Worklaw's March 2022 Subscriber Webinar

Contents

Key factors to prove the fairness of dismissals resulting from mandatory vaccination policies.

Many employers have begun implementing mandatory vaccination policies for their employees and it was inevitable that this would give rise to disputes. At the time of writing two arbitration cases have been finalised at the CCMA, *Theresa Mulderij v Goldrush Group* dealing with an unfair dismissal and *Gideon J Kok v Ndaka Security* on an unfair labour practice, with both decided in favour of the employer.

Dismissal for not vaccinating ruled fair

In *Theresa Mulderij v Goldrush Group case no GAJB 24054-21 dated 21 January 2022* the employee, a training officer, was dismissed on grounds of incapacity as a result of her decision not to comply with the employer's mandatory vaccination policy. At her hearing, the presiding officer found that her incapacity was permanent, as she indicated that she had no intention of being vaccinated. Evidence was led that there were no other suitable positions that she could occupy, which did not require vaccination. She applied for exemption from the mandatory vaccination policy through the exemption committee established by the employer, but this was declined on the grounds that she was a high-risk individual who interacts with colleagues daily in confined spaces. This put her at risk and exposed her colleagues to the risk of possible infection. She appealed the committee's decision but this was turned down.

The employee challenged the substantive fairness of her dismissal. She based her case on a constitutional right to bodily integrity under section 12(2) of the Bill of Rights in the SA Constitution. She also felt extreme social pressure and emotional discomfort in having to decide between her livelihood and accepting the vaccine, doubting the efficacy of vaccines and worried about their side effects. She claimed she had at all times strictly followed the required Covid protocols and had never been infected or had infected anyone else.

The CCMA arbitrator found that she was permanently incapacitated on the basis of her decision to not get vaccinated and had failed to participate in creating a safe working environment. The arbitrator noted that the LRA recognised incapacity as a legitimate ground for dismissal, and that the employer had followed all the legislated steps in establishing its mandatory vaccination policy. The arbitrator mentioned he was influenced by a memo written by Judge Roland Sutherland, Deputy Judge President of the Gauteng Division of the High Court, to fellow colleagues on the issue of workplace vaccinations, which stated –

"If one wishes to be an active member of a community then the incontrovertible legitimate interest of the community must trump the preferences of the individual."

The arbitrator concluded that her incapacity dismissal was fair. We await to see whether the award is taken on review.

Suspension pending vaccination ruled not an unfair labour practice.

In *Gideon J Kok v Ndaka Security and Services case no FSWK2448-21 dated 25 January 2022* the employee was a safety practitioner employed by a private security company that rendered services to various companies including Sasol. Sasol required a 100% vaccination rate applicable to its service providers, but the employee was not willing to be vaccinated for various reasons. He was offered the alternative of submitting weekly negative tests at his own cost, and whilst he made use of this on some occasions, he was subsequently no longer willing to pay for these tests. He was then ordered to stay at home and only return to work once vaccinated or if prepared to submit weekly negative test results. He was still being paid during this period.

The employee claimed his suspension constituted an unfair labour practice based on his views on his constitutional and other legal rights. Whilst the employer contested whether its actions constituted a suspension, the arbitrator ruled that he had jurisdiction to deal with the matter as an alleged unfair labour practice.

The arbitrator went to great lengths to set out the required steps an employer has to follow in implementing a mandatory vaccination policy in terms of the gazetted Covid **Workplace Occupational Health and Safety Measures**, and the extent to which the employer in this case complied with these Measures. In addition, the arbitrator referred to the relevant sections in the Bill of Rights in the Constitution, particularly section 12(2) dealing with the right to bodily and psychological integrity, and section 36 providing for the limitation of individual constitutional rights. The arbitrator concluded that it was fair to limit the employee's constitutional rights under the circumstances of the Covid pandemic, in the interests of attempting to achieve a safe working environment for everyone.

The arbitrator said the requirement for employees to vaccinate was nothing less than what was required of an employer to take "*reasonably practical measures*" to ensure a healthy and safe workplace under section 8(1) of the Occupational Health and Safety Act, and found that the employer had not committed an unfair labour practice.

Criteria for determining the fairness of a non- vaccination dismissal

Although both the above 2 cases were decided in favour of the employers' mandatory vaccination policies, we think many cases are likely to be decided on their specific facts, as opposed to an 'in-principled' view in favour of or anti vaccination. The consequence of this is that some dismissal or unfair labour practice cases will be interpreted to be in favour of mandatory vaccination whereas others may be perceived to be against it, and we may not develop a uniform approach in light of the different scenarios that will come under scrutiny.

So what are the different factors that may influence the outcome of these cases? We think parties dealing with these types of disputes would do well to lead evidence on factors such as the following:

1. **<u>The extent to which the employer, in implementing its mandatory vaccination policy, complied with legislated procedures</u>.**

The revised Occupational Health and Safety Measures gazetted on 11 June 2021, <u>and in particular Annexure C</u>, set out a detailed process employers would have to follow in implementing a mandatory vaccination policy. In both awards discussed above, the arbitrator closely scrutinised the extent to which the employer complied with its statutory obligations in this regard. Non-compliance may well result in findings of unfairness, and in particular procedural unfairness.

In summary, the Measures (in respect of mandatory vaccination), require the employer to –

- **undertake a risk assessment**, identifying those employees who must be vaccinated by virtue of the risk of transmission through their work, or their risk of severe Covid due to their age or comorbidities;
- on the basis of the risk assessment, **develop a plan** outlining the vaccination measures it intends to implement, including notifying identified employees of -
    - the obligation to be vaccinated;
    - the right to refuse vaccination on constitutional or medical grounds;
    - the right to consult a health and safety or worker representative or trade union official;
- **take into account the Constitutional rights of employees** to bodily integrity (section 12(2)) and freedom of religion, belief and opinion (section 13), in developing and implementing the plan;
- **consult** on the risk assessment and plan with any representative unions and any health and safety committee or representative;
- **make the plan available for inspection** by a labour inspector, health and safety committee or representative;
- **provide workers with information** about vaccines used in SA, their benefits, contra-indications, and the risk of any serious side effects;
- **give employees paid time off to be vaccinated,** subject to them providing proof of vaccination during working hours;
- if reasonably practical, **provide transport** to and from vaccination sites;
- **place employees on paid sick leave who suffer vaccination side effects and are unable to work (**whether or not they have sick leave available under the BCEA), accepting an official vaccination certificate in lieu of a medical certificate, **<u>or</u> lodge a claim for compensation** in terms of the compensation for Occupational Injuries and Diseases Act (COIDA);

<u>Note</u> that an employer's wider non-mandatory vaccination obligations in terms of the Measures have, for the sake of brevity, not been dealt with in this document.

If an employee refuses to be vaccinated on any constitutional ground (right to bodily integrity, and the right to freedom of religion, belief and opinion) **or medical ground** (an immediate allergic reaction of any severity to a previous dose or a known, diagnosed allergy to a component of the Covid-19 vaccine), the employer should –

- counsel the employee and if requested, allow the employee to seek guidance from a health and safety or worker representative, or trade union official;

- refer for further medical evaluation should there be a medical contraindication for vaccination;
- if necessary, take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated (note this is discussed in more detail under clause 4 below).

One issue that parties (and arbitrators and judges) will have to grapple with, is the (in our view absurd) requirement under s3(1)(a)(ii) of the Measures that employers had 21 days from the date they came into effect (11 June 2021) to decide whether to implement mandatory vaccination. We have no idea why the drafters saw the need for such urgency, and most employers who have since implemented mandatory polices have ignored this time limit. It remains to be seen whether future revised Measures that may be gazetted, deal with this issue.

2. Which employees the employer applied the policy to, and whether it is able to justify its application?

It is important to note that there appear from the Measures (see section 3(1)(a)(ii)), to be 2 distinct justifications for implementing mandatory vaccination: **firstly** due to the risk of transmission through employees' work, and **secondly** employees' own risk of severe disease or death due to their age or comorbidities.

Some organisations have applied policies 'across the board' for all employees, whereas others have applied them only in respect of specific categories of employees. Either way, the employer would have to justify its application, based on the risk assessments conducted and the operational requirements of employees' positions and/or their age and health profiles.

In theory, it may be easier to defend a selective mandatory vaccination policy as opposed to a blanket policy. Organisations may however find that whilst they initially set out to implement this policy on a selected basis, they ended up applying it virtually 'across the board', if employees for example all use the same entrance facilities, stairways, corridors, lifts, toilets and canteen facilities. Organisations may find that there are an extremely limited number of employees not similarly affected.

3. How the employer dealt with the employee's reasons for refusing the vaccine?

Aside from the legislated requirements in the Measures which the employer obviously has to comply with, many employers have gone to great lengths to set up exemption application committees and further appeal processes. These may be very successful in limiting the number of disputed cases to be dealt with, in many cases finding solutions. For example, it may be found that the mandatory policy has no application in an employee's case, posing no safety risk.

Where we think problems may arise, is when an exemption committee takes it upon itself to interrogate the employee's alleged constitutional, religious, health or related reasons for refusing to be vaccinated, and differentiates their responses based on their assessment of the reasonableness of those objections. For

example, some organisations have reportedly adopted the approach that if they consider the employee's objections to be without merit, they then treat that situation as a failure to comply with a reasonable instruction, resulting in misconduct proceedings if the employee continues to refuse to be vaccinated. We doubt whether an employee's refusal to be vaccinated can ever constitute misconduct, given the right of an employee to refuse vaccination on constitutional or medical grounds (see section 5(a)(ii) of Annexure C to the Measures).

We suggest it will often be very difficult for an exemption committee to judge a sincerely held, subjective view put forward by an employee based on constitutional or medical grounds. It is also important to note that even if an exemption committee decides an employee has a valid objection, he / she should still not be allowed to pose a safety risk to others or to themselves.

For these reasons, we suggest a safer approach may be to attempt to reasonably accommodate all objecting employees where possible under clause 4 below, without necessarily interrogating their reasons for refusal.

4. Whether the employer attempted to reasonably accommodate objecting employees?

Annexure C of the Measures requires the employer to take steps to reasonably accommodate objecting employees in alternative positions not requiring vaccination. Annexure C provides that 'reasonable accommodation' means any modification or adjustment to a job or working environment that would allow the objecting employee to remain in employment, and gives examples of what may constitute 'reasonable accommodation':

- Permitting the employee to work offsite, at home or in isolation at work, or outside ordinary working hours.
- In instances of limited workplace contact with others, wearing an N95 mask.

Parties should be prepared to lead evidence on the extent to which they attempted to reasonably accommodate objecting employees, and the extent to which such opportunities were available.

Whilst the Measures do not specifically deal with what happens if an employer is not reasonably able to accommodate objecting employees, they do incorporate relevant portions of the Disability Code of Good Practice, which include the following:

- **Sections 6.11 – 6.13** that state an employer need not accommodate an employee if it would impose "*unjustifiable hardship*" on the employer's business, described as "*significant or considerable difficulty or expense*". This involves considering the effectiveness of the accommodation and the extent to which it would seriously disrupt the business operations.
- **Section 12.1** that specifically provides that if the employer is unable to retain the employee in employment, "***the employer may terminate the employment relationship***".

It can therefore be argued that, by incorporating section 12.1 of the Disability Code, the Measures do provide for termination of employment if an objecting employee cannot be reasonably accommodated.

5. How the employer categorised reasons for dismissal?

The LRA requires an employer to substantiate the fairness of a dismissal under one of three headings - misconduct, incapacity or operational requirements. The employer in the *Theresa Mulderij v Goldrush* arbitration case discussed above categorised the dismissal as one of incapacity and this was found by the arbitrator to be fair. Broadly speaking, we suggest that 'incapacity' may be the most appropriate category in many instances, whilst other commentators have favoured 'operational requirements' as the category to use.

Whatever category is considered most appropriate, the employer should be prepared to lead evidence that it has complied with all legislative requirements and the procedural and substantive fairness requirements of any applicable Code of Good Practice. Note that if an employer goes the operational requirements route, it would have to comply with all the process requirements of section 189 of the LRA and pay severance pay, unless the employer was able to show that the employee "*unreasonably refused an offer of alternative employment*" (eg by accepting a requirement to be vaccinated) under section 41(4) of the BCEA.

We trust that these suggestions provide practical guidelines to Worklaw subscribers at this point in time in dealing with these types of cases. This is obviously a developing and fluid topic, that will be influenced by any amending legislation, future awards and judgments. It is also crucial to note that implementing mandatory vaccination must continue to be based on current science, which may also change over time as circumstances develop. This should also be carefully monitored.

CASE LAW INDEX

1. Fixed term contracts - not fixed?

Farinha v Boogertman and Partners (J 437/2019) [2021] ZALCJHB 17 (11 February 2021)

Principles:

1. Under the common law there is no right to terminate a fixed-term contract of employment prematurely, in the absence of a material breach by the other party. By entering into a fixed term contract for a specific period, the parties intend to be bound by the contract for the stipulated duration *unless* there is express provision made for earlier termination.
2. Bumping on the basis of longer service is subject to factors such as skill, compatibility and client contacts, particularly at senior levels of management.

Facts

The employee was a project architect employed in July 2016 in terms of a fixed term contract linked to the completion of the Fourways Mall project. But the wording of the contract was confusing and contradictory. The preamble to the contract stated that its duration was "*until suspension, termination or completion of the …..Fourways Mall project and any related work*". Clause 3 however, headed "*Termination of service*", provided in somewhat clumsy wording for the contract to be terminable on 1 calendar month's notice.

As a result of a number of projects having been put on hold, delayed or discontinued, the employer issued the employee a s189 retrenchment consultation notice on 28 February 2019, less than 3 years after being employed. After a consultation process, the employee was retrenched on 15 March 2019.

The employee had expected the Fourways Mall project to last at least 5 years, and had arranged his life accordingly. He referred an unfair dismissal dispute to the CCMA, challenging his retrenchment on 2 grounds: firstly that it was unlawful, given that he claimed he had been employed on a fixed term contract, and secondly, that it was substantively unfair, as he should in any event not have been selected for retrenchment.

The Court noted that "*the contract was not drafted in the clearest of terms*", and found that there was an incongruity between what appeared in the preamble and clause 3. In interpreting the contract the Court had regard to the language and wording used, the purpose of the document, and the background to the preparation and production of the document. The Court found that the contract was a 'hybrid', being a fixed term contract but with the right to terminate prematurely on notice. It said that the language of clause 3 was clear, and imposed notice periods that either party could invoke to terminate the contract. The heading to the clause - "Termination of service" – also made it clear that notice periods were established precisely for the purpose of terminating the contract.

The Court said the principle established by the LAC in Buthelezi v Municipal Demarcation Board *(2004) 25 ILJ 2317 (LAC)* applied in cases that were 'truly' fixed term contracts. The LAC in that case said that when an employment contract is entered into for a fixed term, the courts will hold the parties to the fixed term and not permit any premature termination of the contract, except when one of the parties materially breaches its terms. The Court referred to Lottering & Others v Stellenbosch Municipality *(LC Case no.: C159/2010 Date of judgment: 7 May 2010)* as authority for the view that if the contract is for a fixed term, the contract may be terminated on notice where there is a specific provision permitting termination on notice during the contract period.

The LC concluded that the contract showed that the parties intended the employee, 'all things being equal', to be employed for the duration of the Fourways Mall project, but that either party remained entitled during that period to give the other 1 calendar month's notice to terminate the contract.

With regard to the employee's claim that his retrenchment was substantively unfair, the LC rejected his view that he ought to have 'bumped' another architect. The Court accepted that the other architect was more familiar with the demands of the project, had a good working relationship with the contractor, and was better placed to see the project to completion. The Court said bumping on the basis of longer service has always been subject to factors such as skill, compatibility and client contacts, particularly at senior levels of management.

Extract from the judgment:
(Van Niekerk J)
[8] When an employment contract is entered into for a fixed term, the courts will hold the parties to the fixed term and not permit any premature termination of the contract, except where one of the parties acts in material breach of the contract. fixed-term contract of employment. In *Buthelezi v Municipal Demarcation Board* [2005] 2BLLR115(LAC) in which the Labour Appeal Court (at 9) stated as follows:

> *There is no doubt that at common law a party to a fixed -term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party. In other words, there is no right to terminate such contract even on notice unless its terms provide for such termination…….*

……..
[11] In the present instance, the contract is a hybrid. The preamble to the agreement records that the period of employment is the duration of the Fourways Mall Project. Clause 3 of the contract introduces a right to terminate the contract during the course of the fixed term…….
……..
[13] I find that the terms of the contract concluded between the parties are such that all things being equal, the applicant would be employed by the respondent for the duration of the Fourways Mall project, but that either party remained entitled during that period to give the other one calendar months ' notice of its intention to terminate the contract. In other words, clause 3 of the contract permitted either party to terminate the contract on notice before the expiry of the fixed term stipulated in the preamble.

……..
[15] In effect, the applicant's argument is one of bumping -the contends that he ought to have bumped Araujo. Bumping on the basis of longer service has always been subject to factors such as skill, compatibility and client contacts (see, for example, *Amalgamated Workers Union of SA v Fedics Food Services* (1999) 20 *ILJ* 602(LC)). This is particularly so at senior levels of management……

2. Courts interdicting disciplinary proceedings

Minya v South African Post Office Ltd and Others (P99/20) [2020] ZALCJHB 209; (2021) 42 ILJ 141 (LC) (22 September 2020)

Principles:

1. The powers of the Labour Court under the LRA do not include the micro-management of workplace discipline or every dispute arising out of the workplace. The prerogative to maintain discipline remains that of the employer, and the framework of the LRA is such that it is dispute specific.
2. In accordance with Rule 8 of the Rules of this Court, the applicant is required to set out in the founding affidavit, the reasons why the matter deserves the urgent intervention of this Court, and indicate why she cannot obtain substantive relief in due course. Urgent relief will be denied in circumstances where any urgency claimed is self-created; where it is apparent that the applicant failed to act with the necessary haste in approaching the Court, and further where the respondent would suffer prejudice should urgent relief be granted.

Facts

The applicant in this case was employed as an L4 Senior Manager by the SA Post Office in Port Elizabeth. Disciplinary proceedings were instituted against her in March 2020 and were postponed on several occasions on account of her being ill. The employee was hospitalised from 11 to 22 August 2020 in Hunters craig Hospital. A medical certificate issued on 21 August stated that he was unfit for duty from then until19 September 2020, diagnosing her with "*major depression*".

On 14 September, whilst at Hunters craig Hospital, she was served with a notice to attend a disciplinary hearing on 21 – 22 September 2020. Although she at no stage attempted to contact SAPO to advise of her inability to attend, on 18 September she filed an urgent application with the Labour Court to interdict SAPO from proceeding with the hearing, on the basis that she was too ill to attend. She also on 18 September obtained another medical certificate, which recommended sick leave from 21 to 26 September.

SAPO opposed her urgent application for various reasons, including its lack of urgency, the lack of the Court's jurisdiction, and the failure to satisfy the requirements of the relief sought.

The Labour Court in its judgment was highly critical of the employee's urgent application, saying that it failed to substantiate reasons why the matter deserved the urgent attention of the Court and why she would, if justified, not be able to obtain substantive relief in due course through the dispute mechanisms under the LRA. Urgent relief will be denied in circumstances where any urgency claimed is self-

created; where it is apparent that the applicant failed to act with the necessary haste in approaching the Court, and further where the respondent party would suffer prejudice should urgent relief be granted.

Aside from finding that the employee's application had failed to establish the required grounds of urgency, it also failed to describe the "exceptional circumstances" that were required to give the Labour Court jurisdiction to hear the matter. The LAC in *Booysen v Minister of Safety and Security and others (LAC 09/08, judgment date 1 October 2010)* had found that whilst the Labour Court does have jurisdiction to interdict any unfair conduct, *including* intervening in disciplinary action, the Court's intervention should only be exercised in exceptional cases: among the factors to be considered would be whether a failure to intervene would lead to grave injustice or whether justice might be attained by other means.

The employee's allegations that the exceptional circumstances arose out of the defects in the notice to attend the hearing were "*clearly unsustainable*", as all they pointed to were procedural fairness allegations that could be dealt with under the LRA.

The Court said it failed to understand why the employee could not have simply attended the disciplinary hearing and raised her procedural complaints before the appointed chairperson, where they could have been addressed. The Court stated it was not the Labour Court's function to intervene in disciplinary proceedings that have not even started in earnest, and dictate to employers and chairpersons of disciplinary enquiries how to conduct their own internal disciplinary processes. At that hearing, she would have been afforded an opportunity to plead her case whether for a postponement or defend herself against the countless allegations of misconduct or poor performance against her. To the extent that she may be aggrieved by the ultimate outcome of that enquiry, like other ordinary employees, she had other satisfactory remedies at her disposal including an internal appeal and remedies under the LRA.

The Court confirmed that it should not to be seen as a "*first port of call*" for all workplace related complaints, when these can be sufficiently dealt with internally. In the event that an employee is still aggrieved after an internal process, issues can properly be addressed through the dispute resolution framework of the LRA.

The Court dismissed the application and awarded costs against the employee on a higher scale (attorney and client scale) than would normally be awarded against a losing party. Whilst the Court was highly critical of the employee's attorney and advocate, the cost order was granted against the applicant employee.

This judgment should serve as a warning to employees and their legal representatives who attempt to seek the courts' urgent assistance in preventing or postponing disciplinary hearings in circumstances which are not regarded as exceptional. Whilst the general rule in labour matters is that cost orders do not automatically follow the result, parties should expect that substantial cost orders may be granted when such urgent applications are brought other than in exceptional circumstances.

Extract from the judgment:
(Tlhotlhalemaje J)
[1] There is a misconception prevailing amongst employees aggrieved with minute details of internal disciplinary enquiries, that when the Labour Appeal Court (LAC) in *Booysen v Minister of Safety and Security and Others* held that this Court had jurisdiction to intervene in such internal enquiries, this meant that the Court is ordinarily the first port of call to deal with such internal grievances. This is despite the fact that the LAC had specifically stated that such intervention would only be called for where exceptional circumstances are demonstrated, such as where a grave injustice would result.

[2] From a plethora of such cases that are routinely brought on an urgent basis, it has become increasingly apparent that this Court is more often than not, called upon to micro-manage these internal proceedings, and that every little complaint about internal disciplinary proceedings, whether real or perceived, has by default, become an 'exceptional circumstance'. It has long been stated that the powers of this Court under the Labour Relations Act (LRA) do not include the micro-management of workplace discipline or every dispute arising out of the workplace. This is so in that the prerogative to maintain discipline remains that of the employer, and further since the framework of the LRA is such that it is dispute specific.

[3] Equally worrisome with these applications, is that more often than not, no legal basis is pleaded for this Court to assume jurisdiction, other than flippant and out of context references to terms such as *'unlawful'*, *invalid*', *'legality'*, *'void'*, *'unconstitutional',* and in some instances, *'unfairness'*, with the hope that relief will be granted. These phrases as thrown into the mix are often deemed to be panacea and a magic wand to every complaint arising from internal disciplinary proceedings, with the hope that those proceedings will be wished away.

[4] The facts of this case are symptomatic of the misconception mentioned above, and to say that Court has reached a point beyond exasperation with such cases on its urgent roll is truly an understatement. More often than not, in instances where the applicant parties are not legally qualified or legally represented, this Court, being that of equity, tends to adopt a more lenient approach. However where the parties are legally represented, the Court has to draw a line in the sand.
……

[10] In accordance with Rule 8 of the Rules of this Court, the applicant is required to set out in the founding affidavit, the reasons why the matter deserves the urgent intervention of this Court, and indicate why she cannot obtain substantive relief in due course. It is further trite that urgent relief will be denied in circumstances where any urgency claimed is self-created; where it is apparent that the applicant failed to act with the necessary haste in approaching the Court, and further where the respondent would suffer prejudice should urgent relief be granted.

[11] To the extent that the applicant seeks final relief, she must satisfy three essential requirements, *viz*, (a) the existence of a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.

3. Unfair Dismissal

3.1 Wording of charges - how precise should disciplinary charges be?

***Sol Plaatje Municipality v South African Local Government Bargaining Council and Others* (PA12/19) [2021] ZALAC 24 (5 August 2021)**

Principles:
There is a major difference between the wording of charges in criminal matters and in disciplinary proceedings, and an unduly technical approach to framing disciplinary charges should be avoided. If the main charge of misconduct is not proved, but an attempt to commit such misconduct is proved, the employee may be found guilty of an attempt on that same charge.

Facts:
A municipal manager gave a supervisor of a crew of 4 employees instructions to repair the roof at a hall in Kimberley. When the manager later visited the site he found the supervisor and his crew dismantling an air-conditioner fixed to the roof. He admonished them and told them that their conduct could result in disciplinary action being taken against them. Later on that same day a security official of the municipality found the supervisor and his crew with a municipal vehicle, on which the parts of the air-conditioner had been loaded, outside and close to the premises of a scrap yard. When confronted, the supervisor informed him that the manager had given them permission to dismantle the air-conditioner, and explained that they were busy with “a spin” (a slang term, implying that they were in the process of making a deal in respect of ill-gotten things).

The security officer reported this to the manager, who came to the scene. The vehicle together with the parts were then taken to the premises of the municipality where it was to be secured. Although the manager denied authorising the supervisor and his crew to dismantle the air-conditioner, he took pity on them and decided not to lay criminal charges. On the next Saturday the supervisor, accompanied by some of his crew, went to the municipal premises where the vehicle was kept and tried to first bribe and then, through threats and personal insults, coerce the security guard on duty to give him access to the vehicle and the parts. Although nothing had been taken on this occasion, about a week later the manager informed security that the parts had been stolen from where they had been kept. A police case was then opened.

Disciplinary action was taken against the supervisor and his crew. They were charged with three counts of misconduct and the presiding officer found that the employees were guilty as charged and that dismissal was the only appropriate sanction. The employer alleged in Charge 1 that the employees had ‘sold’ air-conditioner parts.

Their union referred an unfair dismissal dispute on their behalf to the **SALGBC**. In his award, the arbitrator found the supervisor to have been an evasive and unreliable witness who did not hesitate to make up and adapt his testimony and version as circumstances suited him. The arbitrator rejected his version and decided the matter on the version of the municipality. But, having analysed the evidence and the

charges, the arbitrator concluded that the employees were not guilty on charge 1 (the sale of municipal property), because it had not been proved that they sold the parts as alleged in the charge. According to the arbitrator, the finding of the chairperson of the disciplinary hearing that the employees had attempted to sell the parts did not justify finding them guilty on charge 1, because that charge alleges an actual sale and not an attempted one. The arbitrator found that a mere *intent* to sell did not amount to an *attempt* to sell, implying that the employees could not even have been found guilty of an attempt to sell the parts. According to the arbitrator, proof of "bare intent" on its own did not justify dismissal. The arbitrator found that the dismissal was procedurally fair but substantively unfair, and reinstated the employees.

On review at the **Labour Court** the employer submitted that the arbitrator had failed to appreciate that even though charge 1 alleged that the parts had been sold to the scrap yard and the evidence led by the municipality did not establish an actual sale, it did prove an attempt to sell, or dishonest conduct on the part of the supervisor and his crew in that regard; that the charges were wide enough to encompass such dishonest conduct; that the arbitrator had generally failed to consider the principal issues before him and had "evaluated the wrong facts and evidence", while ignoring "pertinent facts and evidence". As a result, the arbitrator came to a conclusion that a reasonable arbitrator would not have come to. The employer also argued that reinstatement was not appropriate because the municipality could not reasonably be expected to trust the supervisor and his crew after what they did.

The Labour Court held that the arbitrator did not misconceive the nature of the dispute before him. According to the court, the issue before the arbitrator "*was whether, on the balance of probabilities, the employees committed the misconduct they were charged with*." The LC found that the arbitrator had considered the appropriateness of the sanction and had been reasonable in his assessment of the evidence before him and had reached a conclusion that any reasonable decision-maker would have reached. The LC found that the municipality had not established any basis upon which the court could find that the arbitrator's award was reviewable and dismissed the application.

On appeal the **Labour Appeal Court** found that the arbitrator erred in his interpretation of the charges and had adopted an overly technical approach, overlooking crucial facts/evidence that led him to unreasonably conclude that the charges had not been proved. The Court said the LAC has repeatedly held that there is a major difference between the wording of charges in criminal matters and in disciplinary proceedings, and that an unduly technical approach to the framing and consideration of disciplinary charges should be avoided. There is also authority that if the main charge of misconduct is not proved, but an attempt to commit such misconduct is proved, the employee may be found guilty of such an attempt on that same charge.

Taking all the evidence into account the LAC said the only reasonable inference was that the employees intended (unlawfully) to sell the parts for their own gain at the scrap yard, after having removed them, and were caught in the process of attempting to do so. They acted in concert and their acts were not only without the authority of the municipality but were dishonest. The supervisor's false versions

about what they did, compounded matters. The LAC held that the dismissals were both procedurally and substantively fair.

This case is a reminder that a disciplinary enquiry is *not* a criminal trial, and the way charges are described is less important that an overall assessment of whether there is evidence of misconduct. The case also confirms that if the main charge of misconduct is not proved, but an attempt to commit such misconduct is established, the employee may be found guilty of an attempt on that same charge.

Extract from the judgment:
(Coppin JA)

[30] It has also been repeatedly held by this Court that there is a major difference between the wording of charges in criminal matters and that of charges in disciplinary proceedings, and that an unduly technical approach to the framing and consideration of the latter should be avoided. There is also authority in this Court that if the main charge of misconduct is not proved, but an attempt to commit such misconduct is proved, the employee may be found guilty of such an attempt on that same charge.

[31] The arbitrator reasonably (if not correctly), rejected Mr Botha and Mr Fritz's version and decided the matter on the version proffered by the municipality. However, the arbitrator erred in his interpretation of the charges and seems to have adopted an overly technical approach in that regard and to have overlooked crucial facts/evidence that led him to unreasonable conclude that charges 1 and 2 had not been proven against Messrs Botha and Fritz.
……..

[35] Taking all the evidence into account the only reasonable inference to be drawn is that Mr Botha and his crew intended (unlawfully) to sell those parts for their own gain at the scrapyard after having removed them. They were caught in the process of attempting to do so. They acted in concert and their acts were not only without the authority of the municipality but were dishonest. Mr Botha's false versions about what they did, actually compounded matters. Mr Fritz's confirmation of those false versions also compounded his dishonesty.

3.2 Provocation as a defence

***Nampak Products (Pty) Ltd t/a Megapak v CCMA and Others* (C512/2018) [2021] ZALCCT, delivered on 24 June 2021**

Principles:
When provocation is advanced as a mitigating factor in an assault, a critical question is whether the extent of the provocation was such that it would have caused any reasonable person in the position of the assailant to have responded in that way. Even if a co-worker's behaviour is petty, insulting, irritating and challenging, this does not amount to justifiable provocation: an assault under these circumstances cannot be excused or minimized on the ground of provocation.

Facts:
M, a production superintendent, had walked into Y's office with a handwritten notice about hygiene, which Y had stuck up in the men's cloakroom. In doing so, Y had not

followed the correct procedure and M wanted him to apologise. M felt that the handwritten notice reflected badly on him as the person in charge of those facilities and was trying to assert the scope of his authority. Y was M's superior, a Key Accounts Manager. Raised voices drew in other staff, and the disagreement continued in the office of the head of HR. There were accusations of lying. Y called M a coward and said he would hit him. M claimed he said that if Y hit him he would make sure that he was fired. The HR Manager pleaded with Y to desist and told M to go to his office. M then moved to his own office, a few meters away. Y forced the door open. M said to Y "*Hit me, hit me, do you want to hit me?*" It was at that point that Y struck M and hit him on the shoulder as M turned his body away to avoid the blow. Y was dismissed for assaulting M.

At the **CCMA** Y challenged the fairness of the dismissal on the basis that the sanction was too harsh. The Commissioner concluded that Y had been provoked into assaulting M, who had been goading him and encouraging him to hit him so that he would be fired. The commissioner held that M suffered no injury as a result of being struck on the shoulder, and there was no evidence that operations at the company had been disrupted by the incident. Moreover, she decided that an apology tendered a couple of days later by Y, asking M to forgive him, was genuine. The commissioner found that the dismissal was substantively unfair and reinstated Y without back pay and with a final written warning.

On review at the **Labour Court**, the court held that, while the arbitrator cannot be faulted for finding that there was provocation by M, what she failed to consider was whether Y's conduct was reasonable in the context and whether it was an immediate response to the provocation. The LC said that Y could have walked away but instead pursued M to his office where the assault took place. His assault on M. was not an instantaneous unreflective reaction to M's conduct, but was a culmination of a sequence of events, the path of which he could and should have altered at more than one point after the brief meeting in the HR office. The court was satisfied that the commissioner could not reasonably have concluded that Y's conduct, even if it was petty, insulting, irritating and challenging, could justifiably have provoked Y, a senior manager, to behave as Y did. As such, the assault could not be excused or minimized on that ground.

Y was guilty of the charges for which he was dismissed. Y failed to establish that his assault of M was a reasonable response to provocation. Y's dismissal was held to be substantively fair.

Extract from the judgment:
Lagrange J:
[35] The arbitrator cannot be faulted for finding that there was provocation by Majoni. The crux of the applicant's criticism of the arbitrator's finding whether the provocation was of such a degree that no reasonable arbitrator could have concluded that the assault was an understandable response to it. The mere existence of provocation is obviously not the end of the inquiry. When provocation is advanced as a mitigating factor in an assault, a critical question is whether the extent of the provocation was such that it would have caused any reasonable person in the position of the assailant to have responded in that way.

[36] In the case of *Tedco Plastics (Pty) Ltd v National Union of Metalworkers of SA & others* (2000) 21 *ILJ* 2710 (LC), the Labour Court summarised the principles governing provocation as applied in the criminal and delictual contexts and applied them in the employment context…….

> *"[15] … Provocation is recognized in our criminal law and law of delict as a basis for excusing or mitigating the consequences of what would otherwise clearly be criminal or delictual conduct……..it appears that two requirements will have to be met, namely, that the provocative conduct must be such that the reaction to it by way of physical assault was reasonable, ie would a reasonable person in the position of the person have acted as he did in the face of the provocation; and, that the conduct must be an immediate and reasonable retaliation, ie it must follow immediately on the provocation and not be out of proportion to the nature and degree of the provocative behaviour."*

……

[37] In this case, the arbitrator appears to have assumed that the mere existence of provocative conduct, as such, mitigated the seriousness of the assault on Yengo. What she failed to consider was whether Yengo's conduct was reasonable in the context and whether it was an immediate response to the provocation…….

3.3 The test for reinstatement: When is reinstatement not 'reasonably practical'?

***Booysen v Safety and Security Sectoral Bargaining Council and Others* (PA12/18) [2021] ZALAC 7 (30 March 2021)**

Principle:
While there is an onus on an employer who is opposed to reinstating an employee whose dismissal is found to be substantively unfair to lead evidence to show that one of the exceptions to reinstatement applies, the dominant consideration in the enquiry is not on the legal onus but rather on the underlying notions of fairness between the parties. The Labour Court or arbitrator ultimately makes a value judgment on the evidence and facts before it.

Facts:
The employee was employed as a chef by the SAPS in Graaff- Reinet. He was charged with committing a common law or statutory offence, by raping a 16-year old schoolgirl in 2012. The alleged rape took place outside of the employee's working hours. His defence to the charge was that it was consensual intercourse.

The SAPS found the employee guilty at an internal disciplinary hearing and dismissed him. He referred an unfair dismissal dispute to the **Bargaining Council**. The arbitrator made an award upholding the dismissal as substantively and procedurally fair.

The employee challenged the arbitrator's award on review to the **Labour Court**. The Labour Court found that the appellant's dismissal was substantively unfair as he did not rape the complainant as charged, and that it was more probable than not that the employee had consensual intercourse with the complainant. On the question of remedy, the Labour Court pointed out that Section 193 of the LRA requires that in

the case of a dismissal that is found to be substantively unfair, an employer must be required to reinstate or re-employ the employee unless the employee does not wish to be reinstated or employed, the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or it is not reasonably practicable for the employer to reinstate or re-employ the employee.

On his own version, the employee had sexual intercourse with a 16-year old, a person barely above the age of consent. Although the employee was not an officer in the SAPS, he was employed by the SAPS at the local police college. It is reasonable to assume in these circumstances that the local community identifies the employee as a member of or associates him with the SAPS. What the employee did, on his own version, was not compatible with the SAP's stated values and was likely to bring the SAPS into disrepute. The Labour Court concluded that a continued employment relationship would be intolerable or not reasonably practical. An award of compensation of 12 months remuneration fitted the requirements of s 193 better.

The appeal to the **Labour Appeal Court** was limited to the Labour Court's conclusion that the employee was not entitled to the primary relief of reinstatement in section 193(2) of the LRA. The SAPS had not led evidence why reinstatement was inappropriate. The LAC noted that while there is an onus on an employer who is opposed to reinstating an employee to show that one of the exceptions to reinstatement applies, the *dominant consideration* in the enquiry is not on the legal onus but rather on the underlying notions of fairness between the parties. The Labour Court or arbitrator ultimately makes a value judgment on the evidence and facts before it.

The LAC held that it was fair, on the objective facts, for the Labour Court to conclude that the employee's conduct was incompatible with the SAPS stated values and was likely to bring the SAPS into disrepute. The Labour Court was justified in concluding that the continued employment relationship with the employee would be intolerable or not reasonably practical, and that an award of compensation as opposed to reinstatement was the appropriate remedy. For these reasons, the appeal against the order of the Labour Court failed.

While this case confirms a broader approach to deciding whether or not to order reinstatement, we would recommend that employers do not forget to lead evidence as to why reinstatement is not appropriate.

Extract from the judgment:
Kathree-Setiloane AJA:

[11] The starting point in determining whether the Labour Court erred in not ordering the SAPS to reinstate the appellant, is to look at how our courts have interpreted section 193(2) of the LRA which provides:

'(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[12] In interpreting this section, this Court has held that where an arbitrator or the Labour Court finds the dismissal of an employee to be unfair then reinstatement is the primary remedy under section 193(2) of the LRA. In other words, if the exceptions to reinstatement in section 193(2)*(a)* to *(d)* do not apply, then the Labour Court or an arbitrator is obliged to require the employer to reinstate or re-employ the employee as the case maybe. Thus, if the employer is opposed to reinstating an employee whose dismissal is found to be substantively unfair, then it must demonstrate that one of the exceptions to reinstatement applies. This would require the employer to present evidence concerning the question of the appropriateness of reinstatement in anticipation of a decision by the Labour Court or an arbitrator that the dismissal is unfair.

[13] It is, however, now settled law that the dominant consideration in the enquiry is not on "the legal onus but rather on the underlying notions of fairness between the parties". Fairness, as held by the Constitutional Court in *Equity Aviation Services (Pty) Ltd v CCMA,* must be "assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment".

***Standard Bank of SA Ltd v Leslie & others* (2021) 42 *ILJ* 1080 (LAC)**

Principles:
An employee's behaviour, whether before or after dismissal, can be taken into account in determining whether, in terms of s 193(2)*(b)*, the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable. It cannot reasonably be expected of an employer to reinstate an employee into a position in which a high degree of trust and integrity was required when from the evidence he had failed to display precisely such behaviour.

Facts:
An employee had been employed as a custodian in a bank's treasury department. The security procedures, which had to be followed at all times given the volume of cash handled, included dual control of cash by two employees at a time, with employees not permitted to have cash in their possession while at work.

The employee's co-worker noticed him placing cash in his back pocket. She only reported this after the end of their shift. Although a cash box was found to be short by R200, the employee was not searched as he had already left the department. He was however later suspended and subsequently dismissed. In unfair dismissal proceedings before the **CCMA**, the commissioner found the employee's dismissal to be substantively unfair and ordered his retrospective reinstatement. On review, the **Labour Court** found no reason to interfere with the award.

On appeal by the bank, the **Labour Appeal Court** noted that, on the evidence before the commissioner, the employee's conduct aroused strong suspicion. His

explanation of events was highly improbable, and his behaviour was most unusual. He failed to explain why he breached normal procedure requiring dual control of cash. Yet, despite this, on the evidence before the commissioner, the finding that the bank had not proved that the employee had conducted himself dishonestly was not one that a reasonable commissioner could not reach (the test for review). In spite of the strong suspicion which the employee's conduct aroused, the bank's evidence at arbitration was insufficient to prove misconduct on the terms contended by the bank. Without clear and reliable evidence of the employee's dishonesty, the commissioner's finding of unfair dismissal was not unreasonable.

Turning to the **appropriate remedy**, the court noted that an employee's behaviour, whether before or after dismissal, can be taken into account in determining whether, in terms of s 193(2)*(b)* of the LRA, a continued employment relationship would be intolerable. Although the courts have made it clear that there must be an extraordinary reason for the court to deviate from reinstatement as the primary remedy, the courts have also refused reinstatement on the basis that it was impracticable.

Applying the above principles, the LAC noted that the bank was entitled to expect honesty and integrity, and to rely on a high degree of trust with employees responsible for counting large sums of money. In applying his mind to the appropriate remedy, s 193(2) required the commissioner not simply to adopt a mechanical approach to awarding reinstatement as the primary remedy, but to consider whether the circumstances surrounding the dismissal were of such a nature that a continued employment relationship would either be intolerable or not reasonably practicable.

The evidence before the commissioner showed that the employee had failed to comply with the bank's operating procedures and that his behaviour had been noticeably unusual and suspicious. Had the commissioner carefully applied his mind to the employee's unlikely explanation for his conduct, coupled with the evidence of his co-worker and another employee, he ought reasonably to have found support for the bank's view that the trust relationship with the employee had broken down. Given the employee's behaviour and the bank's evidence that he could no longer be trusted, it was apparent that significant trust issues had arisen.

These issues, the LAC said, made reinstatement intolerable. It could not reasonably have been expected of the bank to reinstate the employee into a position requiring a high degree of trust and integrity, when from the evidence he had failed to display precisely such behaviour. The court concluded that, in the circumstances, an award of compensation was appropriate. As the employee had 9 years' service, the LAC awarded him the maximum compensation of 12 months for his unfair dismissal.

It is understandable if employers shake their heads at compensation of 12 months for a likely thief. We are a little stunned by the LAC's reasoning: having come to the conclusion that a continued employment relationship was intolerable due to the employee's actions (the test for dismissal under item 4 of the Dismissal Code of Good Practice), one wonders what the LAC would say the employer should have done at the time? It was not open to the employer then, to just pay compensation to

the employee – the remedy the LAC now, after the event, deems appropriate to resolve this situation.

Extract from the judgment:
Savage JA:
[17] In the current matter, the appellant is entitled to expect honesty, integrity and rely on a high degree of trust with its employees who are responsible for counting large sums of money in its treasury department. In applying his mind to the appropriate remedy, s 193(2) required the commissioner not simply to adopt a mechanical approach to the award of reinstatement as the primary remedy, but to consider the circumstances surrounding the dismissal to determine whether these were of such a nature that a continued employment relationship between the parties would either be intolerable or not reasonably practicable.

[18] Properly construed the evidence before the commissioner showed that the employee had failed to comply with the appellant's operating procedures and that his behaviour as viewed on the recordings had been noticeably unusual and suspicious. Had the commissioner carefully applied his mind to the employee's unlikely explanation for his conduct, coupled with the evidence of Ms Motsapi and Mr Scaife, he ought reasonably to have found support for the appellant's view that the trust relationship with the employee had broken down. Given the employee's behaviour and his explanation for it, considered against the appellant's evidence that he could no longer be trusted, it was apparent that significant trust issues had arisen. These issues were of such a nature that they made reinstatement intolerable. It could not reasonably have been expected of the appellant in such circumstances to reinstate the employee into a position in which a high degree of trust and integrity was required when from the evidence he had failed to display precisely such behaviour.

[19] Since the employee had nine years' service with the appellant, and having regard to the circumstances of the matter, an award of compensation was the appropriate remedy in this matter. There was no reason shown why such compensation should be limited. The employee should therefore, given his unfair dismissal, be granted the maximum compensation of 12 months permissible in terms of s 194.

***VSB Construction ta Techni-Civils CC v NUM obo Mngqola and Others* (PA11/2018) [2021] ZALAC 21 (23 July 2021)**

Principle:
In the absence of exceptional circumstances, it is impermissible to couple a finding that a dismissal was inappropriate with a finding that reinstatement would not be appropriate in terms of Section 193(2) of the LRA.

Facts:
The employee was dismissed after being found guilty on a charge of "gross dishonesty" in that he had allegedly stated that the Chief Executive Officer was a racist. He subsequently repeated the allegation to other employees, particularly to members of the human resources department.

At the **Bargaining Council arbitration**, the arbitrator accepted the employer's evidence that the employee had made these statements, but found that the employer had "overreacted" by imposing the sanction of dismissal. The dismissal was, accordingly, ruled to be substantively unfair. The statements were held to be nothing more than an expression of the employee's feelings and opinion, having been asked by three managers to express his opinion. The arbitrator found that the disciplinary chair had erred in finding that the employee was guilty of gross dishonesty.

Having found that the employee's dismissal was substantively unfair, the arbitrator decided that the employee ought not to be reinstated for two reasons: (i) considering the employer's submissions and the circumstances in their entirety, the trust relationship between the employer and the employee had broken down irretrievably; and (ii) the employee "was not an honest witness".

On review at the **Labour Court** the employee contended that the arbitrator had improperly exercised her discretion by refusing to reinstate him, and that this decision was unreasonable and not one which a reasonable arbitrator could have made. The LC overturned the arbitrator's remedy and ordered reinstatement, saying - '"*Given her findings on why dismissal was not an inappropriate sanction, the arbitrator could not possibly have found that a continued employment relationship would be intolerable*".

Dissatisfied with this order, the employer approached the **Labour Appeal Court** to set aside the relief granted by the Labour Court, although it accepted that the dismissal was substantively unfair. The employer contended that the remarks made by the employee were reasonably capable of being construed in the manner complained of by the employer. The employer contended that the burden shifts to the employee to show that, when he uttered these words, he did not mean it to be racist nor demeaning. The employee was the only one who could give this testimony, but he never did. Instead, he was adamant that he never made the remarks, which was a version which was rejected by the arbitrator. The employer submitted his conduct had made it intolerable to have a continued employment relationship.

The LAC confirmed that an arbitrator ***must*** order reinstatement unless one of the exceptions in s 193(2) of the LRA applies. The only exception applicable in this case is s 193(2)(b), which provides that reinstatement or re-employment need not be granted when "*the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable*". The LAC confirmed that an employee's behaviour, even if deserving of reproach, could not be construed to inhibit an order of reinstatement. In this case the dismissal should not have legally taken place. The finding that the dismissal was substantively unfair was not contested by the employer. If a dismissal should not have occurred, the employment relationship would have continued, save for exceptional circumstances as envisaged in s 193(2)(b) of the LRA. Without showing exceptional circumstances, it is impermissible to couple a finding that a dismissal was inappropriate with a finding that reinstatement would not be appropriate.

The LAC found that exceptional circumstances had not been established in this case – no evidence was led during the arbitration to support that reinstatement would be an inappropriate order.

This decision is in line with previous cases which have said that where there is no evidence that employees committed misconduct, there is no evidence that the employment relationship cannot be sustained. The general rule of reinstatement as the preferred remedy for unfair dismissal, must then prevail.

Extract from the judgment:
(Davis JA)
[1] This appeal turns solely on whether, having found a dismissal for alleged misconduct to be substantively unfair because it was "inappropriate" the arbitrator (third respondent) could reasonably have refused to order that Mr Mngqola (the employee) be reinstated and, if so, whether the third respondent had erred by doing so, based on the facts of this case…….
……..
Evaluation
[9] An arbitrator must order reinstatement unless one of the exceptions in s 193(2) of the Labour Relations Act 66 of 1995 (the LRA) applies. The only exception applicable in this case is s 193(2)(b), which provides that reinstatement or reemployment needs not be granted when "*the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable*". In this connection, this Court in *Glencore Holdings (Pty) Ltd and another v Gagi Joseph Sibeko* and others [2018] 1 BLLR 1 (LAC) at para 10, has held that an employee's behaviour, even if deserving of reproach, could not be construed to inhibit and order of reinstatement.

[10] In the present case, the dismissal should not have legally taken place. So much is clear from the finding that the dismissal was substantively unfair, a finding that was not contested by the appellant. If a dismissal should not have occurred, the employment relationship would have continued, save for exceptional circumstances as envisaged in s 193(2)(b) of the LRA. Without a showing of exceptional circumstances, it is impermissible to couple a finding that a dismissal was inappropriate with a finding that reinstatement would not be appropriate.

[11] In this case, there is no such showing. No evidence was led during the arbitration hearing to the effect that reinstatement would be an inappropriate order….

Booi v Amathole District Municipality and Others **(CCT 119/20) [2021] ZACC 36 (19 October 2021)**

Principle:
The term "intolerable" in Section 193(2) of the LRA implies a level of unbearability, and must requires more than that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement, which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal.

Facts:
The employee was employed by the Amathole District Municipality as a senior manager of municipal health services, until he was dismissed for misconduct December 2015following a disciplinary hearing.

The employee disputed the substantive and procedural fairness of his dismissal in the **South African Local Government Bargaining Council,** where an arbitrator cleared him of all the charges and found his dismissal to be substantively unfair. The arbitrator reinstated the employee retrospectively in terms of section 193(2) of the LRA. On the point of reinstatement, the Municipality had argued that the employee's continued employment would be an operational risk, because the trust relationship between him and his direct supervisor had irretrievably broken down. This was insufficient to persuade the arbitrator to deviate from the primary remedy of reinstatement for a substantively unfair dismissal.

The Municipality approached the **Labour Court** to review the award. One of the employer's grounds was that the arbitrator committed a reviewable irregularity by ordering reinstatement despite the fact that the trust relationship between the employee and the Municipality had obviously broken down. The Labour Court held that section 193(2) of the LRA obliges an arbitrator to require an employer to reinstate an employee whose dismissal is found to be unfair, unless the circumstances surrounding the dismissal would render a continued employment relationship "intolerable". On the basis of all the evidence, the Labour Court held that the manner in which the employee conducted himself, although insufficient to sustain a finding of misconduct, was completely destructive of a continued employment relationship. Therefore, in failing to take account of this evidence in ordering reinstatement, the arbitrator reached a decision that fell outside the "band of decisions that are reasonable". The Labour Court upheld the arbitrator's finding that the dismissal was unfair, but set aside the award of retrospective reinstatement, replacing it with one of compensation of eight months' remuneration.

The **Labour Appeal Court** granted condonation for the employee's late filing of an appeal but dismissed the application for leave to appeal, saying it lacked prospects of success.

The **Constitutional Court** held that the language, context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one. The term "intolerable" implies a level of unbearability, and requires more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement in section 193(2), which is to protect substantively unfairly dismissed employees by restoring their employment contracts and putting them back in the position they would have been in but for the unfair dismissal.

The high bar implied by section 193(2)(b) dictates that an arbitrator's decision should not readily be interfered with by a review court, where the arbitrator has considered all the evidence, and found that it does not establish intolerability. The CC held that "intolerability" in the working relationship should not be confused with mere "incompatibility" between the parties. "Incompatibility" might trigger a different kind of enquiry with different remedies. The Court also held that the evidentiary burden to

establish intolerability is heightened when the dismissed employee has been exonerated of all charges.

Because of the extreme delay in filing the appeal, the Court limited the retrospectivity of the reinstatement to the period between the employee's dismissal in December 2015 and the date of the Labour Court's order on 3 November 2017.

We think the Constitutional Court in this case may have departed from the ordinary meaning of 'intolerable' – which is a relationship that cannot be tolerated because of the breakdown of the trust necessary for a productive working relationship. 'Unbearable' is a different and far more stringent requirement, making it very difficult for parties to move on from a failed working relationship, and potentially placing the employee back into a difficult and hostile environment.

Extract from the judgment:
Khampepe ADCJ:
[38] It is plain from this Court's jurisprudence that where a dismissal has been found to be substantively unfair, "reinstatement is the primary remedy" and, therefore, "[a] court or arbitrator must order the employer to reinstate or re-employ the employee unless one or more of the circumstances specified in section 193(2)(a)-(d) exist, in which case compensation may be ordered depending on the nature of the dismissal".

[39] The primacy of the remedy of reinstatement is no coincidence. It is the product of a deliberate policy choice adopted by the Legislature……..

[40] It is accordingly no surprise that the language, context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one. The term "intolerable" implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in section 193(2), which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal. And, my approach to section 193(2)(b) is fortified by the jurisprudence of the Labour Appeal Court and the Labour Court, both of which have taken the view that the conclusion of intolerability should not easily be reached, and that the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability.

[41] Thus, "intolerability" in the working relationship should not be confused with mere "incompatibility" between the parties. "Incompatibility" might trigger a different kind of enquiry with different remedies. For instance, an incapacity enquiry may be held to establish whether the incompatibility goes as far as rendering the employee incapable of fulfilling their duties. This is entirely distinct from "intolerable" relations.

[42] I hasten to add that the evidentiary burden to establish intolerability is heightened where the dismissed employee has been exonerated of all charges… It should take more to meet the high threshold of intolerability than for the employer to simply reproduce, verbatim, the same evidence which has been rejected as insufficient to justify dismissal.

3.4 Compensation for procedural unfairness nullified by serious misconduct?

***McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* (CCT 270/20) [2021] ZACC 14 (17 June 2021)**

Principle:
In assessing procedural fairness, an important factor in determining compensation is the degree to which the employer deviated from the requirements of a fair procedure. The nature and gravity of the misconduct and the attitude of the perpetrator also weigh heavily in the determination of compensation. Where the conduct of the employee is serious, it may be just and equitable to grant no compensation, notwithstanding that the dismissal was procedurally unfair.

Facts:
Dr McGregor was employed as Head of Anaesthesiology at George Hospital, a public hospital which falls under the Department of Health, Western Cape. In December 2016, Dr McGregor was dismissed following an **internal disciplinary inquiry** in which he was found guilty of four charges of sexual harassment.

Each of the charges involved a newly qualified medical practitioner, thirty years Dr McGregor's junior, doing an internship under his supervision. Dr McGregor was alleged to have made unwelcome suggestions of a sexual nature towards the intern. All of the incidents took place whilst Dr McGregor was on duty, acting within his professional and senior capacity.

In January 2017, Dr McGregor lodged an **internal appeal** against the dismissal, which was dismissed. Aggrieved, Dr McGregor referred a dispute to the **Public Health and Social Development Sectoral Bargaining Council**, challenging both the substantive and procedural fairness of the dismissal. The arbitrator found Dr McGregor guilty of three of the four charges of sexual misconduct. However, he concluded that the dismissal was substantively unfair because he had not been treated the same as another employee facing similar charges, and procedurally unfair because he was denied an opportunity to defend himself, as relevant evidence was excluded during his disciplinary hearing. The arbitrator, exercising his discretion, opted not to order reinstatement since the misconduct had been proven and reinstatement would be intolerable. Instead, taking into consideration the nature of the misconduct and the extent of the Department's departure from substantive and procedural fairness, the arbitrator awarded Dr McGregor compensation of R924 679.92, equivalent to six months' remuneration.

Dr McGregor applied to the **Labour Court** to have the arbitration award reviewed and set aside on the basis that his conduct neither constituted sexual harassment nor did it warrant dismissal. The Department brought a counter-review application to set aside the finding that Dr McGregor had not committed misconduct in respect of charge three, the conclusion that the dismissal was procedurally and substantively unfair; and the award of compensation.

The Labour Court found that the arbitrator's findings in respect of the three charges were reasonable and not reviewable, and that the dismissal was substantively fair

but procedurally unfair. The Labour Court declined to set aside or modify the arbitrator's compensation award.

Dr McGregor appealed to the **Labour Appeal Court**, seeking an order that his dismissal was substantively unfair and that he be reinstated. The Department once again raised a cross-appeal in which it averred that the Labour Court had erred in not revisiting the compensation awarded. Although the LAC agreed the dismissal was procedurally unfair, it also found it to be substantively fair and that reinstatement was inappropriate

Dr McGregor appealed to the **Constitutional Court**, seeking the Court to confirm the findings of the arbitrator that the dismissal was substantively and procedurally unfair, and to order his reinstatement. The Constitutional Court dismissed his appeal against the finding of substantive unfairness and his submissions requesting reinstatement, and focussed on the procedural unfairness aspects of the case. The Court held that in assessing compensation for procedural fairness, an important factor is the degree to which the employer deviated from the requirements of a fair procedure. The nature and gravity of the misconduct and the attitude of the perpetrator also weigh heavily in determining the compensation. Where the conduct of the employee is serious, it may be just and equitable to grant no compensation notwithstanding the procedural unfairness.

The Court also said that the appropriateness of compensation must be understood within the context of the dismissal. This means that when the reason for the dismissal is sexual harassment, this must be taken into account. The court found it "*difficult to comprehend that Dr McGregor could walk away with almost R1 000 000 to be paid from a barren public purse"*. The Court was of the view that six months' compensation, for minor procedural hiccups in respect of gross misconduct, was entirely too generous. The Court contemplated the appropriateness of removing the compensation in its entirety, but in recognition that employees are entitled to fair labour practices and procedurally regular dismissals, reduced the award of compensation to an equivalent of two months' remuneration.

This is a really important judgment from the Constitutional Court, opening the door to arguing that the seriousness of the misconduct should be a factor in determining what compensation should be awarded for any procedural unfairness that may have occurred.

Extract from the judgment:
Khampepe J:
Reasons for reducing the amount of compensation
[36] However, as the Department submits, the nature and degree of the deviation from the procedural requirements is relevant. An important factor in determining compensation is the degree to which the employer deviated from the requirements of a fair procedure. As was said in *Kemp*, the more minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation. It is significant then, that the procedural irregularities in this case were of no major consequence, which is illustrated by the fact that when the excluded evidence was included at the arbitration hearing, three of the four charges were upheld. According

to the Department, any reasonably skilled arbitrator would have realised that the procedural unfairness suffered by Dr McGregor was of such insignificance as to be irrelevant. And, Dr McGregor himself recognises that "courts may overlook minor procedural irregularities and where a procedural irregularity is trifling, the courts may exercise their discretion not to grant compensation".

[37] It is also plain from *SARS* and *Tshishonga* that the nature and gravity of the misconduct and the attitude of the perpetrator weigh heavily in the determination of compensation. In fact, there are cases where the conduct of the employee has been deemed so serious as to preclude the granting of compensation, notwithstanding that the dismissal was procedurally unfair…….

[39] It is actually not inconceivable that an award of compensation be set aside completely. In *Johnson & Johnson*, the Labour Appeal Court said that:

"If a dismissal is found to be unfair solely for want of compliance with a proper procedure the Labour Court, or an arbitrator appointed under the LRA, thus has a discretion whether to award compensation or not."

……..

[48] It is difficult to comprehend that Dr McGregor could walk away with almost R1 000 000 to be paid from a barren public purse. Dr McGregor is of the view that the "gross" procedural unfairness justified that amount, as a bare minimum. I am of the view that six months' compensation, for minor procedural hiccups in respect of gross misconduct, is entirely too generous. I cannot but conclude that, on a conspectus of all of the above, the Labour Court should have reviewed and reduced the compensation. And, all of the above would have been considered by the Labour Appeal Court had it applied itself to the Department's cross-appeal, as it should have done. What would have become crystal clear much sooner is that the award of compensation in the amount awarded by the arbitrator is exorbitantly high and at odds with the principles of equity and justice. I have contemplated the appropriateness of removing the compensation in its entirety on account of the gravity of the factual matrix before me. That being said, I am aware of the fact that employees, including Dr McGregor, are entitled to fair labour practices and procedurally regular dismissals. In the result, I reduce the award of compensation to an equivalent of two months' remuneration.

[49] In *Campbell Scientific Africa*, the Labour Appeal Court said that a sanction serves an important purpose in that it "sends out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty". Let a message be sent: "this is the protection which our Constitution affords".

4. Retrenchment: consultation a bi-lateral process

Kimberley Ekapa Mining Joint Venture v National Union of Mineworkers (2021) 42 ILJ 761 (LAC)

Principle:
Consultation as envisaged by s 189(2) involves a bilateral process in which obligations are imposed upon both parties to consult in good faith. Where a union

avoids, frustrates or declines to participate in the consultation or joint consensus-seeking process, an employer does not act in a procedurally unfair manner by continuing with a retrenchment.

Facts:
On 6 June 2018, the employer issued a notice in terms of s 189A of the LRA of its intention to commence an organisational restructuring process, and notified employees that a significant number of retrenchments were contemplated. The notice detailed that its profitability had been negatively impacted by a number of factors, and said the selection criteria were aimed at retaining key employees whose competencies, ie skills, knowledge and experience, met the operational and transformational requirements of the employer.

On 12 June, the employer met with representatives of employees who might be affected, being NUM, UASA, and elected representatives of non-unionised employees. The employer referred the matter for facilitation by the CCMA and the first meeting was held on 13 July. Five further facilitation meetings were held during August and September, with information sought from and provided to employees.

By 3 September, the rationale for retrenchment still remained in issue. The commissioner indicated to the parties that given the lack of significant progress he was withdrawing from the process. Despite the withdrawal of the facilitator, the meeting continued and the employer indicated that it intended to pursue the s 189 process. NUM was not in agreement that the process continue.

The crisp point of dispute between the parties was whether NUM then withdrew from the consultation process. The following day management issued a brief to employees recording that the s 189 process would proceed ‘using what we believe to be fair criteria’. A few weeks later, oa dispute meeting was held with NUM concerning the s 189 consultation. The outcome of the meeting recorded that the parties agreed that they had both raised their issues to their satisfaction and agreed to disagree on all the matters raised by the union. On the following day, the employer began issuing notices of termination to approximately 90 employees, including 47 NUM members. Further dismissal notices followed later.

On 2 October, NUM referred a dispute to the CCMA. On 18 October it brought an application in terms of s 189A(13) in the Labour Court seeking the reinstatement of the retrenched employees on grounds that the employer had failed to follow a fair procedure. The application was heard more than five months later, on 27 March 2019. The dispute between the parties turned on whether NUM hadbeen given an opportunity to consult about selection criteria, or whether it left the consultation process and chose not to be further involved with this issue. The **Labour Court**, in granting the application, found that the employer had not presented proof of NUM’s refusal to consult and that the employer had failed to consult meaningfully with NUM and other employee parties on selection criteria. Furthermore, the court took the view that the selection criteria applied were not shown to be fair and objective.

On appeal, the **Labour Appeal Court** noted that there were clear disputes of fact on the papers; that there was no request on record to refer the matter to oral evidence; and no cross-appeal by NUM against the failure to refer the matter to oral evidence.

The court recorded that s 189(2)*(b)* requires an employer to consult on the method of selecting employees to be dismissed, which involves a bilateral process in which obligations are imposed upon both parties to consult in good faith. The court noted that where a union avoids, frustrates or declines to participate in the consultation or joint consensus-seeking process, an employer does not act in a procedurally unfair manner by continuing with a retrenchment.

Turning to the facts of the matter before it, the court found that there was no dispute that the parties did not consult on the method of selection. The only question was whether, as a matter of fact, this was because NUM had withdrawn from the consultation process. The court noted that the Labour Court had before it both the employer's express averment that NUM had withdrawn from the consultation process and a minute which expressly supported this averment. This created a clear factual dispute to which the court a quo was required to have appropriate regard.

The court found that there was nothing before the Labour Court to show that the employer's denial of NUM's allegations was 'so far-fetched or clearly untenable that the court was justified in rejecting [it] merely on the papers'. The appeal was accordingly upheld and the Labour Court's reinstatement order was overturned.

Extract from the judgment:
Savage AJA:
[19] Section 189(2)*(b)* requires an employer to consult on the method of selecting employees to be dismissed. Unless the employer has a basis for not consulting on the issue, the process will be defective and procedurally unfair. Consultation as envisaged by s 189(2) involves a bilateral process in which obligations are imposed upon both parties to consult in good faith. Where a union avoids, frustrates or declines to participate in the consultation or joint consensus-seeking process, an employer does not act in a procedurally unfair manner by continuing with a retrenchment.

[20] There is no dispute that EKM and NUM did not consult on the method of selection. The only question is whether, as a matter of fact, this was because the NUM had withdrawn from the consultation process or not.

[21] It was submitted in argument for EKM that the Labour Court could only have come to the conclusion that the NUM had not withdrawn from the consultation process if it ignored the answering affidavit and the annexures to it, including the minutes if the meeting of 3 September 2018; and that since NUM had withdrawn from the consultation process, it cannot complain of not having been consulted on selection criteria.

[22] While NUM denied in reply that it had 'adopted the approach that we did not want to continue with the consultation process' and that '[a]t no stage did we refuse to consult', it did not explain how it was then that the minutes of 3 September 2018 expressly recorded that it had withdrawn from the s 189 consultation process…….

5. Affirmative action in recruitment: race based short listing

Magistrates Commission and Others v Lawrence (388/2020) [2021] ZASCA 165 (2 December 2021)

Principle:
At the short-listing stage of an appointment process, legislation does not permit a targeted group approach because no one factor can at the outset override or take precedence over other factors. A process which is rigid, inflexible and quota-driven with a blanket and mechanistic exclusion of one group (in this case white persons), no matter how well they may have scored in respect of the other relevant factors, amounts to not considering an application at all.

Facts:
At the heart of this appeal is the legality and constitutionality of the shortlisting process of the Magistrates Commission and its decision to overlook a white applicant. The respondent, Mr Richard John Lawrence, an acting magistrate, applied for the position of permanent magistrate in response to advertisements for such positions in the magisterial districts of Bloemfontein, Botshabelo and Petrusburg. He was not shortlisted for any of these posts.

Mr Lawrence commenced acting as a magistrate in the Bloemfontein Cluster 'A' group on 2 January 2015. He did so for 4 years and at the time of the short-listing process for a permanent position, his acting appointments, each for 3 months at a time, had been renewed for the 48th time. When the proceedings were instituted, Mr Lawrence had been acting as the Head of the Petrusburg office for 2 years. He also assisted in Bloemfontein and various other courts.

The competence and experience of Mr Lawrence was not in dispute. His acting appointments were renewed for a period of 4 years in accordance with the Deputy Minister of Justice's letters to the Chair of the Chief Magistrates' Forum wherein it was stressed that acting appointments should not be extended for a period of longer than 2 years and that when acting appointments were extended for longer than 2 years it had to be strongly motivated and convincing. The motivations from the acting senior magistrate and the acting chief magistrate for the 48 extensions were strong. In the progress report of September 2018, it was recorded that the statistics revealed that under Mr Lawrence, the Petrusburg court was elevated to the second-best performing court in the cluster and the fifteenth best performing court in the country.

He managed the office well and held meetings with stakeholders in the community to identify issues and took remedial action to improve the service delivery of the office. His productivity in finalising matters was outstanding with him clearing backed-up court rolls. His judgments were sound and well-reasoned. He was praised for his contribution to peer support and the empowerment of colleagues through the training he provided.

Mr Lawrence met all of the requirements of regulation 3 in that he was appropriately qualified, a fit and proper person and a South African citizen. He had the level of education and competency for the posts he applied for (regulation 5). His application also complied with all of the advertised requirements for the posts. Having met all of

the prescribed requirements, Mr Lawrence's application was to be considered alongside those of the other candidates who likewise met those requirements. The record reflects that although Mr Lawrence's name was mentioned 3 times during the short-listing process, he was simply excluded from consideration for any of the posts.

Aggrieved, he approached the **High Court**, Bloemfontein for relief. The application succeeded and the court declared that the short-listing proceedings for the vacancies of magistrates in the 3 Free State districts were unlawful and unconstitutional. The short-listing proceedings and consequently also the recommendations of the Appointments Committee and the appointment of magistrates for those 3 districts were reviewed and set aside.

The Magistrates Commission appealed this decision to the **Supreme Court of Appeals.** The SCA dismissed the appeal, finding that the legislation does not permit a targeted group approach, precisely because no one factor can at the outset override or take precedence over other factors. The SCA held that a selection process which is rigid, inflexible and quota-driven with a blanket and mechanistic exclusion of white persons, no matter how high they may have scored in respect of the other relevant factors, amounts to not considering an application at all.

The SCA said it was important to emphasise that it was concerned here with the short-listing process. It was quite untenable that at this early phase of the recruitment process, candidates should be excluded for no other reason but their race.

This judgment will require rethinking in organisations which automatically screen out members of a specific racial group or gender at the short-listing stage. While the judgment does not contradict earlier judgments which uphold the constitutional protection for affirmative action, it does require a more nuanced consideration of each applicant before considering the targets that the organisation aims to achieve.

It should be read alongside the judgment of *Ethekweni Municipality v Nadesan and Others* (D 1681-17) [2021] ZALCD 1 (3 February 2021) which suggested a practical test to assess the lawfulness of affirmative action measures: "*Is the decision rational? If it's rational, is it unfair when considering internal and external factors?"*

Extract from the judgment:
Potterill AJA:
[23] The record reflects that although Mr Lawrence's name was mentioned three times during the short listing process, he was simply excluded from consideration for any of the posts…….

[24] 'Take away the whites' suggests the application of a rigid exclusionary criterion base on race. The record reflects the same position taken and practice applied by the Committee pertaining to the other two posts; a targeted exclusion of white candidates. It is manifest from the transcript that the Committee was not prepared to consider any of the other criteria in relation to Mr Lawrence. There ought to have been no fixed order or sequence of prioritisation of the listed criteria, but rather a consideration of all of the relevant criteria and, where necessary a balancing of the one against the other. There is always the question of the weight to be allocated to

the different factors in any given situation. Depending on the circumstances, certain factors may have to assume greater significance than the others, but the Committee cannot adopt a blanket approach that prioritises one factor to the exclusion of all the other factors. In adopting a blanket exclusion, as happened here, the Committee impermissibly fettered its own discretion.

……..

[28] As the written reasons for the decision made clear, Mr Lawrence was not shortlisted on the basis that he did not 'meet the section 174(2) of the Constitution-criteria in any of those offices'. The Commission therefore firmly located the reason for his exclusion in his race and gender. What is clear from the record is that the Commission was fixated on excluding candidates from a particular group and no flexibility or deviation from that targeted group would under any circumstances even have been considered.

……

[34] The legislative scheme does not permit a targeted group approach, precisely because no one factor can at the outset override or take precedence over other factors. The starting point of the exercise was therefore fundamentally flawed. The record shows that the process was rigid, inflexible and quota-driven. The blanket exclusion of white persons, no matter how high they may have scored in respect of the other relevant factors is revealing. Any white candidate, no matter how good, was mechanistically excluded. The result was that Mr Lawrence's application was not considered at all. The approach of the Committee was not consistent with the proper interpretation and application of s 174 of the Constitution, regulation 5 or the AP. Rather than considering race as but one of factors, albeit an important one, the Committee set out to exclude candidates, including the respondent, on the basis of their race. Such an approach does not meet the threshold set by our courts and cannot be countenanced. It is important to emphasise that we are concerned here with the shortlisting process. It is quite untenable that at this early phase of the recruitment process, candidates should be excluded for no other reason but their race.

6. Strike action

6.1 Deciding who is involved in strike misconduct?

***NUMSA obo Dhludhlu and Others v Marley Pipe Systems SA (Pty) Ltd* (JA33/2020) [2021] ZALAC 13 (23 June 2021)**

Principles:

The requirements to prove common purpose in the workplace allow an employee to be held to account for collective misconduct where the employee associated with the actions of the group before or after the misconduct, even if not present on the scene; where the employee had prior or subsequent knowledge of the misconduct; and he or she held the necessary intention in relation to it.

Within a labour law context the requisite intention to establish common purpose exists where it is proved that an employee intended that misconduct would result or must have foreseen the possibility that it would occur and yet, despite this, actively associated himself or herself, reckless as to whether such misconduct would ensue.

Facts:
NUMSA members engaged in an unprotected strike, leaving their workstations with placards and written demands which included the removal of Mr Ferdi Steffens, the head of human resources.

Mr Steffens exited his office to engage with the employees. He was surrounded by the employees and seriously assaulted. He was pushed out of a glass window, had rocks thrown at him and was punched and kicked while he lay on the ground. He sustained a number of blows to his body and head, with injuries to his face, arm and body. Two employees not on strike came to his aid, and Mr Steffens left the premises to obtain medical attention. The employer summoned the police, and employees left the premises after being issued with an ultimatum by the employer to do so. On the same day the employer obtained a Labour Court order interdicting the strike and prohibiting acts of violence, intimidation and harassment.

The employer took disciplinary action against 148 employees, all of whom were dismissed following a disciplinary hearing chaired by an independent chairperson. The employees were found to have participated in the unprotected strike and to have acted with a common purpose in Mr Steffens' assault.

The identity of employees who participated in the misconduct was determined from the employer's photographic and video evidence of events on the day; from clock cards used in the payroll system which recorded the names of employees who had arrived and remained at work; from job cards used at workstations; and the evidence of witnesses. In addition, the employees were given the opportunity to provide information to the employer via dropbox or whatsapp to indicate that they had not participated in the misconduct. Those employees who gave an acceptable explanation would not face disciplinary action.

Twelve employees were identified as having participated directly in Mr Steffens' assault. The remaining employees were found by the chairperson to have acted with common purpose on the basis that they had associated themselves with the assault through their presence on the scene; encouraged those involved in the assault; failed to come to the assistance of Mr Steffens; "rejoiced" in the assault; and held placards and demanded in writing that Mr Steffens be removed. In addition, the chairperson took account of the evidence of the employees' own witness that all employees regarded themselves as leaders in respect of events on the day. The chairperson found the employees guilty of misconduct and recommended summary dismissal.

The employees, represented by NUMSA, referred an unfair dismissal dispute to the **MEIBC** and, after conciliation failed, a claim of unfair dismissal to the **Labour Court**. They submitted no unprotected strike or assault took place and that their dismissal was unfair. The Labour Court accepted the evidence of the employer's witnesses as both credible and reliable, consistent with the video footage and photographic evidence. Although the employees' only witness accepted that the strike was unprotected, the Court rejected as improbable his denial that an assault had occurred.

The LC found that the employees who were identified as being on site had acted with common purpose in associating themselves with events on the day and in Mr Steffens' assault, in what was a "*mob attack*". The employer's counterclaim for damages under the LRA was upheld, with the employees ordered, jointly and severally, to pay just and equitable compensation in the amount of R829 835.00 to the employer.

On appeal to the **Labour Appeal Court** there was no dispute that the strike embarked upon by the employees had been unprotected. Also undisputed was that 12 employees had been directly identified as having participated in Mr Steffens' assault and that a further 95 employees had been identified via photographs and video evidence as having been on the scene and therefore associated with the assault. The appeal was pursued for the remaining 41 employees on the basis that common purpose had not been proved because there was no evidence that they had been at the scene of the assault, had been aware of the assault, had intended to make common cause with it, or that they had performed an act of association with it.

The employer's common purpose submissions against the 41 employees relied on the fact that they had been placed at the scene of the assault through clocking records, were absent from their workstations, and video footage showed the entire crowd moving to the offices where the assault took place. Apart from one employee, none of the employees testified or made use of the dropbox or whatsapp opportunities provided to explain their conduct or whereabouts.

The **Labour Appeal Court** held the undisputed evidence was that the striking employees celebrated the assault. Having regard to the proven facts, the inference that all employees were involved in or associated themselves with the assault was the most probable and plausible.

In criminal law to establish 'common purpose' a person must have *intended* the criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself, reckless as to whether the result was to ensue. Within a labour law context the requisite *intention* exists where it is proved that an employee intended that misconduct would result or must have foreseen the possibility that it would occur and yet, despite this, actively associated with it, reckless as to whether such misconduct would ensue.

The LAC held that the Labour Court could not be faulted for finding that the employees committed the misconduct for which they had been dismissed. Given the seriousness of such misconduct, dismissal was an appropriate sanction. For these reasons, the appeal could not succeed.

The doctrine of common purpose is a controversial one because it draws conclusions about intention from association with others. In the context of a strike it requires courage for a union member to disassociate from the group. Association is often coerced, and it is easier to go along with the crowd. For these reasons we believe that there should be caution about relying on common purpose, just as there should be caution about the notion of derivative misconduct. While we understand the frustration employers may face in not being able to prove facts, common purpose can be misused.

Extract from the judgment:
Savage AJA:
Evaluation
[16] The difficulties inherent in determining the individual culpability of an employee in the context of collective misconduct were considered by the Constitutional Court in *Dunlop.* In that matter, the Court stated that:

> *'[46] Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the misconduct. Presence at the scene will not be required, but prior or subsequent knowledge of the violence and the necessary intention in relation thereto will still be required…'.*

[17] The Court recognised that employees may participate in and associate with misconduct in many ways, both direct and indirect, while cautioning that "*no one should be held accountable where no evidence can be adduced to substantiate the claim against individuals, solely on the basis of being part of the group*."
……
[23] From the evidence before the Labour Court, it is clear that the appellant employees associated with the actions of the group before, during or after the misconduct. This included Mr Mokoena who, although he arrived on the scene after the assault, through his conduct associated directly with the actions of the group. It also included the employees who, in Ms Crowie's opinion, she saw to be bystanders. There was no dispute that these employees were present at the scene and associated with the events of the day. They too took no steps to distance themselves from the misconduct either at the time of, during or after the assault. Instead, they persisted with the denial, both in their pleaded case and the evidence of Mr Ledwaba, that any assault had occurred and refused the opportunity to explain their own conduct in relation to it.

[24] In *S v Thebus,* it was made clear that a person "*…must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue*." Within a labour law context the requisite intention exists where it is proved that an employee intended that misconduct would result or must have foreseen the possibility that it would occur and yet, despite this, actively associated himself or herself reckless as to whether such misconduct would ensue. The 41 appellant employees were proved to have held such intent. In such circumstances, the Labour Court cannot be faulted for finding that the appellant employees committed the misconduct for which they had been dismissed. Given the seriousness of such misconduct, dismissal was an appropriate sanction…….

6.2 EFF involvement in labour relations matters

Brightstone Trading 3 Closed Corporation t/a Gordon Road Spar v Economic Freedom Fighters and Others (J 605/21) [2021] ZALCJHB 122 (18 June 2021)

Principle:
A political party can be held liable for the conduct of its members or those members who represented ostensibly that they acted on its behalf. When a political party undermines orderly collective bargaining and dispute resolution, which are cornerstones of the LRA, an employer is entitled to expect its employees to comply with these objectives of the LRA when seeking to resolve any disputes they may have with the employer.

Facts:
The employer conducted business in the food retail sector and is part of the SPAR group of retailers. After the employer demoted an employee from floor manager to cashier, the EFF addressed a letter to the employer, setting out five issues / demands. The letter was issued on the EFF's letterhead and was electronically transferred under the hand of the EFF's regional secretary. A meeting was requested to discuss these five issues, which were raised by "*our members and workers*", relating to the daily rates of employees; unpaid sick notes and medical certificates; unfair treatment that if they joined the EFF they would be dismissed; alleged racism and favoritism; and non-payment of wages. The letter recorded that the EFF *"will not accept any suggestion that since we are not a Trade union, we can't therefore represent our member and workers".*

On the proposed meeting date, members of the EFF arrived at the employer's premises. The situation became volatile. These members, together with employees, engaged in intimidating behaviour (shouting that all cashiers must leave their workstations; verbal threats at employees who did not succumb to their demands; demanding that customers leave the store, directing verbal threats at them, generally instilling fear and uttering that they would attack customers who did not comply; physically barricaded the entrance to the store).

The employer did not take any action at this stage for fear that it would cause the situation to become more volatile. It believed that the protest action was an isolated incident and chose instead to engage the EFF.

When the EFF's members protested at its premises for a second time, the employer agreed to meet with the EFF's representative (the branch secretary of Ward 82, Mr Sono), and its members. However, after taking advice, the employer wrote to the EFF cancelling the scheduled meeting. The letter further cautioned members of the EFF that if they attended at the employer's premises "*as threatened to ensure the closure of the store"*, an urgent court application would be brought against them.

When the EFF received notice of the cancelled meeting, the protest action erupted again and continued for some days. EFF members arrived and demanded a meeting. The request was refused, resulting in yet another disruptive protest where EFF members, with the assistance of some employees, once again shouted and demanded that all cashiers leave their workstations. They also demanded that

customers leave the store and threatened to attack those who did not. Once again customers fled the store. Whilst the store was not physically barricaded on this occasion, it was closed for the safety of the public and the remaining staff members. The employer then approached the **Labour Court** for urgent relief and obtained an interim order against the EFF and named employees, that various forms of intimidation and violence should cease. When the matter was later referred back to court to determine whether the interim urgent order should be discharged or confirmed, it was opposed by the EFF.

The employer relied on the principle of ostensible (apparent) authority in attributing the conduct of Mr Sono and that of the other protestors to the EFF. The EFF did not deny that Mr Sono is a branch secretary but said that it did not authorise him to act on its behalf in engaging in the protest action. It said that it neither sanctioned, authorised or mandated any protest action or unlawful activity, and that such events had nothing to do with it.

The Labour Court accepted that the facts of the case showed that the employer was justified in believing Mr Sono had the (ostensible) authority to act on behalf of the EFF, and granted the employer a final order interdicting the EFF and the named employees from carrying out the unlawful conduct. The court also granted a costs order against the EFF, saying it had no legal standing to become involved in employment matters and that its actions undermined the dispute resolution processes in the LRA.

The principle to be drawn from this case is that a political party can be held liable for the conduct of its members or those members who represented ostensibly that they acted on its behalf.This judgment is consistent with the 2018 decision of *Calgan Lounge (Pty) Ltd v National Union of Furniture and Allied Workers Union of South Africa (NUFAWSA) and Others (J2648/18) [2018] ZALCJHB 334 (9 October 2018)* where the Labour Court was very clear about the intervention of political parties. It confirmed that the deliberate and specific design of the LRA is to designate the task of dealing with workplace disputes and grievances to trade unions. There is no place in this structure for the involvement of political parties. What the EFF did in both cases was to undermine orderly collective bargaining and dispute resolution, which are cornerstones of the LRA.

The message from both cases is that an employer is entitled to expect employees to comply with the LRA when seeking to resolve any disputes they might have with the employer.

Extract from the judgment:
Tulk AJ:
[58] The applicant has succeeded in showing that it relied on a misrepresentation by Mr Sono and the protestors that they acted on behalf of the first respondent. This is the end of the inquiry for ostensible authority. It is only open to the first respondent to contend that the applicant's reliance was, on the probabilities, unreasonable or misguided. This it has failed to do. The import of this is that it is not open to the first respondent to deny that Mr Sono and the protestors were not authorised to act on its behalf. This is a defence to actual authority which allows an applicant to raise

estoppel by replication. The facts that have been placed before me do not warrant such a finding.

[59] Thus, the applicant has succeeded in showing the ostensible authority of Mr Sono who acted in concert with protestors who also claimed to be members of the first respondent. On this basis, the first respondent must account for its involvement in the unlawful protest action.
…….
[71] The *sui generis* contractual nature of the first respondent's relationship with its members, which *inter alia* gives effect to section 19 of the Bill of Rights, means that first respondent cannot contend that it exists separately from its members and cannot be held liable where they "act on a frolic of their own". Rather, as outlined above, the first respondent exists for and because of its members. Thus, this contention is not only expedient, but is also contrary to the *dicta* from the Constitutional Court on the *sui generis* contractual relationship between the first respondent, as a political party and its members.

[72] Finally, the EFF's contention that it exists separately from its members and cannot be held accountable for their conduct, is at odds with the provisions of its own constitution. Therefore, there is no substance to the argument that the first respondent cannot be held liable for the conduct of its members or those members who represented ostensibly that they acted on its behalf.
…….
[74] There can be no doubt that the first respondent's members who are also the applicant's employees embarked in unlawful conduct. They committed acts of intimidation, obstruction and blockading of premises, among others. It is not controversial to grant an order interdicting the employees from engaging in such volatile behaviour. This court has held that such behaviour by employees is unacceptable and has no place in our employment law dispensation…….

[75] There can be no doubt also that the first respondent was directly involved in and instigated the unlawful protest action through the conduct of its members and branch secretary. This it did by engaging in protest action with the employees at the applicant's premises on 16 May 2021 and 29 May 2021 to 1 June 2021. That the EFF was directly involved is also demonstrated by the correspondence of 12 May 2021 written on its letterhead by its branch secretary, making it clear that it was taking up the employees' cause and seeking a meeting on at least five employment conditions.

[76] I can do no better than to rely on the passages in *Calgan Lounge* by Snyman AJ when he confirmed a *rule nisi* against the EFF where it was also engaged in unlawful protest action that furthered a strike:

> *"[41] The first question that must be asked is what was the EFF doing getting involved in workplace issues in the first place, especially considering that the applicant's workplace is organised with the first respondent as majority representative and recognised trade union? The simple answer has to be that the EFF has no business in doing so. It is not a registered trade union. The deliberate and specific design of the LRA is to designate the task of dealing with workplace disputes and grievances to employers' organisations, trade*

> *unions and workplace forums. There is no place in this structure for the involvement of political parties…*
> *…….*
> *[44] What the EFF did in this case was to undermine orderly collective bargaining and dispute resolution, which are cornerstones of the LRA. As an employer, the applicant is entitled to expect its employees to comply with these objectives of the LRA when seeking to resolve any disputes they may have with the applicant as employer. And for the EFF simply to negate all of this based on some misguided view of what the Constitution allows it to do, is simply unacceptable, and cannot be permitted…….*

[77] In sum, the first respondent involved itself in workplace matters that did not concern it because it has no standing as a trade union. The first respondent was not entitled to organise employees in the applicant's workplace or for that matter engage in unlawful protest action in pursuance of demands it simply has no standing to make. As Snyman AJ held in *Calgan Lounge* supra, if it wants to do so, it must register as a trade union, and comply with the LRA.

6.3 Rewards for non-strikers and penalties for strikers?

(a) Can an employer give a bonus to non-strikers for work done during the strike?

***National Union of Mineworkers v Cullinan Diamond Mine (A Division of Petra Diamonds (Pty) Ltd)* (2021) 42 ILJ 785 (LAC)**

Principle:
There is no express provision in the LRA prohibiting employers from providing non-strikers with rewards for the extra work or exceptional performance during a strike. Where the incentive measures are suitable and proportional, and where non-strikers are not advantaged for not exercising their right to strike, the payment of bonus will not be an infringement of s 5 of the LRA.

Facts:
When wage negotiations reached impasse, NUM and its members commenced a protected strike that lasted for 12 operational days. However, shortly before the commencement of the strike the company addressed a letter to all employees, urging them to consider its final wage offer favourably. It added that any employee who joined the industrial action ran the risk of losing the potential bonus payment scheduled for payment at the end of September 2013. After the strike ended, it was decided that all employees, whether they had been on strike or not, would not receive the annual production bonus. Instead, the company proposed that an exceptional performance bonus be paid to all employees who had worked one day or more during the course of the strike and had contributed to exceptional productivity and performance during this period.

NUM considered that the payment of the exceptional bonuses to non-striking employee was unfairly discriminatory as contemplated in the Employment Equity Act 55 of 1998 and the LRA 1995. It brought an unfair discrimination claim in the **Labour Court**. The company submitted that during the strike the mine was able with 34% of

the available man-hours to achieve a production level of 52% of the expected carats, and it argued that this achievement was exceptional, deserving of a bonus payment. The Labour Court dismissed NUM's claim that the mine had discriminated against its members who participated in the protected strike by paying the discretionary bonus to non-striking employees.

In an appeal by NUM to the **Labour Appeal Court**, the court found that the Employment Equity Act was not applicable to the kind of discrimination alleged in the case, but that s 5 of the LRA was applicable. The question for determination was, therefore, whether the payment of bonuses to the non-striking employees amounted to unfair discrimination in terms of s 5 of the LRA. The court had regard to the former LRA of 1956, the provisions of which had been interpreted by the courts to permit employers to resort to the payment of bonuses to non-strikers to mitigate the harmful consequences of a legal or protected strike.

Turning to the LRA 1995, the court then questioned whether s 5 permits or prohibits the practice of rewarding non-strikers with bonuses for staying at work. The court noted that, as there is no express provision in the LRA 1995 prohibiting employers from providing non-strikers with rewards for the extra work or exceptional performance they may put in during the strike, the issue was whether that practice was unfairly discriminatory. Whether employer conduct during industrial action constitutes unfair discrimination is dependent on the context and reasons for which it occurred. The court was of the view that there was no denying that the impact of differential treatment between strikers and non-strikers is disadvantageous for the strikers, and, although the basis of the differentiation might, on the face of it, be innocent, the effect of the differentiation is nonetheless discriminatory in the narrow sense that there is a disparate impact.

The court rejected NUM's argument that the payment of rewards to non-strikers is generally unfair because it undermines the union as a bargaining agent. The court found that a distinction should be drawn between bypassing or undermining the bargaining agent and the deploying of a retaliatory measure as part of the collective bargaining power play during a strike. The court posited that insofar as the policy of the LRA 1995 aims to strengthen collective bargaining as the means of industrial self-regulation, its success depends on strong representative trade unions and employers acting within stable bargaining relationships underwritten by the right to engage in industrial action.

The possibility of an ultimate power play by either side is a powerful inducement for agreement and industrial peace. Just as the employees have measures to compel the process to advance their interests such as strikes, go-slows, overtime bans, boycotts and picketing; so too does the employer, who may seek to protect its interests by resorting to the lock-out, unilateral implementation of its last offer, the employment of temporary replacement labour and ultimately operational requirements dismissals when the strike becomes dysfunctional.

The court then expressed the view that in offering bonuses to non-strikers on the eve of the strike, the employer hopes to gain a tactical advantage before the campaign of its employees picks up momentum at a time when its business is not overly vulnerable. Thus, the court found that just as it is legitimate for a trade union to resort

to industrial action (temporarily suspending the contract) in response to an employer's unilateral management changes, so too may it be legitimate (depending on the circumstances) for the employer to respond to a strike with a unilateral exercise of the managerial prerogative to alter the terms of employment temporarily. Economic sanctions underwrite the collective bargaining process. The unilateral offer of bonuses or additional overtime payments to non-strikers (who may not be members of the union) is no more or less objectionable than the employment of replacement labour, provided the measures are suitable and necessary (proportional) for that purpose.

The court concluded that the company's conduct did not unfairly discriminate against or prejudice the striking employees, nor did it unfairly advantage the non-strikers without a legitimate reason. The non-strikers were not advantaged for not exercising their right to strike. They were advantaged for their attendance and exceptional performance during the strike. But for the exceptional performance, the bonus would not have been paid.

The court accordingly found that the company's conduct was not an infringement of the relevant provisions of s 5 of the LRA and dismissed the appeal.

Extract from the judgment:
Murphy AJA:
[11] The issue on appeal is thus whether the payment of bonuses to the non-striking employees amounted to unfair discrimination in terms of s 5 of the LRA.
……
[19] As stated, there is no general express provision in the LRA or elsewhere outlawing the practice of paying bonuses to non-strikers. The issue is whether that practice is unfairly discriminatory.

[20] As discussed, the Appellate Division in *SA Commercial Catering & Allied Workers Union v OK Bazaars (1929) Ltd* held that even if we accept (as we must) that the right to strike is a necessary ancillary to effective collective bargaining, that does not preclude employers from taking steps to discourage strikes or to mitigate their impact. Whether employer conduct during industrial action constitutes unfair discrimination is dependent on the context in and reasons for which it occurred. Simply put: was the differentiation justified in the circumstances?
……
[23] In so far as the policy of the LRA aims to strengthen collective bargaining as the means of industrial self-regulation, its success depends on strong representative trade unions and employers acting within stable bargaining relationships underwritten by the right to engage in industrial action. The possibility of an ultimate power play by either side is a powerful inducement for agreement and industrial peace. As the Industrial Court suggested in *Chemical Workers Industrial Union v BP South Africa*, collective bargaining is a two-way street. Just as the employees have measures to compel the process to advance their interests such as strikes, go-slows, overtime bans, work to rule, boycotts and picketing; so too does the employer, who may seek to protect its interests by resorting to the lock-out, unilateral implementation of its last offer, the employment of temporary replacement labour and ultimately operational requirements dismissals when the strike becomes dysfunctional. An employer is entitled to attempt to thwart a strike through these

various options. In offering bonuses to non-strikers on the eve of the strike, as happened in this case, the employer hopes to gain a tactical advantage before the campaign of its employees picks up momentum at a time when its business is not overly vulnerable.

[24] Some believe that the lock-out is the equivalent of the employees' right to strike. That is not so. The true countervailing power is the employer's prerogative to act unilaterally……..

[25] Thus, just as it is legitimate for a trade union to resort to industrial action (temporarily suspending the contract) in response to an employer's unilateral management changes, so too it may be legitimate (depending on the circumstances) for the employer to respond to a strike with a unilateral exercise of the managerial prerogative to alter temporarily the terms of employment. Economic sanctions underwrite the collective bargaining process. The unilateral offer of bonuses or additional overtime payments to non-strikers (who may not be members of the union) is no more or less objectionable than the employment of replacement labour, provided the measures are suitable and necessary (proportional) for that purpose.
……..
[28] Although prima facie indirect discrimination, in the context of the constitutional scheme guaranteeing the right to engage in collective bargaining, the respondent's conduct was not unfair and was a legitimate exercise of that right as 'part of the resolutive process'. To state the obvious, no right (including the right to collective bargaining and the right to strike) is absolute. The rights of both industrial actors are subject to reasonable limitation and from time to time require harmonisation. The respondent's conduct was not inconsistent with the policy objectives of the LRA. By reason of its temporary retaliatory nature, and the computation of the bonus being explicitly tailored to attendance and performance for the limited period of the strike, the bonus was a proportional means of advancing the respondent's collective bargaining objectives.

[29] As such, the respondent's conduct did not unfairly discriminate against or prejudice the striking employees; nor did it unfairly advantage the non-strikers without legitimate reason. The non-strikers were not advantaged for not exercising their right to strike. They were advantaged for their attendance and exceptional performance during the strike. But for the exceptional performance the bonus would not have been paid. Accordingly, the respondent's conduct was not an infringement of the relevant provisions of s 5 of the LRA.

(b) Can an 'accrued' bonus be forfeited by strikers?

***Actom (Pty) Ltd v National Union of Metalworkers of South Africa (NUMSA) obo Members and Others* (JA63/2020) [2021] ZALAC 52 (10 December 2021)**

Principle:
Where a bonus 'accrues' over time, the word 'accrue' means a right to which an employee is legally entitled, even though that payment takes place after the date of accrual. In the absence of an express term, accrued bonuses are not forfeited because of subsequent events, such as industrial action.

Facts:
This dispute is about whether project bonuses were forfeited by NUMSA members as a result of industrial action. The employer was a construction company involved in the construction of the Medupi power station in the Limpopo Province on behalf of Eskom.

NUMSA's members embarked upon an unprotected strike on 25 June 2014. On 1 July 2014, NUMSA's members went on a national strike and only returned to work on 28 July 2014. NUMSA's members, then again went on an unprotected strike on 7 August 2014. As the union's members refused to provide undertakings that should they return to work they would comply with the terms and conditions of employment and not continue striking, they were not allowed back on the premises until such time as a Memorandum of Understanding was concluded. This occurred on 16 August 2014 and the union's members resumed employment on 18 August 2014.

On 3 September 2014, the employer provided union representatives with a letter informing them that their members would not be paid their project bonuses from December 2013 to August 2014 as a result of their unprotected strike.

The union lodged a dispute with the **CCMA** that was referred to arbitration. NUMSA's case was that their members should have only forfeited their project bonuses for the month during which they embarked on the unprotected industrial action. The arbitrator did not agree and held there was no basis to infer that the bonus clauses in the applicable Project Bonus agreement should be interpreted to mean that the forfeiture is limited only to the month in which the employees participated in unprotected industrial action. The union's members were therefore not entitled to be paid project bonuses for December 2013 to August 2014.

On review at the **Labour Court**, the court upheld the union's application for review, finding that the only period during which the members of the union were not entitled to a production bonus was when the strike occurred - that is August 2014. Accordingly, the employer was ordered to pay the project bonuses which had accrued from December 2013 to July 2014.

On appeal the **Labour Appeal Court** held that prior to the commencement of the unprotected industrial action, a project bonus may have accrued to the employees, giving a legal entitlement to the bonus prior to the event which was stipulated to trigger a forfeiture. In the absence of an express provision in the Project Bonus agreement saying there would be no entitlement to the bonus for the entire calendar year during which the unprotected industrial action took place, the employer was obliged to recognise the employees' right to the project bonus until the commencement of the industrial action in August 2014. While the employer was entitled to refuse to pay the project bonus for August 2014, it could not ignore the legal entitlement to the project bonus for the period of 'accrual' from December 2013 to July 2014.

The judgment turns on the wording of the Project Bonus agreement and the definition given by the LAC to the word 'accrued', meaning that where a bonus is assessed and accumulated over a period of time, this becomes a legal entitlement which is not easily forfeited. Recognising that the case turned on the precise words

of the agreement in question, another agreement could provide for the complete forfeiture of a potential bonus in the event of unprotected industrial action.

Extract from the judgment:
Davis JA:
Evaluation
[14] This appeal thus depends wholly on the interpretation of clauses 13.25 and particularly whether the finding of the second respondent that the intention of the parties to discourage participation in unprotected industrial action justified a reading of the clause that leads to a justification of a forfeiture of the entire project bonus.

[15] Hence according to the second respondent's award, the appellant was entitled to invoke this clause and refuse to pay bonus payments for the period 1 December 2013 to 30 November 2014. It is common cause that the unprotected strike took place on 7 August 2014 and that strikers resumed duties on 18 August 2014. To recapitulate the second respondent had held that, although clause 13.25 was silent about the degree of forfeiture which would apply in the event of unprotected strike action, 'the parties thus agreed on a more severe sanction for participation in unprotected strike action than absence from work without permission.'

[16] While clause 13.25.3.2.3 made it clear that, in the event of rolling unprotected industrial action, that the 'project bonus in terms of the PLA' will be forfeited, there is no similar provision in the case of other forms of unprotected industrial action. The clause is silent in this regard. The key question therefore is whether the words as employed in clause 13.25 can justifiably bear the weight of the intention of the parties as divined by the second respondent.

[17] The key to unravelling the consequences of employees participating in unprotected strike action is to be found in the wording of clause 13.25.1 which provides for an accrual of a project bonus equal to 15 hours' wages for each completed month worked on the project. The use of the word 'accrue' is significant. The word 'accrue' has a clear meaning, being a right to which an employee is legally entitled, albeit that payment takes place after the date of accrual. See *CIR v Peoples Stones (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A).

[18] Once the word 'accrue' is so defined, it follows that prior to the commencement of unprotected industrial action, a project bonus may have accrued to the employees concerned; that is, they had a legal entitlement to the bonus prior to the event which is stipulated to trigger a forfeiture. Only the period from December 2013 to July 2014 is in dispute, and the question is whether from an engagement with the text of the clause and thus the express wording employed by the parties, the appellant was justified in regarding the project bonus for that period as being forfeited.

[19] Turning to the consequences of this approach to this appeal, the appellant had already paid the project bonuses from September 2014 to December 2014. Given the interpretation of clause 13.25.1 as set out above, the appellant cannot disregard the legal entitlement of the employees, who participated in unprotected industrial action, that is to the project bonus which accrued prior to the date of the industrial action on which they had embarked.

[20] Absent an express provision in clause 13.25 to the effect that there would be no entitlement to the bonus for the entire calendar year during which the unprotected industrial action took place, the appellant was thus obliged to recognise the employees' right to the project bonus until the commencement of the industrial action in August 2014.

6.4 Strikes demanding the removal of managers

***Walsh v The Superintendent General: Eastern Cape Department of Health and Others* (PA14/2019; PA8/20) [2021] ZALAC 19; [2021] 7 BLLR 667 (LAC); (2021) 42 ILJ 1461 (LAC) (30 March 2021)**

Principles:

1. Whilst the phrase 'public interest' has not been given a precise meaning by the courts, it must promote the general welfare of the public. A narrow definition of 'public interest' may be inappropriate. Violent, illegal conduct that trumps constitutional obligations owed by the State can never be conduct in the public interest. A court cannot permit anarchy to be rewarded and couch it as being justified in the name of the public interest.

2. If an employee has a legal entitlement to refuse to perform duties, the deemed dismissal provisions of section 17(3) of the Public Service Act will not apply.

Facts

Mr Walsh became CEO at Fort England Hospital in Gahamstown on 15 October 2012. When he arrived at the hospital, he said there was a split between nursing staff and clinicians, and nurses refused to take blood on instructions from doctors as well as refusing to interpret for doctors. Administration was chaotic, there was little structure, absenteeism was rampant, employees were using hospital facilities to run their own personal businesses during working hours, security guards were being used to do the work of nurses in certain instances, and many staff members were inappropriately interacting financially with patients.

When Walsh sought to respond to these challenges, he was met with considerable opposition from certain unions, union officials and employees, which led to a series of unlawful strikes and violent incidents. Thus began a long, conflict-ridden dispute that was to end in Walsh's forced transfer nearly 5 years later.

During this period court interdicts were obtained and various dispute resolving interventions were attempted, but these did little to resolve matters. Unions demanded that Walsh be removed from the hospital. At one stage Walsh was assaulted by a shop steward and an employee, and at one report feedback meeting a union representative stated that he must "*leave the hospital in a bakkie - they will make the hospital ungovernable*" and "*set the administration building alight*".

Despite an external independent investigation finding little fault with management, the E. Cape Health Department proposed that Walsh and another manager be transferred away from the hospital. When he refused to accept the transfer, he was instructed to not report to work at the hospital whilst a second investigation was conducted. This investigation found that the CEO's manner and approach was "*too*

high handed, autocratic and did not foster or encourage a good working relationship with staff and unions". The second investigation team recommended that the Department should consider an appropriate Leadership Development intervention and implement an improvement plan, or consider transferring the CEO to another facility.

Whilst Walsh did submit a plan of action to the Department, it had no effect on the impasse. Walsh was then offered two alternative positions which he declined. He was then instructed to transfer to the vacant post of Director: Forensic Services in the Department's Bisho office, which he also declined to accept. Walsh then instituted a legal challenge against his transfer saying it was unlawful.

Faced with the dilemma that transfers are not covered under the unfair labour practice definition (unless they constitute a demotion), Walsh brought an application in the Labour Court under s158(1)(h) of the LRA to review the Department's decision to transfer him and declare it unlawful.

Transfers in the Public Service are regulated by s14 of the Public Service Act (PSA). This provides that unless a transfer is with an employee's consent, it must be in the 'public interest' for the transfer to take place and after considering the employee's representations. The Department submitted they had taken Walsh's representations into account and that the transfer was in the public interest, taking into account his personal safety, the interests of the hospital's staff and property, and to ensure the uninterrupted delivery of services at the hospital.

Walsh argued that the transfer was in breach of the PSA, taken without prior meaningful consultation, and was in response to unlawful union demands calling for his removal from office. In Walsh's view, no sufficient reasons had been given as to why his transfer was in the public interest. Based on the alleged procedural unfairness, Walsh submitted his transfer was in breach of s6 of the Promotion of Administrative Justice Act (PAJA).

The Labour Court found that the Superintendent General: E Cape Dept. of Health who signed Walsh's transfer letter, had delegated authority to do so, and that Walsh had been given a meaningful opportunity to make representations about the transfer decision before it was finally made.

Turning to the question of whether Walsh's transfer was in the public interest, the LC found that whilst the unions' demands that he be removed from his position as CEO without due process were unlawful, this was not conclusive in determining whether the transfer was in the public interest. The LC noted that the public interest and the interests of an affected employee do not always coincide, and that an employee's personal interests cannot outweigh what is in the interests of the broader public good. The LC found that the decision to transfer Walsh was not irrational, having taken into consideration a basket of factors including his personal safety, the persistent interruption of services at the hospital, the safety of employees and the hospital property.

Although the LC dismissed Walsh's application to review his transfer, it was highly critical of the unions' conduct and management's response to the situation. The

Court said the unions had sought to advance their interests and those of their members through "*brutal acts of thuggery*" and that shop stewards appear to have committed misconduct that warranted summary dismissal. Instead of reigning in the unlawful behaviour of the unions and their officials and holding them to account for their actions by supporting Walsh in his endeavours to introduce orderly management to the hospital, the LC said the Health Department "*engaged in what can only be described as appeasement and acquiescence and ultimately, craven capitulation to the unlawful demands by the unions to have the applicant removed from his post.*"

Subsequent to Walsh continuing to refuse the transfer to the vacant post of Director: Forensic Services in the Department's Bisho office, the Department eventually invoked the 'deemed dismissal' provisions in section 17(3)(a) of the PSA. This section effectively provides that an employee who is absent from official duties without permission for more than a calendar month, shall be deemed to have been dismissed from the public service on account of misconduct.

Despite Walsh making representations in terms of section 17(3)(b) as to why the Department should reinstate him, the Department declined to do so. Walsh then brought another application in the Labour Court to challenge his deemed dismissal, but this was dismissed. Walsh's appeal to the Labour Court also challenges the legality of his deemed dismissal.

The LAC summarised at the outset of its judgment that the appeal concerned two key questions:

- The rationality of the decision to transfer Walsh; and
- whether Walsh could be deemed to have been discharged.

Regarding the rationality of the decision to transfer Walsh, the LAC disagreed with the LC's view that meaningful consultation had taken place between the Department and him about his transfer prior to it being implemented, as required by s14 of the PSA. The LAC found that "*no constructive engagement was undertaken to assist a dedicated medical professional from the illegal conduct of unionised employees*", and that there was a clear breach of procedural fairness. The LAC said there was no attempt to find a solution, save that Walsh was informed that he had no alternative but to accept one of two options unilaterally decided by the Department.

The LAC also disagreed with the LC's view that Walsh's transfer was in the '*public interest*', as required by s14 of the PSA. Whilst recognising that the '*public interest*' phrase has not been given a precise meaning by our courts, the LAC accepted that it should promote the general welfare of the public as opposed to the Department's more narrow interests. To accept the Department's view that Walsh's continuation as CEO would not have promoted the general welfare of the patients, was "*to allow anarchy to prevail*", as it would mean giving in to "*thuggish behaviour*" and allowing violent, illegal conduct to trump constitutional obligations. The LAC summarised it this way [clause 51]:

> *"… a court cannot permit anarchy to be rewarded and couch it as being justified in the name of the public interest. That is the route to the destruction*

of constitutional governance. Sadly, that is the unintended consequence of the decision of the court a quo."

Regarding whether Walsh could be deemed to have been discharged, the LAC said that its decision that the Department acted procedurally and substantively unfairly in transferring Walsh, meant that he was justified in refusing the transfer to Bisho and tendering his services as CEO at Fort England Hospital in Gahamstown. In turn, this meant that the Department could not rely on the deemed dismissal provisions of s14 of the PSA, as Mr Walsh had not absented himself from his duties as Fort England CEO without permission, as would have been required for that section to apply.

For these reasons the LAC granted Walsh his appeal on both issues, and ordered that he be retrospectively reinstated as CEO of Fort England Hospital.

We understand that the Department has appealed the LAC judgment to the Constitutional Court, which means the LAC decision has effectively been suspended pending the outcome of that appeal. Because of this, we will have to await the outcome of the appeal to find out if the mayhem warned of by the Department will materialise if and when Mr Walsh is reinstated.

In discussing the LC's judgment in Worklaw's *November 2019 Newsflash*, we asked what the Department's management could have done differently at the time to deal with this situation? This question now becomes even more relevant, given the additional substantial legal costs incurred, the further entrenched positions of the parties and the ongoing damage done to Mr Walsh's career.

As is so often the case in conflict ridden situations, early intervention is crucial in preventing entrenched 'win-lose' positions being established from which parties later battle to escape. Top management should be seen to be backing their front line managers and supervisors as far as possible, with early consideration given to using relationship building initiatives involving independent mediators and facilitators. Experienced practitioners in that way can, whether in joint meetings with the parties or in 'side meetings' with them separately, explore the consequences and realities of the choices they face.

Where factual disputes exist between the parties, some form of independent fact finding / adjudication process could be established, with parties agreeing in advance to accept determinations made.

In dealing with conflict ridden relationships at the workplace, parties may inevitably at some stage realise that they can't 'do it on their own' – there is ultimately a clear need for parties to work together, in order for an organisation to survive and thrive. But the bottom line must be, as clearly pointed out by the LAC, that an organisation cannot permit anarchy to be rewarded – that surely is likely to lead to its ultimate destruction.

Extract from the judgment:
(Davis JA)

[50] When the evidence is taken as a whole, it is correct, as respondents observe, that there can be no suggestion that their actions were motivated by bias or malice. But if respondents were concerned primarily to promote the general welfare of the patients at the hospital, then to allow violent, illegal conduct to trump the constitutional obligations owed by the state to patients requiring health care can never be conduct in the public interest. In their view, the continuation of the appellant as the CEO at the hospital would not have promoted the general welfare of the patients. But that is to allow anarchy to prevail; so long as illegal conduct can be sustained, it must follow that thuggish behaviour that, in this case, compromised the health of vulnerable patients totally dependent on the state to vindicate their s 27 rights, must triumph. The evidence indicates that at most, 50 individuals were involved in the sustained illegal conduct, and in a number of instances, there were no more than 15 employees who were the cause of the disruption.

[51] It behoved respondents to have responded to the conduct of but a small group of employees, intent on compromising the efficient running of the hospital, through the use of the legal mechanisms available. It cannot be in the public interest to have preferred illegality over the obligation to provide efficient and effective health care to those in need. In addition, a court cannot permit anarchy to be rewarded and couch it as being justified in the name of the public interest. That is the route to the destruction of constitutional governance. Sadly, that is the unintended consequence of the decision of the court a quo.

……

[60] On 26 March 2020, Nieuwoudt AJ dismissed an application brought by the appellant to set aside the decision that the appellant was correctly deemed to have been discharged and thus his application to be reinstated as CEO of the hospital. It is against this order that the appellant has approached this court, with the leave of the court a quo; hence the second of the key questions to be determined by this court.

[61] In resisting the appeal, respondents are confronted with two significant problems. In the first place, the finding that respondents acted both procedurally and substantively unfairly in transferring appellant from the hospital leads inexorably to the decision that the transfer of appellant to Bhisho must be set aside holds fatal consequences for the application of s 17(3) of the PSA. Section 17(3)*(a)* contains an essential requirement for a deemed dismissal to be triggered that the employee absents himself, in this case, from official duties without permission of his head of department. But in this case, the appellant was unlawfully transferred. Thus he had a legal entitlement to refuse to perform his official duties other than at the hospital at which he tendered his services.