Employment Law

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Client Centricity: Workplace Synergies

Case Law Update 2023

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Foreword

Dear friends and colleagues,

I have practiced in and served the legal profession for many years. During that time, I have witnessed major change in the legal landscape including within the employment law space. Workplaces have always been dynamic spaces where labour, economics, leadership, management, and law intersect. The full spectrum of the law manifests in the workplace. Right now, we are on the cusp of much transformation. The 2020's have brought with it complexity, instability and change in a way that we have not seen for a long time. The COVID-19 pandemic, global economic recessions and inflation, constraints on resources including the supply of electricity, interruptions in supply chains, ecological crises, and increased unemployment reaching critical levels.

One of the significant changes has been the speed of technological advancement and the development of advanced AI platforms and knowledge and information systems that affect all areas of human life. We may not yet understand the full extent to which this will implicate the world of work, but we know that its effect will be concrete. A historical example is illustrative. The mechanised printing press was invented in Europe in the 15th century. Movable typeset and paper were fashioned in China and the Korean peninsula and subsequently mechanised in Europe during the 15th century. This was a precursor to the industrial revolution that completely changed the face of technology and had a significant impact on the workplace. The mechanisation of the printing press made obsolete the profession of scribes but created space for new skills that were aligned to the new technology. It made information more accessible, printed material more affordable and quicker to produce, and resulted in the birth of the newspaper. This innovation in time led to more efficient and effective ways of publishing and circulating written content and its most recent iteration has been the computerisation of writing and circulation of information on the internet with the writer having more control over the formatting and the wide publication of a text.

The future that comes into being may no longer have some of the jobs that we are familiar with today and will require people with skills that we are unaware of yet. While there are valuable opportunities to be had, this will impact job security, skills development, operational processes and requirements, and, without doubt, will create novel legal dimensions, challenges and compliance requirements. We need think carefully of how we will respond. Rejecting or approaching it with hesitance is not an option. Planning a considered way forward by assessing the risks and opportunities and the potential legal scope is essential.

Increasingly because of the complexity of the world, insular and unilateral approaches are less attractive and effective. The lawyer has always been the expert advocate of their clients' interests. However, unlike the past where lawyers would wield autonomy to define a client's problem and the approach to resolve it, the current context requires the lawyer to fully understand the client's perspective, the practicalities of the workplace and business environment, and the strategic logic that influences the conduct and decisions of clients. In this way, there is a productive engagement. The legal and compliance know-how is transformed into a bespoke service that benefits and enriches both the lawyer and the recipient. At CDH, we pride ourselves with centering this approach: focusing on our clients' needs, understanding their environment, making the law accessible, and ultimately making things work and limiting risk.

At this year's conference we will be discussing these themes with some of our clients who will share their insights with us. Furthermore, our annual case law booklet is an important value add contribution that presents a synopsis of some of the key court judgments in the last year. We trust that you will find these offerings interesting and useful. Thank you for journeying with us.

AADIL PATEL
Practice Head: Employment Law

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Acronym List

Abbreviation	Full reference
EEA	Employment Equity Act 55 of 1998
CCMA	Commission for Conciliation, Mediation and Arbitration
Constitution	Constitution of South Africa, 1996
CV	Curriculum Vitae
LC	Labour Court
LAC	Labour Appeal Court
SCA	Supreme Court of Appeal
LRA	Labour Relations Act 66 of 1995

01

Strikes

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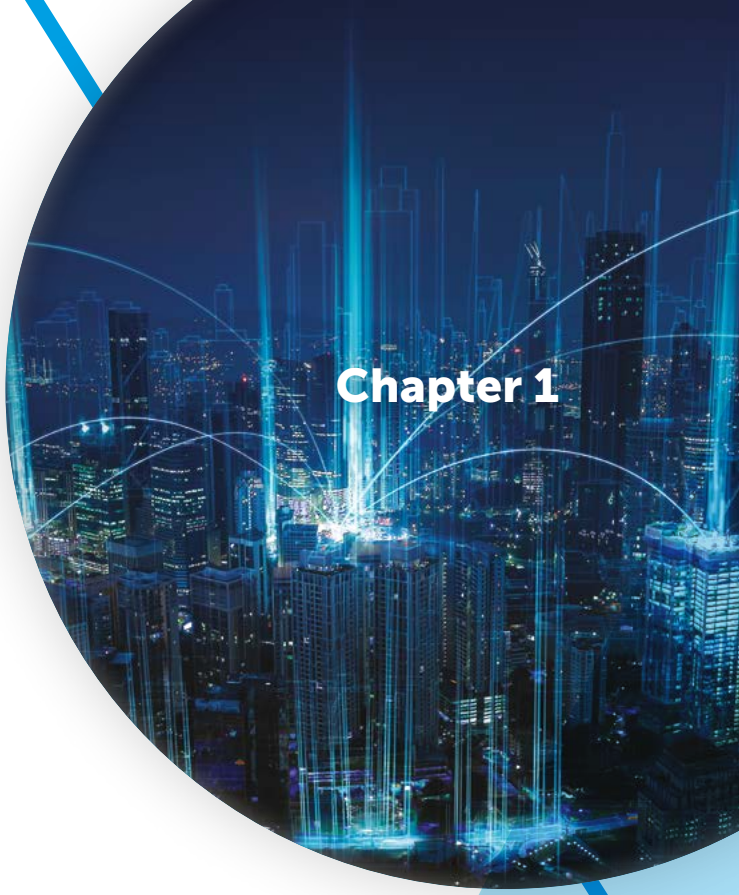

Deductions of monies paid in cases of "*no work, no pay*"

Does section 34 of the BCEA in respect of deductions apply to monies paid in cases of "*no work, no pay*"?

North West Provincial Legislature and One Other v National Education, Health, and Allied Workers Union obo 158 Members [2023] 8 BLLR 745 (LAC)

Summary of the facts

From 16 November 2020 to 15 December 2020, employees of the North West Provincial Legislature (NWPL) engaged in an unprotected strike.

On 16 November 2020, a communiqué was issued by the secretary of the NWPL informing staff members that, given the strike action, the principle of "*no work, no pay*" would apply to those employees who did not attend work on the specified dates.

The strike action was duly interdicted on 27 November 2020 when the LC declared the strike unlawful. A further communiqué was issued by the secretary of the NWPL on 14 December 2020 reiterating that the principle of no work, no pay was to be implemented from 15 December 2020.

Despite the communiqués that was issued, remuneration was paid to all striking employees by the NWPL, due to the NWPL's failure to halt its payroll run to the striking employees. Following this, the NWPL advised the striking employees that it would deduct the remuneration paid to them from their salaries over a number of months.

This communication formed the crux of the dispute between the parties, wherein it was subsequently decided on 13 January 2021 that the deductions were to be suspended pending the conclusion of negotiations between the parties. A task team was appointed to assist in the resolution of the issues; however, no solutions were found.

Following the failure of the negotiations, the NWPL subsequently informed its employees that it would proceed to deduct three working days' remuneration each month from the employee's remuneration until 15 April 2022.

In response, the National Education, Health, and Allied Workers' Union approached the LC on an urgent basis under section 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) seeking urgent interim relief interdicting and/or restraining the NWPL from effecting any deductions from the remuneration of the employees on the basis of their participation in an unlawful strike.

The LC granted final interlocutory relief in the matter, which formed the basis for the appeal.

Chapter 1

Deductions of monies paid in cases of "*no work, no pay*"

Does section 34 of the w in respect of deductions apply to monies paid in cases of "*no work, no pay*"?*...continued*

North West Provincial Legislature and One Other v National Education, Health, and Allied Workers Union obo 158 Members [2023] 8 BLLR 745 (LAC)

Labour Court

The LC found that section 34(1) of the BCEA applies to any deduction from an employee's remuneration unless the legislated exceptions exist, namely, the employee agreeing in writing to the deduction, or where the deduction is permitted by law, collective agreement, court order or arbitration award.

In this instance, the court found that the deduction of remuneration by the NWPL was impermissible and unlawful since no agreement had been concluded with the employees, and neither was there any law in place allowing for a deduction.

The LC further found there to be no conflict between section 67(3) of the LRA, which provides for no work, no pay during a protected strike, and section 34 of the BCEA.

Appeal

In appealing the findings of the LC, the NWPL argued that:

- Section 34 of the BCEA does not apply where the principle of "*no work, no pay*" finds application.
- The "*no work, no pay*" principle constitutes a law as contemplated in section 34(1)(b), thus resulting in compliance with the BCEA.
- The recovery of unearned salaries does not amount to self-help, with set-off applicable.
- The LC's reliance on section 67(3)(b) was misplaced.
- the NWPL's employees were not entitled to be unlawfully enriched.

The employees opposed the appeal on the basis that section 34 of the BCEA bars any deduction from an employee's remuneration unless one of four statutory exceptions is met, regardless of whether the "*no work, no pay*" principle applied.

Summary of the findings of the court

In arriving at its findings, the LAC firstly outlined that remuneration is paid in terms of a contract of employment as a *quid pro quo* for services rendered. Where services are not rendered by an employee, as a general rule, remuneration is not payable.

Within this context, the withholding of labour by employees and the concomitant withholding of remuneration by employers, are powerful tools available to each of the parties. The principle of "*no work, no pay*", given effect by section 67(3) of the LRA means that, "*an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out*". The same principle applies to a protected lock-out.

Deductions of monies paid in cases of "*no work, no pay*"

Does section 34 of the BCEA in respect of deductions apply to monies paid in cases of "*no work, no pay*"?*...continued*

North West Provincial Legislature and One Other v National Education, Health, and Allied Workers Union obo 158 Members [2023] 8 BLLR 745 (LAC)

The LAC found that, in spite of the fact that the NWPL was not obliged to remunerate the employees for services not rendered during the unprotected strike, it did so and thereafter sought to deduct from their salaries unilaterally, without agreement or order obtained through an adjudicative or judicial process.

Set-off finds no application

The court further found issue with the submission made which argued that the NWPL was entitled to rely on set-off as a principle of our common law. In debunking the argument proposed, the LAC explained that the principle of set-off operates where two persons reciprocally owe each other something in their own right, as defined in the *Schierhout v Union Government (Minister of Justice)* [1926] AD 286.

Furthermore, the Constitutional Court in *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others, Head of the Department of Health, Gauteng and Another v Public Servants Association obo Ubogu* (2018) 39 ILJ 337 (CC), made it clear that the doctrine of set-off does not operate *ex-lege* and that where there are no mutual debts, but rather an unresolved dispute about deductions made from an employee's salary, as evidenced in the current matter, it cannot be applied. The NWPL's submission that the essential elements of set-off were present, was thus deemed to not be sustained.

The extent of the indebtedness of the NWPL's employees to the entity had not been determined, and in such circumstances, the court found that it could not be said that a debt was due and payable. The doctrine of set-off therefore did not find application in the matter.

Conclusion

In conclusion, the LAC found that the LC's decision to grant the final relief could not be faulted as the employees held a clear right to obtain final interdictory relief to prevent the NWPL from effecting and/or causing to be effected any deductions from the employees' salaries until the NWPL had complied with the provisions of section 34.

Hugo Pienaar and Asma Cachalia

Chapter 1

Distinction between a terminated strike and a suspended strike for purposes of using replacement labour

Distinguishing between a suspended and terminated strike, and the proper interpretation of "*in response to a strike*" under section 76(1)(b) of the LRA

National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd (2023) 44 ILJ 1189 (CC)

Summary of the facts

On Friday 23 October 2020, the National Union of Metalworkers of South Africa (NUMSA) gave Trenstar (Pty) Ltd (Trenstar) notice that its members would embark on a strike starting at 07h00 on Monday, 26 October 2020.

The notice stated that the strike would take the form of a total withdrawal of labour. The strike commenced and continued for several weeks.

On Friday, 20 November 2020, NUMSA notified Trenstar that its members would suspend the strike and tender their services and return to work on Monday, 23 November 2020.

Following a notification from NUMSA, Trenstar sent a notice on the same day, giving 48 hours' notice of a lock-out of all NUMSA members. The lock-out was in response to NUMSA's strike action, with the company demanding that:

> *"The NUMSA members in the Trenstar bargaining unit drop and waive their demand to be paid by the company a once-off taxable gratuity in an amount of R7,500 to be paid in addition to the ATB."*

NUMSA responded, contending that the lock-out was not in response to a strike, denying that Trenstar was entitled to use replacement labour during the lock-out, and demanding an undertaking that Trenstar would not use temporary labour.

In reply, Trenstar stated, *inter alia*, that the lock-out notice was served before the strike was suspended at close of business on that day (20 November 2020) and that the strike was in any event not over, having only been suspended.

Trenstar's lock-out began at 07h00 on Monday, 23 November 2020.

Labour Court

NUMSA approached the LC for an order interdicting Trenstar from using replacement labour. NUMSA did not challenge the lawfulness of the lock-out but instead alleged that it was not in response to a strike and hence no replacement labour was permitted. The LC dismissed NUMSA's interdict application, reasoning that "*strike*" in section 76(1)(b) of the LRA qualified the type of lock-out during which replacement labour may be used. Meaning that the mere suspension of the strike could not disqualify use of replacement labour.

Distinction between a terminated strike and a suspended strike for purposes of using replacement labour

Distinguishing between a suspended and terminated strike, and the proper interpretation of "*in response to a strike*" under section 76(1)(b) of the LRA...*continued*

National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd (2023) 44 ILJ 1189 (CC)

Appeal

NUMSA took the judgment on appeal and the LAC concluded that the matter was moot.

Constitutional Court

NUMSA approached the Constitutional Court submitting that the matter fell under the court's constitutional jurisdiction due to its relation to labour rights under section 23 of the Constitution and the LRA. The case also touches on a significant legal point, the interpretation of section 76(1)(b) of the LRA. Clarification of this issue was vital for collective bargaining in labour and such cases tend to be moot before reaching an appellate court.

Summary of the findings of the court

The Constitutional Court ruled that the LRA treats terminated and suspended strikes similarly. It determined that a *"strike"* is a state of concerted labour withdrawal for a specific purpose. Thus, while an unconditional right to strike may persist during suspension, it does not meet the LRA's definition of a strike in that there was no longer a withdrawal of labour.

The court determined that the use of replacement labour during a strike is only lawful for the strike's duration, and since the strike had ended before a lock-out by Trenstar, the right to use replacement labour was no longer valid.

Hugo Pienaar and Asma Cachalia

Chapter 1

Provocation by an employer leading to a strike

Determining if a strike was in response to any unjustified conduct by the employer

Mlondo and Others v Electrowave (Pty) Ltd [2023] 8 BLLR 813 (LC)

Summary of the facts

At the outset, it is important to note that the relationship between the employees and the employer was in general, tense, and that the parties had embarked on a relationship by objective exercise (RBO).

The RBO exercise resulted in several objectives, one of which was that the parties would enter into a collective agreement.

On 19 September 2020, the employees engaged in a strike. An ultimatum was issued, and the striking employees returned to work. On 21 September 2020 the employer and the shop stewards concluded an agreement which, *inter alia*, provided for a job grading system plan to be completed by the end of January 2021, and a 5% wage increase with effect from 1 October 2021.The employer was largely dependent on a single client, Nokia, and the wage increase was paid over and above the earlier industry-wide increase in circumstances where the employer felt held to ransom by the striking employees.

The employer proceeded to issue final written warnings for participation in the strike on 21 September, which prompted another unprotected strike. After further discussion, it was agreed to pend the matter of the final written warnings which, after further discussion with the union, were eventually issued on 19 December 2020.

During December 2020, the employer issued a section 189(3) notice of possible retrenchment, which was facilitated. On 8 January, the union was advised of the employer's intention to introduce short time, and to halt the job grading exercise, given the consultations on possible retrenchments.

On 19 January 2021, the employees embarked on another unprotected strike over a number of demands, including that the time frame for the implementation of the job grading system was supposed to be concluded as per their agreement.

As a result, 36 employees were called to a disciplinary hearing before an independent chairperson and were dismissed.

The matter was referred to the LC because the employees argued that their dismissal for participation in an unprotected strike was substantively and procedurally unfair. They stated further that their strike action was provoked by the employer.

During the hearing of the matter at LC, the employees also contended that they did not actually embark on any strike action, however this was quickly dismissed by the court given that they conceded to embarking on a strike in their pleadings.

Provocation by an employer leading to a strike

Determining if a strike was in response to any unjustified conduct by the employer...*continued*

Mlondo and Others v Electrowave (Pty) Ltd [2023] 8 BLLR 813 (LC)

Summary of the findings of the court

The employees argued that they were provoked to strike because the grading system discussed in September 2020 was not finished. The collective agreement provided that the job grading plan was to be completed by the end of January 2021. The unprotected strike took place on 19 January 2021, in circumstances where the employer had submitted a plan to the union for its consideration (with no response from the union) and where on 13 January 2021 it had discussed its proposal to put the job grading plan on hold on account of the retrenchment exercise. At the time the strike occurred, the deadline for the completion of the job grading plan had not yet expired. Thus, the court found that it could not be said that the employer provoked an unprotected strike on the issue of job grading.

The court then considered the employee's submission with regard to provocation. Regarding the issue of provocation, the court held that the threshold for alleged provocation is high. For employees to escape the ordinary consequences of participation in an unprotected strike by way of provocation, the conduct by the employer must be egregious, and there must be some substantial justification proffered to excuse a failure to comply with the applicable procedures of the LRA.

Regarding substantive and procedural fairness, for the purposes of items 6 and 7 of the Code of Good Practice, the court found that the employees' contravention of the LRA was serious as the employees made no attempt whatsoever to comply with the act, and their strike was not in response to any unjustified conduct by the employer. Furthermore, the employees were aware that an unprotected strike was an act of misconduct for which they could have been disciplined (this was expressly stated in the ultimatums issued on 19 January 2021); they were aware that they had final written warnings for the same offence; and they were afforded a right to be heard prior to dismissal.

Therefore, the court held that the dismissal of the employees was both substantively and procedurally fair.

Hugo Pienaar and Asma Cachalia

02

Collective labour law and privacy

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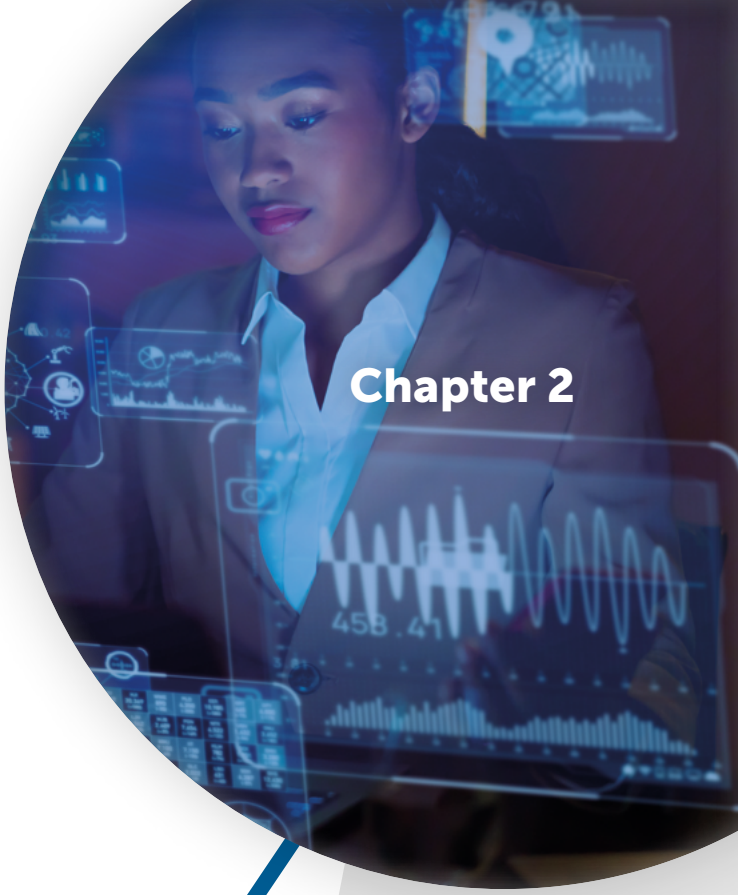

Collective labour law

Does the Minister of Employment and Labour have the power to extend collective agreements to non-parties without first affording them the right to be heard?

Golden Arrow Bus Services (Pty) Ltd and Another v Minister of Employment and Labour and Others [2023] 8 BLLR 775 (LC)

Summary of the facts

The South African Road Passenger Bargaining Council (SARPBAC) concluded a collective wage agreement (MCA) which granted a 4% across-the-board wage increase to the employees of companies falling within its registered scope. The Minister of Employment and Labour (Minister) subsequently extended the MCA to non-parties, including the two applicants, Golden Arrow Bus Services (GABS) and Sibanye Bus Services (Sibanye), both of whom had already withdrawn from SARPBAC.

The applicants contended that the Minister should have afforded them an adequate hearing before automatically applying the extension to them as non-parties. Consequently, they sought orders setting aside the extension and declaring sections 32(2) and (3) of the LRA unconstitutional in so far as they do not require the Minister to follow a fair process before extending bargaining council agreements under such circumstances.

The applicants contended that the Minister committed a reviewable irregularity in not affording them an opportunity to make representations before taking the decision to extend the MCA. They based this right to be heard on section 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and what they considered to be a proper interpretation of sections 32(2) and (3) of the LRA. However, the respondents maintained that there is no general duty on the Minister to afford non-parties the right to be heard before exercising such statutory powers.

In the alternative, the applicants submitted that the MCA was not compliant with the constitution of SARPBAC in that the National Bargaining Forum (NBF) was not quorate, and therefore any collective agreement, including the MCA, was a nullity. This was the turning point for the court.

Chapter 2

Collective labour law

Does the Minister of Employment and Labour have the power to extend collective agreements to non-parties without first affording them the right to be heard?*...continued*

Golden Arrow Bus Services (Pty) Ltd and Another v Minister of Employment and Labour and Others [2023] 8 BLLR 775 (LC)

Summary of the findings of the court

The court ultimately found that an NBF which is not quorate cannot validly perform its constitutional duties, and thus upheld the applicants' submission that the MCA and the decision to extend it to non-parties was a nullity.

However, the court did comment on the applicants' argument that the Minister had infringed their right to be heard and make submissions in terms of both the LRA and PAJA. The court emphasised that there is no statutory obligation on the Minister to give non-parties any form of hearing before exercising their powers in terms of the LRA, nor does a proper reading of the PAJA create this obligation.

The court agreed with the respondents that affording non-parties and minority unions the right to be heard would undermine the very principle of majoritarianism and the collective bargaining process. They further contended that the applicants themselves made the decision to withdraw from SARPBAC and could not then seek to participate in collective bargaining by circumventing majoritarianism.

Accordingly, while the application was upheld on a technicality, it is clear that the principle of majoritarianism stands robustly against any purported rights of non-parties to be heard before the extension of a collective agreement.

Fiona Leppan, Kgodisho Phashe and Kerah Hamilton

Chapter 2

Collective labour law

Does a category of employees within an employer's organisation constitute a "*workplace*" for the purposes of section 21 of the LRA?

National Union of Metalworkers of South Africa v Commission for Conciliation, Mediation and Arbitration and Others [2023] 2 BLLR 159 (LC)

Summary of the facts

The National Union of Metalworkers of South Africa (NUMSA) held organisational rights in respect of hourly-paid employees employed by Mercedes-Benz SA (Pty) Ltd (MBSA). NUMSA subsequently brought an application to extend these organisational rights to another category of MBSA employees in a different job grade, namely certain bands of salaried employees.

Upon MBSA's refusal to discuss the proposal, NUMSA referred a dispute to the CCMA in terms of section 21 of the LRA, requesting organisational rights in respect of this category of employees. The commissioner found that NUMSA had not disclosed the extent of its representativeness in the workplace, but rather restricted itself to its representativeness within a particular job grade.

NUMSA argued that the term "*workplace*" was elastic in that the LRA provides that its definitions will apply "*unless the context indicates otherwise*", and that disputes relating to organisational rights provided the context in which "*workplace*" may include only a category of employees.

The commissioner found against NUMSA and held, firstly, that the CCMA lacked jurisdiction to hear the matter due to NUMSA's failure to properly disclose its representativeness in the workplace as required by section 21 of the LRA, and secondly, that a category of employees within an employer's organisation could not constitute a "*workplace*" for the purposes of section 21 of the LRA.

NUMSA subsequently brought the matter on review before the LC.

Chapter 2

Collective labour law

Does a category of employees within an employer's organisation constitute a "*workplace*" for the purposes of section 21 of the LRA?*...continued*

National Union of Metalworkers of South Africa v Commission for Conciliation, Mediation and Arbitration and Others [2023] 2 BLLR 159 (LC)

Summary of the findings of the court

The LC considered the question of what constitutes a "*workplace*", and whether organisational rights can be claimed in respect of a category of employees for the purposes of section 21 of the LRA.

The court relied on the plain wording of section 21, which states that a workplace means "*the **place or places** where the employees of an employer work*" and held that the language of this definition does not allow for an interpretation which does not envisage the workplace being a place with an address. Embarking on a statutory interpretation of the LRA and the intention of the legislature, the court referred to section 21(8)(b)(v) of the LRA which draws a clear distinction between "*workforce*" and "*workplace*", the workplace encompassing the workforce.

The court found that not only was NUMSA's interpretation of "*workplace*" at odds with the plain language of the LRA, but that it would undermine the values of collective bargaining as enshrined in the LRA and open the door for gerrymandering by predatory and minority trade unions. In other words, any trade union could demand organisational rights even where it lacked meaningful representation in the workforce as a whole. Furthermore, this interpretation would lead to an absurdity, allowing there to be multiple "*workplaces*" within the same organisation.

The court considered NUMSA's argument at the CCMA that it did not seek fresh organisational rights in respect of the salaried MBSA employees, but rather to extend the rights it already possessed to a component of the workforce. However, the court was not convinced and found that by essentially asking the commissioner to extend the scope of an existing collective agreement, NUMSA had ignored the trite principle that a judicial officer is not permitted to revise or even draft a contract for the parties, particularly in the context of collective bargaining where the legislature has intentionally prohibited any unwarranted judicial intervention.

The court ultimately found against NUMSA and held that there should be no conflation of the terms "*workplace*" and "*workforce*". The review application was dismissed with no order as to costs.

Fiona Leppan, Kgodisho Phashe and Kerah Hamilton

Chapter 2

Privacy

Can a trade union request the disclosure of information which is protected by POPIA on behalf of its members?

National Union of Metalworkers of South Africa obo Members v SGB-Smit Power Matla (Pty) Ltd and Another [2022] 4 BALR 449 (CCMA)

Summary of the facts

The applicant, NUMSA, sought an order in terms of section 16(2) read with section 14(4)(b) of the LRA directing the respondents to disclose the content of an insurance policy which covered the wages of its members so that the union could exercise its right to monitor the respondents' compliance with laws relating to terms and conditions of service.

NUMSA alleged that the respondents had short paid its members' wages for a period of roughly eight years and had been informed by the respondents that there was an insurance policy in place which would cover this shortfall. However, the respondents were unwilling to disclose whether the salaries of the NUMSA members were specifically covered by the policy.

NUMSA further argued that because the members in question were party to the policy and had provided their consent to the disclosure of this information in terms of the Protection of Personal Information Act 4 of 2013 (POPIA), there was no privilege nor confidentiality in the information sought.

The respondents declined to disclose this information on the basis that they were not currently bargaining with NUMSA and maintained that the information was privileged. The respondents submitted that the policy had been concluded between them (the respondents) and the insurance company, and that the employees had not been cited in their personal capacities, nor were they a formal party to the policy. Therefore, the respondents contended that NUMSA had no *locus standi* in terms of POPIA.

Summary of the findings of the CCMA

The commissioner considered section 16(2) read with section 14(4) of the LRA, which provides that an employer must disclose all relevant information that will allow a trade union representative to perform their functions effectively. However, subsection 16(5) carves out the exception that employers are not obliged to disclose any information which is, *inter alia*, legally privileged, confidential, or if it would cause substantial harm to an employee or employer if disclosed.

In light of the above, the commissioner considered both the relevance of the information sought as well as the potential harm disclosure could cause to the respondents. The commissioner found that while the policy referred to covered the issue of employees' wages, it had nothing to do with monitoring compliance as put forward by NUMSA.

Furthermore, and importantly, the commissioner found that because the information sought was based on the financial status and records of the respondents, this rendered it confidential as well as privileged on the basis that the policy had been concluded between the respondents and the insurance company.

The commissioner accordingly found against NUMSA, and refused to compel the respondents to disclose the entirety of the policy and/or any portion of it.

Fiona Leppan, Kgodisho Phashe and Kerah Hamilton

03

Employment equity and discrimination, unfair labour practice

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Unfair Labour Practice

An employer's exercise of discretion to promote is unassailable unless it's capricious, malicious or fraudulent

Mashaba v University of Johannesburg and Others [2023] 2 BLLR 119 (LAC)

Summary of the facts

On 1 October 2014 Mashaba commenced employment at the University of Johannesburg (UJ) as a facilitator in the centre for academic staff development. On 19 January 2018 UJ advertised the position of senior co-ordinator in the newly created academic planning and staff development division (division). Mashaba applied for the position. He was not included in the final shortlist for an interview and his application was unsuccessful. Mashaba submitted a grievance claiming that he should have been shortlisted and appointed. The grievance was dismissed.

Mashaba then referred an unfair labour practice dispute relating to promotion to the CCMA. Conciliation failed and Mashaba referred the dispute for arbitration.

At arbitration the commissioner considered the advertisement for the position against Mashaba's CV. The advertisement listed the requirements for the position including:

- experience in how to generate reports;
- manage funds;
- interface with the finance section of UJ with counterparts at the Department of Higher Education and Training;
- manage with counterparts at the Council for Higher Education and with UJ counterparts at the South African Qualification Authority; and
- honours/master's degree (listed as a recommendation in the advertisement, but UJ led witness testimony to show that this should have been a requirement).

UJ received 189 applications for the position. A first shortlist by the panel, which included the division head, Dr Manon, included 19 candidates, of which Mashaba was one. Three candidates were on the final shortlist, which did not include Mashaba. Mashaba claimed that he was unfairly excluded from the final shortlist.

Mashaba contended that he had the required experience. However, the commissioner accepted the evidence led by UJ that Mashaba's CV did not match with what was required in the advertisement.

In the arbitration Mashaba conceded that the person who was ultimately appointed to the position was a suitable candidate and that her appointment was fair.

The commissioner held, in line with the decision in *Arries v CCMA and Others* [2006] 11 BLLR 1062 (LC), that an employer has the discretion to promote and that based on the evidence there were no grounds for a finding that an unfair labour practice had been committed. Mashaba's CCMA referral was accordingly dismissed.

Chapter 3

Unfair Labour Practice

An employer's exercise of discretion to promote is unassailable unless it's capricious, malicious or fraudulent...*continued*

Mashaba v University of Johannesburg and Others [2023] 2 BLLR 119 (LAC)

Mashaba brought a review application before the LC in which he argued that UJ had designed the advertisement to favour the person who was appointed to the position and who was known to Manon and working in her division. Mashaba argued that Manon should have recused herself from the process as she was the reference on the CV of the person appointed and Manon had a conflict of interest.

Mashaba sought protective promotion, i.e. Mashaba wanted to receive the same salary and benefits of the position, and emphasised that he was not seeking to take the position away from the person who had been appointed.

The LC found the commissioner's decision reasonable and the review application was dismissed.

Mashaba appealed to the LAC with the leave of the LC.

Summary of the findings of the court

the LAC held that the appointment and promotion of employees falls squarely within the domain of the employer. An employer must promote in accordance with the requirements for the position and must select the best suitable candidate where there is more than one candidate qualifying for the position.

The fact that a candidate is shortlisted does not mean that they will be appointed. Only one person must be appointed, even if they all qualify. The employer has the discretion to choose which one to appoint. The court cannot interfere with the exercise of this discretion, unless it can be shown that the discretion was exercised capriciously or it is vitiated by malice or fraud.

The LAC found Mashaba's arguments regarding Manon's alleged conflict of interest to be without merit. On the facts, the entire interview panel knew the candidate who was appointed to the position, and they all declared this at the start of the process. Knowledge of a candidate does not on its own disqualify any member of a panel from participating in the process of shortlisting and appointing a candidate. The person alleging the conflict must show something more than mere knowledge of the candidate. Applying Mashaba's argument, the entire interview panel would have had to recuse themselves. The LAC found that this would have resulted in the process being aborted, which defied logic.

Unfair Labour Practice

An employer's exercise of discretion to promote is unassailable unless it's capricious, malicious or fraudulent...*continued*

Mashaba v University of Johannesburg and Others [2023] 2 BLLR 119 (LAC)

The LAC made short work of Mashaba's further arguments finding that:

> *"Failure to shortlist a candidate who does not meet the requirements of the advertised post cannot constitute an unfair labour practice as envisaged in terms of section 186(2)(a) of the LRA. Unless some other considerations are taken into account, other than the requirements of the post, the person whose CV does not match the requirements of the post, and is therefore not shortlisted, does not stand the remotest chance to be appointed in the advertised post."*

The LAC also found that it was improper and unfair for Mashaba to let the interview process run its course and only raise a challenge that it was irregular at the end of the process.

Mashaba's CV did not match with the advertised requirements of the position. UJ exercised its discretion in appointing the best suitable candidate. There was no evidence that it had exercised its discretion capriciously. Accordingly, there was no basis for the court to interfere with the employer's exercise of its discretion in appointing its preferred candidate to the post.

The LAC upheld the LC's decision and dismissed Mashaba's appeal.

Gillian Lumb, Leila Moosa and Alex van Greuning

Chapter 3

Unfair Labour Practice

The effect of a deviation from a recruitment and selection policy

Ekurhuleni Metropolitan Municipality v Mabusela NO and Others [2023] 44 ILJ 137 (LAC)

Summary of the facts

Mr Magagula was already employed by Ekurhuleni Metropolitan Municipality (Metro) when he applied for the position of deputy chief of the police: security services (position). Magagula was shortlisted for the position and interviewed by a selection panel. He ranked fourth highest of the candidates interviewed, but only the two highest scoring candidates progressed to the next stage.

During the next stage the two highest scoring candidates were subjected to competency tests, which they both failed. As a result, the Metro's divisional head of workforce capacity management (Mokoena) recommended that the selection panel reconvene to consider other candidates for further assessment or close the recruitment and selection process and start afresh. This recommendation was not acted upon by the Metro.

Instead, the acting head of human resources (Yawa) submitted a report to the former Metro manager (Ngema) in which he recommended that the third highest scoring candidate and Magagula be subjected to the competency test. Ngema accepted this recommendation. The third highest scoring candidate declined to undergo the test. Magagula underwent the test and passed.

Yawa then submitted a memorandum to Ngema in which he recommended that Magagula be appointed to the position. Ngema was amenable to the appointment, subject to the condition that the chief of police furnished reasons, if any, as to why the appointment should not proceed. Ngema's employment was terminated a few days thereafter and a new Metro manager was appointed (Mashazi). Before his employment terminated, Ngema (the former Metro manager) did not sign Magagula's appointment letter, pending a response from the chief of police. After Mashazi's appointment, Yawa furnished Mashazi with the same recommendation that Magagula be appointed.

Mashazi (in her capacity as Metro manager) refused to comply with the recommendation and declined to promote Magagula. On 28 September 2016, Magagula referred an unfair labour practice dispute to the bargaining council on the basis that the Metro's decision not to promote him to the position was unfair.

On 1 November 2016 the dispute was conciliated without resolve, whereafter the matter proceeded to arbitration.

The arbitrating commissioner (arbitrator) found in favour of Magagula. The Metro took the decision on review. The LC dismissed the Metro's review application. The Metro then applied for leave to appeal to the LAC, which was granted by the LC.

Summary of the findings of the court

As a starting point, the LAC considered the findings of the arbitrator and the LC.

Arbitration

Magagula's case at arbitration was that it was an unfair labour practice for the Metro not to appoint him in accordance with Ngema's recommendation.

Unfair Labour Practice

The effect of a deviation from a recruitment and selection policy...*continued*

Ekurhuleni Metropolitan Municipality v Mabusela NO and Others [2023] 44 ILJ 137 (LAC)

The Metro argued that:

- Magagula did not qualify for appointment because he did not meet the managerial experience requirement;
- the appointment would not be compliant with the Metro's recruitment and selection policy (policy) which provides that no person may be appointed to a post "*without undergoing due process*"; and
- in terms of the process, it is the selection panel that determines the most suitable candidate for the position, which did not occur in the case of Magagula.

Magagula argued that:

- in terms of p7.1.9 of the policy, Mokoena (in her capacity as divisional head: workforce capacity management) was permitted to devise an alternative recruitment and selection method/procedure in exceptional circumstances in order to expedite the filling of posts; and
- by adopting Yawa's recommendation that Magagula be appointed, Ngema had effectively adopted an alternative selection process.

In response, the Metro argued that:

- Magagula's argument amounted to a misreading of the policy because there was no intention on the part of Ngema to implement paragraph 7.1.9 of the policy; and
- in any event, that power vested in Mokoena only, who never purported to exercise that power herself.

The arbitrator found that:

- in respect of paragraph 7.1.9 of the policy, Mokoena was empowered to dispense with the normal recruitment policies;
- that power ultimately vested in Ngema because the Metro manager had the power to make appointments and to reject a recommended candidate and this power had been delegated to Mokoena; and
- failure by the chief of police to object to the appointment of Magagula meant that the condition stipulated by Ngema in order to appoint Magagula had been met.

As a result, the arbitrator found that the Metro had committed an unfair labour practice in failing to appoint Magagula.

LC proceedings

On review, the LC considered whether the arbitrator had interpreted paragraph 7.1.9 of the policy reasonably and held that the meaning the arbitrator gave to the paragraph "*does not stretch the bounds of reasonableness to the extent that the decision is one that a reasonable decision maker could not reach*" and, in particular, held that "*the question of right or wrong does not arise*".

The LC rejected the Metro's argument that the deviation under the policy could only be decided by Mokoena

Chapter 3

Unfair Labour Practice

The effect of a deviation from a recruitment and selection policy...*continued*

Ekurhuleni Metropolitan Municipality v Mabusela NO and Others [2023] 44 ILJ 137 (LAC)

and held that "*in this situation the powers are delegated to the divisional head: workforce capacity through the city manager and it is trite that these powers could accordingly be exercised by the city manager*". The LC added that section 55(1) of the Municipal Systems Act 32 of 2000 (Systems Act) gives Ngema the responsibility in law for all aspects of the municipality's personnel, including the recruitment and selection of suitable candidates for appointment and promotion. Moreover, Ngema, as delegator, did not divest himself of that power.

Findings of the LAC

The review test for interpretation of a legal instrument

The LAC held that it is established law that the applicable test on review of a CCMA or bargaining council arbitrator's interpretation of a legal instrument is correctness and not reasonableness. The basis for this test is that the reasonable arbitrator should not get a legal point wrong.

Interpretation of the policy

The LAC found that nothing in the policy, delegations or any legislation suggested that the power in paragraph 7.1.9 of the policy originally vested in Ngema as Metro manager and the arbitrator was incorrect to find that it did. The Metro manager, while responsible for the appointment of certain staff, is still bound by Metro policies and their power to appoint is still subject to policy directions of the Metro. Moreover, Ngema never purported to exercise those powers.

The LAC emphasised that it is a trite principle in our law that if a power is given to a specific official to exercise and it is exercised by another official who is not authorised by law to exercise that power, the exercise of the power would be illegal or unlawful.

The LAC held that the power in paragraph 7.1.9 of the policy is reserved for the divisional head and as a result could not be exercised by the Metro manager.

Could the Metro's refusal to give effect to the illegal acts give rise to an unfair labour practice?

On appeal, Magagula's lawyers for the first time raised the argument that even if what Yawa and Ngema did was not legal, it stood and had consequences, unless and until the initial act was set aside by the court. In dismissing this contention the LAC found the argument contradictory and held that the validity of the appointment required compliance with the policy and not merely the fact of the actions of human resources and the Metro manager. The illegal actions of Ngema and Yawa which were in breach of the policy effectively resulted in a nullity. As such, they did not give rise to any legal rights. The Metro refused to give effect to the illegal actions, which it was entitled and obliged to do.

The decision of the arbitrator, which was upheld by the LC, was reviewed and set aside by the LAC and the unfair labour practice claim was dismissed.

Gillian Lumb and Leila Moosa

Chapter 3

Unfair Discrimination

Cannabis and safety in the workplace

Marasi v Petroleum Oil and Gas Corporation of South Africa SOC Ltd (C219/2020) [2023] ZALCCT 38 (27 June 2023)

Summary of the facts

As at the date of the judgment Marasi was employed by PetroSA as a telecommunications technician. He had a clean disciplinary record and had worked for PetroSA for 14 years. During or around April and May 2019, Marasi informed PetroSA of his decision to take part in an 18-month traditional healer training programme (programme). Marasi's intention was to keep working in his role at PetroSA while completing the programme. To accommodate his participation in the programme, PetroSA allowed Marasi to transfer from Cape Town to its gas-to-liquids (GTL) plant in Mossel Bay, where the programme's traditional healer school is located.

PetroSA's facility in Mossel Bay is one of the largest GTL refineries in the world. Due to the scale and high-risk nature of PetroSA's Mossel Bay operation, PetroSA requires strict adherence to all processes for entry to and operation in the refinery. The processes are designed to ensure the safety of all employees on site.

To facilitate the safety requirements, employees must complete *inter alia* annual medical assessments and undergo daily breathalyser tests prior to gaining entry to the refinery. The tests are conducted in terms of PetroSA's "*Management Substance Abuse at PetroSA Workplace Policy*" (policy). The purpose of the policy is *inter alia* to ensure compliance with the Mine Health and Safety Act 29 of 1996 and to manage the risk of substance abuse that may lead to an unsafe work environment.

The policy prohibits an employee's access to PetroSA's GTL plant if the employee tests above the prescribed limits, which are set in respect of 17 listed substances, including cannabis. In terms of the policy, "*intoxication*" or "*testing positive*" means testing above the prescribed limit for a listed substance. If an employee tests over the limit the employee is unfit for duty until they test negative or below the limit.

Marasi attended a medical surveillance assessment in Cape Town, where he disclosed for the first time that he was using cannabis. He subsequently tested positive for cannabis. After testing positive, PetroSA refused Marasi access to the refinery. Marasi took a confirmatory laboratory test, but he still tested over the limit for cannabis. PetroSA informed Marasi that because he had tested over the cut-off limit for cannabis, he would be refused access to the refinery until he tested either negative or below the limit, at which point he would be considered fit for duty again.

Marasi was advised to take sick leave (he had a medical certificate from a traditional healer) and annual leave for the period that he was refused access to PetroSA's workplace, which he did.

On 8 July 2019, Marasi raised an internal grievance on the basis that the policy was outdated given the Constitutional Court judgment in *Constitutional Development & Others v Prince and Others* [2018] ZACC 30 (*Prince III*) in which the court held that the private use of cannabis by adults is lawful. The grievance remained unresolved.

On 20 August 2019, Marasi tested below the cut-off limit for cannabis. On 23 August 2019, Marasi returned to work.

Chapter 3

Unfair Discrimination

Cannabis and safety in the workplace...*continued*

Marasi v Petroleum Oil and Gas Corporation of South Africa SOC Ltd (C219/2020) [2023] ZALCCT 38 (27 June 2023)

Marasi referred a dispute to the National Bargaining Council for the Chemical Industry (NBCCI), but the NBCCI ruled that it did not have jurisdiction. Marasi subsequently referred the matter to the CCMA, but the CCMA also found that it lacked jurisdiction given that Marasi's salary was above the earnings threshold (currently R241,110.59 per year) set by the Minister of Employment and Labour in terms of the Basic Conditions of Employment Act 75 of 1997.

On 2 July 2020, Marasi referred his dispute to the LC. Marasi alleged that he had been subjected to unfair discrimination on the grounds of religion and culture in terms of section 6(1) of the EEA and an unfair labour practice based on unfair suspension.

Marasi represented himself at the LC. His claim was that he had been suspended without pay from June 2019 to 23 August 2019 and that this violated his dignity and cultural rights and caused him financial and emotional distress. Marasi sought three months' compensation for the period he was allegedly suspended and damages in the amount of R250,000 for impairment of his dignity, past medical expenses and emotional distress, and an order that PetroSA's alcohol and substance abuse policy be reviewed by PetroSA.

PetroSA's defence was that no discipline had been instituted against Marasi and that he had not been suspended. Marasi's line manager suggested to him that, while undergoing treatment, Marasi should use his available leave until such time as he tested negative for the listed substances and could then access the workplace again.

Although there was a request from Marasi to work from home, PetroSA led evidence that it could not allow him to work from home due to the confidential nature of his work, and while knowing that he would be using cannabis over the limit. In addition, he had important on-site responsibilities.

The factual issues for determination by the LC were whether:

- Marasi had been suspended;
- PetroSA reasonably accommodated Marasi; and
- it was an inherent requirement of his job to test below the limit for cannabis.

Summary of the law and findings of the court

Was Marasi suspended?

The LC found that PetroSA did not suspend Marasi. Suspension implies discipline and no disciplinary steps had been taken against Marasi. Without a suspension the LC found that there could be no unfair labour practice.

Did PetroSA reasonably accommodate Marasi?

The LC found that to the extent reasonable accommodation was relevant to the claim, PetroSA had reasonably accommodated Marasi in his pursuit of his cultural calling.

Unfair Discrimination

Cannabis and safety in the workplace...*continued*

Marasi v Petroleum Oil and Gas Corporation of South Africa SOC Ltd (C219/2020) [2023] ZALCCT 38 (27 June 2023)

The onus of proof and tests for unfair discrimination

Where an employee claims that an employer has unfairly discriminated against them on a ground listed in section 6(1) of the EEA, the onus is on the employer to show either that the alleged discrimination did not occur, or that such discrimination was justified or fair.

In terms of section 6(2) of the EEA, it is not unfair to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. An inherent requirement of the job, where proven, operates as a full defence against an employee's claim of unfair discrimination.

The LC considered and applied the three step test for discrimination set out in *Harksen v Lane* 1997 (11) BCLR 1489: first to establish whether the policy or practice differentiates between people, second whether that differentiation amounts to discrimination, and third determine whether the discrimination is unfair.

Did PetroSA unfairly discriminate against Marasi? Was testing below the limit an inherent requirement of the job?

Applying the test for discrimination, the LC found that there was no differentiation between employees based on the policy. The requirements of the policy applied universally to all PetroSA employees.

However, the LC accepted that the policy may arguably be understood to disproportionately impact the rights of persons who use cannabis for cultural and religious purposes. Accordingly, the LC found that the test for indirect discrimination had been met. The critical question which then arose was whether the discrimination was unfair.

For purposes of determining whether the discrimination was unfair the LC considered whether testing below the limits contained in the policy is an inherent requirement of Marasi's job. The LC considered the Supreme Court of Appeal's decision in *Department of Correctional Services v the Police and Prisons Civil Rights Union* [2013] 4 SA 176 (SCA) in which the court held that an employer policy which required men to shave off their dreadlocks was not justified as it was not proven that having short hair was an inherent requirement of the job of a prison warden. The LC also considered the Constitutional Court's decision in *Damons v City of Cape Town* [2022] 43 ILJ 1549 (CC) which confirmed that if an employer proves an inherent requirement of a job, this is a complete defence against an unfair discrimination claim, provided that the requirement is genuine.

The LC concluded that it was an inherent requirement of Marasi's job to test below the limit for cannabis and that this requirement is reasonable given the nature of the work environment and the requirements of health and safety legislation. Given this finding, the LAC dismissed Marasi's unfair labour practice and unfair discrimination claims.

Gillian Lumb, Leila Moosa and Alex van Greuning

04

Dismissals, misconduct, disciplinary and retrenchments

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
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Constructive dismissals

Alleging constructive dismissal based on mental health

Sanlam Life Insurance Ltd v Mogomatsi and Others (CA 12/2022) [2023] ZALAC 915 August 2023)

Summary of the facts

The employee held the position of Senior Penetration Tester: IT Infrastructure Shared Services at Sanlam Life Insurance Limited. The employee raised a series of complaints giving rise to what he claimed to be the reason for his resignation from Sanlam. During the arbitration proceedings the employee's chief complaint was that the employer called him before a disciplinary enquiry without considering his mental ill-health and the incapacity/ill health process. The employee elected to resign prior to his disciplinary hearing.

As part of his evidence the employee pointed out that he submitted a medical certificate, after his resignation, which stated that he resigned because he had been under stress. This, the employee alleged, was due to his employer's conduct in making the continued employment intolerable.

At the end of the arbitration proceedings, the commissioner was not satisfied that the incidents that the employee pointed out made out a case for constructive dismissal.

The employee reviewed the commissioner's award on the basis that the commissioner had failed to consider his mental ill-health and that the employee was given an ultimatum to apologise to his colleague or resign from employment.

The LC found that the commissioner gave no weight to the employee's mental health issues during the proceedings.

Lastly, the LC found that the evidence brought by the employee during the arbitration proceedings was sufficient to prove that the employment relationship became intolerable, and as a result, the termination of the employment relationship, upon proper assessment, amounted to a constructive dismissal.

The employer was dissatisfied with the decision of the LC and appealed its decision.

Chapter 4

Constructive dismissals

Alleging constructive dismissal based on mental health...*continued*

Sanlam Life Insurance Ltd v Mogomatsi and Others (CA 12/2022) [2023] ZALAC 915 August 2023)

The basis of the appeal was premised on the fact that the employee's mental health issues were not brought to the fore during the arbitration proceedings, therefore, the LC erred in deciding the matter on that basis.

Summary of the findings of the court

The LAC held that to prove a constructive dismissal, the facts of the case must point to the employer having been aware or ought to have been aware of the mental distress of the employee.

Where an employer is aware of an employee's psychiatric illness and the employer is indifferent or insensitive regarding the employee's mental illness or vulnerability and thereby makes the continued employment intolerable, a proper case for constructive dismissal might be established.

Furthermore, the LAC held that an employer needs to always be aware and show a cause for concern, once it has been brought to its attention, about the vulnerabilities that an employee is facing or is exposed to.

In matters where the employee alleges constructive dismissal on the basis of mental health issues, the employee needs to prove that the employer was aware or ought to have been aware of their mental health issues/illness.

The employee failed to prove that his resignation amounted to a constructive dismissal under the circumstances.

Imraan Mahomed, Taryn York, Sashin Naidoo and Iva Babayi

Chapter 4

Unfair dismissals: Retrenchments

The consequences of terminating the services of expectant mothers on the basis of their pregnancy

Brandt v Quoin Wines (2023) 44 ILJ 309 (LC)

Summary of the facts

The employee was employed by the employer as its financial manager.

In September 2019, she fell pregnant. The employee informed the CEO on 3 January 2020 that she would work until 31 May 2020 before taking maternity leave.

Due to complications with her pregnancy, the employee was admitted to hospital on 12 May 2020. The employee was thus unable to attend to her work or conduct a handover as agreed. She gave birth on 21 May 2020 but remained in hospital until 12 June 2020 due to further complications relating to her child.

During this time, the country was under strict COVID-19 restrictions, and consequently no visitors were allowed at the hospital. The employee was again unable to effect a handover.

In the proceedings that came before the LC, the employer's CEO testified that there was a lack of clarity with regard to the employee's maternity leave, and that there was an expectation that she would facilitate a proper handover to her assistant prior to going on maternity leave.

The CEO further stated that there were instances where he was unable to reach the employee, and he required her to be at work in person as some of the daily work could not be dealt with via email.

As a result of the employee's prolonged absence, the employer restructured its business to the extent that the position of financial manager allegedly became redundant.

Once the employee's maternity leave was complete, she returned to work and was informed that her position had become redundant due to restructuring as a result of financial constraints the employer was facing because of the pandemic. The employee was furnished with a retrenchment notice.

Chapter 4

Unfair dismissals: Retrenchments

The consequences of terminating the services of expectant mothers on the basis of their pregnancy...*continued*

Brandt v Quoin Wines (2023) 44 ILJ 309 (LC)

Summary of the findings of the court

The court found that that the employer could not provide exact figures of its financial position or any substantive evidence that showed that retrenchment was a necessity for operational requirements.

The court further found that the employer failed to understand the law in relation to maternity leave. The CEO displayed anger towards the employee for not being readily available while on maternity leave.

That several other employees were burdened with the employee's work responsibilities during her maternity leave was testament to the fact that her position had not become redundant.

Furthermore, the court endorsed the view that an employer cannot escape a claim for an automatically unfair dismissal purely on the argument that a dismissal for operational requirements is justified because of a woman's unavailability to work which results in any extra expenses that it is unable to incur to provide temporary cover for a pregnant employee's absence.

The court found that the employee's dismissal was automatically unfair, and therefore ordered the employer to compensate the employee in the amount of 16 months' worth of her salary.

Imraan Mahomed, Taryn York, Sashin Naidoo and Iva Babayi

Chapter 4

Misconduct

Determining the fairness of dismissing an employee who misrepresented their reason for taking leave

South African Revenue Services v Commission for Conciliation, Mediation and Arbitration and Others (JR 2243/21) [2023] ZALCJHB 222 (21 July 2023)

Summary of the facts

In a review application brought in terms of section 145 (1) of the LRA, the South African Revenue Service (SARS) sought to review and set aside an award in which the CCMA found that a dismissal for malingering was unfair.

Mr. Mathebula was employed by SARS as a junior investigator. On 7 September 2020, Mathebula sent a text message to his supervisor explaining that he had not been feeling well and that his absence from work was due to sickness. Mathebula indicated that he would complete a sick leave application once he was able to. His supervisor subsequently excused him from work.

On 8 September 2020, Mathebula told his supervisor that he was still not feeling well. His supervisor advised him to seek medical attention if he had not yet done so. Mathebula responded by indicating that if he did not get better, he would see a medical doctor.

On 9 September 2020, Mathebula consulted his doctor, who issued a medical certificate certifying that according to him, Mathebula was unfit to attend work from 9 to 11 September 2020.

Unbeknown to Mathebula at the time, his supervisor had identified him on television, while watching the evening news, as a participant at a political protest rally during his period of absence from work due to his alleged illness.

The supervisor sought an explanation from Mathebula. Mathebula explained that he was ill but not bedridden and therefore was able to attend the protest.

It was common cause that Mathebula participated in the protest action.

Mathebula was charged with two counts of dishonesty and one count of gross dishonesty. He was subsequently found guilty and dismissed on 24 March 2021.

Mathebula referred an unfair dismissal dispute to the CCMA, which found his dismissal to be substantively unfair.

Summary of the findings of the court

The court found that it was apparent that although Mathebula unashamedly and audaciously indicated to SARS that he was not feeling well enough to attend to his contractual duties, he was well enough to participate in the protest action.

Mathebula deliberately misrepresented the reason behind his request for leave, knowing that he would not have been granted leave had his supervisor known the real reason for his request.

Chapter 4

Misconduct

Determining the fairness of dismissing an employee who misrepresented their reason for taking leave...*continued*

South African Revenue Services v Commission for Conciliation, Mediation and Arbitration and Others (JR 2243/21) [2023] ZALCJHB 222 (21 July 2023)

The court found that the medical certificate was only sought two days after he attended the protest. As medical illness can only be proven objectively by a medical expert, the court found that the fact that an unsubstantiated medical certificate was produced and accepted for the three days after the protest did not objectively demonstrate that Mathebula was ill on the days that he participated in the protest.

The court therefore found that the commissioner resorted to conjecture when he found that Mathebula was probably ill on the days on which he had attended the protest.

The court also considered the intention behind Mathebula's conduct and found that intention can only be inferred by having regard to the surrounding circumstances.

The only inference which could be drawn from the fact that Mathebula participated in protest action while alleging that he was ill was that he intended to mislead SARS to excuse him from work so that he could attend the protest.

Lastly, the court held that an employment relationship is predicated on trust, and SARS had a reasonable expectation for its employees to be truthful and honest.

In this particular case, Mathebula created a false impression that he was too ill to come to work. The fact that he was seen at the protest was sufficient to expose his misrepresentation.

The court thus set aside the CCMA's award and found Mathebula's dismissal to be fair.

Imraan Mahomed, Taryn York, Sashin Naidoo and Thato Makoaba

Chapter 4

Disciplinary enquiries

Can an employer be interdicted from starting or proceeding with a disciplinary hearing where criminal charges have been laid, are under investigation or are pending before court?

Ramthlakgwe v Modimolle-Mookgopong Local Municipality and Another (JS562/23) [2023] ZALCJHB 190 (15 June 2023)

Summary of the facts

The employee was a manager in the employer's project management unit. In late January 2023, the employee was charged with alleged failure to follow the internal control procedures in connection with 19 payments made to certain service providers.

The charges were later amended to include two additional charges of fraud.

The employee simultaneously had criminal charges laid against him with the South African Police Service in respect of the two additional charges.

The employee argued that he would not be able to answer to the additional charges at the disciplinary enquiry without giving self-incriminatory evidence.

The employee therefore approached the court on an urgent basis, seeking to postpone the disciplinary hearing, *sine die*, in respect of the additional charges pending the finalisation of criminal proceedings initiated against him.

In the alternative, he sought an order for the withdrawal of the additional charges so that the disciplinary hearing would proceed to determine the initial charge only.

Summary of the findings of the court

The nub of the issue facing the court was whether the rights enshrined in section 35 of the Constitution entitle an employee to protection from a disciplinary hearing where they face both disciplinary charges and criminal charges for the same alleged conduct.

In coming to its findings, the court considered the interference of the court pending disciplinary proceedings to be permissible. Such interference will depend on the facts of the case and only where there is a miscarriage of justice, or where prejudice might occur.

However, the default position is to allow proceedings to continue uninterrupted until they are completed.

The court found that in such circumstances the employee has a choice as to whether they exercise their right to remain silent. Conviction in both instances is not dependent on the employee's election not to present a version, but rather on the state and the employer's ability to prove their respective cases. Both the employer and the state must, on their own and independent of an accused or alleged transgressor evidence, bring credible evidence on which the employee might be convicted.

Chapter 4

Disciplinary enquiries

Can an employer be interdicted from starting or proceeding with a disciplinary hearing where criminal charges have been laid, are under investigation or are pending before court?*...continued*

Ramthlakgwe v Modimolle-Mookgopong Local Municipality and Another (JS562/23) [2023] ZALCJHB 190 (15 June 2023)

The court also considered that during disciplinary enquiries, the employee would not have to be proven guilty beyond reasonable doubt, but on a balance of probabilities. In addition, any self-incriminatory evidence may not be automatically admissible at the criminal trial.

The employee was further protected by the possibility of a discharge should the state fail in its onus to prove the allegations of an offence beyond a reasonable doubt. Should the court find that the evidence failed to sustain a guilty verdict at this stage, it would return a verdict of not guilty.

All the constitutional rights provided for in section 35 of the Constitution will remain intact and uncompromised by any evidence which may be given in civil proceedings, such as a disciplinary enquiry.

A guilty finding or acquittal at a disciplinary hearing thus has no bearing on the state's obligation to prove the employee's guilt beyond reasonable doubt at a criminal trial.

The court emphasised further that the employer has always had the right to maintain and enforce discipline through a fair disciplinary process. The police similarly have a duty to investigate criminal conduct regardless of who lays the complaint, even if it is the employer.

The court accordingly found that the applicant had not established any basis on which he deserved the protection sought.

The court further found that the applicant's attempts were so self-serving and ill-conceived that a punitive cost order was warranted.

Imraan Mahomed, Taryn York, Sashin Naidoo and Thato Makoaba

Chapter 4

Insubordination

Can an employee be dismissed for refusing to testify at arbitration proceedings insofar as it amounts to insubordination?

Kaefer Energy Projects (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others
[2022] 43 ILJ 125 (LAC)

Summary of the facts

The respondent employee, a human resources admin clerk, overheard and intervened in an altercation between her manager and another employee. When her fellow employee was dismissed and subsequently referred a dispute to the CCMA, the employer requested the employee to testify at the arbitration. While she initially agreed to do so, the employee informed her employer the day before the hearing that she was no longer willing to testify.

The employee was dismissed for refusing to obey the instruction to testify. At arbitration, the commissioner determined that the question to be answered was whether an employer could dismiss an employee for refusing to testify. He found that the employee had not acted in bad faith, and furthermore that the employer could have subpoenaed the employee if her evidence was important.

On review in the LC, the court upheld the finding of the commissioner and reiterated that a witness who refuses to testify can and should be compelled to do so by subpoena, and thus an employer cannot dismiss an employee for refusal to testify when they have not made use of a subpoena.

Summary of the findings of the court

On appeal to the LAC, the employer contended that the employee's refusal to testify amounted to insubordination as she had breached her duty of good faith.

The LAC determined that the questions which should have been considered by the commissioner were (i) whether the instruction was lawful, reasonable or fair; (ii) whether the employee was in a position to carry out the instruction; and (iii) whether there was a lawful or reasonable excuse for her to refuse to carry out the instruction. Accordingly, the court found that the commissioner had totally misconstrued what was required of him in his determination.

On an analysis of the facts, the LAC held that requesting the employee to testify at arbitration was lawful, reasonable and fair. Furthermore, the employee was in a position to carry out the instruction as she had admitted to overhearing the altercation, and thus had relevant evidence to present to the CCMA. The LAC found further that the employee's reason for not wanting to testify, namely not wanting to *"make a fool of herself"*, was not a reasonable excuse to refuse to carry out a lawful instruction by her employer.

In addressing the issue of a subpoena, the LAC held that the fact that a subpoena is available and is not used does not mean that an employee can simply refuse an employer's instruction to testify where such an instruction is not unreasonable.

The appeal was consequently upheld, with the LC's judgment set aside and its order replaced with one that the employee's dismissal was fair.

Jean Ewang and Nadeem Mahomed

05

COVID related disputes

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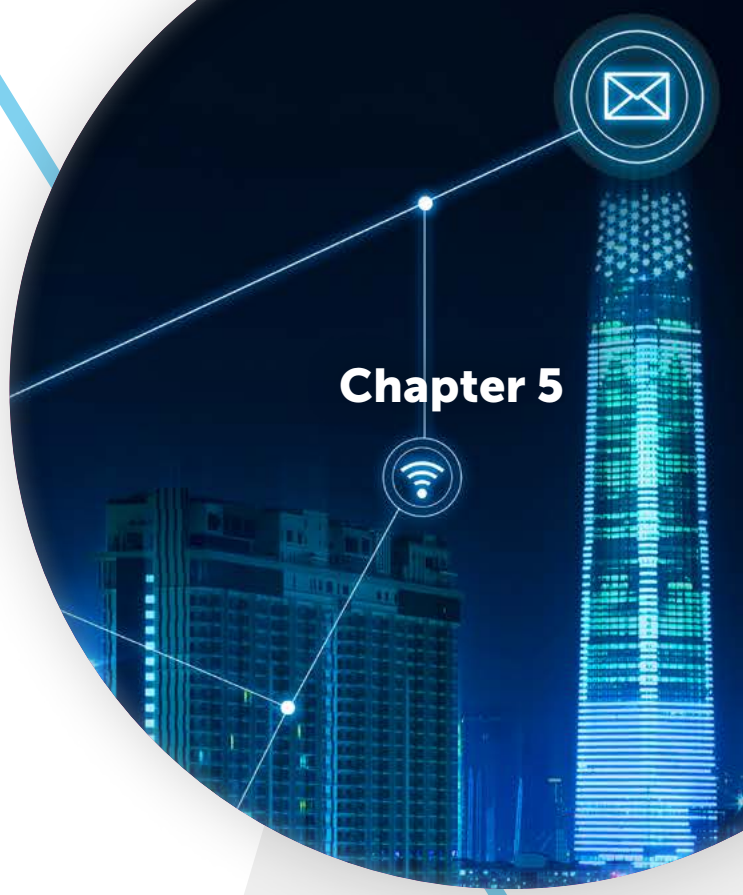

COVID related disputes

Employee who did not work during COVID-19 lockdown denied performance benefits

South African Municipal Workers' Union obo Zulu v Rand Water [2023] 8 BALR 989 (CCMA)

Summary of the facts

The employee was employed on 1 March 2013 by Rand Water as a workshop aid.

After the COVID-19 lockdown restrictions eased in 2022, the employer required all its employees who had been working remotely to return to their respective working stations.

This request excluded employees over the age of 60 or those with comorbidities.

Employees who had not been working during the period of the lockdown, including the applicant, were denied their normal performance bonuses. The employee contended that this amounted to an unfair labour practice.

Rand Water claimed that, much like the other employees who did not work during the lockdown period, the employee did not qualify for a bonus, which was in any case discretionary.

Summary of the findings of the court

The commissioner noted that of all 84 employees in the department, the applicant was the only one who had been denied a bonus and at least one other employee who had not reported to work during that period had received a bonus.

Simply put, this was unfair. This negated the employer's argument that only employees performing their duties were entitled to be paid the incentive bonus.

Furthermore, the unfairness was exacerbated by the employer's failure to consult the employee. There was a duty on Rand Water to consult the employee in this matter as the employee's interests and feelings ought to have been taken into account.

The commissioner reiterated a trite principle that even if a benefit is subject to the discretion of an employer, the exercising of this discretion may still be unfair where an employee can show that they were unfairly deprived of the benefit/s.

The employer was ordered to pay the employee the bonus to which he was entitled.

Imraan Mahomed, Taryn York, Sashin Naidoo and Iva Babayi

Chapter 5

Constructive dismissals

Salary reductions during the COVID-19 pandemic

Westcor SA (Pty) Ltd v Mey and Others (2023) 44 ILJ 397 (LC)

Summary of the facts

The employee was appointed as a jewellery product specialist at Westcor (Pty) Ltd, a merchandiser of fashion accessories.

Employees of Westcor began working reduced hours for reduced wages, supplemented by payments claimed from the Government's Temporary Employer/Employee Relief Scheme, during the COVID-19 lockdown. All employees gave consent for these arrangements.

On 30 June 2020, the employer announced that from 1 July, staff were required to return to working their full working hours, however, they would only be paid 75% of their salaries.

The employee immediately emailed the managing director and stated that she would not be able to accept the salary cut.

In ensuing meetings, the employee offered to work 75% of her hours in return for 75% of her salary in order to invest her remaining time in a side business. Her employer did not agree to this arrangement.

The employee informed Westcor that in as much as she wished to support the company, she was unable to accept the 25% pay cut because her husband was unemployed and her family was falling into debt.

Westcor put forth an offer of a loan to the employee in order to assist her with the 25% shortfall in her salary for the month of July 2020, which the employee rejected. The employee's response was that a loan would result in the incurrence of further debt.

The employee further stated that it would be impermissible for Westcor to unilaterally reduce her salary, and in the event of a retrenchment, the employer would be required to disclose the necessary financial information showing that the salary cuts were necessary.

The employee was of the view that Westcor had been profitable and had sufficient reserves to overcome the lockdown. The employee argued that it was unfair to place the burden of the pandemic on the employees.

Westcor was further unable to commit to a timeline for the austerity measures it had put in place in relation to its remuneration costs.

On 27 July 2020, the employee tendered her resignation and referred a constructive dismissal dispute to the CCMA.

At the CCMA, the commissioner found that the employer had acted unilaterally in breaching the employee's employment contract.

Westcor did not engage in a *bona fide* section 189 consultation, and "*immutably clung*" to its position.

Constructive dismissals

Salary reductions during the COVID-19 pandemic...*continued*

Westcor SA (Pty) Ltd v Mey and Others (2023) 44 ILJ 397 (LC)

The commissioner further found that the employee had done everything reasonably possible to address her objection to the salary reduction, but her employer had remained steadfast.

The commissioner awarded the employee six months' remuneration as compensation for the unfair dismissal.

The employer then challenged the commissioner's finding in the LC.

Summary of the findings of the court

The court held that the employer's unilateral cutting of the employee's salary amounting to a breach of contract was not enough. The question was whether it made the employee's continued employment intolerable.

The court held that in determining whether a constructive dismissal has occurred, the first determination is whether the employer has made the working relationship so intolerable as to bring about the resignation of the employee. Secondly, it must be determined whether such intolerability was unfair.

The court held that the employee could not have been reasonably expected to tolerate the employer's decision to cut her salary, especially with the financial distress she was facing.

Furthermore, the court held that the employee acted reasonably in attempting to preserve its relationship with her employer.

Westcor's insistence that the employee accept the salary cut because other employees accepted it, its refusal to permit her to work reduced hours so that she could use some of her time to supplement her income through her side business, and its failure to substantively justify that cutting salaries was a fair and reasonable measure all resulted in an unfair dismissal.

The employee went as far as to invite Westcor to disclose its financial position, including other measures taken in order to survive any demonstrable pandemic-related distress.

The employer remained intransigent, resulting in the eventual resignation of the employee.

The employer chose from a range of possible responses to the pandemic and lockdown to cut salaries by 25%, and accordingly was the author of the circumstances which the employee alleged made the continued employment intolerable.

The court further found that due to the indefinite period of the salary cuts, the employee's financial distress may have worsened.

The court therefore found in favour of the employee.

Imraan Mahomed, Taryn York, Sashin Naidoo and Iva Babayi

06

Harassment

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Harassment

Vicarious liability of employers for harassment in terms of the EEA

Solidarity obo Oosthuizen v South African Police Service and Others [2023] 3 BLLR 258 (LC)

Summary of the facts

The legal question in this case is .whether the South African Police Service (SAPS), the Minister of Police and the National Commissioner of Police vicariously liable in terms of section 60 of the EEA for the racial harassment allegedly suffered by Colonel Oosthuizen in her workplace?

Colonel Oosthuizen, at the time of the dispute in 2017, was a lieutenant colonel in the SAPS, and the commander of human resources management at the Klerksdorp Police Station.

Oosthuizen had taken minor disciplinary action against two warrant officers, Tikoe and Mphana, regarding incidents of unauthorised absenteeism from the workplace.

The warrant officers were aggrieved by this and became involved in a verbal altercation with Oosthuizen on 27 February 2017. The two then conspired to have Oosthuizen dismissed. They raised a grievance against Oosthuizen, alleging that she used a racial slur when speaking to them. Oosthuizen reported the incident to the station commander at Klerksdorp. He ordered an investigation into the matter. He requested that the warrant officers be transferred from Klerksdorp pending the investigation, however his request was ignored by SAPS.

The situation escalated on 1 March 2017, when Tikoe opened a case of *crimen injuria* against Oosthuizen based on her alleged utterance. Less than a week later, both warrant officers lodged a grievance against Oosthuizen, based on the same allegation. They demanded her transfer, as they claimed that they felt unsafe and intimidated by her presence in the workplace. Oosthuizen in turn opened a case of intimidation against the warrant officers.

On 13 March 2017 and 16 March 2017, SAPS issued reports in respect of the investigations against the two warrant officers. The reports recommended that disciplinary action be taken against them.

The day before the second report was issued, Oosthuizen was approached by an intern at the station, who informed her that she had overheard the two warrant officers conspiring to falsely accuse her of having used a racial slur. The intern provided a statement to SAPS.

On 7 April 2017, Oosthuizen launched a grievance with SAPS. She requested that disciplinary action be taken against the warrant officers for their false accusations of racism against her. More than a month later, on 16 May 2017, SAPS elected instead to transfer Oosthuizen, pending the disciplinary investigation launched in respect of the grievance brought by the warrant officers against her. On 22 May 2017, the trade union Solidarity, on behalf of Oosthuizen, questioned SAPS' decision to transfer

Chapter 6

Harassment

Vicarious liability of employers for harassment in terms of the EEA...*continued*

Solidarity obo Oosthuizen v South African Police Service and Others [2023] 3 BLLR 258 (LC)

Oosthuizen. It also demanded that disciplinary action to be taken against the warrant officers for their false accusations of racism against Oosthuizen.

On the same day the chief prosecutor decided that there were no reasonable prospects of Tikoe's criminal case succeeding and decided not to prosecute Oosthuizen. Oosthuizen opened a separate case of *crimen injuria*, criminal defamation and perjury against both warrant officers. On 25 May 2017, the SAPS investigation found that there was a *prima facie* case against the warrant officers and that they should be charged accordingly. However, rather than disciplining them, the provincial commissioner of SAPS came to an agreement with the Police and Prisons Civil Rights Union, representing the warrant officers, to suspend disciplinary action against them, pending the outcome of the investigation into their grievance against Oosthuizen. Instead, Oosthuizen was investigated and a recommendation to charge her was made.

On 28 June 2017 Oosthuizen submitted a second grievance, based on SAPS' failure to follow its own procedure in addressing her grievance and for suspending disciplinary action against the warrant officers. SAPS failed to address this grievance. On 1 August 2017 Oosthuizen referred a dispute to the CCMA.

On 14 August 2017 SAPS issued Oosthuizen with a notice to attend a disciplinary hearing, alleging that she had used a racial slur in respect of the warrant officers. Oosthuizen was eventually acquitted on all charges against her. The chairperson of the hearing opined, amongst other things, that the witnesses for SAPS gave contradictory testimony and that the warrant officers colluded to falsely accuse her of racism.

On 6 November 2017 Tikoe lodged another grievance, persisting with her claim that Oosthuizen had used a racial slur. After much exchange of correspondence between Solidarity and SAPS, on 19 March 2018 the warrant officers were eventually charged with, amongst other things, conducting themselves in an improper and disgraceful and unacceptable manner and intimidation or victimisation of another employee. Oosthuizen for some bizarre reason was not called as witness at the hearing. Following the disciplinary hearing, Mphana was found not guilty of the allegations as there were no statements that *"corroborated"* the charges. Tikoe had pleaded guilty and received a sanction of a written warning and a day's unpaid leave. Solidarity and Oosthuizen challenged the turn of events.

More than a year later, on 23 October 2020, a regional court found both warrant officers guilty of, amongst other things, assault, *crimen injuria* and making a false statement in an affidavit before a commissioner of oaths. The two warrant officers were then charged by SAPS and subsequently dismissed.

Harassment

Vicarious liability of employers for harassment in terms of the EEA...*continued*

Solidarity obo Oosthuizen v South African Police Service and Others [2023] 3 BLLR 258 (LC)

Legal Principles

The main issue in the subsequent referral by Solidarity and Oosthuizen to the LC was whether SAPS was vicariously liable in terms of section 60 of the EEA for racial harassment and bullying perpetrated by the warrant officers against Oosthuizen. Section 60 provides that:

> *"(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.*
>
> *(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.*
>
> *(3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer* ***must be deemed also to have contravened that provision.***
>
> *(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."*

Section 6(1) of the EEA prohibits unfair discrimination on the grounds listed, of which race is one. Section 6(3) of the EEA provides that the harassment of an employee on any one or a combination of grounds listed in section 6(1), is prohibited as unfair discrimination. Section 11 of the EEA requires that where discrimination or harassment is alleged on a listed ground, the employer against whom the allegation is made must prove, on a balance of probabilities, that the alleged harassment did not take place as alleged or is rational and not unfair, or is otherwise justifiable.

Employer liability

In deciding whether SAPS was vicariously liable in terms of section 60 of the EEA, the LC had to determine the following three issues:

1. Whether the conduct of the warrant officers, in falsely accusing Oosthuizen of racism, constituted unfair discrimination.
2. Whether SAPS, the Minister of Police and the National Commissioner of Police failed to comply with the provisions of section 60 of the EEA (and are vicariously liable).
3. The appropriate relief.

The LC considered the "***impact of the legacy of apartheid and racial segregation that has left us with a racially charged present***". It found that the use of racial slurs stubbornly persists in the workplace, uttered

Chapter 6

Harassment

Vicarious liability of employers for harassment in terms of the EEA...*continued*

Solidarity obo Oosthuizen v South African Police Service and Others [2023] 3 BLLR 258 (LC)

not only by those with the power to subjugate, but notably, that there is an emerging trend of false claims of racial or sexual harassment by subordinates against their superiors in order to circumvent being disciplined. The LC found SAPS' conduct unfortunate. Instead of dealing with the perpetrators, SAPS entertained their grievances against Oosthuizen. She was transferred and disciplinary proceedings were brought against her. It was clear that the warrant officers racially harassed Oosthuizen and that they were motivated by insubordination and animus. Despite the chairperson making adverse findings against the warrant officers, SAPS did nothing to investigate their conduct. It took Solidarity's persistent complaints to spur SAPS into action.

The LC considered the requirements for the application of section 60 of the EEA, which have now been codified in the Code of Good Practice on the Prevention and Elimination of Harassment.

The requirements for employer liability under section 60 are as follows:

1. The conduct must be by an employee of the employer.
2. The conduct must constitute unfair discrimination.
3. The conduct must take place while at work.
4. The alleged conduct must immediately be brought to the attention of the employer.
5. The employer must be aware of the conduct.
6. There must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA.
7. The employer must show that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA.

Applying the law to the facts, the LC found that all the elements to satisfy the requirements of section 60 for vicarious liability had been met. The conduct was by employees of SAPS, the conduct constituted unfair discrimination and happened at work. The conduct of the warrant officers was a premeditated machination to get rid of Oosthuizen. Oosthuizen had brought the racial harassment to the attention of SAPS as soon as it took place.

The court found that, although SAPS initially took steps to investigate Oosthuizen's grievance, the various investigative reports which recommended disciplinary action against the warrant officers were ignored and never implemented. SAPS had failed to consult with all the parties and did not take the necessary steps to eliminate the racial harassment. SAPS was not able to show that it did all that was reasonably practicable to ensure that the warrant officers would not contravene the EEA. It found that SAPS had failed dismally to investigate

Harassment

Vicarious liability of employers for harassment in terms of the EEA...*continued*

Solidarity obo Oosthuizen v South African Police Service and Others [2023] 3 BLLR 258 (LC)

the racial confrontation and to take the necessary steps to eliminate it. Damningly, the LC found that SAPS had protected the perpetrators of the racial harassment. The court found that a SAPS brigadier had abused her position by suppressing critical evidence against the warrant officers and manipulated the outcome of the initial disciplinary enquiry against the warrant officers.

In the court's view, for SAPS to escape being held vicariously liable it had to show firstly that it took reasonable precautions to prevent and promptly correct the inimical behaviour and, secondly, that Oosthuizen had unreasonably failed to take advantage of SAPS' preventative or corrective opportunities. To achieve that SAPS would be expected to transcend the confines of superficial compliance and deal with the historical ethos and systems that had created the toxic environment, susceptible to racial harassment.

In terms of section 50 of the EEA where the LC finds that an employee has been unfairly discriminated against it may make any appropriate order that is just and equitable in the circumstances, including the payment of compensation, damages and an order directing the employer to take steps to prevent the same unfair discrimination from occurring in future. Having found SAPS vicariously liable for the racial harassment suffered by Oosthuizen, the court awarded her compensation in the amount of R300,000. In addition, the LC ordered SAPS to make a written apology to Oosthuizen. Significantly, the LC also awarded costs in favour of Solidarity, as an indication of its displeasure with the respondents' conduct in the matter.

This case illustrates the real obligation on employers to deal swiftly and seriously with any allegations of harassment and to take reasonable precautions to prevent and correct the behaviour complained of. This requires at least consultation with all relevant parties, taking steps to eliminate the conduct, and dealing appropriately with the perpetrators. Mere lip service and superficial compliance will not insulate an employer from vicarious liability. Where necessary, an employer must deal with the historical ethos and systems that have led to the toxic environment.

Jose Jorge, Leila Moosa and Alex van Greuning

Chapter 6

Harassment

Witness credibility, deference, and when a court should interfere with a commissioner's credibility findings

Amathole District Municipality v CCMA and Others [2023] 2 BLLR 103 (LAC)

Summary of the facts

The employee (Ms P) was an administrative assistant for the Amathole District Municipality (Municipality), stationed in Nxuba, Eastern Cape.

In February 2015, a certain Fredericks was transferred to the Municipality as an operations manager. Limited office space resulted in Ms P sharing an office with Fredericks for about three months before he moved into his own office.

Ms P later claimed that between February and July 2015, Fredricks sexually harassed her in that he would, among other things, touch her private parts and request oral sex from her. This happened even after he had moved to his own office. Ms P said that she did not resist Fredericks' advances since she feared being fired, as he was her boss.

In July 2015, Ms P told her boyfriend about Fredricks' conduct. He told her to report the matter to the authorities. She reported the matter to a shop steward who told her to report the matter to the labour relations division.

From July 2015 Ms P started receiving unfavourable reports from Fredericks, indicating poor work performance on her part. Ms P suffered from a stress disorder and was intermittently off on sick leave.

It was only on 2 November 2015, some four months after the alleged sexual harassment stopped, that Ms P lodged a grievance with the labour relations department.

On 20 November 2015 the Municipality informed the relevant parties of a grievance hearing to be held on 1 December 2015. Ms P was unavailable due to ill health and then later annual leave. The Municipality was unable to schedule the grievance hearing until 12 May 2015 because of various postponements occasioned by Ms P.

On 1 June 2016, the Municipality issued the outcome of the grievance. The presiding officer could find no basis for Ms P's sexual harassment allegation against Fredericks and made recommendations, including emotional intervention for Ms P, training sessions to capacitate her, as well as her relocation within the department, since her working relationship with Fredericks was damaged. Dissatisfied with the outcome, Ms P referred a dispute to the CCMA.

Curiously, the CCMA arbitration was presided over by two commissioners. The commissioners found that Ms P had suffered unfair discrimination in the form of sexual harassment and criticised the Municipality for not knowing how to handle the grievance. During the arbitration Fredricks testified that the relationship was consensual and provided emails and SMSes as evidence of this. The commissioners rejected Fredericks' evidence as an *"attempt to swerve the entire arbitration to the work performance"*. They found that since the emails and SMSes were selective and unauthenticated, they could have been tampered with. They also found that the emails and SMSes were *"conveniently selected to reflect the [employee] as the actual perpetrator"*. Accordingly, they rejected all the email and SMS communications between Fredericks and Ms P.

Harassment

Witness credibility, deference, and when a court should interfere with a commissioner's credibility findings...*continued*

Amathole District Municipality v CCMA and Others [2023] 2 BLLR 103 (LAC)

The Municipality was held vicariously liable for the sexual harassment allegedly perpetrated by Fredericks against Ms P, and ordered to pay R150,000 compensation to Ms P.

Dissatisfied with the award, the Municipality took the matter to the LC. The Municipality initially launched review proceedings on 7 November 2016, but was later advised by its counsel that the correct procedure to follow was an appeal in terms of section 10(8) of the EEA. The Municipality then proceeded to note the appeal to the LC in March 2017, six months after the time for doing so had expired.

Because the appeal was late the Municipality was obliged to apply for condonation. The LC dismissed the Municipality's condonation application, finding that it had not provided a reasonable explanation for the delay. It touched on the merits of the appeal, finding that, in any event, it lacked the ability to judge the credibility of witnesses on appeal and therefore could not interfere with the credibility findings of the commissioners.

Dissatisfied with the judgment in the LC, the Municipality appealed to the LAC.

Summary of the findings of the Labour Appeal Court

In the LAC, the Municipality argued that condonation should have been granted and that the LC had erred in finding that it could not interfere with the credibility findings of the commissioners, as the rule was not inflexible. It was argued that the record did not support the findings of the commissioners, and that the LC was entitled to make its own credibility findings. It was further argued that the commissioners had failed to weigh all the relevant evidence and the probabilities before drawing inferences as to the credibility of witnesses.

Finally, the Municipality argued that, even if it was found that there was sexual harassment, it did not follow automatically that the employer was vicariously liable in terms of section 60 of the EEA. Once sexual harassment is committed it must be brought to the notice of the employer immediately. In this case it was argued that Ms P only reported the matter four months after the alleged harassment had ended, and she provided no explanation for the delay. Ms P had also not reported any further acts of sexual harassment since the grievance. Therefore, it could not be argued that the Municipality allowed the harassment to perpetuate. According to their argument, there was no basis for holding the Municipality liable to compensate Ms P.

Condonation

In considering the appeal grounds in respect of the condonation, the LAC held that the Municipality had not wasted time in pursuing its dissatisfaction with the award. The Municipality had been incorrectly advised by its attorneys as to the procedure, but this was remedied once counsel was introduced. The delay was attributable to the Municipality's legal representatives.

Chapter 6

Harassment

Witness credibility, deference, and when a court should interfere with a commissioner's credibility findings...*continued*

Amathole District Municipality v CCMA and Others [2023] 2 BLLR 103 (LAC)

The LAC considered the Constitutional Court's finding that condonation should be granted if it is in the interests of justice to do so. Whether this is so must be determined with reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the effect on the administration of justice, the possibility of prejudice to the other party, and the reasonableness of the explanation for the delay.

The LAC held that good administration of justice does not require that the large degree of blame which attaches to the attorney should also be attributed to the litigant, particularly where there is no suggestion of any prejudice to the respondent. The LAC considered the Municipality's relatively small degree of fault, against the prejudice which it would suffer if the award were to be allowed to stand. In light of the nature of the case and the Municipality's prospects of success on the merits, the LAC granted the appeal in respect of the condonation application.

Credibility of witnesses

As a general rule, a court of appeal should not ordinarily interfere with the credibility findings of a commissioner. The commissioner is in a position to observe the demeanour of witnesses and is accordingly better placed to make proper credibility findings. However, this rule is not inflexible. Where it is clear from the record that a commissioner misdirected him- or herself on the facts or that a wrong conclusion was reached, then the appeal court is duty bound to overrule the factual findings of the commissioner to do justice to the case.

The proper test is not whether a witness is truthful and reliable in all that they say but rather whether, on a balance of probabilities, the essential features of the version presented are true. Accordingly, decision makers have to be careful not to approach evidence in a piecemeal fashion but rather to consider the evidence as a whole.

Turning to the facts, the LAC found that Ms P was not completely candid and frank in her testimony before the CCMA. Her evidence that she was sexually harassed was both internally and externally contradictory. For instance, at the arbitration she denied having performed oral sex on Fredericks. However, there was an audio recording of her admission at the grievance hearing to having done so. This recording was played at the arbitration hearing to show that she was lying. This should have put the reliability of her testimony into question.

The LAC noted that the veracity of Ms P's evidence should have been tested against the documentary evidence presented at arbitration. The commissioners had decided to exclude the emails and SMSes because they were not *"authenticated"*. This overlooked the fact that the authenticity and veracity of the documents were never challenged. Ms P admitted that she wrote the communications, although she did try to explain the reasons why she wrote them.

Harassment

Witness credibility, deference, and when a court should interfere with a commissioner's credibility findings...*continued*

Amathole District Municipality v CCMA and Others [2023] 2 BLLR 103 (LAC)

The emails and SMSes were flirtatious, and at times, overtly sexual. A further blow to Ms P's credibility was that at the arbitration she deliberately misread texts that she sent to Fredericks to play down their sexual nature. The LAC held that the commissioners had erred in not attaching any weight to these communications. They were vitally important in determining the credibility and overall probabilities that showed the consensual nature of the sexual conduct between Ms P and Fredericks. The commissioners' credibility findings were inconsistent with the evidence on record and were the product of an inadequate assessment of the probabilities.

The LAC then considered the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace. The Code states:

"4.1 The term 'harassment' is not defined in the EEA. Harassment is generally understood to be –

4.1.1 ***unwanted conduct****, which impairs dignity;*

4.1.2 which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences; and

4.1.3 is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA."

Whether or not the conduct is unwelcome is an objective test. If the conduct is welcome, it cannot be sexual harassment. Ms P did not resist Fredricks' advances. She responded to his advances. She used affectionate and seductive language in her communications with Fredricks. She did not immediately seek advice from a friend or fellow employee. She waited for three months before raising the complaint with her boyfriend and then a further four months before lodging a grievance. There was no explanation for this delay.

The LAC found that even though Fredricks was not an exemplary witness, on a consideration of the totality of the evidence, there was insufficient evidence before the commissioners that he had sexually harassed Ms P. On this basis, the LC should have upheld the appeal.

Accordingly, the question of employer liability under section 60 of the EEA did not arise. However, the LAC confirmed that, even if there had been sexual harassment, section 60 of the EEA does not create automatic liability on the part of the employer for acts of discrimination by its employees. The requirements for employer liability would have to be met. In this case the harassment had not been reported immediately. When it was brought to the Municipality's attention, it immediately took steps to address the situation. It relocated Ms P away from Fredericks and tried to assist her with her stress. The LAC found that these steps were consistent with section 60 of the EEA.

Jose Jorge, Leila Moosa and Alex van Greuning

07

General practice in labour law [court practice and CCMA practice] and restraint of trade

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Practice and Procedure

Locus Standi – Does an attorney require authority from their client to depose to an affidavit?

Masako v Masako and Another 2022 (3) SA 403 (SCA)

Summary of the facts

The matter was an Appeal which concerned the question of whether an attorney who deposed to an affidavit in support of her client's Rescission Application was required to obtain authorisation from her client to do so.

In launching the Rescission Application, the Appellant's attorney, Moduka deposed to the Founding Affidavit in support thereof. Moduka alleged that an administrative error in her office led to the First Respondent's application being incorrectly diarised for 17 May 2018 instead of 17 April 2018.

The First Respondent opposed the Rescission Application and raised a preliminary point challenging Moduka's *locus standi* on the basis that as the attorney for the Appellant, she was not the party affected by the order which the Appellant sought to rescind. The First Respondent contended that Moduka did not have a "*direct and substantial interest in the main application*", which would entitle her to bring the Rescission Application.

In response to the First Respondent's preliminary point, the Appellant delivered a Confirmatory Affidavit in which she attested to having instructed her attorney to represent her in all proceedings brought by the First Respondent in the matter.

The Regional Court concurred with the First Respondent and upheld the preliminary point. It found that Moduka had not been authorised to bring the Rescission Application on behalf of the Appellant, and that the Appellant's Confirmatory Affidavit was an attempt "*to usher in her authorisation through the backdoor.*"

The Appellant then took the matter on appeal to the High Court which also dismissed it on the same basis as the Regional Court. The matter was then taken on Appeal to the SCA for determination before a full bench.

Summary of the findings of the court

In arriving at the conclusion in its judgment, the SCA held that both the Regional Court and the High Court conflated (i) the legal standing of the party seeking the rescission of the judgment; (ii) the basis for Moduka deposing to an affidavit; and (iii) Moduka's authority to represent the Appellant.

The SCA held that the Appellant had a direct and substantial interest in the matter and had appointed Moduka Attorneys to act on her behalf in opposing the First Respondent's application, meaning that Moduka's *locus standi* was irrelevant.

Insofar as Moduka's authority to depose to the affidavit in support of the Rescission Application was challenged, the court held that given that when a deponent deposes to an affidavit on oath such deponent states that the facts set out therein fall within the deponent's personal knowledge, Moduka did not require the authorisation of the Appellant as the circumstances pertaining to the administrative error which led to the Appellant not attending the proceedings of 17 April 2018 were within Moduka's personal knowledge.

Ultimately, the SCA upheld the Appellant's Appeal, dismissed the orders of both the Regional Court and High Court, with costs, and ordered that the matter be remitted to the Regional Court for determination of the merits of the Rescission Application.

JJ van der Walt

Chapter 7

Restraint of trade

Enforceability of a restraint of trade clause in instances where the employer's business is dependent on the location of where its clients render their services

Heintzmann Traffic Accommodation (Pty) Ltd and Another v Van Oudtshoorn and Others [2023] JOL 59859 (LC)

Summary of the facts

The first and second respondents (Van Oudtshoorn and Sinden) were both employed as sales managers by Heintzmann Traffic Accommodation (Pty) Ltd (Heintzmann), the first applicant. In terms of their respective contracts of employment, Van Oudtshoorn and Sinden signed identical restraint of trade and confidentiality undertakings in which they agreed not to act in competition with Heintzmann for a period of 24 months post termination of their employment. On 17 February 2023, Van Oudtshoorn and Sinden were dismissed by Heintzmann on account of having committed acts of misconduct.

Following their dismissals, Van Oudtshoorn and Sinden registered an entity known as Sales Ops (Pty) Ltd (Sales Ops). Upon learning of this, Heintzmann launched an urgent application to enforce the restraints of trade and confidentiality undertakings. In launching the urgent application, Heintzmann lamented the fact that, when Van Oudtshoorn and Sinden registered Sales Ops, they were in possession of confidential information belonging to Heintzmann.

At the hearing of the urgent application, neither Heintzmann nor Sales Ops was able to adequately explain the nature of their respective businesses. As such, it was left to the court to guess the business of the parties.

In opposing the application to enforce the restraint of trade and confidentiality undertakings, it was submitted by Van Oudtshoorn and Sinden that (i) Heintzmann had failed to illustrate the proprietary interest which was worthy of protection; (ii) the information that Heintzmann sought to protect was neither confidential nor of any use to any respondent; and (iii) Sales Ops was not a competitor to Heintzmann as it carried on the business of a sales agent in the construction sector, and earned commission from the sale of a supplier's products to end-users.

In mounting their defence, Van Oudtshoorn and Sinden averred that Sales Ops did not manufacture any of its own products. However, the court found that in an introductory letter from Sinden to a prospective client, Sales Ops referred to its own products as being manufactured to the highest quality standards.

Considering the facts before it, the court was then tasked to determine whether (i) Heintzmann had invoked the restraint and confidentiality undertakings given by Van Oudtshoorn and Sinden; (ii) Van Oudtshoorn and Sinden had indeed breached their restraint and confidentiality undertakings; and (iii) Van Oudtshoorn and Sinden had made out a case which illustrated that the restraint and confidentiality undertakings were unreasonable and thus unenforceable.

Restraint of trade

Enforceability of a restraint of trade clause in instances where the employer's business is dependent on the location of where its clients render their services...*continued*

Heintzmann Traffic Accommodation (Pty) Ltd and Another v Van Oudtshoorn and Others [2023] JOL 59859 (LC)

Summary of the findings of the court

The test to be applied in the enforceability of a restraint of trade is whether a respondent (former employee) to an application can use the information in his/her possession to gain a competitive advantage over an erstwhile employer.

The court correctly stated that there are two kinds of proprietary interests which can be protected by a restraint agreement, namely (i) "*trade connections*" which are described as relationships with customers, potential customers, and suppliers, and which make up the incorporeal property of a business in the form of its goodwill; and (ii) "*trade secrets*" which can be described as all confidential matter which is useful for the carrying on of a business, and which could therefore be used by a competitor, if disclosed, to gain a competitive advantage.

The court further stated that whether information could be regarded as confidential required a factual enquiry as to whether such information was of economic value to Heintzmann, and not readily available in the public domain.

It was common cause that both Van Oudtshoorn and Sinden held senior positions at Heintzmann and were therefore privy to its trade secrets and connections, both of which are proprietary interests worthy of protection. Neither one of them denied that they had access to this information.

In enforcing the restraint and confidentiality undertakings, the court found that Van Oudtshoorn and Sinden were in possession of confidential information belonging to Heintzmann which could be used by Sales Ops to gain a competitive advantage, especially considering that, post termination, Van Oudtshoorn and Sinden had already approached numerous customers and clients of Heintzmann.

The court further found that the area of restraint was unreasonable on account of the broad definition of "*territory*" in their contracts of employment, in that the definition precluded them from conducting business in South Africa. In balancing the doctrine of *pacta sunt servanda* and Van Oudtshoorn and Sinden's constitutional rights to freedom of trade and occupation, the geographical area to which the restraint was applicable was reduced to the areas as recorded in a Letter of Demand addressed by Heintzmann's attorneys to Van Oudtshoorn and Sinden.

Ultimately, Van Oudtshoorn and Sinden were restrained for a period of 12 months from their termination date, from conducting business in direct competition with Heintzmann, and within a 50km radius of the geographical areas which the parties agreed on.

Hanelle Vrey

Chapter 7

Practice and Procedure

The habitual use of urgent court proceedings by employees in senior positions to avoid the conclusion of their disciplinary hearings

George v Nyoka and Others [2023] 7 BLLR 654 (LC)

Summary of the facts

This case concerns the trend of senior employees using urgent court proceedings to stall ongoing disciplinary enquiries.

The applicant held the position of Director: Community Service, a senior position. Pursuant to an investigation into his appointment with the Municipality, the applicant was placed on precautionary suspension. The investigation revealed that the applicant, when being considered for his appointment with the Municipality, misrepresented the true reason for him having left his erstwhile employer, the Dr Kenneth Kaunda Municipality. In summary, it was established that the applicant's contract with his former employer had not come to an end as he alleged, but rather he had been dismissed on account of allegations of financial misconduct, fraud, and corruption.

Throughout his disciplinary proceedings, the applicant adopted every conceivable stratagem to avoid the disciplinary enquiry. These included postponements premised on the discovery of documents, unavailability of his attorney, his failure to timeously procure the services of a new attorney, and the submission of a medical certificate which failed to disclose his medical condition.

As a measure of last resort, and on 16 February 2023, the applicant then approached the court on an urgent basis and sought to interdict the chairperson of his disciplinary enquiry from making a finding against him pending the finalisation of the application to have the chairperson's appointment set aside due to it being in contravention of the regulations pertaining to disciplinary enquiries for senior managers.

In short, the court was required to determine whether the applicant had made out a case which warranted the court's interference with the Municipality's internal disciplinary processes.

Summary of the findings of the court

In arriving at the conclusion reached in the judgment, the court considered the fatal defectiveness of the applicant's urgent application in that (i) the nature of the pleadings were fatally defective; (ii) the applicant failed to establish the court's jurisdiction to intervene in the matter; (iii) the applicant's urgency was self-created; (iv) the applicant misrepresented the true status of the disciplinary enquiry by failing to disclose to the court that all that was pending at the time of the hearing of the application was the chairperson's outcome of the proceedings; and (v) the applicant approached the court to avoid the disciplinary hearing.

Practice and Procedure

The habitual use of urgent court proceedings by employees in senior positions to avoid the conclusion of their disciplinary hearings...*continued*

George v Nyoka and Others [2023] 7 BLLR 654 (LC)

The court remarked that the applicant had, with the misguided legal muscle behind him, taken all measures necessary to stall and avoid answering to the serious allegations of misconduct against him before his disciplinary enquiry - conduct which smacked of a gross abuse of process.

When addressing the issue of costs, the court noted that it is not its duty to remind practitioners, especially counsel, that they are its officers, and that when they appear in the urgent court, that being a special court, they are required to assist in separating the wheat from the chaff and place before it the identifiable pertinent issues that require its urgent attention. This effectively means being prepared on the facts and the law, and having ensured that the papers they present and rely on are in order.

The court further noted that the facts and background of this case, together with the manner and conduct with which the applicant approached the urgent court, was particularly deplorable and an utter abuse of process. The manner with which the application was brought before the court, and conduct in bringing it was equally *mala fide*, vexatious and reprehensible, since the intention was not only to evade the disciplinary hearing but also to cause the Municipality the inconvenience of having to defend a baseless application - conduct which cannot be countenanced and is clearly deserving of stern rebuke through the nature of costs.

Ultimately, the applicant's urgent application was dismissed with costs being awarded in favour of the Municipality.

Malesela Letwaba

08

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Zimbabwean Exemption Permits

The decision to terminate Zimbabwean Exemption Permits was found to be invalid, unlawful, and unconstitutional

Helen Suzman Foundation and Another v Minister of Home Affairs and Others (32323/2022) [2023] ZAGPPHC 490

Summary of the facts

On 29 November 2021, a directive was issued by the Director-General of the Department of Home Affairs (DHA) confirming the Minister of the DHA's (Minister) decision that no further extensions would be granted to approximately 178,000 Zimbabwean nationals who are holders of a Zimbabwean Exemption Permit (ZEP). This decision was accompanied by an initial grace period of 12 months (i.e. until 31 December 2022) in which ZEP holders were provided an opportunity to legalise their status in South Africa through the mechanisms provided for in terms of the Immigration Act 13 of 2002. After this grace period, additional grace periods were provided to ZEP holders, with the latest one being granted until 31 December 2023.

The surprising announcement by the Minister not to extend the ZEPs gave rise to numerous applications being instituted against him, including by the Helen Suzman Foundation (Foundation) to challenge his decision not to extend the ZEPs. It is common cause that the Minister made this decision without providing ZEP holders – or the South African public at large – with any prior notice or an opportunity for consultation. The Minister was also clear in his assertion that his decision was final. In the circumstances, the Foundation reviewed the Minister's decision and argued that it amounted to administrative action which was reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and the inherent principle of legality as enshrined in the Constitution of the Republic of South Africa. The High Court agreed with the Foundation and held that the Minister's decision amounted to administrative action after considering the elements laid out in the Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others* (CCT 133/13) [2014] (5) SA 69 (CC).

Summary of the findings of the court

The High Court considered the evidence placed before it, namely that ZEP holders, civil society and the South African public were not notified of the Minister's intended decision or provided with an opportunity to make representations before he made his decision. The Minister's decision was made after only having internal discussions with certain units within the DHA. This much was conceded to by the Minister. In the circumstances, the High Court held that for this reason, amongst others, the Minister's decision went against the very purpose of procedural fairness and rationality.

Chapter 8

Zimbabwean Exemption Permits

The decision to terminate Zimbabwean Exemption Permits was found to be invalid, unlawful, and unconstitutional...*continued*

Helen Suzman Foundation and Another v Minister of Home Affairs and Others
(32323/2022) [2023] ZAGPPHC 490

In considering section 36 of the Constitution, and in applying the two-stage limitation analysis, the High Court was required to consider what justifications the Minister offered in the making of his decision. In his press statement of 7 January 2022, the Minister contended that his decision was based on improved conditions in Zimbabwe, and his decision would alleviate pressure on South Africa's asylum system, budget and resource constraints. The High Court also considered the reasons for the Minister's decision that were put forward by the Director-General, namely that unemployment in Zimbabwe had decreased to 5,2%. No clear evidence was, however, placed before the court in support of any of these allegations.

The High Court accordingly held that in the absence of any evidence, the only conclusion that could be reached was that the Minister failed to prove a justification, based on any facts, which was rational, between the limitation of ZEP holders' rights on the one hand, and a legitimate governmental purpose on the other. In the absence of any factual evidence, the Minister's decision amounted to an unjustified limitation of rights, which was both unconstitutional and invalid in terms of section 172(1) of the Constitution.

The High Court accordingly made *inter alia* the following order:

- The Minister's decision to terminate ZEPs, and to refuse to grant any further extensions after 30 June 2023 was declared invalid, unconstitutional and unlawful.
- The Minister's decision was reviewed and set aside.
- The decision was remitted back to the Minister for reconsideration, pursuant to following a fair process which complies with sections 3 and 4 of PAJA.
- Pending the conclusion of a fair process, and the Minister's further decision within 12 months:
  - existing ZEPs shall remain valid for the next 12 months;
  - ZEP holders may not be arrested, ordered to deport or detained in terms of section 34 of the Act;
  - holders of the permit are allowed to enter into and depart the Republic of South Africa in terms of Section 9 of the Act; and
  - permit holders will not be required to produce an exemption certificate or authorisation letter in order to remain in South Africa.

CDH Employment Law practice

Chapter 8

South African citizenship is not an automatic right for the children of non-South African citizens, even if they were born in South Africa

Onai Muzore and Another v Minister of Home Affairs and Another 4013/2021

Summary of the facts

The applicants in this case were both adult Zimbabwean citizens who were residing in South Africa and were the parents of three minor children who were born in South Africa between 2010 and 2016. While the applicants were residing in South Africa, they were not permanent residents. One applicant was allegedly in possession of a work visa and the other a visitor's visa. Upon the birth of their children, the applicants applied for their children to be issued with birth certificates for South African citizens on the basis that they were born in South Africa, and as they did not have Zimbabwean citizenship or nationality. Notwithstanding their application, their children could only be issued with unabridged birth certificates for non-citizens. This would allow their children to return to Zimbabwe, for them to be issued with Zimbabwean birth certificates.

Dissatisfied with this decision, the applicants instituted a review application in terms of the Promotion of Administrative Justice Act 3 of 2000, to set aside the Minister's decision not to issue their children with South African birth certificates, and consequently not conferring them with South African citizenship. The applicants' challenge was primarily based on their children being born in South Africa. The applicants argued that their application gave rise to constitutional issues in relation to the right to fair administrative action, which is enshrined in section 33 of the Constitution of the Republic of South Africa.

Summary of the findings of the court

The High Court was required to determine:

- whether citizenship could be granted to children of people who were neither South African permanent residents nor citizens;
- whether the applicants' minor children qualified for South African citizenship by birth in terms of section 2(2) of the Citizenship Act 8 of 1995 (Citizenship Act); and
- whether the legal status of a parent's admission into South Africa could determine the citizenship of their child under section 2(2) of the Citizenship Act.

In determining these issues, the court considered section 2(2) of the Citizenship Act which provides that:

> *"Any person born in the republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth if – (a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and (b) his or her birth is registered in the republic in accordance with the Births and Deaths Registration Act [51 of] 1992"*

Chapter 8

South African citizenship is not an automatic right for the children of non-South African citizens, even if they were born in South Africa*...continued*

Onai Muzore and Another v Minister of Home Affairs and Another 4013/2021

In expanding on section 2(2) of the Citizenship Act, the court confirmed that citizenship in South Africa is either obtained by birth, descent or naturalisation, and that the basic principle of South African citizenship is that a child follows the citizenship or nationality of their parents.

The court considered and emphasised that the best interests of the applicants' minor children were of paramount importance, and that it would not be in their interests to be separated from their parents. The court accordingly held that the applicants' children had Zimbabwean citizenship by virtue of them being Zimbabwean citizens who had not renounced their Zimbabwean citizenship. This principal is founded on the basis that children inherit the status of their parents to avoid separating them from their parents. As such, the mere fact that the children were born in South Africa did not mean that they had abandoned their parents' country of citizenship or nationality.

Interestingly, the court held that in such a case, the applicants' desire for their children to be regarded as South African citizens would be akin to an inter-country adoption for the purposes of the Hague Convention on International Country Adoption. This point was founded on the fact that the applicants would retain their Zimbabwean citizenship while conferring South African citizenship on their children, and as such, the applicants would have parental rights and responsibilities towards children of a different country.

The court did, however, offer alternative recourse to the applicants in that nothing prohibited their children from obtaining South African citizenship by birth in terms of section 3 of the Citizenship Act if they met the applicable requirements. This section provides that: the parents of non-South African citizens would have to be permanent residents in South Africa; and their children would have to reside in South Africa from the date of their birth to the date of attaining majority, to obtain citizenship by birth.

The most important takeaway from this judgment is the weight placed on the best interests of children, and that it cannot be said to be in their interests to be separated from their parents, notwithstanding the place of their birth. Parents who find themselves in similar circumstances are reminded that while their children would not automatically attain South African citizenship by being born in South Africa, they are not precluded from doing so at a later stage if they follow the correct procedure in terms of section 3 of the Citizenship Act.

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