and Kelly Delaney-Klinger surveyed 323 employees from various industries, including technology, banking, health care and manufacturing to explore the impact of working remotely.[17] About 37% of the sample had a telework arrangement, with 80% of teleworkers working from home. The research found an association between teleworking and higher job performance ratings from supervisors. They attribute higher performance among teleworkers with their belief that they have more autonomy than regular commuters. Perceived autonomy is likely to be influenced by telecommuting intensity. The more extensive telecommuting is, the higher the discretion employees perceive over where and when they work.[18]

"*Work-from-anywhere*" arrangements could be even better for productivity than working from home, depending on the type of work.[19] Work-from-home arrangements often

> The research found an association between teleworking and higher job performance ratings from supervisors.

[15] *"Labour Productivity and Costs" US Bureau of Labor Statistics (https://www.bls.gov/lpc/).*

[16] *DOES WORKING FROM HOME WORK? EVIDENCE FROM A CHINESE EXPERIMENT* Nicholas Bloom, James Liang, John Roberts and Zhichun Jenny Ying. Quarterly Journal of Economics (November 2014).*

[17] *"Are Telecommuters Remotely Good Citizens?" Ravi Gajendran, David Harrison and Kelly Delaney-Klinger. Personnel Psychology (May 2014).*

[18] *"Are Telecommuters Remotely Good Citizens?" Ravi Gajendran, David Harrison and Kelly Delaney-Klinger. Personnel Psychology (May 2014).*

[19] *"Work-From-Anywhere: The Productivity Effects of Geographic Flexibility" Prithwiraj Choudhury, Cirrus Foroughi and Barbara Larson. Harvard Business School working paper (December 2019).*

FLEXIBILITY IN THE WORKING ENVIRONMENT: A LITERATURE REVIEW *...continued*

assume employees live close enough to go to the office a few days a week, or as needed, according to the authors. Work-from-anywhere arrangements let employees work remotely and physically far from their organisation's offices. Research focusing on a natural experiment at the U.S. Patent and Trademark Office, where in 2012 management and union representatives launched a work-from-anywhere policy, found that patent examiners working from anywhere were 4.4% more productive than examiners working from home.[20] Work-from-anywhere examiners relocate to lower cost-of-living locations and report a correlation between relocating to a below-median cost-of-living location and productivity. Two limitations were noted: the study focused on a single organisation, and patent examiners, by and large, don't depend on co-worker interaction to do their jobs.

Flexible work arrangements could also allow some older workers to work longer, if they want to. The willingness to work is stronger when jobs offer a flexible choice of hours worked.[21]

CAREER GROWTH AND COLLABORATION

Some research suggests workers who want flexibility, like a telework option, may face stigma in the workplace.[22] But the current widespread telework situation is unprecedented.[23] If work life ends up looking similar to pre-COVID times, with some number of workers still regularly going to an office and others going in sometimes or not at all, promotions may hinge on what's normal for each employee's work unit.[24] People who telework extensively receive more promotions when teleworking is part of their work unit's culture and when they did extra work outside regular hours.[25] Extensive teleworkers who did extra work and had the opportunity for face-to-face interactions with their supervisors also see higher salary growth. While work context factors examined in the study tended to decrease career penalties for telecommuters including those who telecommuted extensively, the greatest career benefits were attained by those who only occasionally telecommuted.

The willingness to work is stronger when jobs offer a flexible choice of hours worked.

[20] *Work-From-Anywhere: The Productivity Effects of Geographic Flexibility" Prithwiraj Choudhury, Cirrus Foroughi and Barbara Larson. Harvard Business School working paper (December 2019).*

[21] *"Older Americans Would Work Longer if Jobs Were Flexible" John Ameriks, Joseph Briggs, Andrew Caplin, Minjoon Lee, Matthew D. Shapiro, and Christopher Tonetti. American Economic Journal: Macroeconomics (January 2020).*

[22] *"Pluralistic Ignorance and the Flexibility Bias: Understanding and Mitigating Flextime and Flexplace Bias at Work" Christin L. Munsch, Cecilia L. Ridgeway, Joan C. Williams. Work and Occupations (February 2014).*

[23] *"The productivity pitfalls of working from home in the age of COVID-19" Nicholas Bloom. Stanford News (30 March 2020).*

[24] *Is There a Price Telecommuters Pay?" Timothy Golden and Kimberly Eddleston. Journal of Vocational Behavior (February 2020).*

[25] *Is There a Price Telecommuters Pay?" Timothy Golden and Kimberly Eddleston. Journal of Vocational Behavior (February 2020).*

02

MENTAL HEALTH IN THE WORKPLACE AND OPTIMAL WORKING ARRANGEMENTS

Taking a break from the office may be a good way to recharge, but collaboration remains fundamental to the human experience.

FLEXIBILITY IN THE WORKING ENVIRONMENT: A LITERATURE REVIEW *...continued*

As mentioned, a constant throughout the literature is that whether telework arrangements are successful or not depends on the type of work. One study, published in February 2018 in the Journal of Business and Psychology, surveyed 273 telecommuters and supervisors from a company with a voluntary telework program.[26] The authors found teleworkers with complex jobs had better job performance than telecommuters with less complex jobs, and their performance increased with higher levels of telecommuting.

There is also the matter of individual personalities. An outgoing person, for example, might miss office camaraderie, while an introvert might relish less in-person interaction.[27] Based on survey results from 258 workers from a variety of industries and regions, the authors found workers were less exhausted when they had quality in-person interactions with co-workers.[28]"

"*Quality*" is a subjective measure that reflects an individual's appraisal of the adequacy of support or satisfaction with interpersonal interactions.[29] It has been found that exhaustion increased as interactions became more frequent and telework acted as a reprieve from this office exhaustion.[30] Participants represented the demographic characteristics of people with jobs conducive to telework and uniformly worked at small, medium and large companies. Taking a break from the office may be a good way to recharge, but collaboration remains fundamental to the human experience. The tendency for people to work together — to establish and run businesses, to conduct research projects, and to create and share music — is a foundation of human culture.[31] Increasingly, it appears that organisations should aim to position the office as a resource, not a requirement, to get the job done.[32]

Thabang Rapuleng, Tamsanqa Mila and Vaughn Rajah

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26 *"Unpacking the Role of a Telecommuter's Job in Their Performance: Examining Job Complexity, Problem Solving, Interdependence, and Social Support" Timothy D. Golden & Ravi S. Gajendran. Journal of Business and Psychology (February 2018).*

27 *"Getting Away From Them All: Managing Exhaustion from Social Interaction with Telework" Jaime Windeler, Katherine Chudoba and Rui Sundrup. Journal of Organizational Behavior (February 2017).*

28 *"Getting Away From Them All: Managing Exhaustion from Social Interaction with Telework" Jaime Windeler, Katherine Chudoba and Rui Sundrup. Journal of Organizational Behavior (February 2017).*

29 *"Getting Away From Them All: Managing Exhaustion from Social Interaction with Telework" Jaime Windeler, Katherine Chudoba and Rui Sundrup. Journal of Organizational Behavior (February 2017).*

30 *"Getting Away From Them All: Managing Exhaustion from Social Interaction with Telework" Jaime Windeler, Katherine Chudoba and Rui Sundrup. Journal of Organizational Behavior (February 2017).*

31 *"Cues of working together fuel intrinsic motivation" Priyanka Carr and Gregory Walton. Journal of Experimental Social Psychology (July 2014).*

32 *"The Office of the Future – a Hyrbid Solution?" Kriel & Co. (8 July 2020).*

WHETHER THE DISMISSAL OF THE APPLICANT (JANSEN) ON THE GROUNDS OF MISCONDUCT, WHERE HE SUFFERED FROM A MEDICAL CONDITION WHICH HAD BEEN MADE KNOWN TO THE RESPONDENT (LEGAL AID), CONSTITUTED AN AUTOMATICALLY UNFAIR DISMISSAL AND UNFAIR DISCRIMINATION?

Ockert Jansen v Legal Aid South Africa (2018) 39 ILJ 2024 (LC)

The court accordingly ordered that Jansen be reinstated with full retrospective effect and that Legal Aid be ordered to pay Jansen a total of six months compensation.

SUMMARY OF THE FACTS

Jansen was charged and dismissed for absenteeism, gross insolence and refusing to obey a lawful and reasonable instruction. Jansen did not dispute the allegations of absenteeism, insolence, and insubordination. He challenged his dismissal before the LC, claiming an automatically unfair dismissal in terms of section 187(1)(f) of the LRA, contending in his view that the true reason for his dismissal was his manic depression – a form of mental illness, classified as a disability.

SUMMARY OF THE FINDINGS OF THE COURT

The employer, Legal Aid contended that Jansen had failed to make out a *prima facie* case and decided not to present any argument before the LC. Rather, it argued that absolution from the instance should be granted. As a result, all the evidence presented by Jansen before the LC was uncontested.

The LC accepted that Legal Aid was fully aware of the mental condition Jansen was suffering from and that he had been undergoing medical treatment for this condition, therefore, there was a positive duty on Legal Aid to reasonably accommodate him. The court further held that in these circumstances, instead of Legal Aid dismissing Jansen on the grounds of misconduct, they had a duty to institute an incapacity enquiry.

The court noted that Jansen's condition could be very destructive if left unchecked and untreated, and further held that Legal Aid's decision to ignore Jansen's condition when deciding to dismiss him had the potential to impair his human dignity when viewed objectively. Further, this fell within the grounds of an automatically unfair dismissal on the basis of unfair discrimination on the ground of disability.

The court noted further that Legal Aid would have not dismissed Jansen had he not suffered from this condition and his conduct, which was the basis for his dismissal, was inextricably linked to his mental condition, and not the absenteeism; insolence; or insubordination complained of. Accordingly, Jansen was unfairly discriminated against. The court accordingly ordered that Jansen be reinstated with full retrospective effect and that Legal Aid be ordered to pay Jansen a total of six months' compensation. The judgment was taken on appeal to the LAC (as discussed below).

Thabang Rapuleng, Tamsanqa Mila and Rethabile Mochela

02

MENTAL HEALTH IN THE WORKPLACE AND OPTIMAL WORKING ARRANGEMENTS

> The appeal was therefore upheld, and this case will be further prosecuted at the Constitutional Court.

FLEXIBILITY IN THE WORKING CONDITIONS AND THE EFFECTS OF COVID-19 ON MENTAL HEALTH

WHETHER THE DECISION OF THE LABOUR COURT CAN BE OVERTURNED ON APPEAL?

Legal Aid South Africa v Jansen (CA3/2019) [2020] ZALAC 37 (21 July 2020)

SUMMARY OF THE FACTS

The matter involved an appeal of the decision of the LC in terms of which the court held that Jansen's dismissal was automatically unfair and that he had been unfairly discriminated against on the basis of his disability, namely his depression.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC accepted that depression is a prevalent illness, employers have a duty to deal with it sympathetically and should investigate it fully and consider reasonable accommodation and alternatives short of dismissal. In addition, where depression may account in part for an employee's misconduct, depending on the circumstances and the nature of the misconduct, dismissal may not be appropriate.

The LAC held that in order for an employee like Jansen to succeed in an automatically unfair dismissal claim based on depression, the enquiry was not confined to whether the employee was depressed and if his depression impacted on his cognitive and conative capacity or diminished his blameworthiness, instead it was directed at a narrower determination of whether the reason for his dismissal was his depression and if he was subjected to differential treatment on that basis. Furthermore, the employee bore the evidentiary burden to establish a credible possibility (approaching a probability) that the reason for dismissal was differential treatment on account of his depression and not because he misconducted himself. The LAC further held that Legal Aid had a legitimate basis for imposing discipline notwithstanding Jansen's depression, as a result, the proximate reason for disciplining Jansen was solely due to his misconduct and not the fact that he was depressed as he was relatively capable and knowingly conducted himself in contravention of the rules of the workplace, and therefore the imposition of disciplinary measures taken was justified. The LAC concluded that the mere fact that Jansen's depression was a contributing factual cause was not sufficient ground upon which to find that there was an adequate causal link between his depression and his dismissal, and to conclude that depression was the reason for it. Accordingly, there was no proper claim of substantive unfairness and the LC had erred in finding unfair discrimination and that the dismissal was automatically unfair. The appeal was upheld. The matter is set to go on appeal to the CC.

Thabang Rapuleng, Tamsanqa Mila and Rethabile Mochela

03

RETRENCHMENTS

CLIFFE DEKKER HOFMEYR

03

RETRENCHMENTS

The court found that in the absence of the plan, the issuing of the section 189(3) notices commencing consultations was premature and procedurally unfair. It directed that the notices be withdrawn.

RETRENCHMENTS

YOUR RETRENCHMENT IS NOT A MATTER OF TIME, IT'S A MATTER OF INTERPRETATION; MAY A BUSINESS RESCUE PRACTITIONER COMMENCE RETRENCHMENT PROCEEDINGS UNDER SECTION 189 OF THE LRA WITHOUT A BUSINESS RESCUE PLAN?

South African Airways (SOC) Limited (In Business Rescue) and Others v National Union of Metalworkers of South Africa obo Members and Others (JA32/2020) [2020] ZALAC 34 (9 July 2020)

SUMMARY OF THE FACTS

On 11 November 2019, South African Airways SOC Limited (SAA) proposed a reorganisation of its business. This reorganisation anticipated the retrenchments of 944 (out of 4,700) employees. A notice in terms of section 189(3) of the LRA was issued, announcing the planned retrenchment. The consultation process was deferred to January 2020. On 5 December 2019, SAA was placed under voluntary business rescue. The consultation process was officially aborted, as a result of the business rescue practitioners (BRPs) being appointed.

In early February 2020, the BRPs took steps to alter business practices such as closing routes and reducing flights. This was interpreted by NUMSA and other unions to be the commencement of a retrenchment process. They launched an urgent application in the LC to interdict the reorganisation on the basis that no section 189(3) letters had been issued. That application was dismissed on the basis that the BRPs had not yet contemplated retrenchments at that stage and the obligations to issue notices had not yet arisen.

On 9 March 2020, the BRPs issued section 189A notices, inviting employees and unions to consult over the proposed retrenchments. NUMSA refused to participate in the process. NUMSA and SACCA then launched an application in terms of section 189A(13) of the LRA seeking a declarator from the LC that the issuing of the notices was unlawful, alternatively unfair, since the BRPs had not presented the employees with a business rescue plan.

The LC found that there was complete protection against employees' dismissal during business rescue proceedings. It considered section 136(1)(b) of the Companies Act and found that reference in the section to *"contemplated retrenchments in a business rescue plan"* established a precondition precedent for the commencement of any retrenchment process during business rescue proceedings. Any need to retrench had to be rooted in the business rescue plan. The court found that in the absence of the plan, the issuing of the section 189(3) notices commencing consultations was premature and procedurally unfair. It directed that the notices be withdrawn. The court granted leave to appeal its decision.

03

RETRENCHMENTS

> The LAC found that no cogent criticism could be sustained on the LC's conclusion that the issuing of the section 189(3) notice by the BRPs, in the absence of a business rescue plan was premature, unfair and had to be withdrawn.

RETRENCHMENTS

YOUR RETRENCHMENT IS NOT A MATTER OF TIME, IT'S A MATTER OF INTERPRETATION; MAY A BUSINESS RESCUE PRACTITIONER COMMENCE RETRENCHMENT PROCEEDINGS UNDER SECTION 189 OF THE LRA WITHOUT A BUSINESS RESCUE PLAN?

South African Airways (SOC) Limited (In Business Rescue) and Others v National Union of Metalworkers of South Africa obo Members and Others (JA32/2020) [2020] ZALAC 34 (9 July 2020)*...continued*

SUMMARY OF THE FINDINGS OF THE COURT

The LAC considered a number of preliminary jurisdictional points before addressing the main appeal. It addressed the potential mootness of the application as the BRP had published the business rescue plan on 16 June 2020. It held that, although the outcome of the judgment may have no practical effect, it raised novel legal issues which were of public importance. In addition, there were three divergent decisions in the LC on the interpretation of section 136 of the Companies Act. It was therefore in the interests of justice to resolve the legal question. The LAC further dismissed SAA's contention that section 133(1) of the Companies Act prohibited any legal proceedings against a company in business rescue without the written consent of the BRPs. The LAC found that this point should have been raised in the LC and that the BRPs had participated fully in the proceedings in the LC without raising the point. To raise it on appeal was unfair and prejudicial to the other parties to the dispute. The LAC also dismissed SAA's contention that an application in terms of section 189A(13) could only be brought within 30 days after notice of termination of employment had been given, which had not yet occurred. The LAC found that an application in terms of section 189A(13) was triggered as soon as an employer does not comply with a fair procedure. A consulting party could approach the court to compel the employer to comply with a fair procedure and correct any potential irregularity so that the integrity of the consultation process could be restored.

In dealing with the main issue on appeal, the interpretation of section 136(1)(b) of the Companies Act, the LAC found that the primary aim of a business rescue procedure is to rescue the whole company. This included the preservation of jobs. The preservation of jobs was one of the most valuable outcomes of rescuing a company. Section 150(5) of the Companies Act required that a business rescue plan be published within 25 days of the appointment of the BRPs, unless an extension had been granted. It was clear that the plan had to be published within a short period and that possible retrenchments would be contained in the plan as opposed to a piecemeal reconstruction of the company which would allow for a decision on retrenchments before the plan was published. The LAC found that no cogent criticism could be sustained on the LC's conclusion that the issuing of the section 189(3) notice by the BRPs, in the absence of a business rescue plan was premature, unfair and had to be withdrawn. The appeal was dismissed.

The LAC also dismissed the cross-appeal brought by the unions that the BRPs were prohibited from offering voluntary severance packages to employees. The LAC, as did the LC, found that there was no reason in law why the BRPs could not unilaterally offer voluntary severance packages as a measure to avoid dismissals.

Jose Jorge

RETRENCHMENTS

IS REINSTATEMENT ALWAYS RETROSPECTIVE?

South African Commercial, Catering and Allied Workers Union and Others v Massmart Holdings Limited 111/CAC/Jun11

SUMMARY OF THE FACTS

In 2009 and 2010 Massmart retrenched 503 employees due to operational requirements. On 12 March 2012, the Competition Appeal Court (CAC) approved the merger between Wal-Mart Stores Inc and Massmart, subject to certain conditions, including that the merged entity reinstate the 503 employees that were retrenched and take into account their years of service.

Massmart, following the CAC order, reinstated the 503 employees without back pay. SACCAWU contended that although the order did not expressly make provision for back pay that this was implicit in the order that the reinstatement was retrospective and sought an order directing Massmart to make payment of the back pay.

The controversy about whether the reinstatement included back pay spilled over into the Competition Commission which expressed the view that the reinstatement order did not include back pay. Eventually in 2019, the Competition Commission issued a letter confirming that it was satisfied that the merged entity had complied with the conditions imposed by the CAC order.

SUMMARY OF THE FINDINGS OF THE COURT

The issue before the CAC was whether the court's reinstatement order was retrospective in effect.

Massmart contended that both in terms of the ordinary meaning of the word reinstate and as a *"term of art"* in labour law the words reinstate or reinstatement carried no automatic retrospective connotation. In the absence of any ambiguity it argued that the CAC did not have the power to entertain the dispute as it was *functus officio*.

The CAC held that the same principles applicable to the interpretation of documents, also applied to the construction of a court's judgments or orders. In other words, the court's intention must be ascertained primarily from the language of the judgment according to the usual principles of interpretation. A sensible meaning was to be preferred rather than a meaning that leads to insensible or *"unbusinesslike"* results or a result that undermines the apparent purpose of the order.

SACCAWU argued that the reinstatement meant the restoration of the status quo ante and in the case of a dismissed employee this translated into the restoration of the original contract of employment as if the dismissal had not happened. SACCAWU argued that this interpretation applied equally to an order of the CAC.

The issue before the CAC was whether the court's reinstatement order was retrospective in effect.

RETRENCHMENTS

IS REINSTATEMENT ALWAYS RETROSPECTIVE?

South African Commercial, Catering and Allied Workers Union and Others v Massmart Holdings Limited 111/CAC/Jun11

...continued

Massmart contended that the matter did not involve an unfair, unlawful or invalid dismissal. Instead it involved an order of reinstatement as a condition to a merger in the public interest. Here the ordinary meaning of the word reinstatement had to apply.

The CAC considered that section 193(1)(a) of the LRA allows an arbitrator or the LC to order the employer to reinstate the employee from a date not earlier than the date of dismissal. There was a discretion to be exercised in the period of retrospectivity and an employee's entitlement to backpay and benefits may be limited. Consequently, the retrospectivity of the order was not automatic. The CAC agreed with the CC's finding in *Equity Aviation v CCMA* 2009 (1) (SA) 390 (CC), that the ordinary meaning of "*reinstatement*" is that the employee resumes their services from the date of the order of reinstatement on the same contractual terms that applied when the employee's services were terminated. In contrast, the remedy of reemployment which allows for different terms and conditions of employment.

The CAC agreed with Massmart that its order was made in the context of imposing an employment related condition for merger approval and that it was not sitting as a court applying the LRA with a view to determine whether a LRA remedy should be granted. There was no evidence that the retrenchments were attacked as being unlawful or unfair.

The CAC held that the order permitted only one interpretation: namely, resumption of service with no implication of retrospectivity.

Jose Jorge

The CAC considered that section 193(1)(a) of the LRA allows an arbitrator or the LC to order the employer to reinstate the employee from a date not earlier than the date of dismissal.

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RETRENCHMENTS

> After the facilitation process had commenced the President announced the State of Disaster and the level 5 lockdown.

RETRENCHMENTS

THE PERILS OF REFUSING TO ADAPT TO TECHNOLOGICAL CHANGES: IS VIDEO CONFERENCING AN APPROPRIATE MEANS TO CONSULT IN A RETRENCHMENT PROCESS DURING THE LOCKDOWN PERIOD?

Food and Allied Workers Union (FAWU) v South African Breweries [2020] JOL 47365 (LC)

SUMMARY OF THE FACTS

In early January 2020 South African Breweries Limited (SAB) commenced a restructuring process. Because of the large numbers of potentially affected employees, section 189A of the LRA applied. SAB opted for CCMA facilitation in the consultation process. The parties agreed to a facilitation timetable. After the facilitation process had commenced the President announced the State of Disaster and the level 5 lockdown.

In light of the lockdown, physical face to face consultations were not possible. There were two options open to the consulting parties: conduct the remaining consultations by video conferencing or postpone the process. The facilitator proposed that the remaining consultations be held via the popular video conferencing application Zoom. The union's opposition to this proposal was so vehement that the facilitator recused himself and another facilitator was appointed.

In light of the union's refusal to participate in the consultation process, if was to be done by video conferencing, SAB continued with the process and began to populate its new structure. Notices of termination of employment were issued to affected employees.

This led to the union bringing an urgent application to the LC to compel the company to comply with a fair procedure in the consultation process and interdicting it from, amongst other things, proceeding with the consultation process without the physical attendance of the union in the facilitated process.

Ironically, the union agreed to having the urgent application heard by means of Zoom, the very application they were so vehemently opposed to. The union complained that the Zoom application was inefficient and unreliable and that it could not replace physical consultation.

SUMMARY OF THE FINDINGS OF THE COURT

The court found that section 189 of the LRA did not prescribe the form that consultation must assume. In fact, section 189(6)(b) of the LRA suggested that the process could be conducted by correspondence.

The court found that the union's insistence on physical consultations was self-serving and ignorant of the bigger issue of health and safety. It found that with the new normal in the lockdown period, video conferencing was an appropriate form in which meetings could take place. In response to the union's criticism about connectivity issues the court held that where technology was used,

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RETRENCHMENTS

Consultation by video conferencing accorded with the new normal and was actually fair.

RETRENCHMENTS

THE PERILS OF REFUSING TO ADAPT TO TECHNOLOGICAL CHANGES: IS VIDEO CONFERENCING AN APPROPRIATE MEANS TO CONSULT IN A RETRENCHMENT PROCESS DURING THE LOCKDOWN PERIOD?

Food and Allied Workers Union (FAWU) v South African Breweries [2020] JOL 47365 (LC)*...continued*

teething problems were to be expected. This however did not relegate the technology to obsoleteness or make its use unfair. In these circumstances video conferencing was a necessary tool to ensure that restrictions like social distancing as a measure to avoid the spread of the virus was observed. Consultation by video conferencing accorded with the new normal and was actually fair.

Consultations provide an opportunity for an exchange of views and the establishment of a dialogue. Meaningful consultation entails early stage consultation, providing adequate information, time to respond and genuinely considering the response.

On the issue of the incomplete consultation process the court found that the union had unreasonably refused to participate in the process because of the use of the Zoom application. It was not the fault of the company that the union chose to abandon the process.

The application was dismissed.

This judgment shows us how the COVID-19 pandemic has accelerated the fourth industrial revolution. It illustrates further that parties involved in labour relations have to adapt to the new normal, whether it be the embrace of technology or other new ways of working. They cannot cling indefinitely to the old way of work.

Jose Jorge

03

RETRENCHMENTS

RETRENCHMENTS

SKINNING THE VSP GOAT: WHEN DOES AN EMPLOYER CONSULT OVER VOLUNTARY SEVERANCE PACKAGES?

SACU and Another v Telkom SA SOC Ltd (J203/2020) [2020] ZALCJHB 56 (5 March 2020)

SUMMARY OF THE FACTS

On 15 January 2020, Telkom SA SOC Limited (Telkom) gave notice of possible retrenchments to the unions in its workplace. The retrenchments would potentially affect 3,000 of Telkom's 9,500 employees.

As part of the consultation process, and as an alternative to retrenchment, Telkom proposed voluntary severance packages (VSP's) and early retirement packages. SACU and CWU (the Alliance) representing the majority of the affected employees took issue with Telkom's offer of the VSP's. They contended, amongst other things, that section 189(3) of the LRA determined the order for issues of consultation. Severance pay, under which the VSPs should fall, was listed after issues were discussed such as the rationale, alternatives and selection criteria. They maintained that VSPs should only be dealt with at that stage. The argument being that employees would not know whether they could be accommodated in the new structure which made it difficult to know whether to apply for a VSP or not. As the Alliance spokespersons put it the issue of the VSPs was something that should come at the end of the process, Telkom's raising VSPs at the beginning of the process was akin to first skinning a goat and then slaughtering it, rather than the other way around.

Telkom stood by its position that the consultations about the VSP could take place in parallel with discussions about the rationale for the retrenchments. Telkom's view was that the purpose of offering these VSP's was to minimize or avoid retrenchments completely. Telkom opened applications for VSPs, but kept them open until the consultations around the new company structure had been concluded. By the deadline for applications on 21 February 2020, 1,595 employees had applied for VSPs.

The Alliance declared a deadlock and referred a dispute to the LC in terms of section 189A(13) of the LRA seeking an order compelling Telkom to comply with a fair procedure.

SUMMARY OF THE FINDINGS OF THE COURT

In evaluating the extent of its power to intervene in terms of section 189A(13) of the LRA, the court considered various other judgments, all of which emphasised the limited scope of the power of the court to intervene in terms of section 189A(13) of the LRA, as well as the importance of consulting parties to not abuse the section to prevent or delay retrenchments.

Telkom stood by its position that the consultations about the VSP could take place in parallel with discussions about the rationale for the retrenchments.

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RETRENCHMENTS

RETRENCHMENTS

SKINNING THE VSP GOAT: WHEN DOES AN EMPLOYER CONSULT OVER VOLUNTARY SEVERANCE PACKAGES?

SACU and Another v Telkom SA SOC Ltd (J203/2020) [2020] ZALCJHB 56 (5 March 2020)*...continued*

The court referred with approval to *AMCU v Sibanye Gold Ltd* (2019) 8 BLLR 802 (LC) where it was held that the court's intervention in terms of section 189A(13) of the LRA was limited to instance of a refusal or failure by the employer to comply with a fair procedure. The section extended to the court a real time supervisory role over the process with powers to intervene if and when necessary and to craft a remedy to address procedural shortcomings. The section did not allow the consulting parties to use the LC to micromanage the consultation process. The court's intervention was limited to a substantial failure or refusal to comply with the relevant statutory requirements.

The court dismissed the Alliance's contention that section 189(3) of the LRAset a rigid sequence for issues for consultation and that successive item should not be discussed until consensus or impasse was reached on the preceding item. It found that VSPs were one of the ways to reduce the number of forced retrenchments which may eventuate. There was no basis upon which the Alliance should refuse to discuss the VSPs unless its proposal on the timing of the offers was accepted. The failure to agree on an issue did not mean that the process had to grind to a halt.

The court found that the Alliance when it set preconditions for consulting over VSPs erected a stumbling block to the consultations proceeding. The court accordingly dismissed the Alliance's application.

Jose Jorge

The court found that the Alliance when it set preconditions for consulting over VSPs erected a stumbling block to the consultations proceeding.

RETRENCHMENTS

INVALID DISMISSALS REVISITED: DOES NON-COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF A RETRENCHMENT PROCESS RENDER THE DISMISSALS INVALID?

The Cold Chain Pty Ltd v FAWU (JA134/18) [2020] ZALAC 16

> The LC agreed with FAWU and held that the notices of termination were invalid and unlawful.

SUMMARY OF THE FACTS

On 13 December 2013 notices of termination of employment were issued to the relevant members of FAWU, following a consultation process in terms of section 189A of the LRA. The employees were informed that their employment would terminate on 14 January 2014. On 10 January 2014 FAWU launched an application in terms of sections 189A (13) and (14) for an order declaring the notices of retrenchment to be of no force and effect. FAWU relied on the fact that the company had failed to trigger, and therefore comply, with the time periods set out in section 64(1)(a) of the LRA. Where there is no facilitation, a referral to the CCMA or a bargaining council, in terms of section 64 of the LRA, is required to trigger the second 30-day period before notices of termination can be given. FAWU argued that the notices were in breach of the LRA and therefore had to be considered legally invalid. The LC agreed with FAWU and held that the notices of termination were invalid and unlawful. The court ordered the reinstatement of the dismissed employees until such time as the company had complied with the procedures as set out in section 189A of the LRA. The court in doing so relied on the LAC decision in *De Beers Group Services (Pty) Ltd v NUM* (2011) 4 BLLR 319 (LAC).

The LAC after the decision in the De Beers took a different approach to "*invalid*" dismissals in terms of the LRA in a further decision of *Edcon v Steenkamp and others* 2013 (4) SA 247 (LAC) (Edcon, which was later confirmed by the CC in *Steenkamp v Edcon* 2016 (3) SA 251 (CC). The company seized this opportunity to have the judgment against it reversed on appeal.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC in its judgment analysed the Edcon decision. The CC in Edcon agreed that an employer was precluded from giving an employee notice during the period of 30 days from the date of issuing a section 189(3) notice, until the period set out in section 64(1)(a) of the LRA had elapsed (the second 30 day period). In Edcon the employer had not complied with this provision. The effect of this breach lay at the heart of the dispute before the CC.

Zondo J writing for the majority considered an "*invalid*" dismissal and a made a declaratory order that a dismissal is invalid and of no force and effect fall outside of the contemplation of the LRA and such an order could not be granted in a case based on a breach of the LRA concerning

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RETRENCHMENTS

INVALID DISMISSALS REVISITED: DOES NON-COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF A RETRENCHMENT PROCESS RENDER THE DISMISSALS INVALID?

The Cold Chain Pty Ltd v FAWU (JA134/18) [2020] ZALAC 16*...continued*

a dismissal. Zondo J held that there has to be a *"LRA remedy for a LRA breach"*. In this case the LRA remedy was an order compelling the employer to comply with a fair procedure. There was a clear distinction between an unfair dismissal and an "*invalid*" dismissal. A declaration of invalidity is not amongst the remedies provided for under the LRA.

The LAC held that problem with FAWU's case was that its approach would allow it to circumvent the dispute resolution mechanism of the LRA. By seeking a declaration of invalidity, FAWU did not rely on a challenge to procedural fairness, instead it had placed all its eggs in the invalid dismissal basket. Once the invalidity argument failed there was no alternative cause for the courts to consider.

Even if FAWU had pleaded procedural unfairness, the LAC expressed concern that the notices of termination had been issued more than six years prior. The only relief available to the employees would have been an order of reinstatement pending compliance by the company with the procedures in section 189A of the LRA. Considering the period of time that had passed, the LAC found that there did not appear to be any sensible basis to grant what in effect was an interim interdict, pending procedural compliance.

The LAC found that there was no alternative other than to grant the appeal and dismiss FAWU's application in terms of section 189(13) of the LRA with costs.

Jose Jorge

The LAC held that problem with FAWU's case was that its approach would allow it to circumvent the dispute resolution mechanism of the LRA.

04

HEALTH AND SAFETY

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CLIFFE DEKKER HOFMEYR

04

HEALTH AND SAFETY

REFUSAL TO WORK – HEALTH AND SAFETY IN THE TIME OF COVID-19

Over the course of the last year, health and safety compliance has been thrust into the limelight with businesses coming under extreme pressure to review their workplace policies and to take the necessary steps to minimise COVID-19 risk and exposure in their workplaces.

However, during the course of July 2020, the Department found that compliance with COVID-19 prevention requirements was only 47% in the public sector and 57% in the private sector. As of mid-July 2020, the Department had issued over 2,500 notices and almost 400 prohibition notices.

As South Africa moves into its summer season, it is likely that we will see a slight respite in the infection rate, however experts warn of a 'second wave' and generally, it is accepted that COVID-19 will still be with us for the next foreseeable future.

So, what are the repercussions for businesses that do not comply, and may employees refuse to return to work, if their employer is non-compliant?

Under Level 2 – Almost all businesses are permitted to continue or commence operations, but the employer is required to still comply with its preventative measures to mitigate the spread of COVID-19. With the flattening of the curve, many employers are not only seeking to recommence operations, but may also want more employees to return to the office on the basis of productivity, or the efficacy or otherwise of working at the office.

Under the provisions of the Mine Health and Safety Act 29 of 1996 (MHSA), section 23(1) gives an employee a right to leave any working place whenever circumstances arise at that working place which, with reasonable justification, appear to that employee to pose a serious danger to the health or safety of that employee. In the matter of *NUM & others v Chrober Slate (Pty) Ltd* (2007) JOL 20676 (LC) the court however held that there must be evidence to show that there is a real threat and that the employee left the workplace owing to that threat. The belief of a threat of danger is real where it is based on objective information, the belief does not need to be correct, but it should be reasonable given the information available to the employee. The subjective belief of the employee must have an objective basis.

There is however no comparative provision in the OHSA. The COIDA defines an occupational disease as:

> *"a disease contracted by an employee that has arisen out of and during the course of employment."*

Occupationally-acquired COVID-19 is therefore a disease contracted by an employee as defined in the COIDA arising out of and in the course of his or her employment. Some occupations present a particularly increased risk of exposure and infection to COVID-19. Section 66 of COIDA creates a rebuttable presumption that the employee and/or contractor contracted an occupational disease out of and in the course of the employee's employment[1], but this rebuttable presumption does not necessarily apply to the contracting of COVID-19 in all instances.

> Occupationally-acquired COVID-19 is therefore a disease contracted by an employee as defined in the COIDA arising out of and in the course of his or her employment.

04

HEALTH AND SAFETY

REFUSAL TO WORK – HEALTH AND SAFETY IN THE TIME OF COVID*...continued*

An occupationally-acquired COVID-19 diagnosis relies on all of the following factors being present, namely:

- occupational exposure to a known source of COVID-19;
- a reliable diagnosis of COVID-19 as per World Health Organisation guidelines;
- an approved official trip and travel history to countries and/or areas of high risk for COVID-19 on a work assignment;
- a presumed high-risk work environment where transmission of COVID-19 is inherently prevalent; and
- a chronological sequence between the work exposure and the development of the symptoms.

It therefore appears as if the onus will fall on the employee who alleges that he/she contracted COVID-19 at the workplace, to prove such, taking the above factors into consideration.

Employers who don't comply with their legal duty to protect their employees may face consequences including fines, legal action that could lead to imprisonment for up to six months, and shutdown orders, depending on the nature and severity of the transgression.

In terms of paragraph 48 and 49 of the Consolidated Health and Safety Directive issued on 4 June 2020 (Directive), where an employee has a reasonable fear of contracting COVID-19 in the workplace as a result of the fact that the workplace presents imminent or serious exposure risks – employees may refuse to work. No person may advantage or promise to advantage an employee for not exercising her/his right in terms of clause 49; or threaten to take any action against an employee for exercising (or intending to exercise) the rights in clause 49 of the Directive.

When an employer becomes aware of an employee's refusal to work and to exercise their rights, the employer must consult with the compliance officer and any health and safety committee to resolve the issues that have been raised by the respective employee/s in order to address the concerns of the employee/s regarding their "*reasonable justification*" to refuse to work. An example where a "*reasonable justification*" would exist is if the employee can demonstrate that his/her employer has failed to implement any of the preventative measures. Where an employer has, however, taken all reasonable and legally required steps to safeguard its employees, an employer may instruct an employee to work and his/her failure to do so may result in disciplinary action.

After the President's most recent national address, it is clear that government intends to act even harder against COVID-19 transgressions.

Michael Yeates

After the President's most recent national address, it is clear that government intends to act even harder against COVID-19 transgressions.

[1] *Section 66 of COIDA, provides that if an employee, who has contracted an occupational disease was employed in any work mentioned in Schedule 3 in respect of that disease, it shall be presumed, unless the contrary is proved, that such disease arose out of, and in the course of his/her employment.*

05

DISCRIMINATION

CLIFFE DEKKER HOFMEYR

05

DISCRIMINATION

Section 187 (1)(d) of the LRA regards it an unfair dismissal if an employer dismisses an employee on the basis that the employer is taking or intending to take action against the employer.

DISCRIMINATION

AUTOMATICALLY UNFAIR DISMISSAL? - FILING OF A GRIEVANCE DOES NOT AMOUNT TO TAKING ACTION AGAINST AN EMPLOYER IN TERMS OF SECTION 187(1)(D) OF THE LRA

DBT Technologies (Pty) Ltd v Garnevska (JA61/2018) [2020] ZALAC 26; [2020] 9 BLLR 881 (LAC) (18 May 2020)

SUMMARY OF THE FACTS

The respondent commenced employment with the appellant in January 2010. On 2 February 2015, the respondent had a disagreement with a colleague. The respondent alleged that her colleague assaulted her shortly before the meeting was adjourned and instituted a grievance against her colleague. The respondent further reported the incident to the South African Police Services. A grievance inquiry was convened and the external chairperson found that the alleged assault was not proved. The appellant then charged the respondent with various counts of misconduct, including dishonesty. Following a disciplinary hearing enquiry, the chairperson recommended the dismissal of the respondent. Subsequent to an unsuccessful conciliation process, the respondent referred the dispute to the LC in terms of section 191 (5)(b) of the LRA alleging that her dismissal was automatically unfair in terms of section 187 (1)(d) of the LRA.

The question which was litigated upon was whether the disciplinary process which was instituted against the respondent and which led to her dismissal was a result and a direct consequence of the grievance she filed with the appellant and the exercising of a right in terms of the LRA. The reason for the dismissal was thus in sharp dispute. To reiterate, the respondent's pleaded cause of action was that she was dismissed on the basis of discrimination on a prohibited ground in terms of section 187 (1)(d) of the LRA.

Section 187 (1)(d) of the LRA regards it an unfair dismissal if an employer dismisses an employee on the basis that the employee is taking or intending to take action against the employer. But if there is no evidence that the employee was dismissed for taking or intending to take action against the employer, as in this case, the unfair dismissal will not fall into the category of automatically unfair dismissal. In this judgment, the appellant (the employer) appealed against the judgement of the LC, which was handed down on 26 January 2018, which held that the respondent's dismissal was automatically unfair in terms of section 187 (1)(d) of the LRA and ordered it to pay compensation equivalent to nine

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DISCRIMINATION

DISCRIMINATION

AUTOMATICALLY UNFAIR DISMISSAL? - FILING OF A GRIEVANCE DOES NOT AMOUNT TO TAKING ACTION AGAINST EMPLOYER IN TERMS OF SECTION 187(1)(D) OF THE LRA

DBT Technologies (Pty) Ltd v Garnevska (JA61/2018) [2020] ZALAC 26; [2020] 9 BLLR 881 (LAC) (18 May 2020)*...continued*

months remuneration.

SUMMARY OF THE FINDINGS OF THE COURT

The essential inquiry under section 187(1)(d) of the LRA is whether the reason for the dismissal was "*that the employee took action or indicated an intention to take action, against the employer*" by exercising any right conferred by the LRA or participating in any terms of the LRA.

During argument, the LAC was referred to the decision of the LC in *Mackay v Absa Group and another* [1999] 12 BLLR 1317 (LC) (Mackay). The LAC noted that the court a quo in Mackay accepted that the LRA does not make explicit provision for protecting an employee who lodges a grievance against his employer in terms of an internally agreed document such as a grievance procedure or code. The LAC however held that the court in Mackay incorrectly held that, in keeping with the main object of the LRA (the efficient resolving of disputes and the right to fair labour practices) the court must follow a purposive interpretation of section 187(1)(d) of the LRA which would mean that the right conferred by a private agreement binding an employer and employee as well as any proceeding provided by such agreement was to be contemplated in section 187(1)(d) of the LRA. The Mackay decision of the LC was overturned by the LAC. The test for determining whether a dismissal was automatically unfair in terms of sectin 187(1)(d) of the LRA was laid down in SA Chemical *Workers Union v Afrox Ltd* 3 (1999) ILJ 1718 (LAC).The court must determine factual causation by asking whether the dismissal would have occurred if the employee had not taken action against the employer. If the answer is yes then the dismissal is not automatically unfair. If the answer is no, the next issue is to determine whether the taking of action against the employer is the main, dominant, proximate or most likely cause of the dismissal.

The court held that a grievance complaining about a fellow employee's conduct does not constitute taking action against an employer. The LRA does not expressly confer rights upon employees to file grievances.

Accordingly, the respondent had failed to prove that the proximate reason for her dismissal was the one envisaged in section 187(1)(d) of the LRA and that she was dismissed for an automatically unfair reason. The appeal was upheld in the appellant's favour.

Michael Yeates and Kgodisho Pashe

The court held that a grievance complaining about a fellow employee's conduct does not constitute as taking action against an employer.

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INDIVIDUAL LABOUR LAW

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INDIVIDUAL LABOUR LAW

INDIVIDUAL LABOUR LAW

YOUNG AT HEART, BUT NOT IN CONTRACT: DOES A REDUCTION IN THE RETIREMENT AGE CONSTITUTE A UNILATERAL CHANGE TO TERMS AND CONDITIONS OF EMPLOYMENT?

Legal Aid South Africa v Theunissen [2020] 4 BLLR 370 (LAC)

SUMMARY OF THE FACTS

The respondent, Mr Theunissen, was employed by Legal Aid in 2008. His letter of employment was silent on the age of retirement. At the time, Legal Aid had a human resources policy and procedure manual dated 2007 (Manual) which stipulated that the retirement age for all employees was 65 years old. The terms of the Manual were general and applied to all employees, regardless of seniority or years of service. The Manual also provided for flexibility as an inherent requirement and that employees would be consulted if Legal Aid's operational requirements were such that a change was needed to the terms of the Manual.

The 2009, 2012 and 2015 terms and conditions of employment were approved by the Minister of Justice and Constitutional Development, in consultation with the Minister of Finance. The terms provided for a retirement age of 60 years of age. The savings clause in the aforementioned terms and conditions sets out the two exceptions namely (1) if there was an express entitlement in an employment contract to retire at 65 alternatively (2) if a person had reached 55 years of age by 1 August 2009.

On the strength of these terms, Legal Aid gave Mr Theunissen notice of his impending retirement. On 30 June 2017, his services were terminated. Mr Theunissen believed that this constituted a breach of his employment contract and referred a dispute to the LC.

The LC found in his favour, holding that his letter of employment, in conjunction with the Manual, formed his contract of employment. On this basis, the LC held that Mr Theunissen fell into the first section of the savings clause and that his retirement age was 65 years old. In addition, the LC found that there was a unilateral change to Mr Theunissen's employment contract and ordered his reinstatement. The matter was taken on appeal to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

At the core of the dispute was the interpretation of the savings clause provided for in the 2009, 2012 and 2015 terms and conditions of employment. Legal Aid argued that the LC erred in its interpretation of the savings clause. Mr Theunissen on the other hand, contended that the LC correctly interpreted his individual contract of employment as comprising of both his employment letter and the Manual, thereby placing him within the ambit of the first exception in the savings clause.

> The LC found that there was a unilateral change to Mr Theunissen's employment contract and ordered his reinstatement.

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YOUNG AT HEART, BUT NOT IN CONTRACT: DOES A REDUCTION IN THE RETIREMENT AGE CONSTITUTE A UNILATERAL CHANGE TO TERMS AND CONDITIONS OF EMPLOYMENT?

Legal Aid South Africa v Theunissen [2020] 4 BLLR 370 (LAC)*...continued*

The LAC applied a purposive and contextual interpretation that takes into account the objects sought to be achieved by the creation and approval of the 2009 terms and conditions and all subsequent terms and conditions. The LAC held that the core purpose of the 2009 and subsequent terms and conditions was to change the 2007 terms and conditions, and specifically the age of retirement. The LAC found that a proper interpretation of the reference to *"an express entitlement to a retirement age of 65 in an individual employment contract"*, implied that it had to be a document without reference to extraneous terms and conditions, such as the Manual, or the 2009, 2012 and 2015 terms and conditions.

The LAC held that, in the absence of Mr Theunissen' s employment contract allowing him to expressly retire at 65 years old, he did not fall within the ambit of the savings clause. The LAC further held that if there was an intention by Legal Aid to keep the retirement age at 65 years old for everyone employed as at 2007, then they would have expressly done so. The LAC found fault with the manner in which the common cause facts were recorded in the LC judgment namely that the Manual and Mr Theunissen's letter of employment together made up his "*individual employment contract*".

Finally, contrary to the LC, the LAC found that there was no unilateral change to Mr Theunissen's terms and conditions of employment. In fact, extensive consultation took place which involved Mr Theunissen. Mr Theunissen elected not to object to the proposed change in the retirement age during the consultation process. The LAC found that in so doing Mr Theunissen had acquiesced and accepted the 2009, 2012 and 2015 terms and conditions. The consultative process was in line with Legal Aid's policy of flexibility and the change was multilateral, rather than unilateral.

Accordingly, the LAC found that the employment contract was validly terminated on Mr Theunissen reaching 60 years old.

Gillian Lumb and Kara Meiring

The LAC found that the employment contract was validly terminated on Mr Theunissen reaching 60 years old.

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INDIVIDUAL LABOUR LAW

INDIVIDUAL LABOUR LAW

IS AN EMPLOYER LIABLE TO AN EMPLOYEE IN TERMS OF SECTION 60 OF THE EEA FOR RACIST LANGUAGE USED BY AN EXTERNAL THIRD PARTY?

Samka v Shoprite Checkers (Pty) Ltd and Others (CA15/18) [2020] ZALAC 11

SUMMARY OF THE FACTS

The appellant worked as a PT cashier at the first respondent's store. She was approached by a white female customer who wanted to withdraw cash at her till. In the process of determining the amount of money the customer wanted to withdraw, the customer became abusive. She repeatedly called the appellant stupid and used the "*k*" word.

The appellant felt that she had not received the necessary support from the first respondent in dealing with the matter. She further alleged that one of the first respondent's employees took the position that the customer pays her salary and was a long standing patron who would not be rude to the appellant. The CCMA found in the appellant's favour and held that this was a case of indirect racial discrimination in breach of section 6(1) of the EEA.

The finding of the CCMA was taken on appeal to the LC in terms of section 10(6) of the EEA. The question before the LC was whether the first respondent could be held liable for the racist utterances of a customer, as opposed to an employee. The LC found that it is apparent from the clear language of section 60 of the EEA that the section only applies if an employee while at work discriminates against another employee. The employer is then liable if it does not take the necessary steps to eliminate the racist conduct. The provision could not be extended to hold that an employer is liable for the conduct of a third-party customer towards an employee. The judgment of the LC went on appeal to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

On appeal, the crux of the appellant's case was that the EEA applies to a situation where an employer fails to provide a protective work environment for an employee in the instance where the employer is alleged to have failed to take action to address an employee's complaint of racist verbal abuse by a customer. The focus of the LAC was the scope of section 60 of the EEA.

In assessing the wording of section 60, the LAC found that the section is clearly restricted to cases where there is a contravention by an "*employee*", as defined in section 1 of the EEA. The LAC held that this approach makes good sense, given that an employer exercises control over an employee, but not necessarily over a third-party customer. The LAC found no basis in the EEA on which an employer can be held liable to an employee for the actions of a customer. The wording of section 60 is clear and unambiguously confined to the specific relationship between employers and employees. The LAC held that the correct approach in pursing a remedy would be to institute a delictual claim against the customer, or alternatively refer an unfair discrimination claim against the customer to the Equality Court. The wording of the EEA simply did not provide scope for holding the employer liable in such instances.

The appeal was accordingly dismissed.

Gillian Lumb and Kara Meiring

> The question before the LC was whether the first respondent could be held liable for the racist utterances of a customer, as opposed to an employee.

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INDIVIDUAL LABOUR LAW

INDIVIDUAL LABOUR LAW

NOVATION AND FIXED-TERM CONTRACTS: DOES THE NOVATION OF A FIXED-TERM CONTRACT REBUT THE DEEMING PROVISION IN SECTION 198B(5) OF THE LRA?

National Union of Public Service and Allied Workers (NUPSAW) v Mfingwana and Others LC [2020] ZALCCT

SUMMARY OF THE FACTS

NUPSAW employed the first respondent on a six-month fixed-term contract which expired on 31 March 2016. Following expiry of the contract, the first respondent continued to work for NUPSAW for an additional three months. Only after this additional three-month period was the contract extended by way of an addendum (backdated to 1 June 2016) until 31 November 2016.

Less than a month before the expiry of the extended contract, the first respondent was informed that the contract would not be further extended. The first respondent referred a dispute to the CCMA claiming unfair dismissal. The commissioner found in the first respondent's favour. He found that the failure to renew the contract or confirm the first respondent's permanent employment constituted an unfair dismissal. The first respondent was reinstated with backpay. NUPSAW then brought an application to review and set aside the findings of the CCMA.

In his initial arguments, the first respondent relied on section 198B of the LRA which applies to fixed-term contracts and employees earning below the annual earnings threshold set by the Minister. In terms of section 198B of the LRA fixed-term contracts can only endure for more than three months under limited and specific circumstances. The first respondent argued that those circumstances did not exist in his case, and that he should have been employed on an indefinite basis after the initial three month period had been served.

NUPSAW on the other hand, argued that subsequent to the expiry of the initial fixed-term contract, the first respondent had voluntarily entered into an extended further fixed-term contract and that there had been a novation (i.e. the contract had been replaced), which precluded it from being subject to the deeming provision of section 198B(5) of the LRA.

SUMMARY OF THE FINDINGS OF THE COURT

As a point of departure, the LC considered the wording of section 198B(5) of the LRA, the deeming provision, in accordance with which employment in terms of a fixed-term contract concluded or renewed in breach of section 198B(3) of the LRA is deemed to be of an indefinite nature. The LC found that section 198B of the LRA had to be interpreted in relation to its legislative purpose, which was to provide security of employment. The only exception being where a fixed-term contract is clearly justified.

> The LC found that section 198B of the LRA had to be interpreted in relation to its legislative purpose, which was to provide security of employment. The only exception being where a fixed-term contract is clearly justified.

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INDIVIDUAL LABOUR LAW

INDIVIDUAL LABOUR LAW

NOVATION AND FIXED-TERM CONTRACTS: DOES THE NOVATION OF A FIXED-TERM CONTRACT REBUT THE DEEMING PROVISION IN SECTION 198B(5) OF THE LRA?

National Union of Public Service and Allied Workers (NUPSAW) v Mfingwana and Others LC [2020] ZALCCT*...continued*

The LC agreed with the commissioner's analysis of the facts. The commissioner had found that there was no clear justifiable reason for the fixed-term contract. NUPSAW's use of fixed-term contracts as a probationary mechanism was found to be completely contrary to the spirit of section 198B of the LRA.

The LC then had to consider whether the addendum extending the fixed-term contract 'novated' any claim the first respondent may have had to permanent employment arising from the conclusion of the initial fixed-term contract. The LC held that novation involves a waiver of existing rights, which is why there is generally a presumption against novation. As such, an intention to novate must be proved. In order to determine whether there was an intention to novate, the conduct of the parties needed to be considered. The LC found that the first respondent did not have an intention of novating the contract when he signed the extended contract.

The LC further found that novation is only valid and enforceable if the contract it novates is also legally valid. The first contract had ended in March 2016 and was therefore not valid by the time the addendum extending the contract was entered in to by the parties. Essentially, there was no valid contract to novate.

In conclusion, the LC held that the notion that the parties rebutted the deeming provision in section 198B(5) of the LRA through novation flies in the face of the wording of the section which envisages the renewal of a contract in which the exceptions listed in section 198B(3) of the LRA do not apply. The LC agreed with the commissioner that an unfair dismissal had taken place and accordingly dismissed the review application.

Gillian Lumb and Kara Meiring

The LC agreed with the commissioner that an unfair dismissal had taken place and accordingly dismissed the review application.

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INDIVIDUAL LABOUR LAW

INDIVIDUAL LABOUR LAW

SOMETIMES YOU CAN HAVE YOUR CAKE AND EAT IT: THE RIGHT OF AN EMPLOYEE TO BRING A BREACH OF EMPLOYMENT CONTRACT DISPUTE AFTER UNSUCCESSFULLY LITIGATING AN UNFAIR DISMISSAL DISPUTE.

Archer v Public School - Pinelands High School and others [2020] 3 BEER 235 (LAC)

SUMMARY OF THE FACTS

After being dismissed by Pinelands High School (the first respondent), the appellant referred an unfair dismissal dispute to the CCMA. After the CCMA found his dismissal fair, the appellant instituted civil proceedings in the LC claiming that his dismissal was an unlawful breach of his employment contract.

The LC dismissed the claim for "*want of jurisdiction*". The LC found that the appellant could not approach the court on the same set of facts in an attempt to pursue a new cause of action. This decision was brought on appeal to the LAC.

On appeal, the appellant contended that his case before the LC was based on a breach of his employment contract and that the LC had jurisdiction to adjudicate the dispute. Conversely, the respondents argued that the appellant was forum shopping, that the matter was *res judicata*. The respondents also argued that the appellant was bound by his initial election to pursue an unfair dismissal claim before the CCMA and finally, that he could not abandon his initial cause of action.

> The respondents argued that the appellant was forum shopping, that the matter was *res judicata*.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC held that the question for determination was not a new one. The LAC referred to the SCA case of *Makhanya v University of Zululand* (2009) 30 ILJ 1539 in which the SCA held that a dismissed employee has both a common law contractual right, as well as an independent right under the LRA. As a result, an employee has a potential claim for the enforcement of a right outside of the LRA and a claim for the enforcement of an LRA right. Whilst the enforcement of the LRA right was only enforceable in a labour forum, the other right could be enforced in either the HC or the LC.

In applying this principle to the facts before it, the LAC held that the termination of the appellant's employment contract gave rise to both an unfair dismissal claim and a contractual claim. In the circumstances and despite his lack of success in the CCMA, the appellant could still pursue the contractual claim in the LC. The reason being that the cause of action was different and they were two separate claims. The first claim before the CCMA was for compensation arising from an unfair dismissal under the LRA, whereas the second claim was for payment of damages arising from a purported breach of contract. In conclusion, the LAC found that the initial unfair dismissal claim did not extinguish a subsequent claim to enforce contractual rights.

Gillian Lumb and Kara Meiring

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COLLECTIVE LABOUR LAW

CLIFFE DEKKER HOFMEYR

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COLLECTIVE LABOUR LAW

> The LC found that King Hire's lock-out was lawful because the underlying issue in dispute remained unresolved.

COLLECTIVE LABOUR LAW

DOES THE SUSPENSION OF A STRIKE BY A TRADE UNION PURSUANT TO THE ISSUING OF A STRIKE NOTICE, THOUGH THE UNDERLYING DISPUTE REMAINS RESOLVED, RENDER A LOCKOUT INITIATED BY THE EMPLOYER IN RESPONSE THERETO UNLAWFUL?

National Association of South African Workers obo Members v King Hire CC [2020] 3 BLLR 312 (LC)

SUMMARY OF THE FACTS

King Hire refused to accede to NASAW's demand for a 13th cheque. The dispute remained unresolved at the CCMA and NASAW subsequently issued a strike notice. Although the CCMA concluded the picketing rules, King Hire approached the HC for an order prohibiting unlawful interreference with its business and intimidation of its personnel, and creating a perimeter of 500 metres. It is not clear whether NASAW challenged the HC's jurisdiction to deal with the matter. The HC granted King Hire the interim order sought.

Pursuant to the HC's interim order, NASAW suspended the strike pending the HC's return date. However, when its members attempted to report for duty, they were informed that they had been locked out in response to their proposed strike. Despite the NASAW's protest that the lockout was unlawful as its proposed strike had not commenced, the lockout continued for over a month and a half, with the consequence of employees not receiving their salaries. NASAW approached the LC a month later to set aside the lock-out on the basis that it was unlawful.

SUMMARY OF THE FINDINGS OF THE COURT

The LC found that King Hire's lock-out was lawful because the underlying issue in dispute remained unresolved. In respect of NASAW's strike suspension, the LC found that a mere notice suspending the intended strike did not render the lockout unlawful because as long as the dispute referred to conciliation remained unresolved, a lock-out may be implemented.

The LC held that a lock-out is an employer's bargaining tool during a collective bargaining process. Interfering in the bargaining process would deprive the employer of its right to bargain. Once an impasse has arisen, it can only be resolved through mutual agreement or if one side has capitulated. The LC concluded that King Hire was compliant with the LRA as its lock-out notice was timeously issued and that the lock-out was not unlawful.

Fiona Leppan, Bheki Nhlapho and Mayson Petla

07

COLLECTIVE LABOUR LAW

COLLECTIVE LABOUR LAW

CAN A TRADE UNION SIGN EMPLOYEES OUTSIDE THE CLASS OF MEMBERS AS DEFINED IN ITS CONSTITUTION?

National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others
[2020] 7 BLLR 645 (CC) (26 March 2020)

SUMMARY OF THE FACTS

During January 2015, NUMSA approached the employer (Lufil) requesting that it deducts membership fees in its favour. Lufil refused the request on the basis that its operations, being in the paper and packaging industry, did not fall within the permitted scope of NUMSA's constitution. Further, it was Lufil's view that NUMSA was not entitled to organise employees within Lufil's workplace and that NUMSA had acted *ultra vires* its own constitution in admitting these employees as members. NUMSA referred an organisational rights dispute to the CCMA.

The CCMA granted NUMSA certain organisational rights, including the deduction of union fees. Lufil's review application to the LC was dismissed. The LAC granted Lufil's appeal and set aside the CCMA's arbitration award. NUMSA appealed the LAC's decision to the CC.

SUMMARY OF THE FINDINGS OF THE COURT

In upholding the arbitration award, the LC's reasons were that the relationship between a union and its members is a private matter and it is not for a third party to raise a challenge about whether NUMSA was compliant with its constitution. It concluded that the only conditions that needed to be met if a union wants to exercise organisational rights is that the union must be registered, and it must be sufficiently representative.

In setting aside the arbitration award, the LAC found that unions cannot create a class of members outside of the provisions of their constitution. Such a decision was *ultra vires* and invalid and can be challenged by the employer from whom organisational rights are sought.

In the CC, NUMSA contended that the matter concerns the constitutional right to fair labour practices, the right to freedom of association, and raises the question of how the LRA should be interpreted to advance these rights. The CC held that when members have formally adopted a constitution, it becomes legally binding on them and on registration it becomes public. This means that the constitution of a union is then available for inspection by outsiders. The CC found that the LAC was correct to find that the role of a union's constitution was to give effect to the legitimate government policy of orderly collective bargaining at sectoral level.

The CC found that the NUMSA's constitution provided that only workers who are in the metal and related industries are eligible for membership. Further, it found that NUMSA ought to have amended its constitution when it admitted Lufil's employees as members.

The CC dismissed NUMSA's appeal.

Fiona Leppan, Bheki Nhlapho and Kgodisho Phashe

The CC found that the NUMSA's constitution provided that only workers who are in the metal and related industries are eligible for membership.

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COLLECTIVE LABOUR LAW

COLLECTIVE LABOUR LAW

IS THE EXCLUSION OF MINORITY TRADE UNIONS FROM RETRENCHMENT CONSULTATIONS CONSTITUTIONAL?

Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others 2020 (3) SA 1 (CC) (23 January 2020)

SUMMARY OF THE FACTS

The NUM represented a majority of employees who were working at Royal Bafokeng Platinum Limited (Employer). The United Association of South Africa (UASA) and the Association of Mineworkers and Construction Union (AMCU) enjoyed minority support at the workplace. AMCU represented approximately 11% of employees at the employer's workplace.

The NUM, UASA and the employer entered into a collective agreement in terms of which the parties consulted on the Employer's large-scale retrenchment process. This agreement was extended to bind members of minority unions including AMCU's, in terms of section 23(1)(d) of the LRA. The collective agreement contained a clause in terms of which the employees waived their rights to challenge the lawfulness and fairness of their dismissals. This applied to AMCU's members by extension. The collective agreement also excluded the minority trade unions from the consultation process.

AMCU challenged the procedural and substantive fairness of its members dismissals and its exclusion from the consultation process.

SUMMARY OF THE FINDINGS OF THE COURT

AMCU argued that the right to fair labour practices required the Employer to consult with it as the matter involved its members. The essence of AMCU's case was that the principle of majoritarianism played no role in the retrenchment process. The LC did not pronounce on this issue. The LAC found no merit in AMCU's argument and dismissed it.

The CC found that the constitutional right to fair labour practices (as enshrined in section 23 of the Constitution) does not include the right to be individually consulted before being retrenched. In respect of the principle of majoritarianism, the CC found that majority-driven collective bargaining process passes constitutional muster in the context of a retrenchment and that no right to further individual or dual consultation outside of the hierarchy prescribed by section 189(1) of the LRA exists. Further, the CC found that AMCU were unable to show that section 23(1)(d) of the LRA *per se* infringed the constitutional right to fair labour practices. AMCU's appeal was dismissed.

Fiona Leppan, Bheki Nhlapho and Kgodisho Phashe

AMCU challenged the procedural and substantive fairness of its members dismissals and its exclusion from the consultation process.

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STRIKES

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STRIKES

The obligation to conduct a secret ballot of members arises only once a directive has been issued by the Registrar, pursuant to consultations as envisaged in terms of section 19(1) of the LRAA.

STRIKES

WHAT IS THE PROPER INTERPRETATION OF OF SECTION 19 OF THE LRAA IN RELATION TO THE REQUIREMENT TO HOLD A SECRET BALLOT BEFORE EMBARKING ON A STRIKE OR LOCKOUT?

Metalworkers of South Africa (Numsa) and others v Foskor (Pty) Ltd and another
(DA08/2019; DA09/2019) [2020] ZALAC 30

SUMMARY OF THE FACTS

This case concerns an appeal by NUMSA of two judgments of the LC.

NUMSA had embarked on two strikes in respect of two different employers. The strikes commenced a week apart and the employers applied to interdict the strikes on the basis that NUMSA had failed to conduct compulsory ballots beforehand.

The LC interdicted both strikes on this basis that section 19 of the LRAA requires a trade union to conduct a secret ballot before embarking on a strike. NUMSA sought to appeal these judgments in the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC upheld the appeal. In doing so, the LAC held that section 19(1) of the LRAA imposes an obligation on the Registrar to perform two tasks in respect of those trade unions and employers' organisations who do not provide for recorded and secret ballots in their constitutions:

(i) Firstly, the Registrar is obligated to consult with the national office bearers of those unions and employers' organisations on the most appropriate means to amend their constitutions so as to comply with the requirement set out in section 95 of the LRA (i.e. the need to include a provision in their constitutions to conduct secret ballots before calling for a strike or lockout).

(ii) Secondly, after having held the said consultations, to issue a directive to those unions and employers' organisations setting out the period within which appropriate amendments to their constitutions must be effected in order to comply with the provisions of section 95 of the LRA.

The LAC held that it is clear from the wording of section 19(1)(b) of the LRAA that until consultation has taken place with the trade union or employers' organisations and a directive is issued by the Registrar, there is no obligation on the part of the unions or employers' organisations to amend their constitution in the manner contemplated.

Accordingly, the obligation to conduct a secret ballot of members arises only once a directive has been issued by the Registrar, pursuant to consultations as envisaged in terms of section 19(1) of the LRAA.

The LC therefore wrongly concluded that NUMSA was obliged to conduct a secret ballot before calling for a strike, as NUMSA had not yet had an opportunity to engage with the Registrar on the content, form and timeframe of any amendment to its balloting procedures and requirements. Thus, there was no basis to interdict NUMSA and its members from embarking on the strike.

The order of the LC was set aside and substituted with an order dismissing the employers' applications to interdict the strikes.

Hugo Pienaar, Sean Jamieson and Jaden Cramer

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STRIKES

STRIKES

DOES THE PRINCIPLE OF COMMON PURPOSE APPLY IN THE CONTEXT OF A STRIKE AND UNLAWFUL CONDUCT PERPETRATED DURING THE STRIKE?

NUMSA obo Dhludhlu and Others v Markey Pipe Systems SA (Pty) Ltd (JS878/17) [2020] ZALCJHB 13

The LC had to determine whether those employees who could not be placed on the scene, could be found guilty of assault by virtue of having acted with common purpose.

SUMMARY OF THE FACTS

145 employees of Marley Pipe Systems (SA) (Pty) Ltd (the Employer), who were members of NUMSA, embarked on strike action (Employees) at the Employer's Nigel Plant. During the strike, the Employer alleged that its then Head of Human Resources was assaulted by the striking employees.

The Employer alleged that all of the striking employees had acted with common purpose when perpetrating the assault on its former Head of Human Resources.

The Employer obtained an urgent interdict which declared the strike action to be unprotected and interdicted the Employees from further engaging in the unprotected strike action or any conduct in furtherance thereof.

The Employer then held disciplinary hearings in terms of which the Employees were charged and found guilty of participating in an unlawful strike and for assaulting the Head of Human Resources, having acted with common purpose in perpetuating the assault.

The Employees were dismissed.

The issue for determination by the LC was whether the dismissal of the Employees was substantively and procedurally fair. In doing so, the LC had to determine whether those employees who could not be placed on the scene, could be found guilty of assault by virtue of having acted with common purpose.

SUMMARY OF THE FINDINGS OF THE COURT

In finding that the dismissals were procedurally and substantively fair, the LC held that it is not mandatory to place an employee at the scene in order to prove common purpose. Common purpose could be established by inferential reasoning having regard to the conduct of the employees before, during and even after the incident of violence.

Any evidence that an employee associated themselves with the violence before it commenced or even after it ended may therefore be sufficient to warrant complicity in the misconduct.

The LC held that the employee who may not have been at the scene on the day of the assault, had associated himself with the strike and its acts, through his own actions. The principle of common purpose was thus applied in upholding the fairness of this employee's dismissal.

Hugo Pienaar, Sean Jamieson and Jaden Cramer

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STRIKES

> Despite the above interim order, violent attacks occurred at a number of the applicant's premises.

STRIKES

TEST FOR CONTEMPT

Plastic Convertors Association of South Africa (PCASA) obo Members and Others v National Union of Metal Workers of South Africa (NUMSA) and Others (J3725/18) [2020] ZALCJHB 63

SUMMARY OF THE FACTS

The first respondent's members went on strike in support of their demand for increased wages and improved working conditions. As a result of a number of violent attacks during the strike, the applicants approached the LC for an urgent interdict. An interim order was granted (interim strike interdict) interdicting and restraining the respondents, their followers and supporters from engaging in the protest action. The interdict was granted on the basis that the respondents be given the opportunity to respond by a predetermined date to provide reasons as to why the interim interdict should not be made a final order of court. Despite the above interim order, violent attacks occurred at a number of the applicant's premises. This forced the applicant to approach the court on an *ex parte* basis claiming that the first respondent and its members had wilfully disregarded the interim strike interdict. The applicants brought an application to hold the first respondent in contempt of court for failing to adhere to the terms of a strike interdict and sought the imposition of a fine against the first respondent. The first respondent opposed the contempt application and in turn brought a counter application in which it challenged the contempt procedures as set out in the practice manual of the LC.

SUMMARY OF THE FINDINGS OF THE COURT

In hearing this application, the court ordered, among other things, that the urgency of the matter warranted dispensing with certain of the courts rules; that the first respondent and it's representative officials show within a predetermined period cause why monetary sanction by way of substantial fines should not be imposed upon the first respondent and it's representative officials and that costs be awarded against them on a punitive scale. Shortly thereafter, the respondents filed their answering affidavits. Incorporated in the answering affidavits was a three pronged counter application challenging the contempt procedures of the LC on the basis that:

- it impermissibly amended or overruled its own rules in a manner inconsistent with the inherent powers it is granted by the constitution;
- it impermissibly disregarded the principles of substantive law insofar as the applicants we're not required to fully explain why giving notice to an interested party would defeat the very object of the order sought; and
- it infringed on the respondents constitutional rights in respect of access to the courts.

08

STRIKES

Case law shows that a trade union cannot be held vicariously liable for contempt of court by its members; it can only be liable for contempt if it itself through its officials breached the court order.

STRIKES

TEST FOR CONTEMPT

Plastic Convertors Association of South Africa (PCASA) obo Members and Others v National Union of Metal Workers of South Africa (NUMSA) and Others (J3725/18) [2020] ZALCJHB 63*...continued*

The judge dealt with the counter application first:

- **In respect of the first prong: The judge held that:**

  The courts rules are designed to give access to justice and promote the imperative of expeditious dispute resolution. The rules do not oust its inherent power to protect and regulate its own processes to develop the common law on matters of procedure in the interests of justice. The Constitution affords it the authority to introduce rules to protect and regulate it's processes should the need arise and that in respect of contempt procedures it's response is consistent with the powers afforded by the Constitution. The first prong thus failed.

- **In respect of the second prong: The judge held that:**

  In the bringing of *ex parte* application the issuing of a *rule nisi* is fundamental to both procedural and substantive fairness, the respondents could not argue that they had been prejudiced by the issuing of a *rule nisi*. The CC had already confirmed that the procedure is constitutionally compliant and in essence strikes a balance between a respondents procedural safeguards and the need for a courts authority to be vindicated. The second prong thus failed.

- **The third prong: The judge held that:**

  The fact that a *rule nisi* does not contain an interim order cannot find application in contempt applications even on an *ex parte* basis and the respondent cannot argue that this amounts to the denial of its constitutional right of access to the courts or that this shifts the power balance in their collective engagement with the employer. Seeing that the order merely called upon the respondents not to engage in unlawful activity must mean that the third prong fails.

- **The contempt application**

  While the applicants pointed out a significant number of breaches in its papers its oral arguments only focused on two of them. The requirements for a finding of contempt have been formulated in authority by the SCA and require the applicant to prove the requisites beyond reasonable doubt namely, the order, service or notice, non-compliance, wilfulness and *mala fides*. Once the applicant has proved the order, service or notice and non-compliance, the respondent bears the evidentiary burden in relation to wilfulness and *mala fides*. Case law shows that a trade union cannot be held vicariously liable for contempt of court by its members; it can only be liable for contempt if it itself through its officials breached the court order.

08

STRIKES

STRIKES

TEST FOR CONTEMPT

Plastic Convertors Association of South Africa (PCASA) obo Members and Others v National Union of Metal Workers of South Africa (NUMSA) and Others (J3725/18) [2020] ZALCJHB 63*...continued*

Orders to the effect that a union should "*take all reasonable steps*" to persuade its members not to act unlawfully, will not give rise to a finding of contempt on the part of the union, because they are too vague and imprecise. The judge nevertheless meticulously continues to consider the extensive individual submissions by all parties in respect of numerous alleged breaches by the respondents and concludes that at the very least a reasonable doubt exists as to whether the requirements of wilfulness and *mala fides* were the cause thereof. Under the circumstances the judge concludes that it has not been established that the first respondent can be held in contempt of the interim strike interdict order on the basis that it is simply not possible to reach such conclusion given the high threshold to prove contempt. The applications were dismissed and no order was made as to costs.

Hugo Pienaar, Sean Jamieson and Jaden Cramer

Orders to the effect that a union should "*take all reasonable steps*" to persuade its members not to act unlawfully, will not give rise to a finding of contempt on the part of the union, because they are too vague and imprecise.

08

STRIKES

> The Respondents embarked on a strike to reject the emergency financial measures proposed by the applicant due to the COVID-19 pandemic and the effect of the lockdown regulations on the applicant's business.

STRIKES

WHEN CAN EMPLOYEES STRIKE ON THE BASIS OF UNILATERAL AMENDMENTS TO TERMS AND CONDITIONS OF EMPLOYMENT IN TERMS OF SECTION 64(4) OF THE LRA?

Macsteel Service Centres SA Pty Ltd v NUMSA (J483/20) (3 June 2020)

SUMMARY OF THE FACTS

The Applicant (Macsteel) approached the LC on an urgent basis to declare the strike action instituted by the members of the National Union of Metal Workers (Respondents) unprotected. The Respondents embarked on a strike to reject the emergency financial measures proposed by the applicant due to the COVID-19 pandemic and the effect of the lockdown regulations on the Applicant's business.

The Applicant's proposed emergency measures were as follows:

(1) All employees and commission earners are required to take a 20% reduction in salary for three months (May, June, July).

(2) The Applicant will not be a in a position to pay salary increases in July 2020.

(3) No salary increases will be paid to employees who receive promotions for the remainder of 2020.

(4) There will be no bonuses or incentives to the non-scheduled employees for the remainder of the year.

(5) Lastly, the applicant will not be in the position to pay the December leave enhancement pay out to scheduled employees.

The Applicant made an undertaking to apply for the COVID-19 TERS benefits offered by the UIF and assured the employees that the benefit will be paid out once the applicant received the benefit from the UIF. The Respondents, aggrieved by the above, referred a dispute to the Metal and Engineering Industries Bargaining Council (MEIBC). The nature of the dispute was classified as a 'unilateral change in the terms and conditions of employment', in terms of which NUMSA required that the terms and conditions of employment be restored in accordance with section 64(4)(a) and (b) of the LRA.

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STRIKES

The court found that the applicant did not provide any assurance to the employees working full time that the full salaries will be paid regardless of the outcome of the application for the TERS benefit.

STRIKES

WHEN CAN EMPLOYEES STRIKE ON THE BASIS OF UNILATERAL AMENDMENTS TO TERMS AND CONDITIONS OF EMPLOYMENT IN TERMS OF SECTION 64(4) OF THE LRA?

Macsteel Service Centres SA Pty Ltd v NUMSA (J483/20) (3 June 2020)*...continued*

SUMMARY OF THE FINDINGS OF THE COURT

The focus of the judgment handed down by Prinsloo J was on the payment of the employees for May, June and July 2020. The court held that a strike initiated in terms of section 64(4) of the LRA can only take place when there is a unilateral change in the terms and conditions of employment, and when the employer has failed to comply with the request not to implement the unilateral change in the terms and conditions of employment.

Furthermore, the court referred to the *Staff Association* case, in which the LC found that a strike initiated in terms of section 64(4) of the LRA will be successful if the employee can show the court that a change has been effected to the terms and conditions of employment and that there was no consent to the unilateral change in the conditions of employment. Thus, the 20% reduction in the employees' salaries constituted a unilateral change to the terms and conditions of the employment and the employees rejected the implementation of the salary deduction.

Additionally, the court found that the applicant did not provide any assurance to the employees working full time that the full salaries will be paid regardless of the outcome of the application for the TERS benefit. As a result, the court concluded that the applicant had not restored the terms and conditions of employment in terms of section 64(4) of the LRA. Accordingly, the application to declare the strike unprotected was dismissed.

Hugo Pienaar, Sean Jamieson and Jaden Cramer

STRIKES

REPRESENTIVITY AND THE DUTY OF THE EMPLOYER TO CONTACT A MINORITY UNION IN TERMS OF THE PROVISIONS OF ITEM 6(2) OF THE CODE OF GOOD PRACTICE

Roberts Brothers Construction (Pty) Ltd and Another v National Union of Mineworkers and Others (PA08/18) [2020] ZALAC 15 (18 May 2020)

SUMMARY OF THE FACTS

This is an appeal against the judgment of the LC, which held that the dismissal of employees arising from their participation in unprotected strike action was procedurally unfair and awarded the employees compensation in the amount equivalent to six months remuneration.

The facts were common cause. The appellants are construction companies who were jointly involved in a rural bridge construction project. The employees were all construction workers who resided on-site and were all members of a minority union, which did not enjoy a recognition agreement with the companies. The employees were aggrieved about their on-site living conditions, in particular the intermittent and inadequate supply of electricity. The employees consequently embarked on an unprotected strike at a critical time in respect of the construction process without giving the appellants the required notice in terms of the LRA. Despite the issuance of three ultimatums by the appellants advising the employees that their actions were unprotected, prejudicial and would result in dismissal should they not cease immediately and return to work, they persisted in their actions. Their dismissals were eventually effected. The employees referred a dispute to the LC on the basis that their dismissals were procedurally unfair.

SUMMARY OF THE FINDINGS OF THE COURT

The LC accepted that although the strike was in response to a legitimate demand, the ability of the appellant's to satisfy the demand was constrained and that there was indeed no obligation on them to do so. The LC also noted that the employees had failed to engage with senior management despite having had the opportunity to do so and did not follow other protocols and precedents before embarking on the strike. The LC was however critical of the appellant's failure to 'take the simple precaution of phoning a union official to try and make the strikers see reason' despite the fact that there was no recognition agreement between the parties.

Based on a single precedent, the LC held that the dismissals were procedurally unfair and ordered the appellants to pay the employees six months' salary each. On appeal, the LAC recognised that the union, which only had 7% representation amongst the workforce, did not enjoy recognition or organisational rights granted in terms of the LRA. The court added that the guidelines contained in the Code of Good Conduct in Schedule 8 of the LRA were not legislative in nature but were intended to promote orderly collective bargaining and that until minority unions became sufficiently representative they could not be concomitantly entitled to rights conferred upon unions that represent the majority of members. As a result, there was no duty on the appellants to contact the union in terms of the Code of Good Practice. The court held that the dismissals were not procedurally unfair and that the appeal must succeed for that reason. The appeal was upheld and the order of the LC set aside and substituted with an order dismissing the application.

Hugo Pienaar, Sean Jamieson and Jaden Cramer

The court added that the guidelines contained in the Code of Good Conduct in Schedule 8 of the LRA were not legislative in nature but were intended to promote orderly collective bargaining.

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BUSINESS TRANSFERS

CLIFFE DEKKER HOFMEYR

09

BUSINESS TRANSFERS

BUSINESS TRANSFERS

CONCERNING GOING CONCERNS AND SECTION 197 OF THE LRA

Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation [2020] ZACC 21

The CC held that the basis for the transfer determines the parameters for the application of the test in section 197.

SUMMARY OF THE FACTS

In the recent matter between *RTMC v Tasima*; *Tasima v RTMC*, the central dispute in the main application concerned the applicability of section 197 of the LRA to the transfer of the electronic National Traffic Information System (eNaTIS) from Tasima (Pty) Ltd (Tasima) to the Road Traffic Management Corporation (RTMC). The cross-appeal concerned the effective date of such transfer.

The requirements for the operation of section 197 are that (i) the whole or part of a business (ii) must be transferred by the old employer to the new employer (iii) as a going concern. All three requirements must be met in order for the section to be operative.

In terms of recent case law and for section 197 to be triggered, what must be transferred is the business and not merely the service provided by that particular business. There must also be indicators that support the conclusion that when a business changes hands, it was transferred as a going concern. These include whether assets, employees or customers were taken over (albeit that none of them are individually decisive).

In this matter, the Department of Transport entered into a Turnkey Agreement with Tasima for the development of the eNaTIS and the provision of related services. After the expiry of the Turnkey Agreement, the parties concluded an interim arrangement, followed by a five year extension agreement.

In relation to the section 197 transfer, the LC and the LAC both held that section 197 of the LRA applied to the transfer and granted declaratory relief to the effect that Tasima's employees were automatically transferred to the RTMC.

SUMMARY OF THE FINDINGS OF THE COURT

The CC held that the basis for the transfer determines the parameters for the application of the test in section 197. It was held that the operation, maintenance and management of the eNaTIS was Tasima's sole business and that it was this business that was transferred to the RTMC. The RTMC took over Tasima's business "*as is*", immediately after the transfer, carrying on the business on the same premises, using the same assets, performing an identical function and rendering the same services. The first judgment accordingly held that the transfer of the eNaTIS constituted the transfer of a business as a going concern for the purposes of section 197 and dismissed the appeal.

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CONCERNING GOING CONCERNS AND SECTION 197 OF THE LRA

Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation [2020] ZACC 21*...continued*

In the cross appeal, the CC held that the effective date of transfer was the date upon which the RTMC took actual control of the eNaTIS and services. The transfer of a business as a going concern must take place within the parameters of the legal basis of the transfer. This should, and ordinarily would be, the date of the CC's order in a previous judgment. However, the CC held that this general approach may be deviated from in exceptional circumstances. Where there is a clear division between the date on which the obligation to transfer arises and the actual date on which transfer takes place, and where inequities and absurdities may arise as a result of deeming the transfer to have occurred on the date stipulated in the legal basis, the factual date of handover may be deemed to be the effective date.

This judgment reaffirms the principle that when a business is transferred *"as is"*, using the same assets and operating at the same premises, section 197 of the LRA is most likely to apply.

Aadil Patel, Anli Bezuidenhout and Vaughn Rajah

This judgment reaffirms the principle that when a business is transferred *"as is"*, using the same assets and operating at the same premises, section 197 of the LRA is most likely to apply.

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BUSINESS TRANSFERS

BUSINESS TRANSFERS

IS AN AGREEMENT CONCLUDED IN TERMS OF SECTION 197(7) OF THE LRA A COLLECTIVE AGREEMENT WHICH IS CAPABLE OF EXTENSION IN TERMS OF SECTION 23(1)(D) OF THE LRA?

National Union of Mineworkers & others v Anglo Gold Ashanti Ltd & another (2019) 40 ILJ 407 (LC)

SUMMARY OF THE FACTS

The National Union of Mineworkers (NUM) is one of the trade unions recognised by Anglo Gold Ashanti Limited (Anglo Gold). The employees are members of NUM and employed by Anglo Gold Ashanti Health (Pty) Ltd (the Hospital) which hospital is one of Anglo Gold's business units in SA.

On 21 May 2018, Anglo Gold issued a notice in terms of section 189(3) of the LRA, to commence consultations in terms of section 189A of the LRA which was conducted in accordance with the collective agreements between Anglo Gold and the following trade unions: NUM, AUSA, Solidarity and AMCU.

During the consultation held on 4 June 2018, the sale of Anglo Gold's Hospital was discussed, in order to potentially retain some of the jobs of the affected employees. Anglo Gold secured a buyer for the Hospital, JMCA Phodiclinics (JMCA) and concluded a sale agreement that would enable a transfer of the Hospital as a going concern. However, the transaction was subject to a section 197(6) agreement as JMCA did not wish to take transfer of all employees in the employ of the Hospital. An A-List of employees to be transferred and a B-List of employees to be retrenched were established.

On 4 October 2017, a meeting was held between Anglo Gold, the unions, and JMCA specifically to sign the section 197(6) agreement, with the A and B lists, in order to give effect to the sale of the Hospital. At the meeting NUM advised the plenary that it agrees with the agreement in principle but sought an indulgence to secure a mandate from its members. NUM members objected to the section 197(6) agreement. However, NUM advised the respondents that, even though it was not going to sign the section 197(6) agreement, it would participate in the implementation thereof in order to enable the transfer which was to be effected on 12 October 2018.

NUM members objected to the section 197(6) agreement.

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BUSINESS TRANSFERS

BUSINESS TRANSFERS

IS AN AGREEMENT CONCLUDED IN TERMS OF SECTION 197(7) OF THE LRA A COLLECTIVE AGREEMENT WHICH IS CAPABLE OF EXTENSION IN TERMS OF SECTION 23(1)(D) OF THE LRA?

National Union of Mineworkers & others v Anglo Gold Ashanti Ltd & another (2019) 40 ILJ 407 (LC)*...continued*

On 5 October 2018, the applicants' employees disrupted the briefing session which sought to finalise the A-list and B-List, threatening to boycott the implementation of the section 197(6) agreement. Thereafter, the affected employees embarked on a strike. Anglo Gold approached the LC for an order interdicting the unprotected strike and the LC issued a *rule nisi* granting Anglo Gold interim relief. Anglo Gold proceeded with steps to dismiss the employees who participated in the unprotected strike.

In these proceedings, NUM sought an order interdicting the dismissal of its members.

SUMMARY OF THE FINDINGS OF THE COURT

The court was satisfied that the impugned section 197(6) agreement that NUM refused to sign is indeed a collective agreement in terms of section 23, capable of being extended in terms of section 23(1)(d). The agreement was extended to include the NUM members and they were bound by the agreement and embarked upon an unprotected strike.

As a result, NUM's application was dismissed.

Faan Coetzee and Lawrence-John Maralack

The court was satisfied that the impugned section 197(6) agreement that NUM refused to sign is indeed a collective agreement in terms of section 23, capable of being extended in terms of section 23(1)(d).

BUSINESS TRANSFERS

DOES PRESCRIPTION APPLY IN RELATION TO A CLAIM FOR MONIES PURSUANT TO A TRANSFER OF A BUSINESS?

Mobile Telephone Networks (Pty) Ltd v Pillay & others (2019) 40 ILJ 2011 (LAC)

SUMMARY OF THE FACTS

With effect from 1 December 2010, MTN, took over a business previously operated by Interaction Call Centre. The respondents were all employees of Interaction Call Centre. MTN denied that the takeover of Interaction Call Centre constituted a transfer of a business as a going concern and refused to recognise the respondents as employees. As a result, the employees applied to the LC for an order declaring the transaction a transfer in terms of section 197 of the LRA; and to be declared employees of MTN from 1 December 2010, with no loss of service or remuneration.

Consequently, MTN raised prescription as a defence in the LC, contending that the claims for remuneration for that period had prescribed in terms of the Prescription Act, as more than three years had elapsed since the remuneration became due in terms of the contracts of employment.

The LC declared that the transaction between Interaction Call Centre and MTN fell within the ambit of section 197 of the LRA and constituted a transfer of business as a going concern. In addition, the LC declared that the respondents are, in law, employees of the appellant 'effective from 1 December 2010, being the date of transfer, with no loss of service. The LC rejected the defence of prescription. MTN sought to appeal the decision by the LC to the LAC.

> The LC rejected the defence of prescription. MTN sought to appeal the decision by the LC to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC addressed the contracts of employment of the employees and the issue of prescription considering section 197 of LRA. The LAC confirmed that contracts of employment continue uninterrupted and there is no need for employees to tender services and reasoned as follows:

> *"Section 197(2) of the LRA spells out the position of the new employer and the employees, unless otherwise agreed by them, the same terms and conditions that were applicable to the employees under the old employer 'continue in force' under the new employer. The new employer 'steps into the transferor's shoes, and after the transfer is affected, simply employs the transferred employees as if they had always been on its payroll'. It is thus implicit in section 197 that the new employer, like the old employer, has a duty, inter alia, to pay the employees their wages as and when they fell and fall due in terms of their, respective, employment contracts."*

BUSINESS TRANSFERS

DOES PRESCRIPTION APPLY IN RELATION TO A CLAIM FOR MONIES PURSUANT TO A TRANSFER OF A BUSINESS?

Mobile Telephone Networks (Pty) Ltd v Pillay & others (2019) 40 ILJ 2011 (LAC)*...continued*

The LC previously held that, "*taking into account the nature and effect of section 197 'it would appear that it was not required of the employees to tender their services where the business employing them is transferred in accordance with section 197', because 'the employment continues uninterrupted'*." Consequently, the LAC affirmed that employees do not need to tender services during a section 197 business transfer. Thus, an employee does not need to prove that services have been rendered during a claim for the payment of salaries unless the employer alleges that the service of the employee has not been provided. Thus, the court concluded that the employees do not need to tender services.

On the issue of prescription, the LAC held that the order that the respondents obtained from the LC which confirmed that MTN was indeed the employer effectively interrupted the running of prescription in respect of their claims for remuneration for the period 1 December 2010 up to and including 21 April 2015. Additionally, "*In terms of section 12(1) of the Prescription Act, prescription commences when the debt is due, but in terms of section 12(3) of the same Act, a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor. The respondents in this instance could only establish in law that MTN was indeed their debtor by the declaratory order sought and eventually granted by this court on 21 April 2015*".

Furthermore, the LAC held that quantification of the remuneration of the employees by the LC must be upheld on the basis that the parties could not agree to a settlement amount during the appeal proceedings. Thus, the LAC concluded that the respondents are owed their remuneration as employees of MTN owing to the application of section 197 of the LRA.

Mohsina Chenia and Nomathole Nhlapo

An employee does not need prove that services have been rendered during a claim for the payment of salaries unless the employer alleges that the service of the employee has not been provided.

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LEGISLATIVE REVIEW

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LEGISLATIVE REVIEW

SUMMARY OF DIRECTIVE FOR COMPENSATION ON WORKPLACE ACQUIRED NOVEL CORONA VIRUS DISEASE (COVID-19) DATED JUNE 2020 (COMPENSATION DIRECTIVE)

The Compensation Directive pertains to the payment of compensation in the event of contracting COVID-19 during the course and scope of employment and claims against the Compensation Fund. The Compensation Directive will remain in place for the duration of the declaration of a national state of disaster in terms of the DMA or until it is withdrawn by the responsible minister.

In order to establish whether COVID-19 was contracted in the workplace, employers will look at the following factors:

- risks that the workplace poses in relation to certain categories of employees;
- exposure to a known source at the workplace;
- business travel to high risk areas;
- a reliable diagnosis; and
- the chronological sequence between exposure at work and development of symptoms.

The Compensation Directive categorises various occupations according to the following risk categories, this is however merely a guideline:

1. **Very high exposure** – which consists mainly of frontline health workers who perform aerosol generating and cardiorespiratory procedures (ventilation). Those that provide autopsies also fall within this category;
2. **High exposure** – medical and health care delivery and support employees, ambulance drivers and paramedics as well as those who work in a mortuary;
3. **Medium exposure** – Occupations that require frequent or close contact with individuals known to be infected with SARS Cov-2 but who are not known to be infected with COVID-19. The employee will work in areas where there would be contact with the general public; and
4. **Low exposure** – occupations that do not require any contact with individuals known to be infected, and there is little or no contact with the general public.

When considering a claim, the Compensation Fund will look at the risk category that the employee falls into.

> When considering a claim, the Compensation Fund will look at the category that the employee falls into.

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LEGISLATIVE REVIEW

Death benefits will be payable if the employee dies as a result of COVID-19 complications.

SUMMARY OF DIRECTIVE FOR COMPENSATION ON WORKPLACE ACQUIRED NOVEL CORONA VIRUS DISEASE (COVID-19) DATED JUNE 2020 (COMPENSATION DIRECTIVE)

...continued

Impairment:

The degree of impairment is based on medical complications as a result of COVID-19. Permanent impairment will be determined three months after diagnosis when maximum medical improvement is reached.

Where an employee suffers temporary total disablement, payment will continue throughout the period disablement as a result of COVID-19, but shall not exceed 30 days.

Compensation will not be made for unconfirmed cases. In respect of self-isolation and self-quarantine, employers must follow the TERS directive.

The Compensation Commissioner has a right to determine each case on its own merit. Medical aid will be provided in confirmed cases for a period of 30 days and longer if this will mitigate the extent of the disablement (at the discretion of the Compensation Fund).

Death benefits will be payable if the employee dies as a result of COVID-19 complications.

The following documents must be submitted when a claim is made:

1. W.CL.1 form completed by the employer;
2. W.CL.14 form;
3. Exposure and medical questionnaire;
4. First medical report;
5. Exposure history;
6. Medial report on symptoms;
7. Progress medical report for each consultation;
8. Final medical report; or
9. Affidavit by employee if employer cannot be reached or timeously complete W.CL.1 form.

The above-mentioned documentation must be submitted to the office of the Compensation Commissioner for processing.

Asma Cachalia

SUMMARY OF CONSOLIDATED COVID-19 DIRECTION ON HEALTH AND SAFETY IN THE WORKPLACE ISSUED BY THE MINISTER ON 4 JUNE 2020 (DIRECTION)

The Direction seeks to ensure that measures taken by employers under OHSA are consistent with the overall national strategies and policies to minimise the spread of COVID-19. The Direction remains in force for as long as the declaration of a national disaster remains in force. Employers must notify all workers of the contents of this Direction and the manner in which it intends to implement it.

Every employer commencing operations must:

- undertake a risk assessment and develop a plan outlining protective measures in place;
- make the plan available for inspection by an inspector and a person contemplated in clause 17.3 of the OHSA; and
- consult on the risk assessment and plan with trade unions, a health and safety committee or a health and safety representative.

The plan must include:

- the date that the workplace will open and the hours of operation;
- a list of employees permitted to return to work and those who are required to work from home;
- the plan and timetable for the phased - in return of employees to the workplace;
- identification of vulnerable employees for the purposes of paragraph 20.3;
- ways of minimizing the number of workers at the workplace at any one time as contemplated in paragraph 20.8;
- the workplace protective measures required to be taken in terms of this Direction and any sectoral guideline to get the workplace COVID-19 ready;
- the measures for the daily screening of employees and the screening of clients, contractors and visitors to the workplace; and
- the appointment and details of the COVID-19 compliance officer who will oversee the implementation of the plan, address employee concerns and make sure health and safety rules are adhered to.

Administrative measures::

- If the employer employs more than 500 employees, the employer must submit a record of its risk assessment together with a written health and safety policy to its health and safety committee and the Department within 21 days of the commencement of the Direction.
- Employers must take special measures to mitigate the risk of COVID-19 for vulnerable employees in accordance with the DOH's guidelines.
- Employers must notify its employees that if they are sick or have symptoms associated with COVID-19 that they must not come to work and to take paid sick leave in terms of section 22 of the BCEA.
- Hygiene and safety practices must be made available to employees.

The Direction seeks to ensure that measures taken by employers under OHSA are consistent with the overall national strategies and policies to minimise the spread of COVID-19.

SUMMARY OF CONSOLIDATED COVID-19 DIRECTION ON HEALTH AND SAFETY IN THE WORKPLACE ISSUED BY THE MINISTER ON 4 JUNE 2020 (DIRECTION)*...continued*

> Every employer must arrange the workplace to ensure at least one and a half metres between workers while they are working.

Testing Positive:

If a worker has been diagnosed with COVID-19, an employer must:

- inform the DOH and the Department;
- investigate the mode of exposure;
- determine the need to temporarily close the affected work area; and
- give administrative support to any contact-tracing measures implemented by the DOH.

Social distancing measures:

- Every employer must arrange the workplace to ensure at least one and a half metres between workers while they are working. Reducing the number of workers present in the workplace at any time in terms of paragraph 20.8 may assist in achieving the required social distancing.
- If it is not practicable, the employer must:
  - arrange physical barriers to be placed between workstations when required; or
  - supply the employee, free of charge, with appropriate PPE based on a risk assessment of the working place.
- Every employer must ensure that social distancing measures are implemented through supervision both in the workplace and in the common areas. These measures may include dividing the workforce into groups or staggering break-times to avoid the concentration of workers in common areas.

Health and safety measures:

Every employer must implement the following health and safety measures:

- Symptom screening: Employees must be screened for common symptoms, and employees must inform the employer if they have experienced same. Employees will not be allowed to enter the workplace if they have symptoms, and if already at work must be isolated, their area disinfected, and the risk of transmission must be assessed. The employee must be placed on leave in terms of section 22 of the BCEA. An employer must ensure that they do not discriminate against employees who contract COVID-19 during the course and scope of employment. In such an instance, a claim for compensation must be lodged in terms of COIDA.
- If a worker has been diagnosed with COVID-19 and isolated in accordance with the DOH guidelines, an employer may only allow a worker to return to work on the following conditions:
  - The worker has completed the mandatory 14 days self-isolation;
  - the worker has undergone a medical evaluation confirming fitness to work;
  - the employer ensures that personal hygiene, wearing of masks, social distancing, and cough etiquette is strictly adhered to by the worker;
  - the employer closely monitors the worker for symptoms on return to work; and
  - the worker wears a surgical mask for 21 days from the date of diagnosis.

SUMMARY OF CONSOLIDATED COVID-19 DIRECTION ON HEALTH AND SAFETY IN THE WORKPLACE ISSUED BY THE MINISTER ON 4 JUNE 2020 (DIRECTION)*...continued*

- If a worker has been in contact in the workplace with another worker who has been diagnosed with COVID-19, the employer must assess that worker's exposure in accordance with the DOH's guidelines to ascertain whether the exposure carries a high or low risk of transmission between the workers.

If there is a low risk of exposure, the employer:

- may permit the worker to continue working using a cloth mask complying with standard precautions; and
- must monitor the worker's symptoms for 14 days from the first contact.

If there is a high risk of exposure:

- the worker must remain in quarantine for 14 days; and
- the employer of that worker must place the worker on sick leave.

Sanitizers, disinfectants and other measures:

- Sanitizers must contain at least 70% alcohol.
- There must be a sufficient amount of sanitizer based on the number of workers.
- Should the employee work from home he/she must be given a sufficient amount of sanitizer.
- Should the worker be exposed to the public, sanitizer must be available at the workstation.
- All surfaces must be sanitized.
- All common areas must be sanitized.
- Disable biometric systems.
- All workers must wash and sanitize their hands regularly.
- Workers exposed to the public must sanitize their hands before interacting with each person.

Cloth masks:

- All employees must wear cloth masks which must be provided by the employer.
- Number and replicability must be determined per sector and must be provided to the employee.
- Employees must be trained and informed regarding correct use of cloth masks.
- The general requirement for workers to wear masks does not derogate from the fact that, where a risk assessment indicates, specific personal protective equipment is required.

Measures in respect of workplaces to which the public have access:

- The number of public persons allowed in the workplace must be determined in light of square meterage.
- Social distancing must be exercised (1.5 meters) inside and outside the building.
- Physical barriers must be used.
- Symptom screening of members of public must be adopted if possible.
- Notices must be displayed.

> All employees must wear cloth masks which must be provided by the employer.

SUMMARY OF CONSOLIDATED COVID-19 DIRECTION ON HEALTH AND SAFETY IN THE WORKPLACE ISSUED BY THE MINISTER ON 4 JUNE 2020 (DIRECTION)*...continued*

- Masks must be worn by public.
- Provide hand sanitizer at the entrance.
- A compliance officer must be present to ensure adherence.

Ventilation:

- The workplace must be ventilated naturally or mechanically.
- Extractors must be used where practicable.
- Filters must be cleaned and replaced.

Specific Personal Protective Equipment:

- Where needed appropriate PPE must be used.
- A basic plan must be formulated for phasing in of employees taking into account employees over 60 and those with comorbidities.
- Social distancing, physical barriers and sanitizing surfaces and hands must be adopted.
- Other measures as required in terms of the risk assessment must be adopted.

Worker obligations:

- Workers must comply with measures taken by employers.

Refusal to work:

- Employee may refuse to work where the workplace is unsafe and must inform the employer or a H&S representative, providing reasons.
- Any issue must be resolved where possible.
- No person may advantage or promise to advantage any person for not exercising his or her right to not work
- No employer may make any deduction or permit an employee to make any payment to the employer or any other person, in respect of anything which the employer is obliged to provide or to do in terms of the Direction.
- No person may threaten to take any action against a person because that person has exercised or intends to exercise the rights in terms of the Direction.
- No employee may be dismissed, disciplined, prejudiced or harassed for refusing to perform any work.
- If there is a dispute the employee may refer the dispute to the CCMA or a BC.

Employee may refuse to work is justifiable and must inform the employer or a H&S representative as well as provide reasons.

SUMMARY OF CONSOLIDATED COVID-19 DIRECTION ON HEALTH AND SAFETY IN THE WORKPLACE ISSUED BY THE MINISTER ON 4 JUNE 2020 (DIRECTION)*...continued*

Monitoring and enforcing the Direction:

- If a person fails to comply with this Direction, an inspector may perform any of the functions in terms of OHSA and exercise any of the powers in order to monitor compliance with this Direction.
- The penalties provided for in section 38 of OHSA will apply.
- An inspector may advise employees and employers of their rights and obligations.

Sectoral protocols and guidelines:

- Sectoral or industry associations must, in the event of high health risks, develop sector-specific health protocols in consultation with the DOH including providing for those circumstances where a firm within the sector cannot stagger working hours or provide transport for its employees.
- The Chief Inspector appointed in terms of section 27 the OHSA must facilitate the development of sector specific guidelines to supplement this Direction by engaging with the social partners through the offices of the NEDLAC.
- The sector specific guidelines should include the matters referred to in Annexure B (Workplace risk assessment, engineering controls, administrative controls, H&S work practices, PPE and safe transport for employees).

Asma Cachalia

An inspector may advise employees and employers of their rights and obligations.

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LEGISLATIVE REVIEW

PROTECTION OF PERSONAL INFORMATION ACT NO 4 OF 2013 (POPI)

POPI came into effect on 1 July 2020. Compliance with POPI's obligations relating to the processing of information is suspended until 1 July 2021, to allow responsible parties to achieve compliance with its provisions.

POPI emanates from section 14 of the Constitution, which provides that everyone has the right to privacy and it includes a right to protection against the unlawful collection, retention, dissemination and use of personal information. POPI introduces obligations on employers and grants rights to employees in an attempt to balance the right of employers to conduct a business with the right to the privacy of its employees. POPI is not limited to the parties to an employment relationship, but there is no doubt that they are subject to its protections.

In terms of section 6 of POPI, the following instances of processing personal information are specifically excluded from its application: (i) in the course of purely personal or household activities; (ii) information that has been de-identified to the extent that it cannot be identified again; and (iii) by or on behalf of a public body which involves *inter alia*, national security, defence or public safety and identification for the purpose of combatting money laundering or terrorism. Section 7 of POPI also includes other exclusions for journalistic, literary or artistic purposes.

POPI covers all information that employers might collect, retain or archive on any individual who might wish to work, work, or have worked for the employer. This includes both personal and special personal information.

Personal information is information which is about a living identifiable person (a data subject) and affects that person's privacy (whether in his/her personal or family life, business or professional capacity) in the sense that the information has the person as its focus or is otherwise biographical in nature and identifies a person, whether by itself, or together with other information in the organisation's possession or that is likely to come into its possession. Special personal information is information concerning an individual's religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information, the criminal behaviour of a person subject to the extent that such information relates to the alleged commission by the employee of any offence or any proceedings in respect of any offence allegedly committed by an employee or about the disposal of such proceedings. The accessing and processing of special personal information is only allowed in specific instances. Generally, however an employer may not enquire into or access the special personal information of a data subject without the consent of the data subject.

POPI covers all information that employers might collect, retain or archive on any individual who might wish to work, work, or have worked for the employer.

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LEGISLATIVE REVIEW

PROTECTION OF PERSONAL INFORMATION ACT NO 4 OF 2013 (POPI)*...continued*

POPI refers to the persons to whom personal information relates, as "*data subjects*". Within an employment context, this includes applicants and former applicants (successful or unsuccessful), former or current employees, Temporary Employment Services staff, casual staff, staff on secondment and those on work experience placements. The personal information of all of these people must be dealt with in accordance with POPI.

Processing and further processing of personal information is only lawful if it complies with the eight conditions specified in POPI. An employee (data subject) has the right to have his or her personal information processed in accordance with these conditions.

The eight conditions for the lawful processing of personal information are briefly as follows:

- **Accountability, section 8:** employers must ensure that the conditions of POPI are complied with at the time of determining the purpose and means of processing personal information.
- **Processing limitation, sections 9 to 12:** the processing of personal information must be limited to lawful processing and must be done in a manner that does not infringe on the rights of employees.
- **Purpose specification, sections 13 and 14:** collecting of personal information must be for a specified, explicitly defined, lawful purpose.
- **Further processing limitation, section 15:** use of personal information must be in line with the purpose for which it was collected or in accordance with the consent of the employee.
- **Information quality, section 16:** an employer must take practical steps to ensure the information is complete, accurate, updated and not misleading in any way.
- **Openness, sections 17 and 18**: an employer must take reasonable steps to ensure that the employee is aware of the information collected and the source of the information.
- **Security safeguards, sections 19 to 22:** an employer must secure the confidentiality and integrity of personal information in its possession.
- **Data subject participation, sections 23 to 25:** an employee has the right to know what personal information of his/ hers is held by the employer and well as the right to access the personal information in the possession of the employer.

All employers, who are either public or private bodies, as defined in POPI, are required to appoint an information officer who is responsible for, *inter alia*, ensuring compliance with POPI and working with the Information Regulator established in terms of POPI.

POPI creates various criminal offences for non-compliance, infringements or breach of confidentiality. The Information Regulator may impose an administrative fine not exceeding R10 million. Some offences attract imprisonment not exceeding 10 years with or without a fine.

Riola Kok

Processing and further processing of personal information is only lawful if it complies with the eight conditions specified in POPI.

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LEGISLATIVE REVIEW

EMPLOYMENT EQUITY ACT AMENDMENT BILL, 789 OF 2020 (EEAA Bill)

The purpose of the EEAA Bill is, among other things, to (i) align the EEA with the NMWA, (ii) to reduce the burden on small business, by amending the definition of designated employer and deleting the provisions related to voluntary compliance by non-designated employers, (iii) to allow the Minister, by notice in the Government Gazette, to determine sector specific numerical targets for the purposes of ensuring equitable representation and (iv) to widen the definition of "*persons with disabilities*" to align with the United Nations Convention on the Rights of Persons with Disabilities, 2007.

Reducing the burden on small businesses

In terms of the proposed amendments to section 1 of the EEA, being the definition section, the EEAA Bills seeks to delete paragraph (b) of the definition of "*designated employer*", which refers to employers with less than 50 employees who meet the turnover threshold in terms of schedule 4 of the EEA. In addition, the EEAA Bill seeks to repeal section 14 of the EEA which allows non-designated employers to voluntarily comply with the provisions of the EEA by notifying the Director-General of their intention to so do. The purpose of repealing section 14 is to reduce the regulatory burden on small businesses.

Aligning the EEA with the NMWA

In order to align the EEA with the NMWA, the following amendments are proposed: (i) including the definition of "*National Minimum Wage Commission*" to section 1 of the EEA and (ii) to amend section 27 of the EEA to transfer the duty of reporting and monitoring income differentials to the National Minimum Wage Commission, a function that was previously undertaken by the Employment Conditions Commission.

Amended definition of "*persons with disabilities*"

The EEAA Bill seeks to amend the definition of "*persons with disabilities*" to align with the United Nations Convention on the Rights of Persons with Disabilities, 2007. The proposed amended definition is as follows: "*[means] includes people who have a long-term or recurring physical [or] mental intellectual or sensory impairment which in interaction with various barriers may substantially [limits] limit their prospects of entry into, or advancement in, employment and ' persons with disabilities' has a corresponding meaning;*". The amended definition therefore seeks to include sensory impairments that create barriers to entry, access and advancement in the workplace, so as to widen the ambit of the definition of "*persons with disabilities*" and to align the definition with international standards.

> The purpose of repealing section 14 is to reduce the regulatory burden on small businesses.

EMPLOYMENT EQUITY ACT AMENDMENT BILL, 789 OF 2020 (EEAA Bill)*...continued*

> The sector numerical targets are designed as a robust approach to ensuring representation in various sectors and enhancing compliance with the EEA and the equitable representation goals as contained therein.

Numerical sectoral targets

The EEAA Bill seeks to include section 15A to the EEA, in terms of which the Minister is empowered to set sector specific numerical representation targets in order to achieve equitable representation as envisaged in the EEA. In terms of the proposed section 15A, the Minister is empowered to (i) identify economic sectors for the purposes of the EEA, (ii) prescribe the criteria for identifying sectors and sub-sectors, (iii) determine specific national economic sector numerical targets for the purpose of ensuring equitable representation of suitably qualified persons in each sector, (iv) set different national economic sector numerical targets based on occupational levels.

Corresponding amendments to align with the inclusion of the proposed section 15A are as follows:

- The inclusion of the definition of "*sector*" in the definition section of the EEA.
- An amendment to section 20 of the EEA to include numerical targets in an employer's employment equity plan.
- A corresponding amendment to section 27 so as to ensure that an employer considers the sector numerical targets when seeking to address and report on income differentials.
- A corresponding amendment to section 42 of the EEA to align with the introduction of sector specific numerical targets.

The sector numerical targets are designed as a robust approach to ensuring representation in various sectors and enhancing compliance with the EEA and the equitable representation goals as contained therein.

Riola Kok

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AFFRIMATIVE ACTION DIMENSIONS OF COVID-19 REGULATIONS AND DIRECTIVES

CLIFFE DEKKER HOFMEYR

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AFFRIMATIVE ACTION DIMENSIONS OF COVID-19 REGULATIONS AND DIRECTIVES

The HC considered the recent decision in *Solidarity obo Members v The Minister of Small Business Development and others* in coming to its conclusion.

AFFRIMATIVE ACTION DIMENSIONS OF COVID-19 REGULATIONS AND DIRECTIVES

CAN BBBEE STATUS OR CRITERIA BE USED AS A BASIS FOR DISTRIBUTING STATE FUNDS DURING COVID-19?

Democratic Alliance v President of the Republic of South Africa and others [2020] ZAGPPHC 237

SUMMARY OF THE FACTS

Following the outbreak of the coronavirus pandemic, the Minister of Small Business Development (Minister of SBD) established two funds to provide financial relief to small, medium and micro enterprises, namely the Debt Finance Scheme and the Business Growth Resilience Fund. The Democratic Alliance (DA) launched an application in the HC owing to the proclaimed priority to be given to women, youth and people with disabilities, despite the Minister of SBD having previously indicated that the available funds would be distributed equally to all. In essence, the DA argued that it was unlawful for BBBEE status or criteria, such as race, gender and disability to be used as a basis for determining the recipients of benefits from the two funds that had been created. Drawing on *Affordable Medicines Trust v Minister of Health* [2006 (3) SA 247 (CC)], it was also argued that the manner in which government had chosen to prioritise certain groups of people in allocating the funding was vague and unpredictable. In response, the state argued that there was a clear list of applicable criteria to be applied when distributing the funds and that it was competent for the Minister of SBD to identify policy guidelines to be considered by decision makers in the exercise of their discretionary powers to distribute money from either of the funds. Flexibility was required because of the complexity of the situation, which required balancing of competing considerations (including factors such as the total funds available, the number of applicants and their demographic composition).

The Economic Freedom Fighters (EFF) successfully applied to intervene in the matter, and the Commission for Gender Equality was admitted as an amicus to the proceedings.

SUMMARY OF THE FINDINGS OF THE COURT

The HC considered the recent decision in *Solidarity obo Members v The Minister of Small Business Development and others* (case 21314/20, 30 April 2020) in coming to its conclusion. In that case, a Tourism Relief Fund for SMMEs was established, but the selection criteria included detailed scoring criterion, including a maximum of 20 points (out of 100) for BBBEE status. The court in that case held that an appropriate balance had been struck in assisting all candidates, with a small measure of support devoted to matters of empowerment and transformation, which was laudable. By contrast, in the case at hand, the criteria failed to pass legal muster, granting broad decision-making powers without sufficient explanation regarding the details of the expressed prioritisation for women, the youth and disabled.

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AFFRIMATIVE ACTION DIMENSIONS OF COVID-19 REGULATIONS AND DIRECTIVES

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CAN BBBEE STATUS OR CRITERIA BE USED AS A BASIS FOR DISTRIBUTING STATE FUNDS DURING COVID-19?

Democratic Alliance v President of the Republic of South Africa and others [2020] ZAGPPHC 237*...continued*

Nevertheless, given the history of the country, and the systemic disadvantages based on race, class and gender, there was a need to provide redress and prioritise those most in need. Vulnerability in the Covid-19 context could not be separated from race, which overlapped with socio-economic status in SA, and the DMA had to be interpreted accordingly. This implied that those with less resources could be prioritised for assistance in terms of SA's constitutional framework, but the criteria for this had to be carefully and understandably crafted by the responsible authority.

The criteria used for determining which persons or entities were entitled to receive the relief funding were set aside and declared unlawful, but funds already distributed were not affected by the court's decision. The court referred the matter back to the Minister of SBD to redraft the Regulations and to provide proper guidance in respect of the disbursement of the available funding. Significantly, and for the reasons explained, the Minister of SBD was ordered to specifically consider race, gender, youth and disability in reformulating the criteria to be employed.

Avinash Govindjee

> The court referred the matter back to the Minister of SBD to redraft the regs and to provide proper guidance in respect of the disbursement of the available funding.

DEFINITIONS

ABBREVIATION	FULL REFERENCE
BBBEE	Broad Based Black Economic Empowerment
BCEA	Basic Conditions of Employment Act 75 of 1997
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
Companies Act	The Companies Act 71 of 2008
the Constitution	The Constitution of the Republic of South Africa Act 108 of 1996
DOH	Department of Health
Department	Department of Employment and Labour
DMA	Disaster Management Act 57 of 2002
EEA	Employment Equity Act 55 of 1998
HC	High Court
LAC	Labour Appeal Court
LC	Labour Court
LLAA	Labour Laws Amendment Act 10 of 2018
LRA	Labour Relations Act 66 of 1995
LRAA	Labour Relations Amendment Act 8 of 2018
Minister	Minister of Employment and Labour
NMWA	National Minimum Wage Act 9 of 2018
OHSA	Occupational Health and Safety Act 85 of 1993
Prescription Act	Prescription Act 68 of 1969
SCA	Supreme Court of Appeal
SA	Republic of South Africa
Superior Courts Act	Superior Courts Act 10 of 2013
TERS	Temporary Employee Relief Scheme
UIF	Unemployment Insurance Fund

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