Worklaw 2017 Labour Law Update

Contents

Collective Bargaining and Industrial Action Accord and Draft Code

The Nedlac *Accord on Collective Bargaining and Industrial Action* and a *Draft Code of Good Practice: Collective Bargaining, Industrial Action and Picketing* have recently been made public. Whilst the Code is merely a draft at this stage, this newsflash aims to give Worklaw subscribers a sense of what it contained in these important documents and what their significance may be.

Firstly, a general comment on what's *not* in the Accord and draft Code: much had been made in various reports in recent times of measures that may be included to regulate and possibly curtail industrial action, such as the incorporation of provisions requiring **strike ballots** and the use of **arbitration** to resolve protracted disputes. Neither of these measures appear with any significance – *clause 19* of the draft Code merely restates the existing legal position on ballots without taking it any further, namely that the LRA does not require the conduct of a ballot as a requirement for a protected strike or lockout, with s67(7) stating explicitly that the failure to conduct a ballot may not give rise to any litigation that will affect the legality and the protected status of the industrial action. Whilst unions and employer organisations are obliged in s95(5)(p) to provide in their constitutions for a secret ballot before calling a strike or lockout, the Code (see *clause 19(3)*) emphasises that the failure to do so does not invalidate the protected status of the strike or lockout.

Accord

1. Who is bound by it?

Parties to the Accord include trade union federations (eg Cosatu) and employer organisations represented at Nedlac, Government, agencies such as the CCMA and other private sector organisations and institutions. We are uncertain at this stage whether unions such as Numsa and Amcu have signed the Accord.

2. What is its status?

It will be interesting to see whether our Courts regard the Accord as a collective agreement as defined in s213 of the LRA. If so, this potentially brings into play s65(1)(a) which prohibits industrial action if that would be in breach of a collective agreement. It remains to be seen whether a union party to the Accord, having committed to 'peaceful strike action', may be in breach of that collective agreement in the event of a strike occurring that is not 'peaceful', thereby rendering any such industrial action unprotected in terms of s65(1)(a). Against this interpretation is the fact that the wording of this section only precludes strikes if the '*issue in dispute*' giving rise to the industrial action (eg wages) is provided for in a collective agreement, rather than the parties' conduct in pursuing the industrial action.

S65(1)(a) aside, an alleged breach of the Accord is likely to be used in any court proceedings (eg interdicts) relating to the protected status of any industrial action, claims for damages, or the fairness of any dismissals for participating in any such action.

3. What does it say?

Broadly speaking the Accord provides for a commitment to act lawfully and peacefully and to bargain in good faith during industrial action. As such, a lot of what is contained in the Accord is a restatement of what the law is anyway relating to protected / unprotected strikes, and conduct during industrial action. But in various ways in does go further. For example, *clause 8.4* places an onus on unions to make 'public statements' (oral / written?) during a strike calling on their members to act in a law abiding and peaceful manner.

Some of the Accord's provisions are going to be difficult to interpret and apply. For example, parties undertake in terms of *clause 8.9* to "refrain from acting in a manner that makes any conflict worse". Does a spurious wage offer from either side 'make conflict worse'? And is this then a breach of the collective agreement?

Clause 9 appears to be the heart of the Accord. *Clause 9.1* requires parties to-

> *"take all necessary measures to prevent violence, intimidation and damage to property and, if it does occur, to take all the steps necessary to discourage such conduct and to comply with a court order interdicting the violence, intimidation or damage to property."*

Again there may be problems in applying these provisions: for example, eg if an employer's attempt to employ replacement labour during a strike could lead to violence, should it now not do so in terms of this clause?

Clauses 10,11 and 12 deal with the role of Public Order Policing, private security companies and the CCMA / bargainings councils, during strikes, lockouts, pickets and protest action.

Draft Code

Again we emphasise that the Code is merely a draft at this stage. It is divided into various Parts, dealing with –

- Collective bargaining (Part B);
- Workplace democracy and dialogue (Part C);
- Industrial action: strikes and lockouts (Part D); and
- Picketing (Part E).

The Code aims to be a practical guide to collective bargaining. It is wordy and lengthy (35 pages), and much of it simply restates what the law is anyway. A more concise, tighter Code may have been more workable. Whilst it does make some useful contributions, as seen from the outline below, it is disappointing that it did not go further. *Clause 4.4* for example merely recognises there is no statutory or constitutional duty to bargain - we think it could have stated that notwithstanding this, a failure/refusal to bargain in good faith may be taken into account in assessing 'fault' in any manifestations of the conflict that subsequently arise.

Whilst there is much good stuff in the Code, it is silent on outlining what the consequences would be of not following the stated guidelines. The consequences of not complying with the Dismissal Code are clear – any subsequent dismissal is likely to be procedurally and / or substantively unfair with a resultant order for

reinstatement or compensation. But where does a breach of this Code take us? As with a breach of the Accord, the answer will probably lie in providing ammunition for any litigation related to the protected status of any industrial action, damages arising therefrom, or the fairness of any dismissals for participating in any such action.

1. Collective bargaining – Part B

Part B provides detailed guidelines on –

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

The principles of good faith bargaining set out in *clause 7* are perhaps the key clause in the Code. These include a commitment to –

- disclose relevant information;
- written demands and responses;
- no new demands during negotiations;
- no unilateral action prior to deadlock;
- rational and courteous behaviour;
- attend agreed meetings timeously;
- secure mandates and not change negotiators;
- being prepared to modify demands;
- provide appropriate facilities;
- present demands / responses accurately;
- respect parties' rights to communicate with their constituency;
- not bypass the union and deal directly with members, before deadlock;
- consider escalating negotiations to a higher level to avoid deadlock;
- being open to continue negotiations after a dispute has been declared.

Whilst not specifically listed under clause 7, other principles of good faith bargaining appear throughout the Code. For example:

- *Clause 9(5)* requires parties to inform other parties in writing of names of appointed negotiators;
- *Clause 10(2)* spells out what should be included in parties' opening written submissions prior to negotiations commencing.

Having detailed all these good faith bargaining principles, the Code is lacking in spelling out what the consequences would be of a failure to adhere to them, as already highlighted.

2. Workplace democracy and dialogue – Part C

Part C aims to develop a culture of mutual respect and trust between those managing an organisation and those working for it, through consultation in the decision making process. In that sense, it has similar aims to the largely unused workplace forums envisaged by chapter V of the LRA, and it remains to be seen

whether these objectives are any more successful. It is intended that any such initiatives should not undermine collective bargaining arrangements, and guidelines are provided in *clause 15(2)* on how they should co-exist.

3. Industrial action: strikes and lockouts – Part D

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

Along the same lines, *clause 23(1)* provides for the establishment of a 'peace and stability' committee comprising representatives of the union, management, any private security company involved, the SAP, and any facilitator appointed, with the aim of regulating and monitoring conduct during the industrial action. The Code does not cover how this would co-exist with the negotiating forum in place that would be dealing with the issues in dispute that gave rise to the industrial action.

As already stated, *clause 19* on ballots is disappointing - it creates no added pressure to hold strike ballots and reaffirms that a failure to comply with a union's constitution in respect of a strike ballot will not invalidate the protected status of a strike. The Code doesn't even contain the need for a ballot under the principles of good faith bargaining. We think it could also have said that a failure to hold a ballot in terms of a union's constitution, will be taken into account in deciding the fairness of parties' subsequent actions in dealing with manifestations of the conflict.

Clause 20 & *clause 21* contain useful guidelines on the content of strike notices and who may strike. It is however puzzling that the freedom of association principles requiring employees to respect other employees' rights to choose whether to strike or not, the right to freedom of movement in and out of premises, and the employer's right to continue to maintain production, are only stated in *clause 22.4* & *clause 22.5* in relation to employees residing on the employer's premises.

4. Picketing – Part E

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

Overall conclusions

Overall, we think the Accord and draft Code do make a useful contribution to promoting orderly collective bargaining and industrial action. But they spend too much time restating what the law is and re-emphasising parties' obligations to comply with what the law is anyway. They are in our view too long, but short of remedies and penalties to rectify breaches that will inevitably occur.

Whilst there are no obvious sanctions for non compliance built into the documents, they are likely to be used extensively by litigants in court proceedings dealing with the aftermath of industrial action in the form of disputes over strike dismissals, claims for damages to plant and equipment, and other similar actions. The Accord and Code (once finalised) are likely to be extensively referred to by our labour courts in developing a coherent jurisprudence around issues relating to collective bargaining and industrial action. That, it seems, may be the real price parties may pay for non compliance.

Bruce Robertson

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Collective Labour Law

THE EMPLOYMENT CONTRACT

KalipaMtati v KPMG Services (Pty) Ltd J2277/16; 18 October 2016 (LC)

Principle:
Where an employee resigns from the employ of his employer and does so voluntarily and with immediate effect, the employer may not discipline that employee after the resignation has taken effect. The employer loses the right to discipline the employee, also with immediate effect.

Facts:
An employee was accused of conduct related to a conflict of interest, including failing to disclose to the employer her directorship in several companies which were in competition with the employer. The employee terminated her employment by resigning. This case was complicated by the fact that she submitted two letters of resignation to the employer. The first was submitted on 5 September after the employer informed her that it was conducting an investigation into the allegations against her, and stated "*Please accept this letter as a notice of my resignation*." The understanding of the employee was that the notice period would run from 5 September 2016 to 4 October 2016.

The second letter was submitted after the employer indicated to the employee that it would be commencing with the disciplinary proceedings against her. The second letter was dated 14 September 2016, and the relevant part reads as follows:

> "*It is with deep regret that I must inform you I am resigning from my employment ……with immediate effect.*"

At the disciplinary hearing on 30 September 2016, the employee raised the preliminary point concerning the jurisdiction of the chairperson of the disciplinary hearing to discipline her in light of her resignation. It was indicated to the chairperson that should she persist with the disciplinary hearing, the employee would institute an urgent application to interdict her. After the chairperson ruled that she had jurisdiction and that she would be proceeding with the hearing, the employee left the hearing. The chairperson then proceeded with the hearing in the absence of the employee. At the end of the hearing the chairperson found the employee guilty and imposed the sanction of summary dismissal.

The employee brought an urgent application asking the Labour Court to interdict the employer from proceeding with the disciplinary hearing after her resignation. Even though the hearing had been completed by the time the matter came before the Court, it was prepared to consider the matter.

The Labour Court said that there are **two perspectives**: The one is where the resignation is with immediate effect and the other is where the resignation is with an undertaking to serve the notice period. The Court accepted the basic principle that the fact that an employee has given notice to terminate the employment contract does not take away the power of the employer to discipline him or her whilst serving the notice period. In other words if an employee is serving notice he or she is still an employee and subject to the authority of the employer in so far as the employment relationship is concerned. Similarly, all the obligations that arise from the contract are

still binding on the employer during the notice period and this includes the duty to pay the salary of the employee.

If an employer takes disciplinary action against the employee and dismisses him or her before the end of the notice period, the employment relationship would be terminated. In those circumstances the termination will not be due to the resignation of the employee but rather the dismissal for misconduct.

Turning to the facts of the case, the Court said the employee was entitled to terminate the contract by resigning with immediate effect in the middle of the notice period, despite having already resigned on notice. The first resignation on notice, the Court said, had no bearing on the right of the employee to subsequently terminate the contract unilaterally before the end of that period. The LC concluded that the second letter of resignation changed the status of the employee from that of being an employee, in the ordinary sense of the word, to that of being an ex-employee. This meant that the employee's (second) termination of the employment contract with immediate effect took away the right of the employer to proceed with the disciplinary hearing against her.

This judgment looks like authority for employees to resign with immediate effect to insulate themselves from disciplinary action. Can this be correct? We think not.

Let's start with the legal requirements in the BCEA. Section 37 requires notice of specified time periods depending on the length of service. In addition, most contracts of employment have specific notice periods. Although there is no penalty in the BCEA for an employee who just walks off the job or who gives notice with a period shorter than required, an employee remains an employee until the end of the specified or agreed notice period – unless this is waived by the employer.

We accept that many employers will waive their rights to avoid the obligation to remunerate but there will be cases where for important policy and practical reasons, the employer is willing to continue remuneration during the notice period so that it can conduct a disciplinary hearing which results in a record that becomes part of the institutional memory and official record. This could be important for a number of reasons.

While resignation is a unilateral act which does not depend on acceptance by the employer, that act is a separate consideration from the date of termination. Unless the employer waives the notice period, the contract does not terminate on the date the notice is given but when the notice period expires. That notice period is fixed by the BCEA or the contract of employment. The fact that the employee resigns with immediate effect does not necessarily result in termination on the date of resignation. Our view is that in those circumstances the door for a disciplinary hearing remains open during the contractual notice period.

Extract from the judgment:
(Molahlehi J)
[13] The broad principle governing the issue of the power of an employer to discipline an employee who had resigned from his or her employ, is set out in the minority judgment in *Toyota SA v The Commission for Conciliation Mediation and Arbitration and others* (2016) 37 ILJ 313 (CC), the case which the applicant relied on in support of her case. The majority in that case dismissed the application for leave to appeal which means that they never

considered the merits of the application. It is the minority judgment of Zondo J that dealt with the merits of the application and in this regard held that:

> *"[142] Another context of resignation is the normal resignation. Where an employee resigns from the employ of his employer and does so voluntarily, the employer may not discipline that employee after the resignation has taken effect. That is because, once the resignation has taken effect, the employee is no longer an employee of that employer and that employer does not have jurisdiction over the employee anymore. Indeed, even the CCMA or the relevant bargaining council would have no jurisdiction to entertain a referral of a "dismissal" dispute in such a case because there would be no dismissal as envisaged in section 186of the LRA. Therefore, if an employee who has validly resigned later refers an alleged unfair dismissal dispute to arbitration under the LRA and it is found that the employee had validly resigned and had not been dismissed, reinstatement would be incompetent."*

[14] In summary the principle to discern from the above is that an employer has no authority or the power to discipline an employee who resigns from his or her employment once the resignation takes effect. In other words where the resignation is with immediate effect, the employer loses the right to discipline the employee, also with immediate effect.

[15] The issue of resignation by an employee and its consequences to the power of the employer to discipline can be looked at from two perspectives. The one perspective is where the resignation is with immediate effect and the other is where the resignation is with an undertaking to serve the notice period. The consequences of resignation on notice is summarized by Cheadle AJ, as he then was, in the *Lottering* matter as follows:

> *"[14] In an indefinite contract, either party may terminate the contract on notice. A resignation in this context is simply the termination by the employee on notice. There does not have to be a specific provision to that effect, it is an inherent feature of an indefinite contract and if there is no agreed notice, the notice must be reasonable (provided that it is not less than the minimum notice prescribed in section 37 of the BCEA). If the contract is for a fixed term, the contract may only be terminated on notice if there is a specific provision permitting termination on notice during the contractual period – it is not an inherent feature of this kind of contract and accordingly requires specific stipulation.*
>
> *[15] The common law rules relating to termination on notice by an employee can be summarised as follows:*
>
> *15.1 Notice of termination must be unequivocal – Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1985 4 SA 809 (SCA) at 830E.*
>
> *15.2 Once communicated, a notice of termination cannot be withdrawn unless agreed – Rustenberg Town Council v Minister of Labour1942 TPD 220 and Du Toit v Sasko (Pty) Ltd (1999) 20 ILJ 1253 (LC).*
>
> *15.3 Termination on notice is a unilateral act – it does not require acceptance by the employer – Wallis Labour and Employment Law para 33 at 5-10. This rule is disputed by the applicants in so far as it applies to notice not in compliance with the contract. The rule is accordingly dealt with more fully below.*
>
> *15.4 Subject to the waiver of the notice period and the possible summary termination of the contract by the employer during the period of notice, the contract does not terminate on the date the notice is given but when the notice period expires – SALSTAFF obo Bezuidenhout v Metrorail [2001] 9 BALR 926 (AMSA) at para [6].*

> *15.5 If the employee having given notice does not work the notice, the employer is not obliged to pay the employee on the principle of no work no pay;*
>
> *15.6 If notice is given late (or short), that notice is in breach of contract entitling the employer to either hold the employee to what is left of the the contract or to cancel it summarily and sue for damages – SA Music Rights Organisation v Mphatsoe[2009] 7 BLLR 696; and Nationwide Airlines (Pty) Ltd v Roediger& Another (2006) 27 ILJ 1469 (W).*
>
> *15.7 If notice is given late (or short) and the employer elects to hold the employee to the contract, the contract terminates when the full period of notice expires. In other words if a month's notice is required on or before the first day of the month, notice given on the second day of the month will mean that the contract ends at the end of next month. – Honono v Willowvale Bantu School Board & Another 1961(4) SA 408 (A) at 414H – 415A. Since this articulation of the rule is contentious and its application was placed in dispute by the applicants, it too is dealt with more fully below."*

.....

[19] The basic principle, as I understand it, is that the fact that an employee has given notice to terminate the employment contract does not take away the power of the employer to discipline him or her whilst serving the notice period. In other words if an employee is serving notice he or she is still subject to the authority and the power of the employer in as far as the employment relationship is concerned. Similarly, all the obligations that arise from the contract are still binding the employer during the notice period and this includes the duty to pay the salary of the employee.

.....

[22] There is no requirement in law that an employee who resigns on notice, which is then accepted by the employer, cannot resign with immediate effect during the notice period. In other words an employee who issues notice of intention to resign is not barred from resigning thereafter before the expiry of the notice period. In other words an employee in such a situation, need not seek the consent of the employer neither does he or she need to withdraw the initial resignation before doing so.

[23] In my view, the second letter of resignation of the applicant changed the status of the employee from that of being an employee, in the ordinary sense of the word, to that of being the erstwhile employee of the respondent. This means that the termination of the employment contract with immediate effect took away the right of the first respondent to proceed with the disciplinary hearing against her.....

'NON STANDARD' EMPLOYMENT

Enforce Security Group v Mwelase Fikile & Others (DA24/15) [2017] ZALAC 9 (25 January 2017)

Principle:

The definition of dismissal requires that there must be an act by the employer that terminates the contract. Where the end of the fixed term is defined by the completion of a specified event, such as the cancellation of a service contract, this is the proximate cause for the automatic termination of the employees' contracts of employment and does not constitute a dismissal.

Facts:
The appellant is a private security services provider and provided security officers to its various clients contracted to it, including Boardwalk Inkwazi Shopping Centre (Boardwalk), Richards Bay. In terms of the contracts of employment with the employees, the period of employment commenced on a specified date. Clause 3.2 of the contracts provides that:

> *'The period of the employment would endure until the termination of the contract which currently exists between BOARD WALK or its successors (hereinafter referred to as the CLIENT) and the COMPANY.*
>
> 3.2.1 *The Employee agrees that he/she fully understands that the Company's contract with the Client might be terminated by the Client at any time and for any cause or might terminate through [e]ffluxion of time and that in consequence hereof the nature of the Employee's employment with the company and its duration is totally dependent upon the duration of the Company's contract with the Client/s and that the Employee's contract of employment shall automatically terminate. Such termination shall not be construed as a retrenchment but a completion of contract…'*

On 30 September 2011, Boardwalk gave notice of termination of its contract with the security company with effect from 31 October 2011. As a result of the termination notice the security company held meetings on 3 & 4 October 2011 with the shop stewards from NASUWU and SATAWU which were the trade unions representing employees at the workplace. The employer offered the affected employees alternative employment in Durban, but this was rejected by the unions.

All the employees were then handed letters notifying them of the cancellation of the contract by Boardwalk Inkwazi Shopping Centre, offering them alternative employment in Durban, and that their contracts of employment would terminate on 31 October 2011 if they did not take up the offer of alternative employment.

Dissatisfied with their dismissal, the employees referred an unfair dismissal dispute to the CCMA. The commissioner concluded that the client's termination of the agreement with the security company led to the automatic termination of the employees' employment contracts and therefore the employees were not entitled to any form of compensation. Their unfair dismissal application was accordingly dismissed.

On review at the Labour Court (***Mwelase and Others v Enforce Security Group and Others* (D358/12) [2015] ZALCD 46 (31 July 2015)**) it was held that any contractual provision that infringes on the rights conferred by the LRA or Constitution is not valid, and even though an employee might be deemed to have waived his or her rights, such waiver is not valid or enforceable. By finding that the cancellation of the contract between Boardwalk and the employer led to the automatic termination of the employees' contracts of employment, the LC held that the commissioner committed a material error of law by failing to apply his mind to the relevant provisions of the LRA, namely, sections 5(2)(b), 5(4) and 185. The LC found that there was an obligation on the employer to have embarked on a retrenchment

exercise. Regarding alternative offers of employment, the LC held that Durban and Richards Bay are too far apart to commute daily.

At the LAC the employer's appeal was upheld and the LC's decision set aside. The LAC stressed that dismissal only occurs when an employer's own act terminates the contract, and said where employees have agreed that there will be automatic termination if a third party withdraws from the contract, there is no dismissal. The LAC's reasoning was that the definition of dismissal requires that there must be an act by the employer that terminates the contract. Where the end of the fixed term is defined by the completion of a specified event, such as the cancellation of a service contract, this is the proximate cause for the automatic termination of the employees' contracts of employment and does not constitute a dismissal. Enforce was therefore not obliged to retrench the employees.

Extract from the judgment:
(Tlaletsi DJP)

[18] It is clear from the wording of s186 (1) above that there are specifically defined instances that bring about the termination of employment which would be regarded as dismissal. This means therefore that an employment contract can be terminated in a number of ways which do not constitute a dismissal as defined in s 186(1) of the LRA. One such instance would be a fixed –term employment contract entered into for a specific period or upon the happening of a particular event. An event that comes to mind would include a conclusion of a project or the cancellation or expiry of a contract between an employer and a third party. Once the event agreed to between an employer and its employee takes place or materializes, there would ordinarily be no dismissal. It has been the position in common law that the expiry of the fixed term-contract of employment does not constitute termination of the contract by any of the parties. It constituted an automatic termination of the contract by operation of law and not a dismissal

…….

[21] The definition of dismissal requires that there must be an act by the employer that terminates the contract. This is made clear by the legislature's employment of the words "*an employer has terminated a contract of employment with or without notice*". 'That encompasses the ordinary situation of the employer giving notice under the contract of employment and a summary dismissal'. In *National Union of Leather Workers v Barnard NO and Another* this Court had the following to say about 186(1)(a):

> *"The key issue in the interpretation of the phrase 'an employer has terminated the contract with or without notice' is whether the employer has engaged in an act which brings the contract of employment to an end in a manner recognised as valid by the law".*

In *SA Post Office v Mampeule* this Court remarked:

> *"…The subsection defines 'dismissal 'as follows:…an employer has terminated 'a contract of employment with or without notice…' I am in agreement with the court a quo that 'dismissal 'means any act by an employer which results, directly or indirectly, in the termination of an employment contract…*"

[22] The evaluation of the evidence by the court *a quo* turned primarily on whether the automatic termination clause contained in the employees' contracts of employment offends against s5 of the LRA. An evaluation of the nature of the contracts of

employment and the meaning and implication of its terms were not considered. The court a quo seems to have moved from the premise that since the commissioner found that the nature of the employment contracts were "indefinite contracts" of employment *'and that such a finding has not been assailed on review*' it should stand. A finding that the employment contracts were "indefinite contracts" is an erroneous finding by the commissioner. Such a finding constitutes an error of law and cannot stand despite it not being challenged. As pointed out already, the test is whether the finding is a correct one and not strictly whether it falls within a bend of reasonable decisions.

[23] The factual matrix in this case supports the view that the employees' contracts of employment were fixed-term contracts where the end of the fixed term was defined by the completion of a specified task or project, that is, the termination of the Boardwalk contract. The continued existence of these contracts depended on the continued existence of the contract between the appellant and Boardwalk. The employees were employed specifically for the contract between the appellant and Boardwalk. The termination of that contract is a legitimate event that would by agreement, give rise to automatic termination of the employment contracts. It is Boardwalk that cancelled the contract and not the appellant. There was no direct or indirect act by the appellant to cancel the contracts. There is no evidence to suggest that cancellation by Boardwalk was a device to rid the appellant of the employees. Neither is there evidence to suggest that it was a clandestine move by the appellant to dismiss the individual employees. On the facts of this case the cancellation of the service contract by Boardwalk is the proximate cause for the termination of the employees' contracts of employment.

[24] The fact that the appellant had an option to retrench the employees or could have considered other options instead of relying on the automatic termination clause cannot be used to negate the clear terms agreed to by the parties. Put differently, one cannot simply use the considerations of the fairness or otherwise of a dismissal to determine whether an employee has been dismissed.

***AMCU and Others v Piet Wes Civils CC and Another* (J2834/16, J2845/16) [2017] ZALCJHB 7 (13 January 2017)**

Principle:
There is a dismissal when a service provider terminates the contracts of employment because the client has terminated its contract with the service provider. To interpret termination on a 'specified event' to include the cancellation of the contract by the client goes beyond the intention of the legislature.

Facts:
This was an urgent application in terms of s 189A(13) of the LRA. The employees were members of AMCU and employed by the respondents, Piet Wes Civils CC and Waterkloof Skoonmaakdienste CC respectively. They alleged they had been dismissed for operational requirements, that it was a large scale retrenchment contemplated by s 189A of the LRA, and that there was no consultation. They sought reinstatement pending a proper consultation process in terms of s 189A(13).

Both respondent employers provided services to Exxaro coal mine as contractors. They entered into various contracts with Exxaro to perform certain tasks. Exxaro terminated their contracts on one month's notice. The employers then terminated the employees' contracts as a direct result of losing the Exxaro contracts. The employers said that the workers were not dismissed for operational requirements or at all. They

were employed on fixed term contracts, the contracts expired, and their contracts of employment terminated by operation of law.

The LC granted the interdict, ordering the reinstatement of the employees pending retrenchment consultations. The LC held that there is a dismissal when a service provider terminates the contracts of employment because the client has terminated its contract with the service provider, and to interpret termination on a 'specified event' to include the cancellation of the contract by the client goes beyond the intention of the legislature. The LC said the onus is on the employer to prove that there was a justifiable reason for fixing the term of the contract and that the term was agreed. But in this case it was not a genuine fixed term contract contemplated by s 198B(4)(d). Therefore, it was in contravention of s 198B(3) and therefore deemed to be of indefinite duration. The LC held that the clause on which the employers relied was against public policy.

Extract from the judgment:
(Steenkamp J)
[13] The onus is on the employer to prove that there was a justifiable reason for fixing the term of the contract and that the term was agreed.

[14] It is common cause that the clause quoted above is contained in the employment contracts. But, argued Mr *Cook*, it is not a genuine fixed term contract contemplated by subsection 4(d); therefore, it is in contravention of subsection 3 and therefore deemed to be of indefinite duration. The clause on which the respondents rely, he argued, is against public policy and *pro non scripto.*

[15] In neither employer's case was the nature of the work for which it employed the employees "of a limited or definite duration" as contemplated by s 198B(3)(a). Instead, it was linked to the employer being supplied with work by "his clients", i.e. Exxaro. Have the employers demonstrated that that was a "justifiable reason" for a fixed term contract as contemplated by s 198B(3)(b)? If the employers discharge that onus, the contracts will justifiably be seen as being for a fixed term and the employers' defence should succeed; but if not, the employment of the employees will be deemed to be of a fixed duration in terms of subsection 5 and the employers would have to consult over any contemplated dismissals for operational requirements.

[16] One of the "justifiable reasons" contemplated by subsection (4)(d) is an instance where the employees are employed to work exclusively on a specific project that has "a limited or defined duration". But that was not the case here. Exxaro simply terminated its contracts with the two employers on notice; there is no indication on the papers that a specific project had come to an end. The employers have not demonstrated a justifiable reason for fixed term contracts in that regard. An example of a real justifiable reason in terms of this subsection would have been, for example, where Exxaro had contracted the respondents to clean up a specific mine, or to do so within a specified time. This is not such an example.

[17] In a matter decided before the enactment of s 198B, *Fidelity Supercare Cleaning (Pty) Ltd v Busakwe NO*, the Court found in a review application that the commissioner's interpretation of a similar clause in an employment contract was not unreasonable and that the employee was entitled to severance pay. The employment contract provided for the situation where the employer loses the contract on which the employee was employed – much the same as the case here. The employer argued that, where there is a cancellation of a service contract, the employment contract automatically terminates on the date of termination of the applicant's service agreement with the client. The arbitrator found that the employee was not employed on a fixed term contract. In the context of that contract, he did

not accept the employer's argument that the applicant's contract was for a fixed term, or that it would mean that once the employer's client cancels a contract or terminates it, the employees' contracts should or would automatically terminate "by operation of law". And Bhoola J found that the award was not unreasonable. I agree.

[18] More recently, shortly after s 198B came into operation, the Court came to a similar conclusion in a case involving the same company. The Court, with reference to *Sindane v Prestige Cleaning Services* and *Mahlamu v CCMA,* expressed the view (albeit *obiter*) that 'event' in s 198B(1)(a) does not include termination of a contract by a client of the employer. And with reference to s 198B, the Court continued:

> *'Given the expressions about the decisions by this court in Mampeule, Nape and Mahlamu, supra, the view expressed in Twoline Trading above cannot be correct. A contractual provision that provides for the automatic termination of the employment contract at the behest of a third party or external circumstances beyond the rights conferred to the employee in our labour laws undermines an employee's rights to fair labour practices [and] is disallowed by labour market policies. It is contrary to public policy, unconstitutional and unenforceable (Grogan "The Broker's Dilemma" 2010 Employment Law 6). This view is clear from all the decisions referred to above, and it is apparent from these that labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. The freedom to contract cannot extend itself beyond the rights conferred in the constitution, as for instance, against slavery.'*

[19] On the facts of the case before me, I hold a similar view. The contract was not intended to be for a fixed duration, or to terminate on the occurrence of a specified event or the completion of a specified task or project as contemplated by s 198B(1). And to place the construction of a 'specified event' on the cancellation of the Exxaro contract would, in my view, go beyond the intention of the legislature. The very purpose of the enactment of s 198B was to provide security of employment, except in circumstances where a fixed term contract is clearly justified, such as seasonal work or employment to carry out a specific task or to do so within a specified period. To make the workers' employment contingent upon the whims of a third party that can simply terminate the contract between it and the employer on notice, does not fit that purpose. The employers have not, in my view, discharged the onus of showing that there was a justifiable reason to employ the workers on a fixed term contract for more than three months, as contemplated by s 198B(3)(b). The employment contracts were either of an unlimited duration or must be deemed to be of an indefinite duration as contemplated by s 198B(5).

***United Chemical Industries Mining Electrical State Health and Aligned Workers Unions obo Mbombo / Primeserv and another* (2017) 25 NBCRFLI 7.1.1 / [2017] 2 BALR 135 (NBCRFLI)**

Principle:
If the TES employee is not performing a genuine 'temporary service' as defined, the TES client is deemed the employer. "Deeming" should be interpreted as an augmentation rather than as a substitution. The TES therefore retains the employment contract and the client is viewed as the parallel employer for purposes of the LRA.

Facts:
The employee was employed by a TES and placed with its client, a courier service company, as a driver. He started work on 2 May 2012 and was employed there for over 3 years. His contract of employment was terminated on 5 December 2015 and

he claimed that other employees were employed in his place. He referred an unfair dismissal dispute to the National Bargaining Council for the Road Freight and Logistics Industry under s191(5)(a)(iii) of the LRA, submitting that he did not know the reason for his dismissal. The TES' client, the courier service company, was correctly joined as a party to the unfair dismissal dispute but failed to attend the proceedings, which proceeded in their absence.

The arbitrator found that the employee had been employed by the TES on a fixed term contract but that as he was earning below the BCEA threshold of R205 443 per annum, sections 198A and B applied. The arbitrator also found that his employment, being for over 3 years and not as a substitute for a temporarily absent employee, did not fall within the definition of a temporary service under s198A(1), and accordingly he had rights to be deemed an employee of the courier service company (the TES client) under s198A(3)(b).

Having regard to the fixed term contract, the arbitrator referred to s198B(3) that states an employer may only employ someone on a fixed term contract of more than 3 months if the nature of the work is of limited or definite duration or if there is some other 'justifiable reason' for fixing the term of the contract. S198B(4) lists examples of such justifiable reasons for fixed term contracts, and the onus of proof is on the employer to prove the justifiable reason. If no such reason is established, s198B(5) provides that the employment shall be deemed to be of indefinite duration.

The arbitrator found that, whilst the contract may have qualified under s198B(1) as a fixed term contract "terminating on the occurrence of a specified event", namely once the specified work was completed, the employer had not proved there was a justifiable reason for the fixed term contract being more than 3 months. The arbitrator accordingly found the employee to be deemed to be employed on an indefinite basis.

Having regard to the LC judgment in ***Assign Services (Pty) Ltd v CCMA and Others*** **(JR1230/15) [2015] ZALCJHB 283 (8 September 2015),** the arbitrator made the following award:

- the employee's dismissal was both procedurally and substantively unfair;
- the TES and the courier service company were *both* ordered to reinstate the employee retrospectively to his date of dismissal, on the same terms and conditions he enjoyed at that time.

Extract from the award:
(N Paulsen - arbitrator)

[43] I have considered the Labour Relations Amendment Act 6 of 2014, especially section 198A and section 198B thereof, which is applicable in this matter. The said Act was published under Notice 629 in the Government Gazette 37921 on 18 August 2014 and became effective on 1 January 2015 and protects amongst others employees placed by temporary employment services as well as employees employed under limited duration contracts. I have considered whether the service rendered by the applicant in this matter is a genuine temporary service and whether the nature of the work performed by the applicant is of a limited or definite duration and whether the respondents had a justifiable reason for fixing the term of the contract.

[44] The applicant commenced employment with the first respondent on 2 May 2012 as a truck driver until his contract came to and end on 12 December 2015. Section 198A(1) states that a "temporary service" means work for a client (a) for a period not exceeding three

months; (b) as a substitute for an employee of a client who is temporarily absent; or (c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997("the BCEA"). In light of the above I am of the view that the applicant was not rendering a temporary service.

[45] The applicant earns less than the threshold prescribed by the Minister in terms of section 6(3) of the BCEA, which is currently R205 443,30 per annum. In terms of section 198A(2) this section would apply to the applicant.

[46] Section 198A(3)(b) states that for purposes of this Act, an employee not performing such temporary service for the client is: (i) deemed to be the employee of that client and the client is deemed to be the employer; and (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client. In light of the applicant in this matter not performing a genuine "temporary service" I conclude that the client, DHLPE, is the applicant's employer.
.....

[55] I do not see that the nature of the work for which the applicant was employed was of a limited or definite duration. The first respondent did not supply or demonstrate any justifiable reason for fixing the term of the applicant's contract. The first respondent simply refers to "specified work" commencing "as directed" until the specified work is completed. This is not in line with the requirements as set out in section 198B(3). In terms of section 198B(5) the applicant's employment is deemed to be of an indefinite duration.
.....

[59] In ***Assign Services v CCMA and others*** (JR1230/15) [2015] ZALCJHB 283 [also reported at [2015] 11 BLLR 1160 (LC) Ed], the Court stated that "deeming" should be interpreted as an augmentation rather than a substitution. The TES therefore retains the employment contract after three months and the client is viewed as the parallel employer for purposes of the LRA.....

Lolla's Caregiving Agency & Cleaning Services v Ashley Louw & Others LC case number C771/2015 & C670/2015 (27 July 2016)

Principle:
Whilst section 198B(4) lists examples of possible justifications for fixed term contracts of employment, whether or not the duration of the fixed term contract is justified will depend on the circumstances. The duration of employment should be fixed with respect to some term which is objective and ascertainable.

Facts:
The employer provides a contract cleaning service and concluded a 2 year contract (1 July 2014 to 30 June 2016) with the City of Cape Town to clean and maintain public toilets, which contract formed part of an Extended Public Works Programme for the Sport, Recreation and Amenities Department. The employee was employed in December 2014 under this programme initially on a 1 month fixed term contract, which was then extended by 4 1/2 months to June 2015.

When the employer in June 2015 pointed out to the employee that his contract was expiring, he claimed unfair dismissal and submitted that he was entitled to be regarded as an indefinite-duration employee in terms of s198B. The employer disputed this, responding that he was employed for the purposes of an official public

works scheme, the aim of which was to provide jobs to unemployed people. Whilst this contract still had a year to run to June 2016, the employer believed someone else should now be given a chance to work under this contract. Although the public works programme didn't impose any limit on employees' work within the contract period, the employer had decided to limit employment periods within the public works contract period, given the wide need to alleviate poverty and create jobs.

The arbitrator accepted that there was justification for the fixed term contract being more than 3 months, given that the employee was employed for the purpose of an official public works scheme as recognised in s198B(4)(g). But the arbitrator identified the following 2 concerns:

- the fixed term contract did not specify in writing the justifiable reasons for the contract being more than 3 months, as required by s198B(6); and
- whilst the conclusion of a fixed term contract in this instance may have been justified, it did not necessarily mean the duration of the fixed term contract was also justified.

Although the arbitrator noted that the employment contract did not specify the justification for it being more than 3 months, it was nevertheless justified due to the purpose of the employment being for a public works scheme, and for that reason the employee was not deemed to be employed on an indefinite basis. But that was not the end of the matter, the arbitrator said: the duration of employment fixed under the contract was arbitrary, as the employer had no coherent, rational plan to properly achieve an equitable distribution of jobs amongst a targeted group of unemployed people.

The arbitrator found that an employer seeking to justify fixed term contracts under s198B(4)(g), must either show that the duration of employment coincides with the period of the public works contract, or if a shorter period is concluded, it is done in accordance with a rational, coherent policy which is fair, objective, communicated and consistently applied. This was not the case in this instance, and the employer had no rational policy or practice in place. Further, the employer had not even made mention of its justification in the employment contract concluded.

Under these circumstances, the arbitrator found that the employer was not justified in limiting the duration of the employee's fixed term contract to a period shorter than the public works scheme contract he was employed under, and ordered that he be reinstated from the date of his dismissal to the date of the termination of the public works scheme contract on 30 June 2016.

The employer took the arbitrator's award on review to the Labour Court. The order granted by the LC dismissed the employer's review application and gave the award the status of a Labour Court order under s158(1)(c) of the LRA.

Extract from the judgment:
(MAHOSI JA:)

Assessing justifiability in light of duration

(68) It seems to me that a Commissioner assessing the justifiability of the reason for fixing the term of a contract will always have to make this assessment in light of the duration of the contract. As the facts of this case illustrate, an employer may be reasonably justified in fixing the duration of an employment contract to one duration, but not to another. The justifiability of the reason for fixing the term falls to be assessed in light of its fairness. If the reason for

fixing the term to a particular duration is arbitrary or capricious, it will not justify the term: the objective circumstances may justify a different term.

(69) I consider that this is probably the reason for the inclusion of subsection (6)(b): the employer must commit itself upfront to the reason for fixing the term to the contract, so that the worker can decide whether or not it is open to challenge.

(70) In summary, an assessment of the justifiability of the reason for fixing the term of a contract will always involve consideration of the duration. The term itself must be justifiable, not just the permission to fix the term.

The ambit of the 'public works' schemes provision: consideration of subsection 4(g)

(71) Official public works and job creation schemes are expressly included in subsection (4). I consider that the reason that these schemes justify the conclusion of fixed term contracts for longer than three months is precisely that alluded to by Lolla's: It is in order to support a social policy towards an equitable distribution of a scarce resource, being access to income-earning opportunities.
.....
(73) I consider that an employer seeking to justify fixing the term of a contract by relying on subsection 4(g) must either show that the fixed term of the contract coincides with the term of the Scheme, or that, if shorter terms are concluded in order to distribute the available work amongst more unemployed people, that this has been done in accordance with a rational, coherent policy which is fair, objective, communicated and consistently applied.

(74) This could be done, for example, by identifying a group or list from which the targeted employees will be drawn, selecting employees in a manner designed to achieve the purpose of distributing job opportunities as widely as possible, and limiting all contracts to the same duration.

(75) In the matter before me, Lolla's has applied no such policy or practice. Despite its claim that it limits the duration of contracts in order to fairly distribute the work, it has no rational way of doing so. It does not in practice limit the contracts of employees working on the Scheme to a standard length of, say, three or six months.

(76) Had Lolla's been able to show that it consistently concludes contracts of a standard length, and that when each contract ends it engages another worker from the Council's Jobseeker database (as the EPWP contract requires it to do), and that the Applicant was treated similarly to other workers, I may have been persuaded that the conclusion of his particular fixed term contract was justified. Not only could Lolla's not show this, but its justification strikes me as having been arrived at after the fact. It's failure to describe it's reason for fixing the term of the contract, as required by subsection (6)(b), fortifies this impression.

(77) I consider therefore that, in order to give effect to the purpose and objects of the LRA, I should find that whilst the conclusion of a fixed term contract was justified, and whilst the Applicant is not statutorily deemed to be employed on an indefinite basis, the term of the Applicant's particular successive fixed-term contracts is arbitrary and unfair and that Lolla's is justified in limiting the term of his contract of employment only to the length of the EPWP contract.

S.197 TRANSFERS

Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofong Local Municipality (CCT214/15) [2016] ZACC 37 (1 November 2016)

Principle:
The definition of "business" in section 197(1) of the LRA includes a service. This means that it is the business that supplies the service, and not the service itself, that must be transferred.

Facts:
In this case a municipality, responsible for the provision of services to its residents, allowed its electricity services to fall into disrepair. In 2011 the municipal manager entered into an Electricity Management Contract (EMC) with a private company (Rural) to operate and manage the municipal electricity distribution network for a period of 25 years, after which the obligation to supply electricity to residents would revert to the Municipality. In terms of the EMC 16 employees were transferred under section 197 of the LRA by the Municipality to Rural.

Rural started its performance under the provisions of the EMC on 1 September 2011. It expanded the workforce to 127 employees and incurred significant expenditure on the purchase of network materials, specialised vehicles, the compiling and recording of details of the Municipality's electrical distribution infrastructure, the mapping of townships within the Municipality's geographical area, and software systems in relation to the provision of the electrical services. It also purchased immovable property for offices and staff accommodation. This all cost in the region of R96 million.

In August 2013 the Municipality informed Rural that it considered the EMC to be null and void because the then municipal manager did not have the requisite authority to conclude the EMC with Rural. The latter disputed this and contended that this conduct amounted to a repudiation of the Municipality's obligations under the EMC, entitling it to cancel the agreement. This contractual dispute is still pending in the Free State High Court.

Despite the pending action in the High Court, Rural provided the Municipality with information about the identities of the 127 employees, their employment contracts and organisational structure in the beginning of October 2014. It also handed over what it termed the "possession of the Network and the Capital Assets". It proposed an agreement of the transfer of the 127 employees under section 197 of the LRA to the Municipality, which the Municipality refused to accept.

Rural then sought relief in the Labour Court for an order declaring that there had been a transfer of business as a going concern by it to the Municipality and that the employment contracts of the 127 employees should accordingly be transferred to the Municipality. The Labour Court granted the relief, but the Labour Appeal Court overturned that decision on the basis that Rural had failed to discharge the *onus of* showing, on the probabilities, that a transfer of a business as a going concern had taken place and that the very business conducted by Rural had been transferred back to the Municipality. The test was whether the Municipality would have been able to continue business seamlessly after the 'transfer', it being common cause that

certain components of Rural's business that supplied electricity services were not handed back to the Municipality.

When the matter was referred to the Constitutional Court the Municipality argued that the business was not transferred to it as a 'going concern'. At best it received an obligation to provide electricity to the residents but it never received Rural's computers, systems, stationery, vehicles, equipment etc. It also did not receive their debtor's book or an inventory of Rural's business. So it was argued that Rural was not transferred as a going concern.

Rural on the other hand argued that the business comprised the infrastructure for the provision of electricity services and the employees dedicated to that business. Handing over of peripheral assets such as software, vehicles and stationery were not essential for the transaction to constitute one in terms of section 197 of the LRA. The EMC agreement did not contemplate that such assets would ever transfer to the Municipality as part of the business.

The Constitutional Court had to decide whether a transfer of a fully functional business in its expanded form was necessary for it to fall within s 197. The Court was clear that one business could not try to transfer the obligation to take over all employees to the new owner under the guise of s 197, but nevertheless retain for itself the means it used to conduct the business. The Court said while the protection of employees is the primary concern of s 197, employees are also protected by the retrenchment provisions in section 189. The choice in this case was which employer should be responsible for the workers affected by the change in circumstance.
The Constitutional Court accepted that for a transfer of a business as a going concern to occur, not all the assets of the business have to be transferred and that it depends on the nature of the business. But in this case the assets that Rural did not transfer back to the Municipality were essential to the profitability and operation of the business. Without these crucial assets, the Municipality could not have carried on the business without major difficulties. Applying what it called the "factual application of a flexible test", the Court concluded that there had been no transfer of the business to the Municipality as a going concern.

Extract from the judgment:
(Froneman J)
[27] This Court has, in *NEHAWU*, *Aviation Union* and *City Power*, consistently formulated the approach to be followed in determining whether there has been a transfer of business as a going concern under section 197.

[28] *NEHAWU* was decided before the amendment that included a "service" in the definition of "business" was applicable, but regarded the amendment as a clarification of the conclusion it reached. Ngcobo J formulated the approach as follows:

> *"In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually."*

.....

[30] Importantly, and helpfully, Jafta J in the minority judgment also dealt with the inclusion of service in the definition of a business in section 197(1):

> *"Although the definition of business in section 197(1) includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the service and not the service itself."*

[31] *City Power* too accepted and built on the foundations of *NEHAWU* and *Aviation Union*. It is important to note that *City Power* did not find that the mere termination of a service contract triggered the application of section 197 of the LRA. It followed the approach in *NEHAWU* and *Aviation Union* and determined the question on the facts:

> *"On the present facts, there is no dispute that City Power took over the full business 'as is', with all of the complex network infrastructure, assets, know how, and technology required to install and operate the prepaid electricity system with the clear intention of maintaining uninterrupted electricity services to Alexandra Township. The project continued after termination of the service level agreements and completion of the handover process. The business is identifiable and it is discrete. Ultimately a business of providing a system of prepaid electricity to residents of Alexandra continued, save that it was now conducted by a different entity."*

.....

[37] Rural submitted that it expanded the business and made it more profitable. The Municipality, by contrast, complains that certain necessary assets were not transferred. I agree that for a transfer of a business as a going concern to occur, not all the assets of the business have to be transferred and that it depends on the nature of the business and essentiality or otherwise of particular assets for a particular business. That factual application of a flexible test has long been at the heart of our going-concern business transfer jurisprudence. The onus rested on Rural to set out what work the more than hundred additional employees it employed were involved in and what means were provided to them to do that work. It is common cause that certain equipment was not transferred to the Municipality, but it appears improbable that at least some of the newly employed employees did not need and use that equipment in order to do their work. Without the transfer of the means to do the work they did as part of Rural's business, there could be no transfer of the business to the Municipality as a going concern. The assets that Rural did not transfer back to the Municipality were essential to the profitability and operation of the business. Without these crucial assets, the Municipality could not have carried on the business without any major difficulties.....

REPRESENTATION

The Casual Workers' Advice Office and Others v CCMA and Others **CASE NO:J645/16 (21 September 2016)**

Principle:

On a proper interpretation of CCMA Rule 25 read with Rule 35 and the LRA, a commissioner has a discretion to authorise any party to CCMA proceedings to be represented by any other person on good cause shown.

Facts:

The Casual Workers Advice Office (CWAO) and others took court action against the CCMA to remove a rule that they said denies workers their rights. Rule 25 of the CCMA states that only an office bearer, official or member of a registered trade union or a legal representative may offer workers representation at the CCMA. But

according to StatsSA 70% of workers do not belong to a trade union. So if you don't belong to a trade union and you can't afford a lawyer, you're on your own. Many workers rely on community advice offices for information and advice about enforcing their rights, but can't be represented by them because they are not lawyers or unions. What is perhaps even more bizarre is that workers are even prohibited from representing each other.

The argument of CWAO is that the CCMA is supposed to protect and uphold the rights of workers but Rule 25 prejudices the rights to a fair hearing of the vast number of workers who do not belong to a trade union and cannot afford a lawyer. The rule therefore prevents the CCMA from fulfilling its function of resolving disputes expeditiously and inexpensively. CWAO argued that in order to properly access their rights, workers need representation in proceedings before the CCMA. They should be allowed to be represented by either one of the hundreds of community advice offices around the country or one or more fellow-employees.

The LC issued an order declaring that, on a proper interpretation of Rule 25 read with Rule 35, a commissioner has a discretion to authorise any party to CCMA proceedings to be represented by any other person, on good cause shown. Whilst Rule 25 provides for specific representation, Rule 35 affords a far wider discretion to achieve the objects of the LRA, allowing a commissioner to condone any failure to comply with the Rules on good cause shown.

The order means that CCMA commissioners are now obliged to exercise a discretion to allow persons other than those specified in Rule 25 to represent parties during hearings. The Court gave the CCMA ten days to issue a practice notice to all its commissioners outlining how the right should be exercised, which has since happened.

The practice note issued by the CCMA provides that a commissioner in exercising this discretion, should consider factors such as the following:

- Whether it is unreasonable to expect a party to deal with the dispute without representation, after considering factors such as –
    - the nature of the questions of law and facts raised;
    - the complexity of the dispute;
    - any public interest;
    - the ability of that party to deal with the dispute.
- The reason (eg affordability) why a person contemplated in Rule 25 cannot represent that party.
- The ability of the proposed representative to represent that party.
- Whether the proposed representative is subject to the control of a professional or statutory body.
- Whether the proposed representative will contribute to the fairness of the proceedings and the expeditious resolution of the dispute.
- Any prejudice to the other party.

Whilst the above court application was brought by a community advice office and clause 5 of the CCMA Practice Note deals specifically with representation by such offices, the effect of the Court's order is in our view much wider: it means that CCMA commissioners must now exercise a much wider discretion and give consideration to

any appropriate person (eg a family member or friend) representing a party at CCMA proceedings.

Extract from the judgment:
(Van Niekerk J)

2. It is declared that, on a proper interpretation of Rule 25, read with rule 35 of the CCMS rules and the provisions of the Labour Relations Act 66 of 1995, a commissioner has a discretion to authorise any party to CCMA proceedings to be represented by any other person, on good cause shown.

3. The CCMA is directed to file a practice note with this court within ten court days directing commissioners that they have a discretion in terms of paragraph 2 of this order and setting out guidelines for the manner in which that discretion should be exercised. Such directive shall make provision for the discretion to be exercised, in appropriate circumstances, to permit representation by community advice offices registered in terms of the Non Profit Organisations Act 71 of 1997.

Msunduzi Municipality v Hoskins **(DA14/15) [2016] ZALAC 61; [2017] 2 BLLR 124 (LAC) ; (2017) 38 ILJ 582 (LAC) (2 September 2016)**

Principle:
There is nothing unlawful or unreasonable about an employer's instruction to an employee who is part of management, that s/he may not represent employees against disciplinary action taken by management.

Facts:
A municipal employee in a management position defied the municipal manager's instruction to stop representing employees in disciplinary enquiries instituted by the municipality. After a disciplinary hearing he was dismissed for refusing to comply with the instruction to recuse himself from and ceasing to represent fellow employees in disciplinary proceedings instituted by the municipality; he was also found guilty of gross misconduct for failing to act in good faith, not acting in the best interest of the municipality and bringing the municipality into disrepute and one charge of gross insolence by being rude, disrespectful, sarcastic, abusive, insulting and provocative to the Municipal Manager.

In arbitration at the South African Local Government Bargaining Council (SALGBC) the arbitrator found that the dismissal was fair and that there was no need for progressive discipline as the insubordination was a serious transgression. There had been a complete breakdown of the employment relationship and it was clear that the employee could no longer work with the employer.

On review at the Labour Court the arbitration award was set aside and substituted with an order that the dismissal of the employee was unfair on the basis that the sanction of dismissal was inappropriate. The Labour Court substituted the dismissal award with an order reinstating the employee to his employment retrospectively but limited to a period of six months. In addition, the LC ordered that the respondent be issued with a final written warning.

On appeal, the LAC confirmed that the instruction was lawful and reasonable and that the employee's conduct amounted to gross insubordination. In addition, the employee had blatantly and public challenged the authority of the municipal

manager, had dared him to take action and had shown no remorse. In these circumstances, dismissal was the appropriate sanction.

It could be argued that the LAC in this case has taken a different approach to that in ***Seaward v Securicor SA (Pty) Ltd (LAC Case no: JA 68/06)***. In that case the dismissal of a manager was based, among other things, on the fact that he represented a fellow manager in a disciplinary enquiry. The LAC held that the dismissal constituted victimization and was an automatically unfair dismissal.

What can we make of the apparent different approaches adopted by the LAC? It seems to us that the *manner* in which and *extent* to which a manager seeks to represent other employees in a hearing may be the determining factor in distinguishing between the different approaches adopted in ***Seaward*** and ***Hoskins***. For an employer to take issue with a manager being chosen by an employee in a 'once off' case would seem to justify the approach adopted in ***Seaward***, namely that this would be in contravention of our labour laws.

By comparison, the manager in ***Hoskins*** was a regular representative who boasted of his record in representing cases against his own management team and "dared" his manager to take action against him for doing so. He publicised a letter on the notice board in which he referred to his fellow employees as "faceless, spineless and nameless advisors", leading the LAC to comment that the contents of the letter were "one of the most classical examples of gross disobedience that one can find". Under these circumstances it would seem management was fully within its rights to regard the HR manager's actions as a direct conflict of interest, and was justified in giving him instructions to cease representing employees in such proceedings.

Extract from the judgment:
(Tlaletsi AJP)

[25] **.....**there is nothing unlawful or unreasonable about the Municipal Manager's instruction to the respondent, who as part of management, is not expected to represent employees against disciplinary actions taken by management. The reasons why the conduct of the respondent was found to be unacceptable were conveyed to the respondent and are in my view valid. The respondent who is not even a union representative or official has no right to be a representative. It is, after all, the employee who is charged with misconduct that can legitimately complain that he/she is denied representation by a representative of his/her choice. That the respondent was bent on acting against his employer is made clear by *inter alia*, his evidence that his record against his employer was impeccable such that external attorneys had to be appointed by the municipality to match him. Instead of acknowledging the wrongfulness of his conduct, he is boastful about his "impeccable" record of winning cases against his employer and co-managers.

[26] It cannot be disputed that the respondent was found guilty of serious instances of insubordination and insolence. His insubordination was a direct challenge to the authority of the Municipal Manager. He without any doubt intended to seriously undermine the authority of the Municipal Manager and in so doing humiliated him. By posting the letter on the notice board, he wanted his feelings about the Municipal Manager known by other employees and any other person who reads the letter. The publication, also, has a potential to influence the reader not to respect the head of the institution. To further aggravate the situation, he distributed copies of the letter to other employees of the municipality and a union which he was not even a member of. This act could only have been intended to make the Municipal Manager lose the respect of his subordinates and the trade union.

[27] The contents of the letter are in my view a reflection of one of the most classical examples of gross disobedience that one can find. The respondent made it clear that he was not going to obey the instruction and even dared the Municipal Manager to take further steps he had warned would be taken should he continue with his conduct. He warns him that he is due to fail against him like his predecessors he named in the letter. He further refers to his fellow employees as faceless, spineless and nameless advisors.
[28] In line with his resolve, the respondent continued to represent the employees in blatant disregard of the instruction. When the Municipal Manager issued a further instruction, he chose not to respond to the letter and ignored its contents by continuing to represent the employees. The respondent had an opportunity to reflect on his decision to refuse to obey the instruction; and on the contents of his letter to the Municipal Manager. He squandered the opportunity to repent when warned by the Municipal Manager; and to heed the advice by his colleagues. His further conduct towards the Municipal Manager at the arbitration showed a lack of remorse. For his counsel to now submit from the bar that the respondent is remorseful, is nothing else but to regret what he has done because of the situation he now finds himself in. He dared the Municipal Manager and he took up the dare. Put differently, the respondent got what he called for.

DISMISSAL - MISCONDUCT

Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA73/15) [2017] ZALAC 4 (10 January 2017)

Principle:
Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, there are certain acts of misconduct, particularly gross dishonesty, which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal.

Facts:
An employee, a senior shop steward, was dismissed after a disciplinary enquiry which found him guilty of dishonesty in that he procured a false statement of costs from his child's school in order for the company to pay more than it should. The shop stewards received the bursary applications from the employees and checked them to ensure their correctness before submitting them to the committee for approval. The employee, being a senior shop steward at Bidserv, collected the bursary applications from other employees and was familiar with the procedures and internal workings.

At the CCMA the commissioner placed emphasis on the fact that there was no evidence to support the differential treatment between the employee and the other two employees. The commissioner found that the employee was not afforded an opportunity to present evidence in mitigation of the sanction during his internal enquiry. He was of the view that the employee's 15 years of service and his clean disciplinary record militated against his dismissal. He held that no evidence was led to prove that the employment relationship had been irreparably damaged by the submission of the impugned quotation. All that the employee had to do was to reduce the amount payable in respect of the quotation as it did with other employees. But the commissioner remarked that the employee did not approach the CCMA with clean hands. He ordered that he be reinstated but limited his retrospective pay to three months' salary to mark his displeasure at the conduct he "deemed inappropriate with respect to the whole saga of procuring the quotation."

On review at the Labour Court it was held that the commissioner's award passed the test of falling within the band of reasonable decisions that could be reached in the circumstances of this case.

On appeal at the LAC it was held that the probabilities were that the employee knowingly submitted a false quotation in the hope of claiming more for his child's uniform from the appellant. Further it was held that the commissioner ought not to have embarked on the question of inconsistency in the application of discipline without having first determined the underlying reason for the dismissal and that he did not provide any basis for his finding that the other two employees had been dishonest.

The LAC held that it was incomprehensible that the commissioner concluded that the substratum of the employment relationship had not been destroyed when he had not determined whether the employee committed a dishonest act and its impact on the relationship of trust. The misconduct committed by the employee was of a serious nature and that his length of service foundered in the face of the weight of authority by the Courts. The appeal was therefore upheld with costs and the shop steward's dismissal confirmed.

Extract from the judgment:
(Phatshoane AJA)

[33] As already alluded to, the commissioner held that no evidence was led to prove that the employment relationship had been irreparably damaged by the submission of the impugned quotation. He was of the view that Ramapuputla's 15 years of service and his clean disciplinary record militated against his dismissal. In *Toyota SA Motors (Pty) Ltd v Radebe and Others*, this Court pronounced:

> *'[15].....Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty. It appears to me that the commissioner did not appreciate this fundamental point.*
>
> *[16] I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.'*

[34] Recently in *Woolworths (Pty) Ltd v Mabija and Others,* this Court held:

> *'[21] The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonesty, cannot be visited with a dismissal without any evidence as to the impact of the misconduct. In some cases, the more outstandingly bad conduct of an employee would warrant an inference that trust relationship has been*

destroyed. It is, however, always better if such evidence is led by people who are in a position to testify to such break down. Even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others in order to determine whether the sanction of dismissal was fair..'

[35] Regard being had to the analysis set out above it is incomprehensible that the commissioner could conclude that the substratum of the employment relationship had not been destroyed when he had not determined whether Ramapuputla committed a dishonest act and its impact on the trust relationship. There is no question that the misconduct committed by Mr Ramapuputla is of a very serious nature. His length of service founders in the face of the weight of authority and facts referred to in the preceding paragraphs. The fact that he was a shop steward who had to be exemplary to other employees aggravates his misconduct. He also did not show any contrition. On this conspectus, his dismissal was justified.

***G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. and Others* (CA2/2015) [2016] ZALAC 55 (25 November 2016)**

Principle:
An employer is entitled to full disclosure of all relevant information when a decision is being made to employ a person as a security guard, given the trust implicit in the nature of that position. Dismissal is fair even where the misrepresentation is discovered after 14 years and a good service record.

Facts:
When the employee applied for employment with the appellant in 1996, he was asked in a written application for employment: "*Have you ever been convicted of a criminal offence?*" He indicated that he had not and the employer employed him as a security guard. Fourteen years later, on 30 July 2010, the employee applied for promotion to the position of controller. A criminal record check was undertaken. It indicated that he had two previous criminal convictions: one for rape in 1982 for which he, being 17 years old at the time, received six lashes; and the second for assault with intent to do grievous bodily harm in 1991 for which he paid a fine of R200.

The employer, after a disciplinary hearing, dismissed the employee for 'misrepresentation and/or dishonesty concerning an application for employment and/or breach of PSIRA Regulations code of conduct'. Section 23(1)(d) of the Private Security Industry Regulation Act 56 of 2001 (PSIRA Act), (the operation of which post-dated the employee's employment, provides that a person may be registered as a security service provider provided he or she "*was not found guilty of an offence specified in the Schedule within a period of 10 years immediately before the submission of the application to the Authority*".

At the disciplinary hearing, the employee's defence was that he did not know that he had been convicted of a criminal offence as he had not gone to jail. Concerning his rape conviction he stated that: '*I was 17 and did not understand the law. It was not rape. She was my girlfriend. She agreed to it because she was not where she was supposed to be'*. He stated further that the assault case related to an incident in which '(a)*nother man who came from jail to visit a lady in my mother's house. When he grabbed this lady I defended her, and assaulted him. He laid a charge against*

me. I had to go to court. My brother got a lawyer to defend me. I was given a fine and my brother paid the fine.'

At arbitration his dismissal was found substantively unfair and retrospective reinstatement was awarded. On review Labour Court found that while the employee had committed misconduct, dismissal was unfair and retrospective reinstatement ordered. On appeal the LAC found the employee's dismissal was substantively fair, given the serious nature of the misconduct committed. The appeal was upheld with no order as to costs.

Extract from the judgment:
(Savage AJA)

[23] The employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is "*a sensible operational response to risk management"*. Obtaining employment on false pretences whether by misrepresenting qualifications, skills, experience or prior work history has been found to justify dismissal, with it stated in *Boss Logistics v Phopi and others* that if this were not so, a sanction short of dismissal would only serve to reward dishonesty.

[24] A conviction for rape and assault is antithetical to employment in the position of a security guard given the nature of that position. The fact that the PSIRA Act bars the employment of a person in the security industry until 10 years has elapsed from the date of a criminal conviction illustrates the seriousness with which criminal infractions are, for obvious reason, viewed in the industry. An employer is entitled to full disclosure of all relevant information when a decision is being made to employ a person as a security guard given the trust implicit in the nature of that position; and where an express question is asked of a potential employee, an employer is entitled to expect an honest answer in response.

[25] It is so that the third respondent's years of service and clean disciplinary record provided mitigation and, as stated in *Edcon Ltd v Pillemer NO and Others,* were "*an important consideration in determining the appropriateness of…dismissal*". However, as was stated by this Court in *Toyota SA Motors (Pty) Ltd v Radebe and Others:*

> '...*Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty*…'

[26] It is so that there existed no risk of repetition by the third respondent of the offence in its precise form and that the damage suffered was limited to his employment in circumstances in which the appellant may otherwise not have employed him. However, the fact remained that the third respondent was employed on false pretences in circumstances in which he had deliberately concealed the true state of affairs from the appellant. His conduct was dishonest and constituted a serious breach of the appellant's disciplinary code. When confronted with evidence of his misconduct, the third respondent did not express any remorse but blamed his dishonesty first on his lack of knowledge that his offences amounted to convictions and then later on his belief that after 1994 his criminal record no longer existed.

[27] Having regard to all of these relevant factors, and in spite of the absence of direct evidence showing the breakdown in the trust relationship and the appellant's misplaced reliance on the provisions of PSIRA, I am satisfied that the sanction of dismissal imposed by the appellant on the third respondent was fair. The false misrepresentation made by the third respondent was blatantly dishonest in circumstances in which the appellant is entitled as an operational imperative to rely on honesty and full disclosure by its potential employees. It induced employment and when discovered was met with an absence of remorse on the part of the third respondent. The fact that a lengthy period had elapsed since the misrepresentation, during which time the third respondent had rendered long service without disciplinary infraction, while a relevant consideration, does not compel a different result. This is so in that the fact that dishonesty has been concealed for an extended period does not in itself negate the seriousness of the misconduct or justify its different treatment. To find differently would send the wrong message.

City of Johannesburg v Swanepoel N.O. and Others **(JR2316/12) [2016] ZALCJHB 80 (26 February 2016)**

Principle:
Insubordination in the workplace is a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to an employers' authority.

Facts:
The employee held the position of Director of the Alexandra Renewal Project ("the ARP") which was funded by National Government. The aim of the ARP was to develop Alexandra Township with emphasis placed on high density housing. The ARP had been an ongoing project since 2001.The employee and the municipality concluded a contract of employment which regulated the municipality's right to give effect to a transfer.

Tensions arose between the municipality and members of the Alexandra community, led by the ANC Youth League. Death threats were made leading to a reasonable apprehension of harm to the employee. The municipality believed it was duty bound to take all reasonable steps to eradicate or mitigate the potential for such harm. The municipality sought to transfer the employee to a different position in its organisation in Region B. The municipality was aware of its onerous obligations to maintain a safe working environment in accordance with the objectives and spirit of the Occupational Health and Safety Act, 85 of 1993. The employee refused the transfer and was subsequently disciplined for gross insubordination as a consequence of such failure to carry out reasonable and lawful instructions.

The arbitrator found against the municipality which took the matter on review to the Labour Court. Apart from its main finding that dismissal was justified on grounds of gross insubordination, the LC made comments on transfers. It commented that if a transfer to Region B turned out to be unreasonable and unfair, the employee would have had other options such as the lodging of an internal grievance or pursuit of his Constitutional right not to be subjected to an unfair labour practice. The LC acknowledged that the LRA provides no express remedy for employees who are unfairly transferred. It noted however, the LAC has brought such actions within the bounds of the LRA. Employers are required to ensure that any transfer must accord with the provisions of sections 186(1)(e) and (2)(a) of the LRA – the transfer must

not render the employment relationship intolerable; it must not constitute a demotion. In this particular case, the transfer served a public interest given the very sensitive and unique dynamics that were interwoven with the employee's duties and functions.

Extract from the judgment
(Leppan, AJ)

[50] The Labour Court has distinguished between insolence (repudiation by an employee of his duty to show respect) and insubordination (refusal to obey an employer's instructions). Both forms of misconduct are properly embraced by the terms of 'insubordination' as used in Schedule 8 Code of practice: dismissal in the Labour Relations Act of 1995 ("the Code of good practice").

[51] Insubordination is possibly a more serious offence because it presupposes an intentional breach by the employee of the duty to obey the employer's instructions. The Code requires that defiance must be 'gross' to justify dismissal. This means that the insubordination must be serious, persistent and deliberate, and that the employer should adduce proof that the employee was guilty of defying an instruction. This the Applicant succeeded in proving.

[52] Grogan, in Employment Law, states the following:

> *'The best measure of the gravity of insubordination and/or 'insolence' is the effect it has on the employment relationship. Other things being equal, an isolated refusal to carry out an instruction is less likely to destroy the relationship between the employer and the employee than sustained and deliberate defiance of authority. The latter form of insubordination is well illustrated by Theewaterskloof Municipality v SALGBC (Western Cape Division). The Labour Court held that a senior manager who accepted payment of an allowance well knowing that he was not entitled to it, then offered to repay the amounts in derisory instalments, had deliberately breached the trust relationship. Given the destruction of the employment relationship and his total lack of remorse, the employee could not reply on either the general right to progressive discipline or on his long and previously unblemished service record. The court upheld the employee's dismissal.'*

[53] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others,* the Labour Appeal Court held that '[t]he offence of insubordination in the workplace has, in this regard, been described by the courts as a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to an employers' authority' and in that regard, the Labour Appeal Court referred to the decision of *Commercial Catering and Allied Workers' Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)*.

[54] The Third Respondent was insubordinate in a serious manner. He was asked since December 2011 to transfer to Region B but repeatedly and defiantly refused. Even when he was given a last opportunity to make representations why he should not be suspended for such repeated refusal to carry out his employer's instructions, he failed to do so. He could have relented and followed the instructions of the Applicant and moved to Region B. The Third Respondent refused to transfer.

DISMISSAL - INCAPACITY

Damelin (Pty) Ltd v Solidarity obo Parkinson and Others (JA48/15) [2017] ZALAC 6 (10 January 2017)

Principle:
Although a senior employee is expected to be able to assess whether he is performing according to standard and accordingly does not need the degree of regulation or training that lower skilled employees require in order to perform their functions, an employer is not absolved from providing such an employee with resources that are essential for the achievement of the required standard or set targets.

Facts:
P commenced employment as the general manager of the Boksburg campus, with effect from 3 January 2011. His contract of employment specified that- *'The attainment of performance goals determined by the employer, from time to time shall be periodically evaluated by the employee's supervisor, continued non-attainment of performance goals may result in the termination of employment.*'

When P assumed his position at the Boksburg campus in January 2011, the campus had 352 enrolled students of which 168 were first-year students. His target for 2012 was to enrol 420 first year students by February 2012. P queried the figure of 15 000 grade 12 learners as there were only 12 735 grade 12 learners in his area and this translated into 10 824 'leads' (85% of 12 735). He concluded that incorrect numbers had given rise to unrealistic targets. His manager replied saying that 15 000 was the same figure as in the previous year, 2010. P failed to reach the required standards.

A disciplinary inquiry was convened and P was charged with poor work performance relating to his failure to reach sales targets. He was dismissed and referred a dispute to the CCMA. At arbitration, the manager expressed the opinion that the target enrolments set for 2012 was achievable based on the number of leads. The commissioner considered the Dismissal Code on Good Practice regarding poor work performance and found that P had been given more than a period of six months to improve his performance. He had not communicated that his targets were not attainable. Higher standards are expected of senior employees. The warning letters were sufficient and there did not need to be a formal warning. Dismissal was the appropriate sanction.

P was dissatisfied with the award. He applied to the Labour Court to review and set aside the award, which it did, reinstating P. The basis of the Court's decision was mainly procedural because Damelin had deviated from procedures specified in its code without notification. The 'warning' letter was ambiguous and was not a proper warning. In terms of Damelin's own code dismissal could only be considered as a fourth step.

On appeal the LAC held 27 days within which to achieve the target was inadequate and showed that either the period was too short or that the target was incapable of being achieved. The LAC confirmed that an employer is not absolved from providing a senior employee with resources that are essential for the achievement of the required standard or set targets.

Extract from the judgment:
(Landman JA)

[40] In *Palace Engineering (Pty) Ltd v Ngcobo and Others*, it was said at para 24:

> *'Although a senior employee is indeed expected to be able to assess whether he is performing according to standard and accordingly does not need the degree of regulation or training that lower skilled employees require in order to perform their functions, an employer is not absolved from providing such an employee with resources that are essential for the achievement of the required standard or set targets.'*

[41] Accepting that the letter of 25 January 2012 constituted a final warning, the period of some 27 days within which to achieve the reduced target set in that letter, given all that preceded it and taking into account that it was not achieved even with assistance afforded by Damelin head office goes to show that either the period was too short or that the target was incapable of being achieved.

[42] In my view a reasonable commissioner would have found that Damelin had not acquitted the *onus* of showing that there was a fair reason to dismiss Parkinson and that dismissal was a fair sanction.

DISMISSAL – OPERATIONAL REQUIREMENTS

Standard Bank of South Africa Ltd v Letsoalo (J18/2014) [2016] ZALAC 43 (27 July 2016)

Principle:
Courts will not assist employees who refuse to accept reasonable alternative positions, and will not find against employers who provide a reasonable explanation for not accepting alternatives proposed by employees or their unions.

Facts:
The employee was the provincial foreign exchange manager of Standard Bank in Mpumalanga, reporting to the provincial sales manager. Due to the worsening economic climate, her position was one of those identified as 'non critical' by the bank. She was a member of SASBO, the representative union at the work place.

Prior to embarking on the retrenchment process, the Bank consulted with SASBO regarding possible dismissals due to operational requirements. An agreement was reached on the procedure to be followed, in terms of which all employees identified as occupying non critical positions were to be placed on informal redeployment for six months. If a suitable position was not identified during that period, the employees would be placed on a further informal redeployment process for two months. If there were still no suitable positions available, the employees would be issued with letters of termination at the beginning of April 2012, with their services to terminate on 30 April 2012.

In Mpumalanga four positions, including this employee's position, were identified as non critical. Subsequent to the consultation with SASBO, the Bank consulted individually with the affected employees in terms of the agreement with SASBO. The consultation with this particular employee was done through the provincial sales manager. She applied for various positions, but was unsuccessful. On 23 April 2012, she was offered a position with the Company's business banking section as an

accounts analyst, at a lower salary than she was currently earning. She rejected the offer and on 30 April 2012 was dismissed for operational requirements.

The employee referred an unfair dismissal dispute to the Labour Court, challenging the procedural fairness of her dismissal. She alleged she had not been properly consulted in terms of s189 before being retrenched. The LC focussed on the interaction between management and the employee relating to the alternative position offered to her at a lower salary, her response to this offer, and whether during this process management complied with its obligation to consult under s189 of the LRA.

The alternative position offered to her was at a salary of R379 484 per annum, R6 187 per month lower than what she was currently earning (R453 737 per annum). Although she initially miscalculated the reduction she would have to accept in this alternative position, she made it clear she was not prepared to accept a reduction of more than R4 000 per month. E-mails crossed between the parties discussing this matter, it was discussed telephonically between them, and at least 2 meetings were held between the employee and her manager in an attempt to reach agreement.

Management made it clear that the remuneration offered to her was at the maximum level applicable in that job grading band and that it could not offer more, and that if she failed to accept it she would be retrenched. The employee at all times responded that she could not accept the salary reduction proposed. In her final e-mail on 26 April before being retrenched, she again declined the position and suggested her salary be cut by no more than R3 311 per month. Whilst management did not reply to this e-mail, her manager phoned her on 27 April in a further attempt to persuade her to accept the offer. The employee again rejected it and she was retrenched on 30 April.

Taking into account the requirements of s189(6) (namely that the employer must consider and respond to representations made, and if it does not agree, must give reasons why; and if written representations are made, the employer must respond in writing), the LC found that the employee had not completely rejected the offer made to her and had effectively made a counter offer that her remuneration be reduced by a lesser amount. The LC said there was no evidence that the employer had considered this counter offer, and accordingly found that the employer had not complied with its obligation to consult under s189. On this basis the LC found that her retrenchment was procedurally unfair, and ordered the employer to pay her 12 months' salary as compensation.

On appeal, the LAC did not agree with the LC's views on the consultation process that took place between the parties, and whether this complied with the requirements of s189. The LAC rejected the LC's view that the manner in which the Bank had consulted with the employee was procedurally unfair, and said that two well-settled principles established by previous cases must be applied:

(1) courts will not assist employees who refuse to accept reasonable alternative positions;
(2) courts will not find against employers who provide a reasonable explanation for not accepting alternatives proposed by employees or their unions.

The Court found that by the time the employee sent her last e-mail before being retrenched on 26 April, in which she again rejected the alternative position offered to her and proposed that her salary be cut by no more than R3 311 per month, it was clear the parties held irreconcilable views on the matter. The Bank had made it clear they could not offer her a higher salary, and she had made it clear that she would not accept the position unless they did so. It would therefore have been an exercise in futility, the LAC said, had the Bank responded to her final e-mail: it would have simply reiterated its earlier position that there was nothing more it could offer her in terms of salary in the alternative position.

The LRA requires consultation, not futile engagements, the LAC said, and stated that the LC had placed *"form above substance"* by concluding that the dismissal was procedurally unfair simply because the employer did not respond to the employee's last e-mail, despite the extensive and exhaustive consultations that had preceded it.

The LAC found that the employee was clearly ill-advised and unreasonable in rejecting the alternative position offered to her, and that the Bank had provided a reasonable explanation for not accepting the alternatives she proposed. The LAC overturned the LC's judgment and found that the Bank had acted procedurally fairly in retrenching the employee.

Extract from the judgment:
(MAKGOKA AJA:)
[19] I turn now to consider whether Ms Letsoalo's e-mail dated 26 April 2012 constituted a counter-offer. This is essentially an enquiry as to whether there was proper consultation. It involves a factual enquiry. As to how that enquiry is to be undertaken, two well-settled principles must be applied. The first is that courts will not assist employees who refuse to accept reasonable alternative positions. The second is that courts will not find against employers who provide a reasonable explanation for not accepting alternatives proposed by employees or their trade unions. Therefore, in the context of the present case, it must be determined (a) whether Ms Letsoalo refused to accept a reasonable alternative position, and (b) whether the appellant provided a reasonable explanation for not accepting the alternative remuneration package proposed by Ms Letsoalo.

[20] It is common cause that the appellant did not respond to Ms Letsoalo's e-mail of 26 April 2012, and that the appellant proceeded with the retrenchment process. According to the Labour Court, this demonstrates that the retrenchment occurred without the appellant considering her "counter-offer". On that basis, the Labour Court found that the dismissal was procedurally unfair. It appears that the Labour Court ignored the background and context of Ms Letsoalo's e-mail. It was preceded by intensive engagement between her and the appellant (represented by Mr Jonker). Sight should not be lost of the fact that the alternative position offered to Ms Letsoalo was two grades lower than the one she held. It was a demotion. Necessarily therefore, a substantial reduction in salary was inevitable. It was explained to her repeatedly by Mr Jonker and Dlamini that the salary that was offered for the lower position was the highest in that band, and there was no way the salary could be increased if she accepted the position.

[21] Two meetings were held in this regard where the point was made clear to her. After each meeting, she made her position very clear that she was not prepared to accept a salary reduction beyond a particular threshold. By 26 April 2012, it was clear that the parties held irreconcilable views on the matter. It would therefore have been an exercise in futility, and served little or no purpose, had the appellant reverted to Ms Letsoalo as to its final decision. In all circumstances, the answer to what the Labour Court deemed to be a counter-proposal, was a foregone conclusion: the appellant would have simply reiterated its earlier position

that there was nothing more it could offer in terms of salary to Ms Letsoalo in the alternative position.

[22] The context in which the offer was made, and responded to, must be borne in mind. It is this: The appellant was experiencing financial difficulties. The appellant's final position had been conveyed clearly and unequivocally to Ms Letsoalo. Under those circumstances, it is difficult to see what difference it would have made, had the appellant responded to Ms Letsoalo's e-mail. Had there been a response, it would predictably have been to reiterate the appellant's position, which had been conveyed to her previously. In all circumstances, Ms Letsoalo cannot tenably suggest that she does not know the reason why the appellant proceeded with the retrenchment without responding to her e-mail of 26 April 2012. The Labour Court did not address this aspect. At the risk of repetition, the reason was provided to her repeatedly during the process of consultation, as fully set out in the paragraphs above.

[23] In the context of the matter, the appellant's reason for not responding to Ms Letsoalo's e-mail is self-evident. It is unlikely that the representations of Ms Letsoalo would have dissuaded the appellant otherwise, given the virtual breakdown in the consultation process. The law requires consultation, not futile engagements. As this Court explained in *SACTWU and Another v Discreto* (*a Division of Trump & Springbok Holdings*)*,* the function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision, but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham.

[24] In the present case, far from being a sham, the consultation process engaged by the appellant was genuine and *bona fide*, geared to minimise the impact of the retrenchment on Ms Letsoalo. Therefore, by concluding that the dismissal was procedurally unfair simply because there was no response to Ms Letsoalo's e-mail, despite extensive and exhaustive consultations that preceded it, the Labour Court, in my view, placed form above substance. The appellant, in particular Mr Jonker, did everything it could to assist her and to comply with its obligations in terms of s189 of the LRA.

DISMISSAL – PROCEDURAL FAIRNESS

Ethekwini Municipality v Hadebe and Others (DA17/14) [2016] ZALAC 14 (10 May 2016)

Principles:

(1) A dismissal may be substantively unfair due to an employer's inconsistent application of discipline. As a general rule, fairness requires that like cases are dealt with alike, whether in the consistent enforcement of a rule or in the imposition of a penalty.
(2) The unfair dismissal remedies of reinstatement and compensation in terms of s193(1)9a) of the LRA, are in the alternative and mutually exclusive.
(3) An order for costs on an attorney client scale is an extra-ordinary one that should be reserved for cases where there is clearly vexatious and reprehensible conduct on the part of a litigant.

Facts:

Ms H was a senior buyer, employed by Ethekwini Municipality in its Water and Sanitation unit. She was responsible for the procurement of goods from suppliers in accordance with the Municipality's supply chain management policy. Following an internal audit of the Sanitation unit's affairs that revealed several breaches of the supply chain management policy for the period July to October 2006, the auditors

recommended disciplinary action against certain employees, including Ms H. She was suspended and charged with 9 alleged breaches of the supply chain management policy. She was convicted of 8 charges, and was dismissed on 27 March 2008.

Ms H referred an unfair dismissal dispute to the South African Local Government Bargaining Council. The arbitrator found her guilty on 3 charges, summarised as follows:

- She was alleged to have purchased shade cloth from a supplier at a higher price than offered by another supplier and without a quotation having been obtained, resulting in an additional cost of R11 685.
- She was alleged to have cancelled an order from one supplier, citing an over-supply of the commodity in stock, only to replace it with another supplier a day later, without obtaining the necessary quotations from other suppliers.
- She was alleged to have unnecessarily increased orders of roof screws, plastic cups and wooden pegs, thereby creating an unnecessary over-supply of those goods.

In all 3 charges, Ms H was alleged to have failed to conduct herself with honesty and integrity, and to perform her tasks diligently.

At arbitration, she gave evidence that the Municipality had been inconsistent in its application of discipline. The internal audit report had also implicated another employee, Ms M, but she was the only one charged with misconduct. The auditors had recommended that action be taken against Ms M on suspicion of colluding with suppliers. The Municipality had lost R375 000 due to the “cover quoting” that Ms M was allegedly implicated in. No action was taken against Ms M and she was subsequently promoted to the senior buyer position vacated by Ms H when she was dismissed.

One of the Municipality’s witnesses testified that a strategic decision was taken by the Municipality to first initiate criminal and civil proceedings against Ms H, and depending on the outcome thereof, revisit Ms M’s position. Initially, it was thought that Ms H had influenced Ms M, or that there was collusion between them. It was only when preparing for the arbitration, and perusing the relevant files that it was discovered that nothing had been done regarding Ms M.

The arbitrator found that Ms H’s dismissal was substantively unfair as a result of the Municipality’s inconsistent application of discipline, and awarded her 9 months’ remuneration as compensation amounting to R82 203. The arbitrator found that reinstatement would be inappropriate taking into account the following factors -

- The nature of the offences she had been found guilty of;
- She did not show any remorse for her conduct;
- She conceded working relationships were ‘not good’;

Ms H instituted review proceedings in the Labour Court, alleging that the arbitrator was obliged to order her reinstatement once he found that her dismissal was substantively unfair, unless the factors referred to in s193(2) were applicable. This section requires reinstatement or re-employment unless -

- this is not sought by the employee;
- circumstances make a continued employment relationship intolerable;

- it is not 'reasonably practicable'; or
- the dismissal is only unfair for procedural reasons.

Ms H also submitted that the Municipality had not led any evidence that the trust relationship between the parties has irretrievably broken down, and (despite her earlier concessions) argued that she had a good relationship with her manager.

The LC overturned the arbitrator's award and reinstated Ms H 'without back pay', and also ordered that she be paid the compensation stated by the arbitrator, namely R82 203. The LC also awarded costs against the Municipality on an 'attorney and client' scale - a higher scale that is normally used by the courts to censure a party for vexatious or reprehensible conduct.

The Municipality appealed against the LC's decision, arguing that it erred in the following ways:
- by ordering reinstatement;
- granting reinstatement and compensation;
- awarding costs on an attorney and client scale.

The LAC considered the standard test for review proceedings – namely 'whether the conclusion reached by the arbitrator is not one which a reasonable arbitrator could reach'. The LAC came to the conclusion that the arbitrator's award "fell within the band of decisions that a reasonable decision-maker could make on the facts available to him" and was therefore not reviewable. The LC accordingly overturned the LC's decision and confirmed that the arbitrator's award should stand.

Although it was not strictly necessary to do so, the LAC went on to clarify that, according to the Constitutional Court's decision in *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC), the LC did not have jurisdiction to award both reinstatement and compensation, these remedies being in the alternative and mutually exclusive.

The LAC was also highly critical of the LC for awarding costs against the Municipality on an attorney and client scale. It concluded that there was simply no basis at all in the judgment why a costs order was justified, and that it was undesirable for a party to be penalised in this way without being given the opportunity to make submissions on whether such an order should be granted.

Extract from the judgment:
(Makgoka AJA)
[11] In his award, the arbitrator considered the collective agreement concluded between the municipality and its employees, which enjoins the municipality to act consistently and fairly with regard to matters of discipline. The arbitrator further made reference to the code of good practice dealing with dismissals, and observed that as a general rule, fairness required that like cases be dealt with alike, whether in the consistent enforcement of a rule or in the imposition of a penalty.

[12] On the above considerations, the arbitrator concluded that there was nothing preventing the municipality from charging Ms Mkhize once it realised that she should have been disciplined. The arbitrator further observed that, instead, she had been promoted to the position initially held by Ms Hadebe, and thus benefitting by occupying a position she could not occupy on merit whilst Ms Hadebe was still employed. As a result, the arbitrator found

Ms Hadebe's dismissal substantively unfair on the basis of this inconsistency. With regard to the procedural fairness of the dismissal, the arbitrator found no merit in the contentions by Ms Hadebe of bias on the part of the chairperson of the disciplinary hearing, and found that the dismissal was procedurally fair. Having made those findings, the arbitrator proceeded to consider what an appropriate remedy would be under the circumstances, regard being had to the provisions of s 193 of the LRA.

[13] The arbitrator considered that the order of reinstatement would be inappropriate. In reaching that conclusion, the arbitrator took the following factors into consideration: the nature of the offences Ms Hadebe had been found guilty of; that she did not demonstrate any remorse for her conduct; that she had conceded that the relationship at work was no longer good, which point was further confirmed by her union representative at the appeal hearing; that the trust relationship had broken down in the buying section and that Ms Hadebe was prepared to accept reinstatement without back-pay to any other position. The arbitrator accordingly granted Ms Hadebe compensation in the amount equivalent to nine months' remuneration, calculated at her monthly salary of R9 133.72, which adds up to a sum of R82 203.48. The arbitrator considered this compensation to be just and equitable. The prayer for reinstatement was refused, and the arbitrator made no order as to costs.
.....
[29] With respect to the learned Acting Judge, and as correctly argued on behalf of the municipality, this is a conflation of the factors relied on by the arbitrator to determine the *quantum* of compensation with those which militated against an order for reinstatement. The ultimate question is whether the conclusion reached by the arbitrator is not one which a reasonable arbitrator could reach. I am firmly of the view that the conclusion reached by the arbitrator "falls within the band of decisions that a reasonable decision-maker could make on the facts available to him" and therefore, not reviewable. The Labour Court accordingly misdirected itself in concluding the contrary, and therefore, on this basis alone, the appeal has to succeed.

[30] Having reached this conclusion, it is not necessary to consider the other aspects argued on behalf of the municipality, namely whether it was competent for the Labour Court to order reinstatement and compensation in the same relief. In any event, that issue was authoritatively settled by the Constitutional Court in *Equity Aviation Services v CCMA and Others* where it was concluded that the remedies in s 193(1)(a) are in the alternative and mutually exclusive.
.....
[36] The order of costs on a scale of attorney and client is an extra-ordinary one which should be reserved for cases where there is clearly and indubitably vexatious and reprehensible conduct on the part of a litigant. It is discernible from a consideration of the authorities that where the Labour Court has made a costs order, it has invariably considered that it was deviating from the general premise, and therefore carefully reasoned the basis of such an order. Unfortunately, in the present matter, the court did not even state its reasons for making the costs order. For all of the above reasons, the costs order made by the Labour Court falls to be set aside and replaced with one where no order is made with regard to the costs of the review application.

***Broadcasting, Electronic, Media & Allied Workers Union and others v South African Broadcasting Corporation and others* [2016] 6 BLLR 595 (LC)**

Principle:
Where an employer has to deal with similar allegations of misconduct against a great number of employees, it would be unworkable to adopt a process where each employee must be heard individually, call witnesses and present evidence. The rules of natural justice, and especially the principle of *audi alteram partem*, will be satisfied, in an attenuated process, such as -

(a) individual employees being presented with the allegations against them in writing;
(b) individual employees having the opportunity to make written representations;
(c) a chairperson or a panel considering the representations and making a finding;
(d) if found guilty of misconduct, the employee would have the opportunity to make representations as to sanction;
(e) the chairperson making a recommendation to the employer.

Facts:
BEMAWU sought an interdict to halt a disciplinary process against 35 of its members. The disciplinary process stemmed from allegations of fraud on a massive scale perpetrated against the SABC Medical Aid Scheme. In fact far more employees were charged: the SABC intended to take disciplinary action against more than 100 employees.

Given the number of employees involved, it had adopted a disciplinary process that differed from that envisaged by its Disciplinary Code ie that of individual hearings presided over by a panel of three chairpersons with *viva voce* evidence and the opportunity to cross-examine. Instead, it adopted a process where the individual employees were presented with the allegations against them in writing; they could then make written representations; and those representations would be considered by a chairperson from a panel appointed by Tokiso, the independent dispute resolution agency. That chairperson, taking into account the allegations and representations, would have to make a decision whether or not the individual employee in question had or had not committed the misconduct complained of. If the employee was found to have committed the misconduct, that employee would be given the opportunity to make further representations with regard to sanction after which the chairperson would make a recommendation on sanction to the SABC.

The Union argued that this departure from the Disciplinary Code which forms part of all employees' contracts of employment was unfair and should be interdicted.

The Labour Court found the application failed to satisfy the requirement of urgency, but nevertheless went on to comment on the proposed disciplinary process. The court found that the rules of natural justice, and especially the principle of *audi alteram partem*, would be satisfied, albeit in an attenuated manner, in the process that the employer had decided to adopt.

Extract from the judgment:
(Steenkamp J:)
[14] Against the background of that clause it seems to me that the process envisaged by the SABC does ensure that discipline will be exercised fairly in accordance with the rules of natural justice, albeit not in the way that the SABC normally conducts its disciplinary procedures. In these circumstances, where the Corporation has to deal with similar allegations of misconduct against more than 100 employees, it would be unworkable to adopt a process where each employee must be heard individually, call witnesses and present evidence. The rules of natural justice, and especially the principle of *audi alteram partem*, will be satisfied, albeit in an attenuated manner, in the process that the Corporation has decided to adopt.
.....
[17] Although the process adopted by the SABC in this case is different from that it normally adopts, I do not think that it can be said that it is not a "formal disciplinary hearing". It envisages a hearing chaired by an independent and experienced chairperson on the panel

of a respected dispute resolution agency. It envisages a hearing, albeit on paper without hearing oral evidence or argument. In my view it satisfies the requirements set out in the Code of Good Practice of the Labour Relations Act and set out by my Brother Van Niekerk J in the well-known case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 (27) ILJ 1644 (LC) at 1652 [also reported at [2006] 9 BLLR 833 (LC) – Ed]. As a reminder, in that case, Van Niekerk J said:

> *"The balance struck by the Labour Relations Act thus recognises not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognises that to require onerous workplace disciplinary procedures is inconsistent with the right to expeditious arbitration on merits. Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioner at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employees."*

[18] That is exactly the conundrum that the SABC faces in these proceedings. To have individual hearings for each individual employee numbering more than 100, along the lines of a criminal justice model, will impede the very workplace efficiencies that Van Niekerk J spoke about. As Mr *Van As* and Mr *Maserumule* also accepted, the Labour Appeal Court held in *Booysens v Minister of Safety and Security* 2011 (32) ILJ 112 (LAC) at paragraph 54 [also reported at [2011] 1 BLLR 83 (LAC) – Ed] that the court will only intervene in incomplete disciplinary hearings in exceptional circumstances. The Court said that there is no exhaustive list of such circumstances but that:

> *"The factors to be considered would in my view be where the failure to intervene would lead to grave injustice or where justice might be attained by other means."*

[19] In this case, it would appear to me that, firstly, the process adopted by the SABC will not lead to grave injustice. The union members will still have an opportunity to be heard. Secondly, and this foreshadows the question of an alternative remedy, justice may be attained by other means, that is the dispute resolution system prescribed by the Labour Relations Act. In fact, in the case before me, the exceptional circumstances go the other way. Exceptional circumstances have necessitated the corporation to adopt a procedure other than the normal procedure envisaged by its Disciplinary Code. Those circumstances are the number of employees involved and the operational efficiencies of the organisation. I would, therefore, have formed the view on the merits that the union has not established a clear right as is required for final relief.

***Dorrainn Bailiff Investments (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JR86/2011, JA8/2015) [2016] ZALAC 20 (26 May 2016)**

Principle:

If an employer wishes to rely on an employee's previous disciplinary record, it is necessary to comply with existing practice or contractual or collective undertakings to establish if previous warnings lapse after a period or may be taken into account regardless of when they were issued.

Facts:

The employer, a retail pharmacy, delivers medication to the residences of some of its clients. The employee was employed as a driver from 2003 until his dismissal on 12

August 2010. He referred an unfair dismissal dispute to the CCMA. In arbitration the Commissioner found that his dismissal was unfair and ordered the employer to pay him compensation in the amount of R34 098 which translated into six month's salary. The employer launched an unsuccessful review application. Dissatisfied with the outcome of the review application, the employer then appealed to the LAC.

The event that gave rise to his dismissal was extreme verbal abuse of the employer, and in dismissing him, previous warnings were taken into account. During 2007 he was found guilty of using the company vehicle for private purposes without permission and transporting passengers without permission. He was involved in a collision after which it was determined that he was responsible for the accident. During 2009 he was found guilty of misconduct for failing to pay back any of R800 loaned to him. Also during 2009 he was found guilty of leaving his place of employment without permission, arriving late at work 16 times in 18 days and failing to collect a script for a patient. He requested to be given a final chance. He was given a final written warning on condition that there was an immediate and substantial improvement in his performance and attitude.

The Commissioner found that the employee was guilty of gross misconduct but regarded dismissal as too serious a sanction. On review the Labour Court held that the Commissioner did not give proper weight to the previous transgressions. He referred to the last final warning and said nothing about the first and second final warnings. He did not have regard to the total picture when it came to the disciplinary record of the employee.

Extract from the judgment
(Musi JA)

[16] The appellant kept all the records of the previous transgressions and it made the third respondent aware that those records would be considered if he were to be found guilty of misconduct in future. It is clear that the appellant kept and preserved the previous transgressions for future use. It took lapsed warnings into account when deciding on a penalty for later misconduct. *In Shoprite Checkers v Ramdaw*, Zondo JP, as he then was, said the following:

> *'In our law there is no statutory provision that deals with what the duration of a disciplinary warning is, nor is there a statutory provision that deals with what the effect is in law of the lapsing of a disciplinary warning. An employer and an employee may deal with these matters in their contract of employment. …. These matters may also be governed by an established practice in a particular workplace. Depending on what the contract of employment between the parties, or, the applicable collective agreement, provides or what the established practice is in a particular workplace, the fact that an employee's previous warning has lapsed or expired may well mean in a particular workplace that such employee must be treated as having a clean record when he is next found guilty of misconduct*.'

[17] More importantly, for purposes of this case, it has been said that:

> *'It is for the employer, if he wishes to rely on an employee's previous disciplinary record to prove which regime applies in the particular workplace.'*

[18] In this matter, the last final written warning makes plain which regime applied in this workplace. The third respondent was told in no uncertain terms that his entire disciplinary record would be used against him.

[19] The Commissioner did not give proper weight to the previous transgressions. He referred to the last final warning and said nothing about the first and second final warnings. He did not have regard to the total picture when it comes to the disciplinary record of the third respondent. It is clear that he limited his enquiry and reasons to "the valid final warning on record" in the process disregarding the other final warnings. In light of the clear indication to the third respondent during the last final warning that all previous transgressions would in future be considered, the Commissioner committed an irregularity by not considering those.

EMPLOYMENT EQUITY

Solidarity and Others v Department of Correctional Services and Others (CCT 78/15) [2016] ZACC 18 (15 July 2016)

Principles:

1. Black candidates, whether they are African, Coloured or Indian people, are also subject to the *Barnard* principle (ie promotion may be refused to white people who are already over-represented in that occupational level). Both men and women are also subject to that principle.
2. Targets in employment equity plans will not constitute quotas where there is provision for deviations from the targets of the plan.
3. The basis used in setting the numerical goals or targets in employment equity plans must be the one authorised by the statute. A wrong basis will lead to wrong targets.

Facts:

The Department of Correctional Service's 2010 EE Plan set certain numerical targets to be attained within the five year period of the plan, in order to achieve employment equity in the Department's workforce. The numerical targets in the 2010 EE Plan were based on national mid-year population estimates for 2005, issued by Statistics South Africa.

In 2011 the Department advertised certain posts in the Western Cape. The individual applicants in this case applied for appointment to some of the posts. Most of the individual applicants were recommended for appointment by the respective interview panels but most were denied appointment. In the case of males, the basis for this decision was that they were Coloured persons and Coloured persons were already overrepresented in the relevant occupational levels. In the case of women, the basis was that women were also already overrepresented in the relevant occupational levels. This meant that appointing these applicants to the positions for which they had applied would not be in accordance with the 2010 EE Plan.

The applicants referred unfair labour practice disputes to the CCMA for conciliation in terms of the LRA. The basis of the disputes was that the Department's refusal to appoint the individual applicants on the ground that they belonged to a race or gender that was already overrepresented on the relevant occupational levels constituted unfair discrimination and, therefore, an unfair labour practice. The applicants also attacked the 2010 EE Plan as non-compliant with the EE Act and as invalid. The conciliation process was unsuccessful. The dispute was then referred to the Labour Court for adjudication as an unfair labour practice dispute.

The Labour Court in ***Solidarity & Others v Dept. of Correctional Services & Others (C 368/2012, C968/2012) [2013] ZALCCT 38 (18 October 2013)*** concluded that the 2010 EE Plan did not comply with the EE Act. The Court held that section 42 of the EE Act meant that both the regional and national demographics had to be taken into account in determining numerical targets. The LC did not order that the applicants should be appointed or promoted to the positions for which they had applied, but ordered the Department to take immediate steps to ensure that both national and regional demographics were taken into account when setting equity targets at all occupational levels of its workforce.

On appeal in ***Solidarity and Others v Department of Correctional Services and Others (CA23/13) [2015] ZALAC 6 (10 April 2015)***, the LAC concluded that the deviations from the 2010 EE Plan made the numerical targets flexible, and that they were not quotas. It said that, if rationally implemented, the deviations ensured that the plan was not implemented in a rigid fashion. The LAC found that the 2010 EE Plan complied with the EE Act and the Constitution, and dismissed the appeal.

On appeal, the Constitutional Court overturned the LAC decision and found that the 2010 EE Plan did not comply with the EE Act and the Constitution. In coming to this conclusion, the Court made three distinct findings:

Firstly, the CC held that Black candidates, whether they are African, Coloured or Indian people, are also subject to the principle in the *Barnard* case (namely that promotion may be refused to White people who are already over-represented in that occupational level). Both men and women are subject to that principle. This has to be so, the Court said, because the transformation of the workplace entails that the workforce of an employer should be broadly representative of the people of South Africa.

Secondly, the CC held that targets in employment equity plans will not constitute quotas where there is provision for deviations from the targets of the plan. Allowing deviations for scarce skills and other exceptions provides flexibility.

Thirdly, the CC held that the basis used in setting the numerical goals or targets in employment equity plans must be one authorised by statute. A wrong basis will lead to wrong targets. In failing to use the demographic profile of both the national and regional economically active population to set the numerical targets, the Department had acted in breach of its obligation in terms of section 42(1)(a) of the EEA and, thus, unlawfully.

What makes the CC decision interesting is that it was determined to bring resolution to the historical dispute. Unlike the Labour Court which made a general order, the CC ordered that those applicants who had applied for appointment to posts that currently remained vacant, must be appointed to those posts and be paid remuneration and benefits attached to those posts. Those applicants who had applied for appointment to posts that were currently filled, must be paid the remuneration and benefits attached to those posts.

Extract from the judgment:
(Zondo J)

[39] In my view the application of the *Barnard* principle is not limited to White candidates. Black candidates, whether they are African people, Coloured people or Indian people are also subject to the *Barnard* principle. Indeed, both men and women are also subject to that principle. This has to be so because the transformation of the workplace entails, in my view, that the workforce of an employer should be broadly representative of the people of South Africa. A workplace or workforce that is broadly representative of the people of South Africa cannot be achieved with an exclusively segmented workforce. For example, a workforce that consists of only White and Indian managers and, thus, excludes Coloured people and African people or a senior management that consists of African people and Coloured people only and excludes White people and Indian people or a senior management that has men only and excludes women. If, therefore, it is accepted that the workforce that is required to be achieved is one that is inclusive of all these racial groups and both genders, the next question is whether there is a level of representation that each group must achieve or whether it is sufficient if each group has a presence in all levels no matter how insignificant their presence may be. In my view, the level of representation of each group must broadly accord with its level of representation among the people of South Africa.

….....

[48] The EE Act, like all legislation, must be construed consistently with the Constitution. Properly interpreted the EE Act seeks to achieve a constitutional objective that every workforce or workplace should be broadly representative of the people of South Africa. The result is that all the groups that fall under "Black" must be equitably represented within all occupational levels of the workforce of a designated employer. It will not be enough to have one group or two groups only and to exclude another group or other groups on the basis that the high presence of one or two makes up for the absence or insignificant presence of another group or of the other groups. Therefore, a designated employer is entitled, as a matter of law, to deny an African or Coloured person or Indian person appointment to a certain occupational level on the basis that African people, Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in that level. On the basis of the same principle an employer is entitled to refuse to appoint a man or woman to a post at a particular level on the basis that men or women, as the case may be, are already overrepresented or adequately represented at that occupational level. However, that is if the determination that the group is already adequately represented or overrepresented has a proper basis. Whether or not in this case there was a proper basis for that determination will be dealt with later.

.....

[50] In *Barnard* this Court, although not defining a quota exhaustively, held that one of the distinctions between a quota and a numerical target is that a quota is rigid whereas a numerical target is flexible. Therefore, for the applicants to show that the numerical targets constituted quotas, they need to first show that they were rigid. The applicants submitted that the targets were rigid and were applied rigidly. The 2010 EE Plan made provision for deviation from the Plan and, therefore, for deviation from the targets in certain circumstances. These include cases where a candidate whose appointment would not advance the achievement of the targets of the 2010 EE Plan but could, nevertheless, be appointed if he or she had scarce skills or where the operational requirements of the Department were such that a deviation from the targets was justified or was warranted.

[51] The applicants acknowledged that the 2010 EE Plan made provision for deviations from the targets set by the Plan. They submitted that the provision for deviations in the limited circumstances in which deviations were permitted could not save the targets from being held to be quotas. In support of their contention, the applicants pointed out that only the Commissioner could authorise a deviation, that the 2010 EE Plan provided that managers who did not ensure compliance with it would be sanctioned. They contended that no

provision was made in the Plan for deviations to be invoked by the candidates who were aggrieved.

[52] Once it is accepted that the 2010 EE Plan contained a provision for deviations from the targets of the Plan, then, in my view the targets cannot be said to be rigid, particularly where it cannot be said that the situations in which deviations are permitted are situations that do not occur in reality. The evidence given at the trial on behalf of the Department revealed, for example, that scarce skills included cases of candidates who are doctors and those who are social workers. A Department such as the Department of Correctional Services must have a need for many social workers. Deviations could be made in regard to, among others, posts for social workers and doctors.

.....

[77] Going back to section 42(a), it seems to me that, if a designated employer uses a wrong basis to determine the level of representation of suitably qualified people from and amongst the different designated groups, the numerical goals or targets that it may set for itself to achieve within a given period would be wrong. It is of fundamental importance that the basis used in setting the numerical goals or targets be the one authorised by the statute. A wrong basis will lead to wrong targets. In the present case the Department only used the national demographic profile to determine the level of representation of the different designated groups. At the time the law was that it was obliged to use the demographic profile of both the national and regional economically active population. It did not also take into account the demographic profile of the regional economically active population as it was obliged to in terms of section 42(a).

[78] In failing to use the demographic profile of both the national and regional economically active population to set the numerical targets, the Department acted in breach of its obligation in terms of section 42(a) and, thus, unlawfully. It had no power to disregard the requirement of also taking into account the demographic profile of the regional economically active population provided for in section 42(a). The Department sought to justify its conduct in this regard on the basis that it is a national Department. The problem with this is that section 42(a) did not exclude national Departments from its application. Accordingly, the fact that it is a national Department in terms of section 1 of the Public Service Act did not exempt it from complying with the requirements of section 42(a).

[79] The effect of the above conclusion is that, when the Department refused to appoint the Coloured and female individual applicants on the basis that they belonged to groups that were already overrepresented within the occupational levels to which they wanted to be appointed, the overrepresentation of those groups had been determined on a wrong benchmark. Whether the groups would still have been overrepresented or not had the correct benchmark been used, we do not know. However, the fact of the matter is that the Department acted in breach of its obligations under section 42(a) as that provision stood before it was amended.

[80] Once it has been found that the overrepresentation relied upon by the Department to refuse to appoint the Coloured and female individual applicants lacked a proper basis, what remains is that the Department is not able to justify the use of race and gender in not appointing them.....

DISCRIMINATION

(a) Disability

***Smith v Kit kat Group (Pty) Ltd* (JS787/14) [2016] ZALCJHB 362; [2016] 12 BLLR 1239 (LC) (23 September 2016)**

Principle:
Disability is not synonymous with incapacity. An employer must comply with its obligation under the Disability Code to explore how the employee's disability could be accommodated. An employee is incapacitated if the employer cannot accommodate him /her or if refusing an offer of reasonable accommodation. Dismissing an employee who is incapacitated in those circumstances is fair but dismissing an employee who is disabled but not incapacitated is unfair.

Facts:
The employee was employed by the Company as a general manager in June 2005 at its head office in Pretoria West. He was a valued, well respected senior employee with very good working relationships with other employees, and reported directly to the CEO. He attempted suicide for unknown reasons in September 2013, by shooting himself in the mouth. This left him severely injured and his face disfigured.

The employee was granted leave, some of which was unpaid, and was given a loan of R80 000 by the employer during this period, to assist him. The employee was assured that as soon as he had recovered, he could come back to work. After nearly 4 months, the employee was ready to return to work in February 2014. The employer was provided with a report from the employee's psychiatrist, confirming that his speech had improved to the extent that he could make himself understood, that he was mentally and intellectually stable and intact, and that it was unlikely that the unfortunate circumstances would re-occur. The employer responded that although he had physically recovered and was mentally able to work, he was 'not facially acceptable', and his presence would remind employees of the unfortunate event. The employer suggested he pursue a disability claim and that the issue of returning to work be revisited at end March 2014.

Following various meetings and correspondence between the parties, the employer by April 2014 made it clear it was not prepared to allow the employee to return to work due to him being 'cosmetically unacceptable' and as one could only understand 70 to 80% of what he was saying, all of which meant he was not capable of performing his duties in full. This was notwithstanding the employee confirming that he was fit and ready to work, supported by a second doctor's report that he was able to go back to work. The employer also sought to recover its loan to the employee.

The employee sought legal advice and tendered his services. When no response was received, he initially instituted unfair labour practice proceedings on the basis of unfair suspension, as he had never been formally dismissed. Subsequently, the employee instituted unfair discrimination proceedings in the Labour Court based on disability, being one of the listed grounds under s.6(1) of the EEA.

The LC accepted that the attempted suicide resulted in the employee's face being disfigured, and that he had a speech impediment as a result of the physical damage

to his mouth and jaw; and that these were permanent disabilities that would be apparent to any third party observer. The LC further accepted that these were disabilities in terms of the Code of Good Practice on the Employment of Persons with Disabilities. Strangely, the Court appeared to accept this without specifically addressing whether the circumstances of the disability excluded the Code from applying under para 5.3.3(c).

The LC found that the employer did nothing to comply with its obligation under the Code to explore how the employee's disability could be accommodated. Such an exercise was essential for any discrimination against the applicant to be considered fair. The Court confirmed that *"disability is not synonymous with incapacity."* An employee is incapacitated if the employer cannot accommodate him /her or if refusing an offer of reasonable accommodation. Dismissing an employee who is incapacitated in those circumstances is fair, but dismissing an employee who is disabled but not incapacitated is unfair.

The Court showed its strong displeasure at the employer's conduct. It found that the employer's description of the employee's face as being 'cosmetically unacceptable' was appalling. The LC also found that accommodating the employee would not have constituted an unjustifiable hardship for the employer. If the employee had recommenced working and it was found at any subsequent stage that he was unable to fulfil his duties to the 'full' extent, the employer could then have instituted incapacity proceedings under the LRA.

In this case the LC felt it was appropriate, due to the facts of the case, to award both damages and compensation. The Court recognised it was very difficult to quantify in financial terms the hurt and humiliation suffered by being discriminated against, and said a balance was needed: awards should give effect to the purpose of the anti-discriminatory measures in the Employment Equity Act and should be sufficiently high to deter other persons from similar behaviour in the future, but should not be so excessive that they induce a sense of shock.

Taking all the circumstances of this case into consideration, the LC awarded the employee damages equivalent to 24 months' salary, which is comparable to the maximum compensation award for an automatic unfair dismissal in terms of Section 194(3) of the LRA. In addition, the LC awarded compensation of 6 months' salary for the hurt and humiliation the employee suffered. All this effectively meant the employee was awarded over R1,5 million in damages and compensation, plus the costs of the court proceedings.

Subsequent to this judgment, the employer sought leave to appeal the outcome to the LAC, but this application was rejected.

Extract from the judgment:
(Snyman AJ)

[38] In my view, the injuries suffered by the applicant and the consequent effect thereof left the applicant with a disability as contemplated by the EEA, which defines 'people with disabilities' as meaning '… people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'. In the Code of Good Practice on employment of people with disabilities published in terms of the EEA ('the Code'), it is reflected that the scope of protection for persons with disabilities in employment focuses on the effect of a disability on the person in

relation to the working environment**,** and not on the diagnosis or the impairment per se. The Code defines persons with disabilities as being persons that:

> '(a) have a physical or mental impairment;
> (b) which is long term or recurring; and
> (c) which substantially limits their prospects of entry into, or advancement in employment.'

.....

[48] The manner in which the respondent dealt with this matter in nothing else but unacceptable. The moment when the applicant tendered service, the respondent should have accepted him back into service. If the respondent believed that the applicant was substantially impaired from doing his job because he was 'cosmetically unacceptable' and had a speech impediment, it needed to deal with this either by way of incapacity proceedings or conducting the kind of enquiry envisaged by the EEA as will be elaborated on hereunder. But first the applicant should have been allowed to report for work, and then return to work.

.....

[58] The respondent contended that because of his speech impediment, which made it difficult to understand the applicant, the applicant was not able to 'fully' do his job. Assuming for the purposes of argument that the respondent's concerns in this regard, at least on a *prima facie* basis, may have been justified, the fact is that the respondent presented no evidence and conducted no process to justify or even remotely substantiate this point of view. What the respondent needed to do was to have conducted a proper incapacity investigation into what consequences this speech impediment would have on the applicant's ability to discharge his duties. The respondent needed to properly and objectively assess to what extent the applicant's ability to interact with fellow employees or suppliers was impacted upon (the applicant had little dealings with customers). Further, and if there was an impact, it needed to be explored how the applicant could possibly be accommodated. But what the respondent did was to simply assume that disability automatically equates to incapacity, which is not so. As the Court said in *Standard Bank*.

> *'Disability is not synonymous with incapacity. … An employee is incapacitated if the employer cannot accommodate her or if she refuses an offer of reasonable accommodation. Dismissing an employee who is incapacitated in those circumstances is fair but dismissing an employee who is disabled but not incapacitated is unfair.'*

.....

[61] The point is that the respondent did absolutely nothing where it came to exploring with the applicant, if accepting that his disability impacted on his abilities, could be accommodated. Such an exercise was essential for any discrimination against the applicant to be considered fair

.....

[65] The respondent also tried to establish some or other hardship based on the applicant's facial features. The respondent suggested that it traumatized the applicant's fellow employees. There was no evidence to justify this suggestion. Both Johan and Mahomed, the only witnesses to testify for the respondent, stated that they had no concerns about the applicant's facial features. It remains a complete mystery to me why the respondent, on several occasions, would describe the applicant as 'cosmetically unacceptable'. I, in any event, find such an approach to be appalling. To in effect exclude the applicant from working because of how he looked, especially considering he was not employed as a runway model for a fashion house, is simply inexplicable. I consider any reliance by the respondent on the concept of the applicant being 'cosmetically unacceptable' to be patently unfair

.....

<u>The issue of relief</u>

[71] Considering that the applicant was indeed unfairly discriminated against by the respondent, this Court has the following powers, in terms of Section 50(2) of the EEA:

'If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-

(a) payment of compensation by the employer to that employee;
(b) payment of damages by the employer to that employee …'

.....

[73] In *SA Airways* the Court held:

'…The EEA draws a distinction between 'compensation' and 'damages', and does not regard them as the same.

…...The intention must have been that they connote different kinds of award. In my view, the only rational meaning that can be given to the terms is that 'damages' connotes a monetary award for patrimonial loss and 'compensation' connotes a monetary award for non-patrimonial loss (including a 'solatium').'

.....

[82] Based on a consideration of all these factors as set out above, I believe that an appropriate damages award in terms Section 50(2) of the EEA is an amount equivalent to 24(twenty four) months' salary, which is comparable to the maximum compensation award for an automatic unfair dismissal in terms of Section 194(3) of the LRA. As to an appropriate award of compensation as a solatium, I consider that an additional award of 6(six) months' salary would be appropriate. Overall, in exercising by discretion, I believe this to be fair to both parties, considering what happened as a whole.

[83] Accordingly, and based on the applicant remuneration of R51 339.98, as extracted from the applicant's last normal pay slip, for a total period of 30(thirty) months, the applicant is awarded R1 540 199.40 in damages and compensation.

(b) Liability of employer under s 60 of EEA

Liberty Group Limited v M (JA105/2015) [2017] ZALAC 19 (7 March 2017)

Principle:

The requirements for employer liability for sexual harassment to arise under s 60 of the EEA include the employer's failure –
(a) to consult all relevant parties,
(b) to take the necessary steps to eliminate the conduct and
(c) to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.

Facts:

After more than 10 years employment, an employee resigned from her position as an insurance clerk. In her letter of resignation, she stated that her working environment had become intolerable "*due to ongoing and continued sexual harassment*" by her manager. Following her resignation the employee referred an unfair discrimination dispute to the CCMA which ruled that it lacked jurisdiction to determine the dispute at arbitration. The employee referred the matter to the Labour Court for adjudication.

In her evidence, the employee testified that following the sexual harassment, she did not know whom to trust. She feared she may lose her job if she reported the matter, given that Mr M was not only her senior but responsible for appraising her performance.

Three weeks after the alleged 4 incidents of harassment, the employee reported the matter to her line manager, who referred her to the sexual harassment policy. He communicated the allegation to a human resources consultant the next day, who made an emailed request for a meeting with the employee but this meeting did not occur due to scheduling difficulties. The employee obtained the necessary forms needed to lodge a sexual harassment complaint but did not submit the complaint. The employee testified that she contacted the employee wellness call centre to ask for information regarding her submission of a sexual harassment complaint but was told to refer the matter to the CCMA. This was disputed.

When the employee resigned her team leader Ms Nyathi contacted her. When the employee told Ms Nyathi about the sexual harassment, Ms Nyathi was sympathetic and asked her not to resign so that the employer could deal with the matter. The employee tore up her first letter of resignation. When Ms Nyathi offered to speak to Mr M, the employee declined the offer. In the following two-week period no steps were taken by the employer to investigate the sexual harassment complaint. The employee then submitted a second resignation letter and a week later referred a dispute to the CCMA. Following her resignation, she did not assist the employer in its investigation of the matter as she stated that the employer had not co-operated with her initially, was doing "*too little too late*", she did not trust the employer and she was "*being overwhelmed*" by it. Although Mr M was initially suspended from work, his suspension was ultimately uplifted.

The Labour Court found that the employee had proved her sexual harassment by Mr M mainly because the employer put up no direct evidence to rebut the employee's version. The Court consequently found that:
(1) The employer had failed to take reasonable steps in terms of Section 60 of the EEA to protect the employee upon becoming aware of the complaint at the earliest opportunity when the employee brought it to the attention of the employer;
(2) The employer only took necessary steps after the employee's second resignation letter;
(3) Accordingly, the employer failed to protect the employee as required in terms of section 60 of the EEA.

The parties in due course agreed quantum in the amount of R250 000 and the employer was granted leave to appeal against the finding on the merits only. The LAC dismissed the appeal and confirmed the findings of the Labour Court. Of significance is that the LAC noted:

> *"From the record what is apparent is a vicious and sustained attack launched by the appellant, through its counsel, on the respondent's person, her motives and credibility and the reliability of her evidence over some three days of unacceptably harsh, cruel and vicious cross-examination. The result was that she became victim to unwarranted and unjustified secondary harassment at the hands of the appellant, an issue that was taken up by this Court with counsel at the outset of the hearing."*

Extract from the judgment:
(Savage AJA)
[34] Section 60 of the EEA 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.'

.....

[38] The Court in *Potgieter v National Commissioner of the SA Police Service and Another (Potgieter*) usefully set out the requirements for employer liability to arise under the EEA where the complaint raised is one of sexual harassment. These are that:

(i) The sexual harassment conduct complained of was committed by another employee.
(ii) It was sexual harassment constituting unfair discrimination.
(iii) The sexual harassment took place at the workplace.
(iv) The alleged sexual harassment was immediately brought to the attention of the employer.
(v) The employer was aware of the incident of sexual harassment.
(vi) The employer failed to consult all relevant parties, or take the necessary steps to eliminate the conduct will otherwise comply with the provisions of the EEA.
(vii) The employer failed to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.

.....

[44] From the record what is apparent is a vicious and sustained attack launched by the appellant, through its counsel, on the respondent's person, her motives and credibility and the reliability of her evidence over some three days of unacceptably harsh, cruel and vicious cross-examination. The result was that she became victim to unwarranted and unjustified secondary harassment at the hands of the appellant, an issue that was taken up by this Court with counsel at the outset of the hearing.

.....

Liability under s 60

[59] The appellant contends that the Labour Court erred and misdirected itself in its approach to liability under s 60. An employer is deemed liable under s 60(3) where the conduct in contravention of the EEA has been proved and the employer failed, under s 60(2) to "*consult with the relevant parties*" and fail to "*take the necessary steps to eliminate the alleged conduct and comply with the provisions of the Act*".

[60] After Mr Haines and Ms Soller had been informed that the respondent had raised a sexual harassment complaint against her immediate manager, Mr Mosesi informed the respondent that he was aware that she had contacted human resources. The respondent's alarm at being told by her superior of her contact with human resources is understandable given the sensitivity of the report. The effect of informing Mr Mosesi of this communication was that the appellant failed to take the positive steps to protect the respondent in the manner contemplated by both its own policy and the EEA to ensure that Mr Mosesi "*would not act in contravention of this Act".*

[61] The absence of any investigation into the issue until after the respondent had resigned was glaring. The focus of the attention of Ms Nyathi, the respondent's team leader, after the respondent's first resignation letter at the end of September 2009 was to seek her withdrawal of the resignation. Following that resignation having been withdrawn by the

respondent, no investigation into the sexual harassment complaint ensued until after the respondent's second resignation letter dated 13 October 2009. Mr Mosesi was not suspended from work until 26 October 2009. It followed that no steps were taken by the appellant after the complaint was reported to ensure that the sexual harassment of the respondent did not continue.

[62] It was contended for the appellant that it was difficult to imagine what other steps the appellant could be expected to have taken in advance to avoid a situation as the present, short of not employing Mr Mosesi. In approaching the matter on this basis, the appellant fails to have regard to its failure to adhere to its own sexual harassment policy in taking "*appropriate action"* when *"complaints are identified and/or raised*" or offering *"appropriate support*" on a confidential basis. While much emphasis is placed on the respondent's refusal to participate in the investigation launched subsequent to her second resignation and her lack of cooperation with disciplinary proceedings against Mr Mosesi thereafter, ultimately resulting in his suspension being uplifted, the evidence shows that the respondent no longer trusted that the appellant had or would take the matter up in the appropriate manner. If nothing more, her stance given the manner of her treatment by the appellant is understandable.

[63] In its approach to the interpretation of s 60 and the hostile manner of its defence to the respondent's claim, the appellant not only failed to have regard to the purpose and objects of the EEA but adopted precisely the response that the EEA seeks to prevent: a failure to recognise the seriousness of the conduct complained of; a lack of interest in resolving the issue in the manner required; a failure to consult and take the necessary steps to eliminate the conduct complained of; and a failure to do all that was reasonably practicable to ensure that its employee would not act in a manner contrary to the provisions of the EEA.

(c) Sexual harassment

***Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (CA14/2014) [2015] ZALAC 51; (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) (23 October 2015)**

Principles:

(1) Both the 1998 and the 2005 Codes on Sexual Harassment must be taken in to account by commissioners in interpreting and applying the LRA. Whilst the 2005 Code is called the "Amended Code", it does not replace or supersede the 1998 Code, which to date has not been withdrawn.

(2) The fact that the unwelcome sexual advances were not of a physical nature, occurred during the course of one incident, and were not persisted with thereafter, did not negate the fact that they constituted sexual harassment as defined in both Codes.

Facts:

Mr S was a 48 year old installation manager employed by Campbell Scientific Africa. As part of his duties, he was working on a joint project in Botswana. On one particular trip, he was staying at a lodge in Botswana with Mr L, a colleague from his company and a 23 year old female consultant, Ms M, from another company. On the last night at the lodge, after the 3 of them had dinner together, Mr S told her he felt lonely, made advances towards her and asked her to go for a walk alone with him or go to his room, an invitation which she said he "*reiterated a number of times*" to the point that she felt "*quite uncomfortable*". He also asked her if she had a boyfriend, causing her to respond that she did, that she was in contact with him and that it was

a serious relationship. Mr S then invited her to phone him in the middle of the night if she changed her mind.

Ms M said she felt threatened, that his advances to her were "*not welcome at all"* and she programmed Mr L's number into her cellphone so that he was "*one button away from a call just in case anything happened*". Ms M continued that she felt *"quite insulted", "quite shocked"* and upset given that it was "…*just before we went to bed and the sleeping arrangements were that Mr S's room was quite close to mine*…". Following the incident, Ms M said she would not agree to work with Mr S again.

At arbitration the commissioner found that, although occurring after hours, Mr S's conduct constituted sexual harassment, with the verbal sexual advances made to Ms M unwelcome and related to the workplace. Although Ms M did not tell him to stop, she made it clear in no uncertain terms that his advances were not acceptable and that she had blatantly refused the invitation. Mr S's dismissal was found to be procedurally and substantively fair.

When the arbitrator's decision was taken on review to the LC, the LC overturned the award and found that the dismissal was substantively unfair. The LC retrospectively re-instated Mr S subject to a final written warning valid for 12 months.

The LC found that whilst Mr S's conduct was crude and inappropriate, it ... *"did not cross the line from a single incident of an unreciprocated sexual advance to (become) sexual harassment*", given that Mr S had backed off once Ms M made it plain it was not welcome. In blunt terms, the LC felt *"he was trying his luck*" and whilst his conduct was inappropriate, it did not justify dismissal. The LC was also influenced by its finding that there was no workplace power differential between them – they worked for different employers, and that the incident took place after work.

Whilst the LC accepted that a single incident of unwelcome sexual conduct can constitute sexual harassment, such an incident must be serious – this nearly always involves an infringement of bodily integrity such as touching, groping, or some other form of sexual assault, which had not happened in this case. In the LC's view, it could only have become sexual harassment if he had persisted in it, or if it was a serious single transgression.

The LAC took issue with the LC's finding that Mr S's conduct did not constitute sexual harassment and that there was no power differential between him and Ms M, a female close to 25 years his junior. Applying both the 1998 Sexual Harassment Code of Good Practice issued by Nedlac under the LRA, and the 2005 Amended Code on Handling Sexual Harassment Cases in the Workplace issued by the Minister of Labour under the EEA, the LAC concluded that Mr S's conduct constituted sexual harassment. Both Codes recognise that a single act may constitute sexual harassment. The fact that Mr S's conduct was not physical, occurred during the course of one incident and was not persisted with thereafter, did not negate the fact that it constituted sexual harassment.

The LAC found that Mr S's conduct was.... *"unwelcome and unwanted; it was offensive; it intruded upon Ms M's dignity and integrity; and it caused her to feel both insulted and concerned for her personal safety."*

The LAC overturned the LC decision, and found that the arbitrator's award was justifiable and should be upheld.

Extract from the judgment:
(Savage AJA)

[19] The treatment of harassment as a form of unfair discrimination in s6(3) of the Employment Equity Act 55 of 1998 recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace. This is echoed in the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (the 1998 Code), issued by NEDLAC under s203(1) of the Labour Relations Act 66 of 1995 (LRA), and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace (the Amended Code), issued by the Minister of Labour in terms of s54(1)(b) of the Employment Equity Act 55 of 1998.

.....

[24] In spite of it being termed the "Amended" Code, this Code does not replace or supersede the 1998 Code, which to date has not been withdrawn. The result is that in terms of s203(3), both Codes are as "relevant codes of good practice" to guide commissioners in the interpretation and application of the LRA.

.....

[27] There is no dispute that Mr Simmers made advances to Ms Markides that took the form of unwelcome and unwanted conduct of a sexual nature. While the Labour Court found the advances crude and an inappropriate, it erred in finding that the advances made constituted inappropriate sexual attention and not harassment, were not serious and did not impair the dignity of Ms Markides, who was not a co-employee, with whom there existed no disparity of power and when the two were unlikely to work together in the future. To the contrary, the unwelcome and inappropriate advances were directed by Mr Simmers at a young woman close to 25 years his junior whose employment had placed her alone in his company and that of Mr Le Roux in rural Botswana. Underlying such advances, lay a power differential that favoured Mr Simmers due to both his age and gender. Ms Markides' dignity was impaired by the insecurity caused to her by the unwelcome advances and by her clearly expressed feelings of insult. As much was apparent from her evidence that she was insulted, felt "incredibly nervous" given the proximity of the sleeping arrangements at the lodge and that she programmed Mr Le Roux's number onto her phone "just in case anything happened".

.....

[32] .....Mr Simmers' conduct constituted sexual harassment, as defined in both Codes: it was unwelcome and unwanted; it was offensive; it intruded upon Ms Markides' dignity and integrity; and is caused her to feel both insulted and concerned for her personal safety.

[33] In *SA Broadcasting Corporation Ltd v Grogan NO and Another,* Steenkamp AJ (as he then was) observed that sexual harassment by older men in positions of power has become a scourge in the workplace. In *Gaga v Anglo Platinum Ltd and Others,* this Court noted similarly that the rule against sexual harassment targets, amongst other things, reprehensible expressions of misplaced authority by superiors towards their subordinates. The fact that Mr Simmers did not hold an employment position senior to that of Ms Markides or that they were not co-employees did not have the result that no disparity in power existed between the two. His conduct was as reprehensible as it would have been had it been metered out by a senior employee towards his junior in that it was founded on the pervasive power differential that exists in our society between men and women and, in the circumstances of this case, between older men and younger women. Far from not being serious Mr Simmers capitalised on Ms Markides' isolation in Botswana to make the unwelcome advances that he did. The fact that his conduct was not physical, that it occurred during the course of one incident and was not persisted with thereafter, did not negate the fact that it constituted sexual harassment and in this regard the Labour Court erred in treating the conduct as simply an unreciprocated sexual advance in which Mr Simmers was

only “trying his luck”. In its approach the Court overlooked that in electing to make the unwelcome sexual advances that he did, Mr Simmers’ conduct violated Ms Markides’ right to enjoy substantive equality in the workplace. It caused her to be singled out opportunistically by Mr Simmers to face his unwelcome sexual advances in circumstances in which she was entitled to expect and rely on the fact that within the context of her work this would not occur. In treating the conduct as sexual harassment, Ms Markides, and other women such as her, are assured of their entitlement to engage constructively and on an equal basis in the workplace without unwarranted interference upon their dignity and integrity. This is the protection which our Constitution affords.

COLLECTIVE LABOUR LAW

(a) Industrial action

***Mndebele and Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (JA57/12) [2016] ZALAC 28 (14 June 2016)**

Principles:

1. There is no requirement in law that all the duties of an employee must be expressly set out in the employment contract, and employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only changes that are so dramatic as to amount to the employee having to do an entirely different job, which give rise to a right to refuse to do the job in the required manner.

2. The Code does not suggest how the ultimatum should be distributed, or require that it must be in writing. Furthermore, it states that the issuing of an ultimatum is not an invariable requirement. Employees will have been given an ultimatum that 'served the purpose' for which the law requires an ultimatum to be issued, if they were cautioned in clear language and were specifically informed of the consequences of their failure to heed the warning, and if employees were given an opportunity to reflect on their conduct and to desist from it.

3. When deciding on the substantive fairness of a dismissal for participating in unprotected strike action, the Dismissal Code of Good Practice requires the seriousness of the contravention of the Act, attempts made to comply with the Act, and whether or not the strike was in response to unjustified conduct by the employer to be considered.

Facts:

The case was referred to the LAC as an application for condonation for the late filing of the record of appeal, and the reinstatement of an appeal against a Labour Court judgment that had found employees were fairly dismissed for their participation in an unlawful strike. The employees in this case lodged a condonation application for the late filing of the documents some 3 years late, and perhaps on that basis alone their application was doomed for failure. But in the process of dismissing their application, the LAC considered their prospects of success on the merits of their case, and the Court had some interesting things to say about when employees' actions in refusing an instruction constitute a strike, the requirements for an ultimatum, and the circumstances justifying dismissal for an unprotected strike.

The employees were employed in various positions in the Company's smeltering business in Rustenburg. Following an extended shut down period during December 2008 / January 2009 due to poor economic conditions, and at a time when normal manufacturing activities had still not resumed, employees were required to attend training sessions in place of their normal work. Employees were obliged to report for work and attend scheduled training at the plant daily, until manufacturing operations resumed.

During this period the Company launched a national 'wellness' campaign, and as a part of that programme, employees were informed to attend a 4 hour launch on 3 March 2009, attending either the morning of the afternoon session. Employees refused to attend the morning session, gathering on the grass outside the tent where the launch was to be held and preventing others from attending. They advised management that they would not attend unless certain pay queries raised at a February meeting between employee representatives and management were resolved. Some employee grievances had been resolved at that meeting, but management was awaiting further information from employee representatives about outstanding individual pay queries, in order to address those remaining queries. When they continued to refuse to attend the morning session for the reason stated, employees were warned that their actions constituted unprotected industrial action and that they would be disciplined. They were advised that if they did not go to the launch, "separation" would be discussed.

At a lunchtime meeting, employees who had not attended the morning training session were given the further opportunity to attend the afternoon session, but the majority of them refused. Around 12h00 management addressed a letter to the union representing some of the employees, informing it that its members had embarked on unprotected industrial action and urging it to convey the possible consequences to them.

Disciplinary action was subsequently instituted against the employees who refused to attend the launches. Employees refused to attend individual hearings and demanded that one combined hearing be held. Management thought that would be impractical but indicated its willingness to hear 10 employees in one disciplinary hearing at a time. Employees rejected this proposal and became disruptive, and security was called to assist in pacifying the situation. Whilst some employees attended their hearings and were given final warnings after claiming intimidation, the hearings for most employees continued in their absence and resulted in them being dismissed.

Employees appealed against their dismissals but most again refused to attend the appeal hearings, their union again demanding a single hearing. Management's offer to hear 5 dismissed employees in one appeal hearing at a time was rejected. The appeals of some of the dismissed employees who did attend were successful and they were re-instated.

Just over a hundred dismissed employees then referred an unfair dismissal dispute to the Labour Court, about half of whom were represented by The Togetherness Amalgamated Worker Union of SA (Tawusa). The LC dismissed their claim for unfair dismissal and they were granted leave to appeal to the LAC. Although the LAC rejected the applicants' condonation application for the late filing of documents and

accordingly dismissed the appeal application on that basis, the Court in the process had some interesting comments on the merits of the dispute.

The LAC considered whether the employees' refusal to attend the wellness launch constituted a strike, as defined in s213 of the LRA. In summary, this requires 'a refusal to work' for the purpose of remedying a grievance or resolving a mutual interest dispute. The LAC agreed with the LC that it did. The employees had disobeyed a lawful and reasonable management instruction to attend the launch, and their actions amounted to 'a concerted refusal to work'. Because normal operations had been suspended, their 'work' at that time was to attend the launch. Whilst the employees argued that attending the wellness campaign was not part of their contractual duties, the LAC found that there is no requirement in law that all the duties of an employee must be expressly set out in the employment contract.

It was clear from the facts of this case that management did not give the employees *"an ultimatum in the conventional sense"*, as described by the LAC. What management did do, when addressing employees on the morning of the wellness launch, was to state that "separation" would be discussed if they refused to attend. Later, employees were given a second chance and instructed to attend the second session in the afternoon. At about 12h00, management addressed a letter to the union representing some of the employees informing it that its members had embarked on unprotected industrial action and urging it to convey the possible consequences to them. The LAC found that on that basis, management's intentions were clear and employees had sufficient time to re-consider their positions between the morning and the afternoon sessions. The employees had accordingly been given an ultimatum that 'served the purpose' for which the law requires an ultimatum to be issued - they were cautioned in clear language and were specifically informed of the consequences of their failure to heed the warning. Employees were given an opportunity to reflect on their conduct and to desist from it.

Item 6 of the Dismissal Code of Good Practice requires the following factors to be considered, when deciding on the substantive fairness of a dismissal for participating in unprotected strike action:

- The seriousness of the contravention of the Act;
- Attempts made to comply with the Act;
- Whether or not the strike was in response to unjustified conduct by the employer.

Applying these factors, the LAC agreed that dismissal was an appropriate sanction for the strikers' misconduct. The Court found there was no unjustified conduct on the part of the employer that had caused the strike. The unprotected strike in this case had unusual features that made it different from typical strikes, and although the strike was of short duration, its duration was determined by the fact that it consisted of a boycott of the wellness launch which subverted the employer's purpose.

Moreover, the strikers persisted in their defiance by failing to take advantage of the second opportunity to attend the launch in the afternoon. The strike's impact was not economic but was designed to ensure that the Company's activities could not proceed as planned. It thus undermined the authority and prerogative of the employer in achieving its social responsibility to its employees, which was of obvious importance to the Company. While, as discussed, an ultimatum in the conventional

sense was not issued, employees were informed of the implications of their conduct and understood that if they did not attend the launch, separation would be discussed. Having been warned and having been afforded a second opportunity during lunch time to attend the launch, the employees had sufficient time to consider their stance. In addition, the strike was not spontaneous, but rather planned to occur at the time at would create maximum pressure on the Company.

For these reasons the LAC agreed that the dismissal of the strikers was substantively fair.

Extract from the judgment:
(Murphy AJA)
[15] The central issues for decision by the Labour Court were whether i) the appellants' refusal to attend the launch constituted a strike; ii) an appropriate ultimatum was given; iii) dismissal was the appropriate sanction in the circumstances; and iv) the termination of employment was procedurally and substantively unfair.
.....
[20] The appellants argued that in any event the court a quo erred in concluding that their refusal to attend the wellness campaign amounted to a refusal to work. They submitted that the court a quo failed to appreciate that attending the wellness campaign was not part of their contractual duties. Their submission is without merit. There is no requirement in law that all the duties of an employee must be expressly set out in his or her contract of employment. A number of implied obligations are imposed on employees in terms of the common law, including the employee's obligation to obey lawful and reasonable instructions of the employer; to serve the employer's interests; to act in good faith; and to be subordinate to the employer. Employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only changes that are so dramatic as to amount to the employee having to do an entirely different job which give rise to a right to refuse to do the job in the required manner. The appellants' refusal to work was consequently in breach of their common law obligations. The court a quo thus correctly found that the refusal by the appellants to attend the launch constituted a "refusal to work" and that their conduct fell squarely within the meaning of that term as used in the definition of a strike in section 213 of the LRA.
.....
[27] The Code does not suggest how the ultimatum should be distributed, or require that it must be in writing. Furthermore, it states that the issuing of an ultimatum is not an invariable requirement. The purpose of an ultimatum is not to elicit any information or explanations from the employees but to give them an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum must be issued with the sole purpose of enticing the employees to return to work, and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct they face dismissal. Because an ultimatum is akin to a final warning, the purpose of which is to provide for a cooling-off period before a final decision to dismiss is taken, the audi rule must be observed both before an ultimatum is issued and after it has expired. In each instance, the hearing may be collective in nature and need not be formal.

[28] The court a quo correctly stated that an ultimatum in the conventional sense was not issued in this case, nevertheless, it was not suggested by the appellants' witnesses that they did not understand what Cilliers meant when he told them that if they did not attend the launch then "separation" would be discussed. The peculiar circumstances in this case reveal that the opportunity to attend the launch, which was planned for one day, was slipping away and having been afforded a second opportunity during lunch to attend the launch, the appellants did indeed have sufficient time to consider their stance and to modify their conduct. Having regard to the principles pertaining to ultimatums and their purpose, I agree

with La Grange J that the appellants were issued with an ultimatum that served the purpose for which the law requires an ultimatum to be issued. The appellants were cautioned in clear language and were specifically informed of the consequences of their failure to heed the warning. They were accordingly given an opportunity to reflect on their conduct and to desist from it.

.....

[34] The court a quo determined that dismissal was an appropriate sanction for the misconduct of the appellants and hence that the dismissal was substantively fair. It is clear from its reasoning that the court a quo kept the provisions of item 6 of Schedule 8 to the LRA in mind. It had regard to the nature and seriousness of the contravention of the LRA and the fact that there was no unjustified conduct on the part of the employer that had caused the strike. It emphasised that the unprotected strike in which the appellants participated had unusual features that made it different from typical strikes. It held that although the strike was for a short duration, its duration was determined by the fact that it consisted of a boycott of the wellness launch which subverted the employer's purpose. Moreover, the appellants persisted in their defiance by failing to take advantage of the second opportunity to attend the launch in the afternoon. The strike's impact was not economic but was designed to ensure that the activities of the respondent could not proceed as planned. It thus undermined the authority and prerogative of the employer in achieving its social responsibility to its employees, which was of obvious importance to the respondent. While, as discussed, an ultimatum in the conventional sense was not issued, the appellants were apprised of the implications of their conduct and understood what Cilliers meant when he told them that if they did not attend the launch separation would be discussed. Though normally an ultimatum would allow employees more time to reflect on their conduct, in this case the opportunity to attend the launch, planned for one day, was lost. Having been warned and having been afforded a second opportunity during lunch time to attend the launch, the appellants had sufficient time to consider their stance. In addition, the strike was not spontaneous, but rather planned to occur at the time that would create maximum pressure on the respondent and the strike was not one that the employer had provoked through any unjust conduct. The reliance placed by the chairperson of the disciplinary hearings on the prior conduct of the appellants and that some of them had previously been issued with final written warnings which had expired was found by the court a quo to be legitimate in the circumstances, and in any event in the final analysis did not alter the fairness of the sanction. In my view, the reasoning of the court a quo on the question of sanction is cogent and unassailable. I agree therefore with the Labour Court that the dismissal of the appellants was both procedurally and substantively fair and accordingly the appeal is without merit.

NUM and Others v Power Construction (Pty) Ltd (C85/2014) [2016] ZALCCT 24 (27 July 2016)

Principle:

In an unprotected strike the form that the pre-dismissal hearing takes will depend on the circumstances. The ultimate test is whether the strikers were given a fair hearing. Where strikers are -

(1) made aware of the unprotected nature of the strike, not only by management, but also by their own union representatives;

(2) given the opportunity to make representations through the union representatives and invited to appoint their own representatives; and

(3) given another opportunity to make representations after the dismissal,

then the dismissals will be procedurally fair.

Facts:
Power Construction dismissed 33 workers (the second and further applicants) after they had participated in an unprotected strike. The union argued that the nature and extent of the strike did not warrant the dismissal of the employees and that they were in any event dismissed without a disciplinary hearing.

On Wednesday, 14 August 2013, the company informed the employees that they did not have to work on Thursday due to expected bad weather. They asked if they could also take Friday 16 August off as rain was predicted for the day as well. The company refused and instructed the employees to report for duty on Friday 16 August; and told them that anyone who did not would be disciplined.

As agreed, the employees did not go to work on Thursday 15 August. They did report for work at about 07:15 on Friday 16 August. There is a dispute about the state of the weather on that day. The employer conceded that rainfall had ceased by 10:00. The weather data for the nearest recording station shows that the drizzle had stopped by 10:00. The employees still refused to go to work.At 11:00 the site manager, and the senior site foreman, addressed the striking employees and demanded that they return to work, failing which they would not be paid for the day. They refused.

The HR practitioner, Cupido, arrived at approximately 13:30. He told the employees for the third time to go to work. He reminded them that, should they have a grievance, they could refer it to the CCMA. He asked the striking workers to nominate two representatives who should meet in his office while the rest of them returned to work. They refused. At 1430 on Friday 16 August, the employer issued a first ultimatum or communiqué to all striking employees and read it out to them. The employees still did not return to work. They went home on the company transport at about 15:00 when the site manager decided to book the site off.

On Monday, 19 August 2013 the employees did return to the site at 07:30 but they still refused to work. Cupido had contacted Phibantu, a NUM shop steward who works at the company's head office. Phibantu arrived at the site with Cupido. Phibantu spoke to the employees and asked them what their grievances were. He then went into the site office and told Jacobs and Cupido that the employees wanted payment for Friday 16 August as the weather had been inclement. Cupido asked Phibantu to return to the employees and asked them to nominate four representatives to enter into discussions while the rest of the employees returned to work. They refused. Phibantu left at approximately 09:00. He called the NUM organiser at the Bellville regional office, Eugenia Peter, to assist. Cupido addressed the employees again and instructed them to return to work and to lodge a grievance in due course. They refused.

At about 12:00 the company issued a second ultimatum. Peter only arrived at the premises at about 15:00. She met with the company management and the striking employees. She could not resolve the issue and left.

Jacobs issued a third ultimatum at about 15:00.The striking workers still did not heed the ultimatum. They left the premises and returned on Tuesday, 20 August 2013 at about 07:30. This was day three of the unprotected strike.

The workers again congregated outside the site gate at the site offices. Peter arrived at about 09:00 and spoke to Cupido. Cupido asked her to speak to the employees and ensure that they return to the site. She tried to persuade the employees to return to work while she attended to their grievance. Instead, the employees insisted on taking their tea break before returning to work. Cupido pointed out that there had not worked at all; that, in the circumstances they were not entitled to a tea break; and that they should return to work immediately. They refused. Peter left. Cupido issued notices of dismissal at about 11:30 on Tuesday, 20 August 2013.

After the dismissal, a meeting was held between some of the employees; Phibantu, Cupido and Stofberg at the company's head office on Thursday, 22 August 2013. At the meeting, the company offered to reinstate the employees on their previous conditions of employment, subject to them signing an undertaking to return to work. The employees refused to sign the undertaking. That resulted in the offer to reinstate them retrospectively being withdrawn.

The union referred an unfair dismissal dispute to the CCMA. Conciliation failed. The Labour Court, noting that there was no disciplinary hearing, held that it was difficult to see how a formal disciplinary hearing could have made any difference before the striking workers were dismissed. They were made aware of the unprotected nature of the strike, not only by management, but also by their own union representatives. They were told at least three times that they ran the risk of dismissal, should they continue. Yet they persisted. They were given the opportunity to make representations through the union representatives and invited to appoint their own representatives. They refused. In these circumstances there was no procedural unfairness.

Extract from the judgment:
(Steenkamp J)

[50] The substantive fairness of the dismissal must be determined in the light of the facts of the case, including:

50.1. the seriousness of the contravention of the LRA;
50.2. attempts made to comply with the LRA; and
50.3. whether or not the strike was in response to unjustified conduct by the employer.

[51] Prior to dismissal the employer should, at the earliest opportunity, contact the trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms such a state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it, if the employer cannot reasonably be expected to extend the steps to the employees in question, the employer may dispense with them.

.....

[66] There was no disciplinary hearing before the company dismissed the employees on Tuesday 20 August 2013.

[67] The Code of Good Practice does not envisage a formal disciplinary hearing before employees participating in an unprotected strike may be dismissed. However, in *Modise&ors v Steve's Spar Blackheath* a divided Labour Appeal Court held that, subject to certain exceptions, and procedural strikers must be given a hearing as well as an ultimatum prior to dismissal in order to give expression to the *audi alteram*

partem rule. The hearing may be of a collective nature and may take place in the context of the discussion that the employer is required to have with the employees' trade union in terms of item 6 (2).

[68] The form that the hearing takes will depend on the circumstances. In some cases a formal hearing might be required whereas in other circumstances it will suffice to send a letter to the strikers or the union inviting them to make representations. The ultimate test is whether the strikers were given a fair hearing.

.....

[71] In this case, as in *Xinwa*, management repeatedly warned the striking workers that the strike was unprotected. It issued three ultimatums in which it warned the striking workers that they could be dismissed if they did not return to work. To union representatives tried to persuade the workers to return to work. They refused.

[72] It could still be argued, as the union did, that the very absence of a disciplinary hearing before the dismissal is in itself procedurally unfair. But on the facts of this case, and given the precedent of the Constitutional Court in *Xinwa*, I disagree. It is difficult to see how a formal disciplinary hearing could have made any difference before the striking workers were dismissed. They were made aware of the unprotected nature of the strike, not only by management, but also by their own union representatives. They were told at least three times that they ran the risk of dismissal, should they continue. Yet they persisted. They were given the opportunity to make representations through the union representatives and invited to appoint their own representatives. They refused. And although the company did not, on a balance of probabilities, contact the regional office of NUM – choosing to involve the shopsteward, Phibantu, instead – that fact, though open to censure, did not have any effect on the strikers' actions. Phibantu did contact the regional organiser, Peter. She spoke to management and to the strikers. Her efforts came to nought.

[73] What is more, the company gave the striking workers yet another opportunity to make representations through both the elected representatives and the trade union representatives after the dismissal. They were offered reinstatement on conditions that were not unreasonable. In my view, that cured any procedural unfairness that may have arisen before the dismissal.

***Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited* [2016] ZACC 28**

Principles:

(1) An ultimatum should afford the strikers a proper opportunity for obtaining advice and taking a rational decision as to what course of action to follow. An ultimatum should confer an adequate period of time for both parties to the dispute to "cool-off", ensuring that an employer does not act in anger or with undue haste and that the striking workers act rationally, having been given the opportunity to reflect.

(2) A protected strike remains protected except in the following circumstances:
(a) if the employer complies fully and unconditionally with the demand;
(b) if the union or employees abandoned the authorised purpose of the strike and sought to achieve a different purpose that is not authorised;
(c) if the employer and the union or workers were to reach an agreement that settles the dispute even if the employer has not complied fully and unconditionally with the original demand of the union and the workers.

Facts:
The dispute was whether the dismissal of the union's members, by their employer Unitrans Fuel and Chemical (Pty) Limited (Unitrans) on 2 November 2010 following a strike, was fair and whether they should be reinstated. Both the Labour Court and the Labour Appeal Court had held that the dismissal was fair because the strike had been unprotected. The Constitutional Court, however, held that their strike was protected and their dismissal was automatically unfair. It has accordingly ordered their reinstatement with backpay.

After prior litigation about whether employees could strike on a list of demands, on 26 October 2010 TAWUSA issued a strike notice and emphasised that the collective refusal to work would be in pursuit of the demands permitted by the LAC, being wage discrepancies and wage cuts. Further meetings were held but no resolution could be reached. This led to Unitrans launching a further urgent application to interdict the strike. The LC granted an interdict against TAWUSA. Despite this, on 28 October 2010, the strike commenced. It endured for six days during which several meetings were held between the parties. During this period, Unitrans issued four ultimatums in which it stated that the demands made by the workers differed from those determined by the LAC and that the demands were for increases in wages and would be a cost to the company. This, it said, rendered the strike unlawful. It demanded that the workers resume their duties. In the final ultimatum, which was issued on 1 November 2010 14h05, Unitrans capitulated to the demand on wage cuts. It required the striking workers to resume their duties by 06h00 on 2 November 2010, failing which they would be dismissed. On 2 November 2010, the workers did not return to work. As a result, Unitrans summarily dismissed the workers.

TAWUSA and the dismissed workers challenged the dismissals in the Labour Court, which held that the strike was unprotected and that the dismissals were fair. The individual applicants' claims were thus dismissed with costs. Their appeal to the LAC was also dismissed. Davis JA concluded that the strike was unprotected and dismissed the appeal. He did so without considering the second leg of the inquiry, that is, notwithstanding the fact that the strike was unprotected, whether the dismissals were unfair under the circumstances.

In the Constitutional Court, TAWUSA appealed against the second LAC judgment. In the CC, the judges were divided, with 5 judges in a minority judgment finding that the dismissals were substantively fair (because the strike was unprotected after the employer capitulated) but procedurally unfair because of the short period given in the ultimatum. Six judges in a majority judgment held that the strike was protected throughout and the dismissals were therefore automatically unfair.

In the minority judgment, the Court dealt with the requirements for a fair ultimatum, stating that an ultimatum should afford the strikers "a proper opportunity for obtaining advice and taking a rational decision as to what course of action to follow". The Court emphasised the importance of an ultimatum conferring an adequate period of time for both parties to the dispute to "cool-off", ensuring that an employer does not act in anger or with undue haste and that the striking workers act rationally, having been given the opportunity to reflect.

Extract from the judgment:
(Mhlantla J - minority judgment)

[60] It has been held to be unreasonable to expect strikers to resume work in too short a time. A reasonable time ultimately will depend on the circumstances, but an ultimatum should afford the strikers "a proper opportunity for obtaining advice and taking a rational decision as to what course of action to follow".

[61] In *Allround Tooling* the LAC found the dismissal of 117 workers pursuant to two ultimatums, served on the same day, procedurally unfair as too short a period of time was given. The employer's ultimatum should have expired "after the striking employees had had a weekend to cool down and to calmly reflect on the consequences of their conduct and having obtained the advice of the local union leadership, *the probabilities are that they would have returned to work*".

[62] In *Pro Roof Cape* the Labour Court found the dismissal of 22 workers who had been given just over two hours' notice to adhere to an ultimatum to be procedurally unfair. It held that "more time should have been allowed to reflect on the ultimatums once an undertaking had been given. . . . The [dismissals] could have been avoided by the provision of more time and information by the employer".

[63] In *Plaschem* the LAC found the dismissal of 42 workers, pursuant to a series of oral and written ultimatums, provided between 12h15 and 14h45 during the course of a working day, to be procedurally unfair. In this regard, the Court held:

> *"When considering the question of dismissal it is important that an employer does not act over hastily. He must give fair warning or ultimatum that he intends to dismiss so that the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on their decisions is eliminated or limited."*

[64] In light of these decisions, it is apparent that the period of time conferred by the ultimatum must be viewed in light of the conditions prevailing at the time it was issued. The time period conferred by an ultimatum must be viewed in the context of whether the ultimatum provided an adequate opportunity for the workers involved to engage with its contents and respond accordingly. This is in line with item 6(2) of the Code encompassing the *audi alteram partem* principle, which extends into the terrain of unprotected strike action. Further, the importance of conferring an adequate period of time for both parties to the dispute to "cool-off" must be emphasised. An adequate cooling-off period ensures that an employer does not act in anger or with undue haste and that in turn the striking workers act rationally having been given the opportunity to reflect.

.....

(Zondo J - majority judgment)

[115] The first judgment holds that, although the strike was initially protected, it ceased to be protected at about 14h05 on 1 November when Unitrans issued the final ultimatum. The first judgment takes the view that from that time up to 2 November, when the workers were dismissed, the strike was unprotected and the workers participated in an unprotected strike at that stage. It goes on to hold that Unitrans was entitled to issue its final ultimatum when it did because the strike had become unprotected and the workers should have returned to work at 06h00 on 2 November. In my view, the first judgment goes wrong on this point. The strike was protected from beginning to end and its legal status never changed. I explain this below.

.....

[117] The question that arises is how a protected strike changes from being a protected strike to an unprotected strike. This is a critical question to consider before deciding whether, by making the promise that it made or giving the undertaking that it gave, Unitrans

changed a protected strike into an unprotected strike. It is necessary to go back to the basic principle of our law on strikes. I have quoted the definition of the word "strike" above. The definition reveals that a strike is a concerted refusal to work or retardation or obstruction of work that is initiated for a specific purpose. The definition makes it clear that the concerted refusal to work or retardation or obstruction of work must be resorted to "for the purpose of *remedying* a grievance or resolving a dispute" in respect of any matter of mutual interest between employer and employee.

[118] Where the concerted refusal to work is resorted to in support of a demand made by a trade union or workers to an employer, the employer would need to comply fully and unconditionally with the demand in order for a protected strike to turn into an unprotected strike. Once the employer has remedied the grievance or complied with the demand or once the dispute has been resolved, the workers may not continue with their concerted refusal to work because the purpose for which they would have been entitled to withhold their labour would have been achieved. Any continued refusal to work would lack an authorised purpose. Therefore, the strike would be unprotected.

[119] Another way in which a protected strike would cease to be protected would be if the union or employees abandoned the authorised purpose of the concerted refusal to work and sought to achieve a different purpose that is not authorised. Yet another way would be if the employer and the union or workers were to reach an agreement that settles the dispute even if the employer has not complied fully and unconditionally with the original demand of the union and the workers. Absent any of these methods of turning a protected strike into an unprotected strike, a protected strike remains protected. I shall apply these principles to the facts of this case shortly but, before I do so, I need to deal with a prior question that arises from the relevant paragraph of the final ultimatum.
.....
[125] Did Unitrans promise to put them on their wage rates in terms of their contracts of employment? No. It promised them something much less. It promised them that they would be put on those wage rates as a gesture of its goodwill and in order to end the strike. This means that, whereas, prior to that promise, the Shell 7 had a contractual right to be on those wage rates, if they accepted Unitrans' promise, the basis for their continued presence on those wage rates would no longer be their contractual rights but it would be Unitrans' goodwill. This means that, whereas they embarked upon a collective refusal to work in order to put pressure on Unitrans to honour its contractual obligations that were enforceable in a court of law, Unitrans promised them a benefit that was not based on an enforceable right in law but something based on its goodwill that could not be enforced in law. If TAWUSA and the workers had accepted Unitrans' promise, they would not have got what they had demanded but would have been short-changed. Therefore, the basis upon which Unitrans made its promise showed that it was not giving the workers what they were demanding.

[126] Going back to the definition of the word "strike", it cannot be said that Unitrans' promise, based as it was on its gesture of goodwill, could have remedied the grievance of the workers nor could it be said to have complied with the wage cut demand or resolved the dispute. Unitrans was not prepared to accept or acknowledge that it was contractually obliged to do what was envisaged in the wage cut demand in respect of the Shell 7. Whatever Unitrans was prepared to do, it was prepared to do as a gesture of its goodwill.

[127] If TAWUSA and the workers had accepted Unitrans' promise and the Shell 7 were then placed on the agreed wage rates but no longer because they were contractually entitled to be on those wage rates but because of Unitrans' goodwill, they would have lost a justiciable contractual right to be on those wage rates and accepted a regime to be there at the pleasure of Unitrans. Therefore, the basis upon which Unitrans made its promise is enough to justify the conclusion that that promise could not and did not change the protected strike into an unprotected strike.

***National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW) and Others v Universal Product Network (Pty) Ltd*; (2016) 37 ILJ 476 (LC); [2016] 4 BLLR 408 (LC)**

Principle:
There may be circumstances where the levels and degree of violence and interference by outside parties in a strike tilt the balance toward a finding that the protected strike called by the union should be declared unprotected.

Facts:
After the strike notice was issued, the employer and the union agreed on picketing rules. However once the strike commenced the employer alleged that the striking employees had failed to comply with the picketing rules and had committed various acts of strike-related misconduct. The Labour Court granted an order in terms of which the picketing rules were effectively enforced and misconduct interdicted. The employer subsequently filed an application to hold the union and two of its unions' officials in contempt of the order granted. That application remains pending.

During the course of the strike banners were displayed criticising the employer's holding company, Woolworths, for doing business with Israel and that Palestinian flags were waved. During the course of the strike, members of the Economic Freedom Fighters (EFF) visited the employer's premises demanding to negotiate with management. EFF members urged strikers to intensify the strike by targeting trucks doing deliveries and entering and leaving the employer's gates. The employer argued that the EFF was seeking to use political power and threats of violence and that the strike ceased to be lawful on account of the associated demands made in service of the wider political goals of the EFF.

The union asserted that it was not in alliance or in partnership with the EFF, and had no control over the EFF and its programs. While some of the union's members could well have been members of the EFF and while the EFF may have demonstrated solidarity with the striking workers, these are not matters that had been sanctioned by the union.

The Labour Court was asked to rule on whether the strike notice was sufficient and the employer asked to have the strike declared unprotected. On the facts placed before the court, the levels and degree of violence and interference by outside parties do not tilt the balance toward a finding that the protected strike called by the union should be declared unprotected.

Whilst on the facts of this case the Court was not prepared to do so, the Court affirmed that there may be circumstances where the levels and degree of violence and interference by outside parties in a strike tilt the balance toward a finding that a protected strike called by the union should be declared unprotected.

Extract from the judgment:
(Van Niekerk J)

[24] Section 64 of the LRA establishes a number of procedural constraints on the exercise of the right to strike. Section 64 (1) (b) reads as follows:

> Every employee has the right to strike and every employer has the right to lock out if – (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer.

.....

[29] Turning next to the applicant's contention that the nature of the strikers changed to an extent that the union no longer pursues the settlement of legitimate demands relating to matters of mutual interest but pursues violence and political matters, it should be recognised at the outset that this court's intervention is reactive and thus limited. The law has its limits. What is obviously required is a more holistic approach and a greater understanding of the factors that contribute to mob violence, together with a pre-emptive process and measures that are supportive of good faith negotiation.

[30] Be that as it may, this court has suggested on a number of occasions that violent and unruly conduct is the antithesis of the aim of a strike, which is to persuade the employer through the peaceful withholding of work to agree to the union's demands. *In Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Fututre of South Africa Workers' Union* (2012) 33 *ILJ* 998 (LC), the court said the following:

> *[13] This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When there are any of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy a protected status.*

[31] Insofar as the applicant's claim has as its basis the contention that what may have been a protected strike has transmuted to an unprotected strike, the Labour Appeal Court has held that such a transmutation would only occur if it is shown that the employees had used the protected strike as leverage to achieve objectives other than those in respect of which strike action could legitimately be taken. (See *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metalworkers of SA & others* (2001) 32 *ILJ* 2939 (LAC), at paragraph 52.)

[32] The proper approach, it would seem to me, is that proposed by Prof Rycroft see Rycroft *supra*) who acknowledges the practical difficulties that clearly arise, not least the determination of how much violence will misconduct would have to have occurred before the court intervenes. He suggests that the court ask the following question 'Has misconduct taken place to an extent that the strike no longer promotes functional collective-bargaining, and is therefore no longer deserving of its protected status'? In answering this question, Prof Rycroft proposes that the court weigh the levels of violence and efforts by the union concerned to curb it. He explains that this is not an anti-union proposal; rather, he imagines a balancing counter-measure allowing unions to launch a similar court application for an order granting protected status to an otherwise unlawful strike if it is in response to unjustified conduct by the employer (see Rycroft *supra* 43). In my view, this is an eminently sensible approach to adopt.

.....

[37] In relation to the acts of violence in respect of which is the applicant seeks to have the strike declared unprotected, it is regrettable that the acts of wanton and gratuitous violence appear inevitably to accompany strike action, whether protected or unprotected. Strike -related misconduct is a scourge and a serious impediment to the peaceful exercise of the right to strike and picket. More than that, it is a denial of the rights of those at whom violence is directed, typically those who elect to continue working and suppliers of those employers who are the target of strike action, and poses serious risks to investment and other drivers of economic growth. A week in the urgent court where employers seek interdicts against strike-related misconduct

on a daily basis bears testimony to this. What is more concerning is that those institutions whose function it is to uphold order (in most instances, the South African Police Services) appear content to remain spectators of wanton acts of violence, intimidation and sabotage, adopting the view that they will intervene if and only if the court order is granted. Why this court should be called upon routinely to authorise and direct the SAPS to execute its statutory functions in relation to strike -related violence is incomprehensible.

[38] While, as it has previously indicated, this court will in appropriate circumstances declare an initially protected strike unprotected on account of levels and degrees of violence which seriously undermine the fundamental values of our Constitution, this is not a conclusion that ought lightly to be reached. A conclusion to this effect itself denies the exercise of fundamental labour rights, and as the Constitutional Court pointed out in *SATAWU*, this court ought not to easily to adopt too intrusive an interpretation of the substantive limits on the exercise of the right to strike.

[39] What the particular threshold might be is not a matter that I am called on to decide, but Prof Rycroft's proposals make eminent sense. On the facts before me, I am not able to find that in the present instance, the nature and degree of violence is not such that the strike no longer promotes functional collective bargaining. Further, the efforts made by the union to curb acts of violence and to disassociate itself from those acts appear to me to be sincere.

(b) Shop stewards

SAMWU and Others v Ethekwini Municipality and Others (DA5/13) [2016] ZALAC 47; [2016] 12 BLLR 1208 (LAC) (2 September 2016)

Principles:

(1) Being shop stewards does not detract from the fact that employees still remain subordinate to their employer, and under an obligation to comply with lawful and reasonable instructions given by the employer.

(2) Insubordination concerns the wilful refusal to comply with an employer's lawful and reasonable instruction. Where the insubordination is gross, in that it is persistent, deliberate and public, a sanction of dismissal would normally be justified.

Facts:

2 shop stewards were employed by Ethekwini Municipality at its South Western depot in Chatsworth, Durban. They were both dismissed in 2008 for misconduct involving gross insubordination, following an incident at the employer's premises. It was alleged that they 'illegally' locked the gate at the depot, preventing staff and contractors from entering and leaving the depot to perform their duties and thereby disrupting the employer's operations. It was also alleged that they were insolent, provocative and intimidatory towards the maintenance manager during this incident.

It was not disputed that the locking of the gate was unauthorised and that this caused a disruption to the employer's operations. The maintenance manager gave evidence that he ascertained from the security guard that the 2 shop stewards had taken the gate keys from him and locked the gate. He then called a meeting attended by, amongst others, the 2 shop stewards. He instructed the 2 shop stewards to open the gate, which they refused to do, informing him that it would only

be opened if he went to the lecture room to address the general staff on certain employee grievances that had been raised. Even when he went to the lecture room to address employees, they still did not open the gate and it remained closed for some 2 ½ hours. The maintenance manager said they defied him in front of other employees and that their refusal to comply with his instructions constituted gross insubordination.

The shop stewards denied taking the gate keys from the security guard and locking the gate, submitting that it was locked by disgruntled employees demanding a meeting with the maintenance manager. They said that they at all times were acting in their capacity as shop stewards and on instructions given by employees.

A disciplinary hearing found them guilty and they were summarily dismissed on 13 March 2009. Dissatisfied with their dismissal, they referred the matter to arbitration. The arbitrator found them guilty of gross insubordination and that their dismissal was substantively fair. He found however that their dismissal was procedurally unfair, on the basis that a presiding officer had been appointed to chair the hearing who was not qualified to do so in terms of the employer's disciplinary procedure. As a result he awarded compensation of R6 289 to the one shop steward and R15 866 to the other.

Dissatisfied with the outcome, they took the matter on review to the Labour Court. In the Labour Court proceedings, the shop stewards submitted that their dismissals were unfair given their many years of service and clean records, and they disputed whether their actions constituted insubordination, let alone gross insubordination. The LC did not agree, and found that there had been a deliberate and serious challenge to management's authority. On the issue of their role as shop stewards, the LC said a shop steward is meant to lead by example and remains an employee. It can never be right for a shop steward to advance as an excuse the argument that what was done was whilst pursuing the interests of members.

The LC accordingly dismissed the shop stewards' review application and they appealed to the LAC. On appeal they failed to convince the LAC that there were grounds to review the arbitrator's award. On the distinction between mere insubordination and gross insubordination, the LAC said it is well settled that where insubordination was gross, in that it was persistent, deliberate and public, a sanction of dismissal would normally be justified.

Regarding their role as shop stewards, the LAC commented that it would appear from their actions that they laboured under a serious misconception that being shop stewards gave them the power and latitude to domineer and bully management as they pleased. The LAC said that being shop stewards does not detract from the fact that employees still remain subordinate to their employers and under the obligation to obey and comply with lawful and reasonable instructions given by the employer.

The LAC found that their dismissals were justified.

Extract from the judgment:
(Ndlovu JA)

[22] In the decision of this Court in *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters and Others,* the distinction between insubordination and gross insubordination was restated:

> *'It is trite that an employee is guilty of insubordination if the employee concerned wilfully refuses to comply with a lawful and reasonable instruction issued by the employer. It is also well settled that where the insubordination was gross, in that it was persistent, deliberate and public, a sanction of dismissal would normally be justified.'*

.....

[27] It would appear from their actions that the employees laboured under a serious misconception that being in the position of shop stewards, as they were, gave them the power and latitude to domineer and bully the management and as they pleased, with impunity. Being affiliated to organised labour does not detract from the fact that employees still remain subordinate to their employers and to obey and comply with lawful and reasonable instructions given by the employers. In the present instance, the employees ought to have been aware and mindful of their responsibilities and limitations in the workplace, in their capacities as shop stewards. The collective agreement made it clear, *inter alia*, that: "*Except as otherwise provided for in this agreement, or any other agreement between the parties, the shop stewards will be subject to the same rules, regulations and other conditions of employment as other employees of the employer."* One of these is that "*an employee…should obey all lawful and reasonable instructions given by a person having authority to do so"*. (Emphasised)

.....

[29] For a period of some 2½ hours, the employer's productive operations had come to a standstill, having been sabotaged by the employees by their actions. They had no legal or moral justification to conduct themselves in that manner. They deliberately and maliciously defied a lawful and reasonable instruction given to them by Mr Dalton, their maintenance manager, who was authorised to give such instruction to them. In the circumstances, I am inclined to hold that the finding of the arbitrator, that the employees committed gross insubordination by refusing to comply with Mr Dalton's lawful and reasonable instruction, was a reasonable finding. Their dismissal was, therefore, justified.

National Union of Metal Workers of South Africa (NUMSA) obo Motloba v Johnson Controls Automotive SA (Pty) Ltd and Others (PA6/15) [2017] ZALAC 14 (3 February 2017)

Principle:
A shop steward should fearlessly pursue the interest of his/her constituency and ought to be protected against any form of victimisation for doing so. However, this is no licence to resort to defiance and needless confrontation. A shop steward remains an employee, from whom his employer is entitled to expect conduct that is appropriate to that relationship.

Facts:
The employee was a shop steward and in that capacity he had a series of discussions with the payroll administrators because he did not agree with their interpretation of the MIBCO's collective agreement regulating how the employees on night shift were to be paid for work performed on a public holiday.

Unhappiness emerged from a group of employees who accused the shop steward of having agreed with the employer's interpretation of the collective agreement. The dissatisfaction culminated into a two and half minute incident which led to disciplinary charges being brought against the shop steward. He was charged with physical and verbal assault, serious disrespect, impudence and/or insolence and/or threatening and/or intimidating.

The shop steward was dismissed and referred an unfair dismissal dispute to arbitration. The arbitrator found that the employee was not guilty on the charges because the employer did not succeed in proving that he acted intentionally and unlawfully. The arbitrator relied on the 1989 Industrial Court decision in ***Food & Allied Workers Union v Harvestime Corporation (Pty) Ltd*** which held that '*an employee, when he approaches or negotiates with a senior official or management, in his capacity as shop steward, does so on virtually an equal level with such senior official or management and the ordinary rules applicable to the normal employer-employee relationship are then somewhat relaxed*.'

The arbitrator concluded that the dismissal was procedurally fair but substantively unfair. He determined that the reinstatement or re-employment of the employee was impracticable because of the required interaction between the complainant and the employee. He ordered compensation equivalent to 12 months' remuneration.

The employee filed an application to review and set aside the arbitration award on the basis that the arbitrator acted irrationally in not ordering that he be reinstated, having found the dismissal was substantively unfair. The employer launched a cross-review against the arbitrator's conclusion that the dismissal was substantively unfair.

The Labour Court was critical of the arbitrator's assessment of the evidence. It also held that to the extent that the arbitrator applied the incorrect "anything goes" approach suggested in *Harvestime Corporation,* he committed a gross irregularity. The Court reasoned that the approach adopted by the arbitrator led to his conclusion that the employee had not committed any physical and verbal assault or any serious disrespect, impudence or insolence or exhibited any threatening and intimidating behaviour towards her. The Labour Court concluded that the only reasonable conclusion to be made on the facts was that the employee committed the acts of misconduct for which he was charged.

On appeal at the LAC, the judgment of the LC was confirmed. The LAC took the opportunity to qualify the judgment in *Harvestime Corporation.*

Extract from the judgment:
(Phatshoane AJA)

[47] As already alluded to, in arriving at the conclusion that the dismissal of decision of the Industrial Court in *FAWU v Harvestime Corporation (Pty) Ltd* where the Court held that in instances where a shop steward approaches or negotiates with a senior official or management he/she does so on virtually an equal level with such senior official or management and the ordinary rules applicable to the normal employer-employee relationship are somewhat relaxed.

[48] The principle formulated in the considerable body of authority both in the Labour Court and in this Court is that a shop steward should fearlessly pursue the interest of his/her constituency and ought to be protected against any form of victimisation for

doing so. However, this is no licence to resort to defiance and needless confrontation. A shop steward remains an employee, from whom his employer is entitled to expect conduct that is appropriate to that relationship. The fact that the bargaining meetings often degenerate does not mean that one should jettison the principle that, as in the workplace also, at the negotiations table the employer and the employee should treat each other with the respect they both deserve. Assaults and threats thereof are not conducive to harmony or to productive negotiation. It is unacceptable to hold that when one acts in a representative capacity "anything goes".

[49] In my view, the incident complained of in this case did not arise during the course of the negotiations or within the context of the collective bargaining process. It simply erupted out of the accusations levelled against Mr Motloba by his constituency that he agreed with Johnson Control's interpretation of the collective agreement. I am of the view that the arbitrator misconceived the nature of the enquiry he was enjoined to undertake in holding that the heated exchange was in relation to an issue of relevance to industrial relations and that Mr Motloba approached Ms Bezuidenhout in his capacity as a shop steward. Even assuming that the heated exchange was in the course of negotiations Mr Motloba's conduct flies in the face of the ample authority referred to in the preceding paragraph. A vociferous and determined shop-steward should act in the best interest of his/her constituency and not in a manner that is improper and unbefitting of the office he/she holds. Reliance by arbitrator on *Harvestime Corporation* in this matrix was plainly wrong and had been correctly found by the Court *a quo* as amounting to a gross irregularity.

McDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and Others (JA10/2016) [2016] ZALAC 32 (28 June 2016)

Principle:
Except where a union needs to prove membership for collective bargaining purposes, the relationship between a union and its members is a private matter. When an employee wants a particular union to represent him in a dismissal proceeding, the only relevant question is that *worker's right* to choose that union.

Facts:
In this case the individual workers had been dismissed in the wake of a strike, allegedly characterised by violence. The dismissed workers referred an unfair dismissal dispute to the bargaining council. The employer raised, as a point *in limine,* the argument that the workers were not at that time members of AMCU, because their membership had lapsed by reason of non-payment of subscriptions in excess of three months, and therefore AMCU could not represent them according to AMCU's constitution.

On review, the Labour Court held that the arbitrator had not properly grasped the provisions of the Union's constitution and, thus, the ruling had to be set aside. Both the arbitrator and the Labour Court framed the rationale for the outcome in terms of the *right of the union* to represent persons. Neither articulated the point that the issue was also about the *individuals' rights to choose a union* to represent them. Neither the arbitrator nor the Labour Court addressed the question of whether an employer has any right to challenge the membership credentials of persons who desire a union to represent them in disciplinary proceedings or before a statutory arbitration forum; (ie the CCMA or a Bargaining Council forum).

The matter was taken on appeal to the LAC, which held that except as regards the need for a union to prove membership for collective bargaining purposes, the relationship between a union and its members is a private matter. When an individual applicant wants a particular union to represent him in a dismissal proceeding, the only relevant question is that *worker's right* to choose that union. Whilst the LAC's reasoning differed from that of the LC, it nevertheless dismissed the appeal and confirmed the Labour Court's decision.

This approach is a confirmation of the provision in Item 4(1) of the Code of Good Conduct: Dismissal where it simply says: *"The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee."* How this should be applied, we think, would depend on the facts of each case, decided on the basis of fairness / reasonableness. For example, an employee based in Durban could not automatically expect to demand representation from a fellow employee based in Johannesburg. The concept of a 'workplace' as defined under s213 and what constitutes the workplace for a particular organisation, may be a useful guideline. An employer would have to be able to motivate good practical reasons why representation should for example be restricted to a specific department within the workplace.

Extract from the judgment:
(Sutherland JA:)

Whose rights are at stake?

[32] Both the arbitrator and the Labour Court, on the premise of the parties' presentation of their cases, treated the matter as if the representation issue was solely about the union's *right to "represent"* its members. However, it is also, and moreover, primarily, concerned with the *rights of the individual workers* who were parties to the dispute before the forum, to *choose their representatives*.

[33] The rules of the CCMA regulate representation of parties in misconduct proceedings before the CCMA. There is nothing before the court to suggest that the Bargaining Council did or could apply different norms.

[34] CCMA Rule 25(1)(a)(ii), stipulates that a person who is a party to a dispute, may be represented in conciliation by an office bearer, official or member of that person's registered union. Rule 25(1)(b) ii extends that right to arbitration proceedings. These provisions say nothing about a unions' right to represent their members in such proceedings.

.....

[40] Bluntly, what business is it of an employer, in such circumstances, to concern itself with whether membership dues are up to date or any other aspect of the relationship between individual employees and their union? In my view, there is no basis at all.

[41] On the facts of this case, the individuals claimed to be members and the union claimed them as members. Assuming that the employer's challenge that the individuals were not in good standing were to be true, surely the choice of the union to elect not to cancel the membership or enforce specific performance is one which it can make without regard to any third party? No creditor is by law obliged to cancel a contract because the debtor fails to comply with the terms of the contract. Moreover, it has been held by Basson J in *Transport and General Workers Union and Others v Coin Security Group (Pty) Ltd* (2001) 22 ILJ 968 (LC) at [160] – [161] that an employee who appears before the Labour Court represented by a union pursuant to

Section 161(c) of the LRA, needs not have been a member at the time of that employee's dismissal. If that be so, the relationship between union and a purported member in such proceedings is not dependent, in the least, on a history of membership, a point also latent in the decision in *County Fair (Supra)*

[42] Moreover, except as regards the need for a union to prove membership for collective bargaining purposes, the relationship between a union and its members is a private matter. To interfere with the private contractual relationship of other persons, a stranger would have to demonstrate some sort of delictual harm. None exists to justify the appellant seeking to pierce the veil of AMCU's internal affairs in relation to the dismissal dispute. If regard be had, for example, to the requirements for an interdict, the appellant, on these facts, can demonstrate neither a right nor a harm. The appellant's legitimate interest in the validity of membership for another purpose, relating to it incurring an obligation to accord AMCU a representative status, is quite distinct from any legitimate concerns it might conceivably have in relation to arbitration proceedings about misconduct.

(c) Derivative Misconduct

***Dunlop Mixing and Technical Services (Pty) Ltd & Others v NUMSA obo Nganezi & Others* (D345/14) [2016] ZALCD 9; (2016) 37 ILJ 2065 (LC); [2016] 10 BLLR 1024 (LC) (11 May 2016)**

Principle:
Where a reasonable inference can be drawn that employees were present during misconduct, a failure to come forward and either identify the perpetrators, or explain why they could not do so, constitutes derivative misconduct.

Facts:
The employer's business is based in Howick in the KZN midlands. During August 2012, employees went on a protected strike over a wage dispute declared by Numsa, their Union. The strike was characterised by violent confrontations between the strikers and supervisors in a dangerously volatile situation, and serious acts of misconduct occurred involving attacks on vehicles and placing the Company's premises under siege. An interdict was obtained restricting the striking employees from being within 50 metres of the access road to the Company's premises and interdicting the unlawful conduct. Despite this, it continued for over a month.

Right from the commencement of the strike, management called upon the Union and employees to come forward with information about the identity of the perpetrators of the misconduct and the violence. After the strike, employees continued to fail to comply with instructions to identity the perpetrators. Of a total of 107 striking employees, 29 employees were subsequently dismissed for specific acts of misconduct identified as well as derivative misconduct, and the remaining 78 employees were dismissed for derivative misconduct only. Employees dismissed for derivative misconduct referred an unfair dismissal dispute to arbitration at the CCMA.

The arbitrator found that the dismissal of 42 of the striking employees was both substantively and procedurally fair. Whilst some of these employees had been found guilty of direct misconduct, a number of these employees who were found to have been fairly dismissed were dismissed for derivative misconduct only. These

employees had all been proved as having been present when the acts of misconduct occurred.

The arbitrator drew a distinction between those employees who, based on the evidence led, had been found to be present during the misconduct and those in respect of whom no such direct evidence existed. The arbitrator found that the dismissal of the balance of 65 employees for derivative misconduct was unfair, on the basis that there was no evidence that showed they were specifically identified as having been present during the misconduct. Dissatisfied with the award, the employer took it on review to the Labour Court.

The Union opposed the review application on the basis that there was insufficient evidence to show that the 65 employees committed any wrongdoing or were even present during the misconduct. As such, the employer's claim that it could no longer trust these employees was irrational and irrelevant in the absence of any evidence of wrongdoing on the part of the employees.

The Labour Court did not agree with the Union's submissions, and found that the Union's approach ignores the fact that the nature of the derivative misconduct lies in the failure of the striking employees to come forward and assist the employer to identify the perpetrators. Whilst these employees were not specifically identified as having been present during the misconduct, the LC came to the conclusion that this could be inferred from the facts of this case. The LC was satisfied that the only reasonable inference that could be drawn from the evidence was that the employees were present during the strike and the misconduct: if they weren't present or had no information regarding the perpetrators, they would have utilised the opportunities afforded them to come forward and say so, and yet they did not.

Under such circumstances, the LC found that the employees could not hide behind the right to remain silent, given that none of them chose to give evidence at the internal hearings or at the arbitration. There was in these circumstances a positive duty on these employees to come forward and either identify the perpetrators, or explain why they could not do so – for example, by saying they weren't there.

The LC concluded that the employees were guilty of derivative misconduct by failing to come forward and either –

- exonerate themselves by explaining they were not present and could not identify the perpetrators; or
- identify the perpetrators who committed the misconduct.

The LC commented that whilst the right to remain silent is sacrosanct in criminal matters where accused persons are presumed to innocent until found guilty, this presumption of innocence does not apply in these proceedings. The LC found that by failing to come forward and provide an explanation in circumstances in which it could be inferred they were present during the misconduct, they had breached the employment trust relationship and their dismissals were acordingly fair. On the basis the arbitrator's award was overturned.

Extract from the judgment:
(Gush J)

[41] The third respondent concluded that the applicant bore the onus of "proving on a balance of probabilities **that the [employees] knew who the perpetrators of the principal misconduct were and that they failed to disclose such information** to the [applicants]".

[42] This conclusion ignores the fact, as dealt with above, that the derivative misconduct the applicants relied upon related, in addition to failing to identify the perpetrators, to a breach of trust arising from the failure to come forward. Either to identify the perpetrators or exonerate themselves.

.....

[48] In analysing the evidence it is apparent that the third respondent in determining whether the applicants had discharged the onus, lost sight in the final analysis of that aspect of the derivative misconduct for which the employees were found guilty and dismissed. The third respondent failed to consider firstly whether a reasonable inference could be drawn that the respondent employees were present and secondly if such an inference could be drawn whether the failure of the employees to come forward and provide either an explanation exonerating themselves or providing the names of the perpetrators constituted derivative misconduct.

.....

[54] It is abundantly clear from the record and the evidence as summarised and analysed by the third respondent that the applicants themselves regarded the failure of the employees to come forward with information relating to the perpetrators of principal misconduct **or** to exonerate themselves constituted a breach of the relationship of trust and confidence.

[55] In analysing the evidence and considering the various incidents the third respondent appears to concentrate only on the simple issue of whether the applicants were able to identify who was present or not. This approach is inexorably linked to the third respondent's failure to consider whether it could be inferred that the respondent employees were present and "through their silence make themselves guilty of a derivative violation of trust and confidence".

.....

[58] The record reflects that it was not the respondents' case that the respondent employees were neither on strike nor present during the acts of misconduct. The respondent employees simply remained silent. The witnesses who gave evidence on behalf of the respondents simply denied any misconduct, breach of the strike and picketing rules or the interdict.

[59] It is trite that the arbitration was a hearing *de novo*. The respondent employees had been afforded an opportunity to come forward before they were dismissed. This opportunity was again available to them at the arbitration. In the face of the extensive evidence relating to the presence of the striking employees and of the serious misconduct the first respondent and the employees elected deliberately not to give evidence or an explanation. (Besides Duma and Grantham whose evidence was simply to the effect that no misconduct took place, which evidence was rejected by the third respondent.) The right to remain silent is sacrosanct in criminal matters where accused persons are presumed to innocent until found guilty. This is not a criminal investigation and the presumption of innocence does not apply.

[60] The issue in question in this matter is whether the respondent employees were entitled despite the nature of the employment relationship to passively remain silent in the face of an opportunity to assist in the investigation. The Courts have repeatedly stressed the nature and essence of the employment relationship which is based on trust and good faith. The response by the respondent employees in this matter particularly taking into account the evidence adduced by the applicants to simply remain silent was a breach of that trust.

.....

[76] I am satisfied that the only reasonable and plausible inference that can be drawn from the evidence is that the respondent employees were present during the strike and

accordingly during the misconduct. If they weren't present or had no information regarding the perpetrators they would have said so. They, despite the opportunities afforded them, did not.

.....

[78] Despite the fact that tension often runs high during industrial action the level of misconduct and violence and the duration thereof in this matter reinforces the necessity for employers to be able on to rely on the "duty of good faith towards the employer" and that the employee "breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined." This duty must extend to the opportunity to exonerate oneself. Specifically when the employer has repeatedly requested information regarding the perpetrators of the misconduct and the striking employees are well aware of this.

[79] In the circumstances of this matter and in particular given the serious nature of the misconduct suggests the failure to provide an explanation constituted misconduct and justified the disciplinary action. The evidence adduced by the applicants created an inference that the respondent employees were present. Accordingly, as employees of the applicants, the "essentials of trust and confidence" demanded that they do more than simply remain silent. Their failure to come forward and provide an answer constituted derivative misconduct. The third respondent did not consider whether such an inference could be drawn and in so doing did not take into account material that was properly placed before him. This constitutes a valid ground of review.

(d) Union recognition

***AMCU & Others v Chamber of Mines of SA & Others* (CCT87/16) [2017] ZACC 3 (21 February 2017)**

Principles:

1. The 'workplace' is not the place where any single employee works – it is where employees collectively work. In determining that, 'location' is not the primary factor, 'functional organisation' is. A 'workplace' may be a single location or a number of locations, based on the independence of those operations in the light of their size, function and organisation.
2. Majoritarianism is a recurrent theme throughout the LRA. Whilst its application may limit the right to strike, this is justified through benefitting orderly collective bargaining.

Facts:

The Chamber of Mines, acting on behalf of its members in the gold mining sector (including Harmony Gold, AngloGold Ashanti and Sibanye Gold), negotiated wages and working conditions with unions representing the majority of workers in the sector, namely NUM, Solidarity and UASA. The resulting collective agreement expressly made it applicable to all the companies' employees in terms of s23(1)(d) – ie even those not members of those unions.

AMCU did not accept the employers' offer and was not a party to the agreement. In January 2014, it notified the three companies mentioned above that its members were going on strike from 23 January 2014 at 5 specific mines at which it had majority membership. AMCU was not however the overall majority union at any of the mining companies who own those mines. In response, the Chamber obtained a Labour Court interdict in terms of s.65(1) and (3), which prohibit striking by anyone

who is bound by a collective agreement that either prohibits a strike or even regulates the issue in dispute. The LC accepted that AMCU's members at those mines were bound by the collective agreement concluded with the majority unions.

AMCU appealed the LC decision to the LAC, but failed. This was then referred to the Constitutional Court. The crisp issue facing the CC was whether the collective agreement negotiated with the unions having an overall majority in the sector, applied at the 5 mines at which AMCU had a majority. This required the CC to consider and apply the definition of a "workplace" in s213, which provides as follows:

"If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation".

The CC accordingly had to decide whether each mine where AMCU had a majority was an *"independent operation"* by reason of its *"size, function or organisation"*? In summary, AMCU argued that the collective agreement should not have been extended in terms of s23(1)(d) to apply at those 5 mines at which it had majority membership, as the other unions did not have a majority at those workplaces – those mines should have been regarded as "the workplace" for the purposes of the LRA. Further, the application of s23(1)(d) in this instance was unconstitutional, as it interfered with the constitutional right of AMCU's members to strike.

The CC did not agree. The CC confirmed that for the purposes of the LRA, a 'workplace' is not the place where any single employee works – like that individual's workshop or assembly line or desk: it is where employees ***collectively*** work. And in determining that, ***'location'*** is not the primary factor, ***'functional organisation'*** is. This then means that a 'workplace' may be a single location or a number of locations, based on the independence of those operations in the light of their size, function and organisation.

On the facts of this case, the CC agreed with both the LC and the LAC that the 5 mines at which AMCU had majority membership, were not independent operations. The CC found that each mining company constituted a single industry-wide workplace, despite the fact that at some of the individual mines, the companies had concluded separate recognition agreements with AMCU.

The CC noted that majoritarianism is a recurrent theme throughout the LRA. The CC recognised that its application in this instance limited the right to strike, but that this was justified in that majoritarianism, in this context, benefitted orderly collective bargaining.

The key then to determining the workplace is whether the operation is 'functionally independent' – *not* where it is located. This will be determined on the facts of each case. Parties intending on persuading a court to accept their interpretation of the 'workplace' in their particular circumstances, will need to lead convincing evidence relating to the independence of that workplace on the basis of its size, function and organisation.

Extract from the judgment:
(Cameron J)

[24] Two things are immediately notable about the way the statute defines "workplace". The first is its focus on employees as a collectivity. The second is the relative immateriality of location. Both signal that "workplace" has a special statutory meaning.

[25] First, "workplace" is not the place where any single employee works – like that individual's workshop or assembly line or field or desk or office. It is where "the employees of an employer", collectively, work. The statute approaches the concept from the point of view of those employees as a collectivity. This accords with the role the term "workplace" plays in the LRA. This sees workers as a collectivity, rather than as isolated individuals. And that in turn squares with the statute's objects. The promotion of orderly bargaining by workers, collectively, is one of the statute's express primary objects. That the focus of the definition of "workplace" is on workers as a collectivity rather than as separate individuals fits.

[26] The second point follows. It is that location is not primary: functional organisation is. The definition encompasses one or more "place or places where employees of an employer work". This means that "the place or places" where workers work may constitute a single workplace. That entails the intrinsic possibility of locational multiplicity for a single "workplace". Right at the outset this eliminates any notion, which the ordinary meaning of "workplace" might encourage, that each single place where a worker works is a separate "workplace".

[27] The first part of the definition creates a default rule that, regardless of the places, one or more, where employees of an employer work, they are all part of the same workplace. The second part superimposes a proviso in the form of an exception – regardless of how many places where employees work, different "operations" may be different workplaces only if they meet the criteria the definition specifies. The key is whether an operation is independent – not where it is located. Yet again, no significance is attached to the "places" where employees work, since the term features in both parts of the definition. Each independent operation, which constitutes a separate "workplace", may itself be at one or more separate locations.

[28] Hence the proviso determines not so much whether separate physical places of work are separate workplaces, but rather whether independent "operations", however geographically dispersed, are separate workplaces. The pivotal concept is independence. If there are two or more operations and they are "independent of one another by reason of their size, function or organisation" then "the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation". This is a test of functional organisation, and not geography or location.

.....

[30] It is this statutory definition the Labour Court and the Labour Appeal Court applied. Was each AMCU-majority mine a separate "workplace"? That depends not on the mines' geographic location or where the individual workers worked, but on the functional signifiers of independence the definition lists. It requires one to determine whether the employer companies conduct two or more operations "that are independent of one another by reason of their size, function or organisation".

[31] On this question, the facts before the Labour Court and the Labour Appeal Court were not in dispute. They related to the organisational methodology and practicalities of each mining company. The Labour Court and the Labour Appeal Court both found, in conclusory terms, that the individual AMCU-majority mines did not constitute independent operations. They were not swayed by the fact that, at some of the individual mines, the companies had concluded separate recognition agreements with AMCU. Each mining company constituted a single industry-wide workplace.

.....
[50] AMCU is right that the codification of majoritarianism in section 23(1)(d) limits the right to strike. The key question is whether the principle provides sufficient justification for that limitation. Both the Labour Court and the Labour Appeal Court gave detailed and extensive consideration to this. I do not seek to improve their reasoning. In short, the best justification for the limitation the principle imposes is that majoritarianism, in this context, benefits orderly collective bargaining.

BCEA

TFD Network Africa (Pty) Ltd v Singh N.O. and Others (CA16/15) [2016] ZALAC 50 (8 November 2016)

Principle:
Where protective measures, specifically transport, are not available to an employee required to perform night work, the employee is entitled to raise the absence of those measures as a defence to a charge of failing to work or disobeying an instruction.

Facts
A truck driver was contractually obliged to work overtime when his employer required him to do so. His terms and conditions of employment were regulated by the National Bargaining Council Agreement of the Bargaining Council for the Road Freight Industry of 2004 as amended and certain provisions of the Basic Conditions of Employment Act 75 of 1997 (the BCEA).

On 6 and 7 December 2010, while working his usual shift that ended at 17:00, the employee was instructed to work overtime until 19:00. He was of the view that he could not work until 19:00 because of a lack of transport to his home. But, he was prepared to work until 18:00 and did so. He then left to catch the bus, which would drop him off near his place of residence. He explained why he could not work until 19:00. This was because he would be obliged to board a bus that left at 19:15 and disembarks at the centre of Mitchell's Plain. He lived in Lentegeur and so would have to walk about 2 km to his place of residence. He said that it was not safe to walk home at this time of night.

The employee was called before a disciplinary inquiry charged with breaching his contract by failing to work overtime and refusing to obey a reasonable order. The chairperson rejected his defence and dismissed him as he had previously been disciplined for a similar offence.

The employee's union referred a dispute to the Bargaining Council for the Road Freight and Logistics Industry which had jurisdiction. At the arbitration the employer contended that the employee had not been requested to perform night work as the majority of the shift did not fall within the hours 18:00 and 06:00.The arbitrator rejected these contentions and found for the employee. In doing so, he held that when overtime work is performed beyond 18h00 it falls under night work. There is nothing in the BCEA to suggest otherwise. If an employee is required to perform work at night, the employer must ensure that transportation is available between the employee's place of residence and the work place at the commencement and conclusion of the shift.

The employer was dissatisfied with the award and launched review proceedings in the LC. The court held these were the relevant principles:
(a) transportation needs only be available; the employer needs not to provide transport if there is public transport available;
(b) if the employee's full shift falls within the hours 18:00 and 06:00 there is no doubt that the transport subsection applies;
(c) the purpose of the regulation of night work is to avoid or minimize health risks and includes risks to the safety of workers during their commuting to and from work;
(d) the concept of night work does not require work to be regularly performed; and
(e) the award was not so unreasonable that no other arbitrator could have come to the same conclusion.

The appeal was dismissed by the LAC which confirmed when the obligation to provide transport is triggered and, importantly, held that the refusal to work if transport is not provided for night shift employees is justified.

Extract from the judgment:
(Landman JA)
[15] The background facts are not decisive in this appeal. The clauses relating to night work apply regardless of gender, geographical location, whether it is light or dark at 18:00 or 06:00, and whether the employee lives in a dangerous area or one that is generally considered to be a safe area.

[16] Night work raises a number of concerns, including the health, safety, compensation and transport of employees who perform work at night. It is for these reasons that night work is regulated by statute and by bargaining council agreements for the protection of these employees. Crucial to the governance of night work is the concept of night work.

[17] The submission that the preponderance of the working shift must resort within the hours of 18:00 to 06:00 for the employee's work to constitute night work, has no foundation. To a large extent, this submission echoes the definition of night work that has been scrapped by the parties to the bargaining council. There is simply no indication that the parties to the council agreement intended night work to bear anything resembling the previous concept. The definition is unambiguous and does not lead to absurd results. It is apparent from clause 17 that all work performed between 18:00 and 06:00, whether occasional or regular work, is night work. But, work performed between 23:00 and 06:00 on a regular basis attracts further obligations for the employer as regards these employees.
.....
[25] The finding by the arbitrator that the dismissal was substantively unfair is a finding that cannot be interfered with and cannot be faulted. Where the protective measures are not available to an employee required to perform night work, the employee is entitled to raise the absence of those measures as a defence to a charge of failing to work or disobeying an instruction.