Worklaw 2016 Labour Law Update

Contents

LEGISLATIVE UPDATE: A PRACTICAL GUIDE

A. BEING 'DEEMED' AN EMPLOYER UNDER S198A-D.

1. The legal framework

Worklaw subscribers will know that s198 of the LRA was fundamentally altered by the 2014 Amendments to the Act. The new sections 198A-D, which apply to employees earning below the BCEA earnings threshold (currently R205 433 per annum), can result in an employee being "deemed" to be employed on an indefinite basis under two different circumstances:

- Firstly, an employee on a **fixed term contract of longer than 3 months** will be deemed to be employed on an indefinite basis, unless the work is of limited or definite duration, or a '*justifiable reason'* for the longer contract exists (as defined under s198B(4)). In any event, employees on contracts longer than 3 months must not be treated less favourably than permanent employees performing similar work, unless '*justifiable reasons'* exist.

- Secondly, a **TES employee** (ie labour broker employee) who is found to be not providing a *'temporary service'* to a client (as defined under s198A(1)), will be deemed to be the *client's* indefinite employee. The employee must be treated on the whole not less favourably than other employees of the client performing similar work, unless '*justifiable reasons'* exist.

(Note: Definitions of the words in *italics* above are contained in a schedule at the end of this document.)

The first category above is not particularly complicated in that it only involves one employer, namely the employer who concluded a fixed term contract with the employee and who is now 'deemed' to be employing that person on an indefinite basis. The second category on the other hand becomes very complicated, in that the employee is initially employed by the labour broker but is then 'deemed' to be employed by the labour broker's client.

2. What's the effect of this?

The Act provides for the following consequences as a result of a labour broker's employee being deemed to be the client's employee under s198A:

- Section 198A(3)(b) provides that the employee is deemed to be the employee of the client, and the client is deemed to be the employer, with the employment being on an indefinite basis.

- Section 198(4A) provides that –
    - The employee may institute proceedings against either the TES or the client, or both;
    - A labour inspector acting under the BCEA may enforce compliance against the TES or the client, or both;
    - An order or award made against the TES or the client, may be enforced against either.

3. Application by arbitrators, the courts and the CCMA

At least three arbitration awards have been issued during the past year that appeared to be singing from the same hymn sheet, and in each case have interpreted the new deeming provisions in sections 198 and 198A of the LRA in a manner that finds that when a labour broker places employees with a client not in a 'temporary service' as defined, the client is deemed the sole employer of those employees. Two of these awards - *Assign Services v Krost Shelving* and *Mphirime v Value Logistics* - are summarised on Worklaw.

The ***Assign Services*** award has since been successfully reviewed and overturned by the Labour Court in *Assign Services (Pty) Ltd v CCMA and Others* (JR1230/15) [2015] ZALCJHB 283 (8 September 2015). The LC rejected the 'sole employer' approach and found that the deeming provisions in section 198A(3) of the LRA make the labour broker's client to be the employer for the purposes of the Act (ie the LRA – so does this mean for example that the client wouldn't be regarded as the employer for the purposes of unfair discrimination claims under the EEA??). But, the Court said, nothing in this deeming provision invalidates the employment contract between TES and worker, which remains in place. There is also no reason why the TES is not concurrently vested with the statutory rights and obligations of an employer under the LRA.

This LC review judgment, whilst it is all we have to go on at present, unfortunately poses as many questions as it answers. For example, confusion remains over which employer would have the responsibility to conduct a disciplinary hearing to ensure any dismissal (and termination of the employment contract) was procedurally and substantively fair – is it just the client, or do both the client and the TES have this responsibility?

Since the *Assign Services* review judgment, the CCMA in March 2016 issued a *Resource Guide on the Labour Law Amendments*. Notwithstanding the above LC review judgment rejecting the 'sole employer' approach, the CCMA in relation to unfair dismissal disputes, states in the Guidelines that *"the TES is the employer only if* (our emphasis) *the worker is performing a genuinely temporary service"* (page 23), and that *"if the employee has become an employee of the client as a result of the deeming provision, alleged unfair dismissal proceedings must be brought against the client"* (page 25). Whilst we are unsure about the legal correctness of this approach, there seems little doubt about how the CCMA thinks these sections should be applied.

4. How to manage the new situation?

Given the confusing manner in which the Act has been drafted and the fact that the CCMA and the LC have thus far interpreted these provisions differently, how does an employer manage its affairs to avoid legal potholes?

There is no explicit procedure provided in the LRA for a TES employee who believes he/she is working for a client in a manner that does not constitute a 'temporary service', to bring an application to be deemed the client's employee. In the circumstances, we think the problems over the interpretation of the deeming provisions are most likely to arise in 2 situations:

- When a TES employee working for a client is dismissed and wishes to challenge that dismissal; or

- When a TES employee working for a client compares earnings with the client's comparable employees, and wishes to claim 'equal pay for equal work' in comparison with them.

In both the above situations, the deeming provisions may need to be interpreted. We attempt below to provide practical guidance as to how the client employer should handle these 2 situations.

4.1 Unfair dismissal disputes

Given that the LC in *Assign Services* stated that the deeming provisions make the client the employer for the purposes of the LRA, and the CCMA's approach to these provisions as outlined above, **the bottom line for the client employer is that it is in the direct firing line**, irrespective of what concurrent obligations also rest with the TES. But if both have obligations as the employer, it would be completely impractical for them to act independently of each other – for example, by conducting separate disciplinary hearings over the same issues that could potentially result in different outcomes. It seems clear they should both act 'as one' in relation to the employer's obligations towards an employee – but what is the best way of achieving this?

We suggest that the TES agreement between the TES and the client could incorporate a provision that appoints one or the other of them to act as the employer on their joint behalf, in any dealings with an employee who has been working for the client for 3 months or more, and who was not employed as a substitute for a temporarily absent employee (ie who falls outside the definition of a *'temporary service'*). Given that one of the reasons why the client may have contracted with the TES in the first place was to avoid having to engage as employer with the placed employees, the client may prefer to appoint the TES as the employer on their joint behalf, rather than taking on these obligations. The TES would in any event be acting as the employer for its employees who are providing a 'temporary service' to the client. An indemnity could also be incorporated into the agreement, providing that the TES accepts responsibility for any liability imposed on the client as a result of the deeming provisions, accepting however the limitations of any such indemnity in the case of a reinstatement order granted specifically against the client.

Whilst the above approach may be scrutinised by arbitrators seeking to identify the client as the employer, it is little different to an employer contracting out aspects of its HR function to consultants or appointing an outsider to chair a disciplinary enquiry.

There may be other TES clients' who wish to take on this responsibility as employer on their joint behalf, to ensure that any disciplinary action taken is in compliance with the procedural and substantive fairness requirements of the LRA. The client may feel this is a safer option in managing its risks, and that this option is in any event more in line with the approach adopted by the CCMA and the LC's *Assign Services* judgment. Either way, it would be imperative for the TES and the client to as far as possible act as one employer in dealings with the employee.

4.2 **'Equal pay for equal work' disputes under s198A-D**

'Equal pay for equal work' disputes arising under the EEA are discussed in section B below. But these disputes can also arise under sections 198A-D of the LRA in respect of employees earning below the BCEA earnings threshold (currently R205 433 per annum), in the following ways:

- a **labour broker employee** who has been deemed to be the client's indefinite employee as a result of not providing a *'temporary service',* must be treated on the whole not less favourably than the client's other employees performing similar work, unless '*justifiable reasons'* exist under s198D(2);

- an employee on a **fixed term contract of longer than 3 months (**irrespective of whether having the right to be deemed an indefinite employee due to their being no justifiable reason for that contract being more than 3 months) must not be treated less favourably than permanent employees performing similar work, unless '*justifiable reasons'* exist under s198D(2);

- a **part time employee,** after 3 months, must be treated on the whole not less favourably than a comparable full-time employee doing similar work, unless '*justifiable reasons'* exist under s198D(2).

Different wording is strangely used under the above 3 sections to describe the obligation to treat similar or comparable employees equally. Whilst the reasons for this are unexplained, the intention is essentially similar in each case – namely to equalise remuneration for these specific employees earning below the BCEA earnings threshold and doing similar work under similar circumstances.

In the case above of a deemed labour broker employee claiming 'equal pay for equal work' against the client under s198A(5), it is again essential that the 2 potential employers, ie the labour broker and the client, act 'as one'. The suggestions provided in para 4.1 above, as to how this could be achieved, are again applicable here.

Defences to these claims, framed as '*justifiable reasons'* under s198D(2), provide that it would be justifiable if –

> *"the different treatment is a result of the application of a system that takes into account -*
> *(a) seniority, experience or length of service;*
> *(b) merit;*
> *(c) the quality or quantity of work performed; or*
> *(d) other criteria of a similar nature,*
> *and such reason is not prohibited by section 6(1) of the EEA"* (this section lists grounds for unfair discrimination such as race, gender, sex etc).

It is interesting that the above list omits factors such as the **shortage of a relevant skill** in a particular job classification and '**market forces'**, which are listed as valid defences to similar claims under the EEA. This is however not a closed list and it would still be possible to argue that such factors should be taken into account under the '*other criteria of a similar nature'* category.

The practical consequences of overlapping rights flowing from sections 198A and B become important, when considering claims for 'equal pay for equal work'.

Consider this example:
A TES employee is placed with a client on a 6 month contract as a replacement for a temporarily absent employee: could the employee potentially claim 'equal pay for equal work' against the client?

Our suggested answer:
This placement falls within the definition of a 'temporary service', and as such the employee has no prospects of being deemed the client's employee. But the employee is covered by s198B(8)(a) that obliges the employer to treat an employee on a fixed term contract of longer than 3 months, as favourably as a permanent employee doing similar work. *But who is the employer in this case?* Its the TES, and so whilst the employee may have such a claim against the TES, no such claim could be brought against the client.

Another interesting question: do sections 198A-D of the LRA contemplate claims based on 'work of equal value'? Claims under the amended EEA are widened, based on the specific wording used in the new section 6(4), to include claims based on comparable employees doing 'work of equal value'. No similar wording exists under sections 198A-D, and it could be argued that these sections limit claims to the narrower base of comparable employees 'performing the same or similar work'. This would then exclude a comparison between employees doing different work, but in the same job grade and that arguably add the same 'value' to the organisation (eg a comparison of a head office admin and shop floor position).

It remains to be seen whether arbitrators and the courts recognise this distinction in deciding disputes under sections 198A-D.

B. PROCESSING 'EQUAL PAY FOR EQUAL WORK' DISPUTES UNDER THE EEA.

As we have already noted above, 'equal pay for equal work' arises from the legislation in two ways, firstly in specified circumstances under the LRA in the amended sections 198A-C dealing with labour broker, fixed term contract and part time employees earning below the BCEA earnings threshold (currently R205 433 per annum), and secondly as a much broader unfair discrimination claim available to <u>any</u> employee at whatever earning level, under the amended section 6(4) of the Employment Equity Act. In both instances, it is not about determining a 'fair wage', but rather an attempt to eliminate unfairness resulting from paying some employees less than others for doing similar work under similar circumstances.

The two Acts create certain rights and obligations only applicable to claims under that Act; for example the LRA lists specific defences to 'equal pay for equal work' claims under that Act in s198D(2), whereas defences to these claims under the EEA are covered in clause 7 of the **2014 EEA Regulations** and clause 7 of the **EEA's Code of Good Practice on Equal Pay for Work of Equal Value**. Whilst the defences overlap, there are also important differences. Section 11 of the EEA also spells out the test for the burden of proof in bringing claims under that Act, which would not be applicable in assessing claims under the LRA.

Nevertheless, arbitrators and the courts are likely to lean heavily on the jurisprudence created under either Act in assessing any 'equal pay for equal work' disputes.

1. Grounds under the EEA.

Whilst it has always been possible to process 'equal pay for equal work' claims under the unfair discrimination provisions of the EEA, a more explicit right was created by the 2014 amendments to the Act. Section 6(4) was added, providing as follows:

> *"A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination."*

The above section then links to section 6(1) that lists grounds for unfair discrimination. It declares that "no person may unfairly discriminate, directly or indirectly, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth *or on any other arbitrary ground* (our emphasis)."

There is accordingly not a closed list of grounds that may constitute unfair discrimination. It includes –

- specifically listed grounds such as race, gender, sex, etc....;
- similar grounds not specifically mentioned, eg trade union membership or political affiliation;
- or any other arbitrary ground.

The above *"or any other arbitrary ground"* was added in 2014. **Does it add any value, seeing that similar grounds not specifically mentioned were already included?** We think it does, if one accepts that being treated differently for no good reason is 'arbitrary' and amounts to *'discrimination on any other arbitrary ground'*. In other words, it should not be necessary to provide a label and base the case on a specified *ground* – the claim should succeed if there is simply no good reason for the discrimination.

Despite our views above, arbitrators in several cases since the EEA was amended and the LC in *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others* (C687/15) [2016] ZALCCT 14 (19 April 2016) have taken the view that the mere 'arbitrary' actions of an employer do not, as such, amount to discrimination within the accepted legal definition of the concept. The LC held in *Pioneer Foods* that complainants must identify the listed or unlisted arbitrary ground of discrimination relied upon, and that it is not fair to the employer for an arbitration to run without the complainant union being required to identify – and then being held to – the unlisted arbitrary ground of discrimination relied upon.

In *Duma v Minister of Correctional Services and Others* (C604/2012) [2016] ZALCCT 6 (2 February 2016), the applicant claimed unfair discrimination on the arbitrary

ground of the geographic location of her post. She claimed that, in her position as Western Cape Senior Correctional Officer, she was paid less than comparable positions in other provinces. The Court (applying the pre 2014 amendment EEA) accepted that any distinction between employees based solely on the area of the country in which they work, is *"given our history, an anathema to the society envisaged by the Constitution.*" We are somewhat startled by what appears to be the LC's unqualified acceptance of this - it is widely accepted for example that remuneration levels in Johannesburg are significantly higher than in say Durban or Cape Town. Market forces, cost of living and other variables all play their part. Perhaps a significant factor in this case was that none of these variables appear to have been submitted and argued by the employer in this case – their defence appeared to have been based on the bare denial that discrimination had taken place at all.

The learning from this judgment for employers is that, where differences do exist between comparable employees in different locations around the country, they need to be able to justify why these differences exist, and that the size of the difference is in relation to the variable factors responsible for the difference. Their failure to do so, based on this judgment, may well result in findings of unfair discrimination.

In *South African Municipal Workers Union and Another v Nelson Mandela Bay Municipality* (P483/11) [2015] ZALCPE 70 (24 November 2015) the Labour Court (importantly again applying the 'old' Act) held that in a wage discrimination claim an employee must demonstrate is that there is a *causal nexus* (a connection between two things which causes the event) between the differentiation on the basis of gender and the treatment accorded to her in respect of the grading of her post. The court said that where other reasonable inferences can be drawn from the facts, this *causal nexus* will not be established. It accepted that administrative chaos (which the court said was "gender neutral" – should this be a valid defence??) may have been the real causal nexus, and that it could not be inferred that it was because the employee was female.

It may be that the outcome of this case may have been different, had it been based on the new section 6 of the EEA, and we look forward to a coherent judgment from the courts on this issue.

2. The 'date of the dispute' and its impact on prescription and the need for condonation.

The ***Duma*** judgment referred to above is also interesting from another perspective – namely how to assess the date when the dispute arose if a cause of action arose not from one incident of unfairness that happened on a specific date (eg an unfair dismissal), but when the unfairness is ongoing, as in the case of an employee being unfairly paid less than others for the same work. This becomes important in order to decide whether the dispute has been referred outside the required time limits, thereby requiring a condonation application, and whether the dispute may not have prescribed altogether (for the purpose of most labour disputes, the prescription period is three years).

The Court referred to *SA Broadcasting Corporation Ltd v CCMA & Others* (JA36/07) [2009] ZALAC 13; (2010) 31 ILJ 592 (LAC) ; [2010] 3 BLLR 251 (LAC) (18 November 2009) as authority for the view that, where the discrimination is continual and repetitive, it is ongoing and will only end when the employer stops discriminating. On this basis, the LC said no condonation was required for any late filing of the dispute, and it granted Mrs Duma relief for the retrospective period of three years before she lodged her dispute. It was accepted that any claim for the period prior thereto had prescribed.

3. The burden of proof

Prior to the 2014 amendments, section 11 of the EEA provided that whenever unfair discrimination is alleged in terms of the Act, the *employer* against whom the allegation is made must establish that it is fair. In a somewhat confusing manner, the 2014 amendments to section 11 distinguished between the grounds under which discrimination is claimed. This section now provides that-

- **if unfair discrimination is alleged on a ground listed in section 6 (1),** *the employer* against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—
  (a) did not take place as alleged; or
  (b) is rational and not unfair, or is otherwise justifiable.

  (*Note:* It would seem that the above section covers those instances in which unfair discrimination is claimed on specifically listed grounds such as race, gender, sex, etc, *and* when it is claimed on similar grounds not specifically mentioned in the section, such as trade union membership or political affiliation.)

- **if unfair discrimination is alleged on an arbitrary ground**, *the complainant* (ie the employee) must prove, on a balance of probabilities, that—
  (a) the conduct complained of is not rational;
  (b) the conduct complained of amounts to discrimination; and
  (c) the discrimination is unfair.

What we find confusing from the amended section 11 is that the criteria an employer has to prove to discount an allegation of unfair discrimination on a listed ground, is surprisingly not necessarily a mirror image of what an employee has to prove to establish unfair discrimination on an arbitrary ground. In addition, by listing the 3 criteria that all have to be proved to establish unfair discrimination on an arbitrary ground, one could potentially get to the somewhat bizarre situation, for example, of finding that conduct could amount to discrimination that is unfair, but is rational?

It remains to be seen how these sections will be applied by the courts

4. The need for a comparator

By definition, equal pay claims require **a comparator** – a yardstick against which to compare one's remuneration. As we have said, the EEA is not attempting to determine a 'fair wage', but rather is attempting to eliminate unfairness resulting from paying some employees less than others for doing similar work under similar circumstances. And yet little clear direction is given as to what comparator to use?

What does seem clear from the wording of the Act is that the intended comparator could be a single employee earning more than the affected employee. A similar approach appears from the growing number of unfair discrimination arbitrations dealing with claims by employees for 'equal pay for equal work' – the awards in many of these cases analyse a comparison against named individuals. And yet the recently published Code of Good Practice on Equal Pay / Remuneration for Work of Equal Value, providing practical guidance on how to apply 'equal pay for equal work' in the workplace, suggests in item 8.1.6 the use of the *"average or the median earning of employees in the relevant jobs"* as the means of comparison. These are in themselves 2 potentially very different comparators – from our understanding, an **average** would be arrived at by adding all the wages of comparable employees and dividing that by the total number of employees compared. The **median** would probably be the midpoint between the wages of the highest and lowest paid employees compared.

This issue is of critical importance. For example, the arbitrator in the ***Assign Services*** award (subsequently reviewed and overturned by the LC for other reasons in *Assign Services (Pty) Ltd v CCMA and Others* (JR1230/15) [2015] ZALCJHB 283 (8 September 2015)), in determining that the labour broker's client was the sole employer of the placed employees and in giving effect to the employer's obligation to treat them "on the whole not less favourably", simply ordered that "*parity between the deemed employees and other indefinite employees of the client should apply*". What does this mean? Would an employer attempting to comply with such an award apply the average or the median earnings of all employees in that job grade irrespective of their length of service? And what if the affected employees argued that the comparator should be certain higher earning employee(s) within the job grade?

Parties contesting 'equal pay for equal work' claims should submit clear evidence and arguments on what they believe the appropriate comparator in that case should be.

5. Impairing human dignity

The LC in the ***Duma*** judgment referred to above appeared to accept that where unfair discrimination is alleged, there is a need to establish that the alleged grounds *"impair the fundamental human dignity of people in a comparably serious matter".* It went on to find that (para 21) –

"the ground of geographical location as a basis to prejudice an employee (by paying them less for the same work as another employee in a different location) has the ability to impair the dignity of that person in a manner comparable to the listed grounds and amounts to discrimination."

Several CCMA arbitrators have, since the 2014 EEA amendments came into force, similarly required applicants to establish that differentiation 'impacted on the applicant's human dignity' in order to constitute unfair discrimination. We question the application of this test, which is not required by section 11 or anywhere else in the EEA or its Regulations, and it appears to have been imported from the 1998 Code on Sexual Harassment.

We would welcome a coherent judgment interpreting the post 2014 amendment definition of unfair discrimination, that addresses this issue.

6. Defences to claims for equal pay

Defences to these claims under the EEA are covered in clause 7 of the **2014 EEA Regulations** and clause 7 of the **EEA's Code of Good Practice on Equal Pay for Work of Equal Value**.

Regulation 7 deals with the situation where employees perform work that is of equal value but there is a difference in terms and conditions of employment, including remuneration. This difference will *not* be regarded as unfair discrimination if the difference is **fair and rational** *and* is based on any one or a combination of the following grounds:

(a) the individuals' respective **seniority** or **length of service**;
(b) the individuals' respective **qualifications, ability, competence or potential** above the minimum acceptable levels required for the performance of the job;
(c) the individuals' respective **performance, quantity or quality of work**, provided that employees are equally subject to the employer's performance evaluation system, that the performance evaluation system is consistently applied;
(d) where an employee is **demoted as a result of organisational restructuring** or for any other legitimate reason without a reduction in pay and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level;
(e) where an individual is **employed temporarily in a position for purposes of gaining experience or training** and as a result receives different remuneration or enjoys different terms and conditions of employment;
(f) the existence of a **shortage of relevant skill, or the market value** in a particular job classification; and
(g) **any other relevant factor** that is not unfairly discriminatory in terms of section 6(1) of the Act.

Note that there are **two questions**: Is the difference fair and rational? **AND** Is it based on one of the above grounds? The 'fair and rational' test is satisfied if it can be shown that the application of one of the grounds above is not biased against an employee or group of employees based on race, gender or disability or any other listed ground **and** it is applied in a proportionate manner.

We think its unfortunate that these defences are covered in both the Regulations and the Code of Good Practice, as there are differences – the Code surprisingly makes no mention of the important defence of the existence of **the market value** (para (f) above) in a particular job classification. This is important omission, as market forces are likely to be a frequent defence raised by employers in justifying differentiation – for example in the situation of having to pay a higher package to attract prospective new employees, due to their current high earning levels with a previous employer. This omission highlights the tension in having both a Code and (sometimes conflicting) Regulations dealing with the same subject matter. Where there is conflict, the Regulations should take precedence.

What if the employer has identified that unfair discrimination exists, and is taking steps to address it? Section 27 of the EEA highlights the obligation on employers to "progressively reduce" disproportionate income differentials resulting from unfair discrimination caused by unequal pay for equal work. A similar approach is recognised in the Employment Equity Regulations and the Code of Good Practice. Paragraph 3(1) of the Regulations obliges an employer to "take steps" to eliminate differences in terms and conditions of employment, to eliminate unfair discrimination, and a similar approach is adopted in paragraph 3.8 of the Code.

Where an employer has reported on disproportionate income differentials in its employment equity reports, or has a recognised plan in place to address the problem over a specified period, it remains to be seen the extent to which this will be regarded as a valid defence to interim claims for 'equal pay for equal work' brought by affected employees.

7. **The way forward**

We recognise that we are only at the beginning of the process of determining a settled jurisprudence in 'equal pay for equal work' cases and we can expect inconsistencies in arbitration awards, particularly until such time as the courts have had to decide these issues. But from the sample of cases heard so far, we suspect that for employees who know that they are being paid less than others doing the same job but cannot identify the reason for it, the prospects of success do not appear to be promising.

SCHEDULE OF KEY DEFINITIONS – NON STANDARD EMPLOYMENT

- '***Temporary services'*** in relation to TES employees, means work for a client-

(a) for a period not exceeding 3 months;
(b) as a substitute for a temporarily absent employee; or
(c) as determined by a bargaining council collective agreement, a sectoral determination or the Minister.

- '***Justifiable reasons'*** for treating the employees in question *'not less favourably*' than comparable employees doing similar work, include –

(a) seniority, experience or length of service;
(b) merit;
(c) the quality or quantity of work performed; or
(d) other criteria of a similar nature.

- A '***justifiable reason'*** for having fixed term contracts longer than 3 months include being employed –

(a) to replace a temporarily absent employee;
(b) due to a temporary work increase, not expected to last beyond 12 months;
(c) as a student/ recent graduate, to get training or work experience;
(d) to work exclusively on a specific project of limited / defined duration;
(e) as a non-citizen in terms of a work permit for a defined period;
(f) to perform seasonal work;
(g) on an official public works or job creation scheme;
(h) in a position funded by an external source for a limited period; or
(i) past the normal or agreed retirement age.

INDEX OF CASES **PAGE**

THE EMPLOYMENT RELATIONSHIP

Rheinmetall Denel Munition (Pty) Ltd v National Bargaining Council for the Chemical Industry & others (2015) 36 ILJ 2117 (LC)

Principle:
While a probationary appointment made in a junior level post requires a considerable degree of on-the-job training, during the probationary period of an experienced person appointed into a responsible position, an employer can point out perceived shortcomings and emphasise the importance of improving performance if a permanent appointment is to be made.

Facts:
The employee was appointed on a six-month probationary period as the personal assistant to the General Manager: Human Relations. Five months later she was dismissed for dishonesty, poor performance and absenteeism before the probationary period had expired.

The arbitrator who decided her unfair dismissal claim found that, even though she was guilty of failing to perform regular and lawful instructions and guilty of poor work performance, the sanction of dismissal was too severe and ordered her reinstatement retrospective to the date of her dismissal with backpay. The arbitrator concluded that the approach of the employer had been to see if the employee could 'swim without sinking' and had not given her any prior formal warning for her dismissal. Consequently, he found that the sanction of dismissal was too harsh. Recognising that the employee could no longer work with her previous boss, the arbitrator ordered her reinstatement but in the position of a permanent employee in a post other than secretary to the General Manager: Human Resources.

The Labour Court held that the arbitrator had used the incorrect approach in evaluating a probationary employee appointed to a responsible position. The LC also found that the arbitrator had not given weight to evidence of the employee's dishonesty. The LC reviewed and set aside the arbitrator's award, and found that the dismissal was fair. The Court held that when dealing with a person on probation in a responsible position like a professional assistant, where the person claims to have the necessary experience to do the job, it is not unreasonable for the employer simply to point out the perceived shortcomings of the probationer and to emphasise the importance of improving her performance if she wants to be permanently appointed. The Court found that the bargaining council arbitrator had failed to appreciate this, and appeared to believe that the employer had to treat such a probationer as someone who was still in training.

Extract from the judgment:
(Lagrange, J)
[20] In considering the appropriate sanction, even on the charges which the arbitrator concluded Nombande was guilty of, the arbitrator appears not to have applied the guidelines for dealing with a probationer when considering the standard of what constitutes a sufficient reason for dismissal in the circumstances before him. While acknowledging the basis on which Nakedi said she employed Nombande, namely as someone with sufficient prior experience to organise functions and perform the required responsibilities, the arbitrator appears to have implicitly believed that the employer was expected to treat her as someone who was still in training.

[21] It will often happen that a probationary appointment is made in a junior level post in which it is anticipated that a considerable degree of on-the-job training will be conducted during the probation period. This was clearly not the kind of post to which Nombande was appointed. Consequently, the arbitrator ought to have realised that when dealing with a person on probation in a responsible position like that of a PA, where the successful candidate claimed to have the necessary experience for doing the job, it is not unreasonable for the employer to simply point out the perceived shortcomings of the probationer and to emphasise the importance of improving her performance if she wanted to be permanently appointed. His failure to appreciate this led him to arrive at an outcome that was not one a reasonable arbitrator could have come to.

[22] Quite apart from that, there was nothing to suggest that Nombande was asked to do tasks beyond the level of competence she professed to have. At the end of the day, the essence of the applicant's complaint was that Nakedi could not depend on Nombande as she ought to have been able to. In this respect, the arbitrator simply did not consider the specific attributes of the probationary appointment that was under consideration. Had he done so, he could not but have realised that this was not a situation involving the appointment of a novice or where the duties imposed where ones that required close supervision and guidance. Again, even if one leaves aside the arbitrator's unreasonable finding on the charge of dishonesty, the applicant's conduct on 8 January in attending to her own personal business when her superior was not at the office and misrepresenting her whereabouts to obscure the unauthorised nature of what she was doing is clearly conduct that would raise grave concerns if committed by a permanent PA, let alone someone on probation.

.....

Order

[27] In light of the reasoning above, the arbitration award of the second respondent dated 20 June 2013 under case number WCCHEM243-12/13 is reviewed and set aside.

[28] The arbitrator's effective finding that the third respondent's dismissal was unfair is substituted with a finding that her dismissal was fair.

[29] No order is made as to costs

'NON STANDARD' EMPLOYMENT

SATAWU Obo Dube and Others v Fidelity Supercare Cleaning Services Group (Pty) Ltd (JS 879 / 10) [2015] ZALCJHB 129 (17 April 2015)

Principles:

(1) A labour broker / TES may not use automatic termination provisions at the instance of a client to avoid fair dismissal procedures in terms of the LRA. But where an employee of a TES declines to accept reasonable alternative employment, s/he may not be entitled to compensation arising out of an unfair dismissal.

(2) A fixed term contract of employment that defines an *'event'* in sub-section *198B (1) (a)* as including the fact that where a client terminates its contract with the employee's employer, or demands the removal of the employee from the client's workplace, that that should result in the automatic termination of the employee's contract of employment, is against public policy and section 5 of the LRA and the fundamental rights of employees in s185 of that Act.

Facts:
A cleaning contractor (Fidelity Supercare) concluded a cleaning service level agreement (SLA) with the University of the Witwatersrand (Wits University). Three employees of Fidelity Supercare were placed at Wits University. They were all members of SATAWU. The employees were employed in terms of written contracts of employment that provided their employment would terminate *"on the date appearing on the schedule or the date upon which the contract which exists between the company and the customer terminated or on the retirement date, whichever date occurs first".* The contract also provided that *"the employee specifically acknowledges that he/she fully understands that the company's contract with the customer might be terminated by the customer… and the employee fully understands that there will be no entitlement of severance pay".*

During 2009, Wits University gave notice to Fidelity Supercare terminating the service level agreement. Fidelity Supercare advised all employees in writing that the SLA with Wits University was ending and recorded that their employment would consequently terminate in terms of their employment contracts. It was common cause that none of the employees was consulted by the employer in terms of section 189 of the LRA, and this was the crux of the employees' case that their dismissals were unfair.

Before the termination of the SLA, Fidelity Supercare entered into a new SLA with Wits University, which envisaged a vastly reduced staff complement and service for a period of one year. Fidelity Supercare issued notices to the employees advising that Fidelity Supercare had positions available at Wits University and invited its employees to apply for those vacant positions. There were 7 vacant positions at the level of supervisors, and 162 cleaner positions. Neither Dube nor any of the other applicants applied for placement in the vacancies despite encouragement by Fidelity Supercare. As a result, their contracts were terminated. The employer submitted that it did not dismiss them for operational reasons, and that their contracts had automatically terminated at the end of December 2009 in terms of specific provisions of their contracts of employment.

The LC, despite some earlier judgments to the contrary, confirmed that a contractual provision that provides for the automatic termination of the employment contract at the behest of a third party, contradicts employees' rights in labour law and undermines rights to fair labour practices. It is contrary to public policy, unconstitutional and unenforceable.

In passing, the LC also considered the new 'non standard' employment provisions of the new s198B under the recent LRA amendments. Section 198B (1) provides that a fixed-term contract of employment means a contract of employment that terminates on-

(a) *the occurrence of a specified event*;
(b) the completion of a specific task or project; or
(c) a fixed date, other than an employee's normal or agreed retirement age,

Even with regard to higher earners not covered by sections 198A-D, the LC expressed the view that a fixed term contract of employment that defines an *'event'* in sub-section *198B (1) (a)* as including the fact that where a client terminates its

contract with the employee's employer, or demands the removal of the employee from the client's workplace, that that should result in the automatic termination of the employee's contract of employment, is against public policy, section 5 of the LRA and the fundamental rights of employees in s185 of that Act. The interpretation of *'event'* must be taken on a narrow, than a wider, approach purposefully to maximise the protection of job security and other constitutionally recognised labour rights and practices.

Despite the LC finding in this case that the employees' contracts did not terminate automatically as result of the termination of the SLA and that they were dismissed for operational reasons, the failure by the applicants to consider reasonable alternative employment resulted in the LC refusing to award compensation. The LC concluded that the employee could have avoided her dismissal by accepting the offer of reasonable alternative employment. This, the court submitted, negated any procedural unfairness in the matter. The LC felt that the employer 'bent backwardly' to ensure that as many employees as possible would get taken on the new contract, and that it had acted 'prudently and fairly' in the circumstances.

Extract from the judgment:
(Mosime AJ)

[24] This court has to determine the nature and terms of the employees' contracts of employment with the respondent and establish whether these can validly terminate employment *automatically* following the termination of the service level agreement between their employer and the employer's client. This question entails, in essence, whether or not there was a dismissal.

[25] Should it be found that the employees' contracts did not terminate automatically but that they were indeed dismissed by the Respondent, the Court will be required to determine whether their dismissal was substantively and procedurally fair or not, taking into account the facts of this case.

.....

<u>When is automatic termination of a contract of employment permissible?</u>

[29] A view has already been posited, approved and upheld in the labour courts holding effectively that a current contract of employment can terminate by operation of its terms *(de jure)*, as a natural consequence of the termination of another contract, to which the current contract intensively relies for its own subsistence. This is possible in all instances where there is a contractual arrangement in terms of which a person, the employee, agrees that his or her services have been procured for and will be provided to a client, a third party, by a temporary employment service ("the employer"). When in such circumstances, there is a clause in the current contract to the effect that when a certain "event" occurs, such as the client terminating the SLA contract with the employer, the current contract will also terminate. There can be no question, save where there is an attack on the lawfulness or validity of the contract itself, that when such an event comes to pass, the current contract will also validly and/or lawfully terminate.

[30] To the extent that this termination is triggered by the *"occurrence of an event"* and is not based on an employer's own decision, there is no dismissal and the employee is not entitled to a hearing nor, as it would be the case with the public sector employees, is the termination subject to judicial review (*Nkopo v Public Health and Welfare Bargaining Council and Others* and *MEC, Public Works, Northern Province v CCMA and Others*). The conundrum arises when a school of events occur and it is incumbent to decide which of those are capable of terminating a contract of employment validly without it being said that there was a dismissal.

.....

[48] The particular event or events that obviate the dismissal in circumstances where there is a fixed term contract are now succinct and doubtless, as provided for in the following provision of the new amendments to the LRA, with regard to employees earning below the regulated earnings threshold:

> *'Section 198B (1) for the purposes of this section, a 'fixed-term' contract of employment means a contract of employment that terminates on-*
>
> *(d) the occurrence of a specified event;*
> *(e) the completion of a specific task or project; or*
> *(f) a fixed date, other than an employee's normal or agreed retirement age, subject to sub-section (3)'*

[49] So *Sindane* should be understood, in my view. The position should thus still be, with regard to higher earners, that they cannot commit in a contract of employment to an arrangement that defines an *'event'* in sub-section *198B (1) (a)* as including the fact that where a client terminates its contract with the employee's employer, or demands the removal of the employee from the client's workplace, that that should result in the automatic termination of the employee's contract of employment. The reasons for disallowing such terminations are that the arrangements, in addition to those already mentioned, are that they are against public policy (*Nape*), they seek to truncate the provisions of section 5 of the LRA and the fundamental right of the employee embodied in s185 of that Act (*Mampeule (LC**)**). Also, they are not a direct act of the employer (or employee) but one galvanised by an external third party to the contract (*Mahlamu, Mapeule*). Of necessity, the interpretation of *'event'* must be taken on a narrow, than a wider, approach purposefully to maximise the protection of job security and other constitutionally recognised labour rights and practices.

….....

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

….....

[56] It is noted, in passing, that those policy changes propounded in judicial decisions referred to above, have now come to pass, and the contractions by which unscrupulous labour brokers and their clients could use contracts to shield themselves from obligations to protect the security of employment have been jettisoned. The New Labour Relations Amendment Act (Act No 6 of 2014) stipulates new provisions for the regulation of non-standard employment, and effectively protects employees who would find themselves in the same situation as the applicant in this matter, henceforth.

[57] The new *sub-section 198 (4C)*of the LRA, as amended, provides as follows:

> *'An employee may not be employed by a temporary employment service on terms and conditions of employment which are not permitted by this Act, any employment law, sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services'.*

[58] The Act also provides that in any proceedings brought by an employee, the Labour Court or an arbitrator may determine whether a provision in an employment contract or a contract between the temporary employment service and a client complies with subsection 4C and make an appropriate order or award.

[59] It can no longer be debatable that, following this legislative directive, labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. A contractual provision that provides for the automatic termination of the employment contract and undermines the employee's rights to fair labour practices, or that clads slavery with a mink coat, is now prohibited and statutorily invalid.

Kelly Industrial Ltd v CCMA & Others (JR 1237/13 [2015] ZALCJHB 12 (21 January 2015)

Principles:

1. An agency arrangement in terms of which the labour broker undertakes to place employees and assign them work, but pending these attempts the employees will not receive remuneration and benefits and should not expect that the employer will provide work, offends the principle of security of employment and goes against the very notion and definition of an employment relationship where an employer provides work to an employee who renders services and is entitled to remuneration.
2. When reviewing a jurisdictional fact, the *Sidumo* test of whether the finding of the arbitrator was one which no reasonable arbitrator could on the evidence arrive at, is not applicable.

Facts:

Kelly Industrial is a labour broker that places its employees with clients on a temporary basis at various sites. The ten employees in question were assigned by Kelly Industrial as general workers with KEC International at one of its operations in June 2012, on limited duration contracts. In March 2013 they received written notice from Kelly Industrial that their assignment at this particular project was to end. They were paid two week's remuneration in lieu of notice and accrued leave, and provided with UIF claim forms.

The employees referred an unfair dismissal dispute to the CCMA. They submitted they were employed for the duration of the *project* and not only for an *assignment* period, and that the project had not come to an end when their assignment with the client ended. The employer's case was hampered by the fact that the sole witness it called had no direct knowledge of the facts in question, and his evidence was largely hearsay. But in essence, the employer claimed at arbitration that whilst these employees' assignments had come to an end, this had no effect on their employment relationship with the company. This continued on the basis that whilst they were not placed on an assignment, they would receive no remuneration / benefits and with no expectation of immediately being placed elsewhere.

The arbitrator found that the employees had discharged the onus of proving they had been dismissed, and concluded that their dismissals were both substantively and procedurally unfair for lack of a valid reason and a fair procedure.

The employer took the matter on review and argued that the arbitrator committed gross misconduct in concluding that the employees had been dismissed, in that he ignored the fact that the employer was a TES and that termination of the *placement* of the employees on a temporary basis did not constitute a dismissal. What was in place was essentially an unpaid 'lay off' arrangement.

The LC disagreed and dismissed the review application. The court interpreted the contract between the parties as meaning the employees understandably believed they were employed for the duration of the *project*, and the contract further provided their employment could be terminated on completion of the project. It was also common cause that the project had not been completed at the time the employees' assignment at KEC International came to an end. Despite this, the LC found that the employer had dismissed the employees by giving them notice.

The LC was particularly scathing about the unpaid 'lay off' arrangement the company submitted was in place. The LC referred to the judgment of *NUMSA v Abancedisi Labour Services* (857/12) [2013] ZASCA 143 (30 September 2013) in which the SCA found that a similar lay off arrangement by a labour broker constituted an unfair dismissal. The SCA rejected the idea that a labour broker could retain employees, without work and without pay, on indefinite suspension. If work cannot be found, retrenchment must follow, or the inaction must be taken to be an unfair dismissal.

The employer also raised the alternative argument that there was no dismissal, as the employees' employment contracts terminated 'automatically' on the completion of the assignment. This argument had never been raised at the arbitration, but was in any event rejected by the court.

In the review proceedings, it appears the employer got the applicable test for review wrong. It argued the case on the basis of the standard review test as laid down in *Sidumo v Rustenburg Platinum Mines Ltd and Others* (Case CCT 85/06 Decided on 05 October 2007), namely whether '*the decision reached by the commissioner is one that a reasonable decision-maker could not reach?'* But as the LC pointed out, this was not the test for review in this instance. Whether or not the employees had been dismissed (the essence of the case) was a jurisdictional fact, which must be determined – even on review – objectively. The LC followed a long line of cases that have said that when dealing with a jurisdictional issue, the court on review simply has to decide whether the commissioner was **right or wrong** – effectively the same test as for an appeal, and a far less onerous standard than the ***Sidumo*** review test applicable in unfair dismissal and unfair labour practice decisions. And in deciding whether the arbitrator's decision was right or wrong, the court only considers evidence and argument placed before the arbitrator – parties cannot raise new issues at the review stage.

Extract from the judgment:
(Venter, AJ)

[23] As the second respondent's finding is that the respondents were dismissed, which finding is a jurisdictional fact, the Sidumo test of whether the finding of the second respondent was one which no reasonable commissioner could arrive at on the evidence before him is not applicable.

[24] The applicant in setting out its grounds of review in the founding and supplementary affidavits appears to have misconstrued the correct test of review and has argued that the award is not an award a reasonable commissioner would have arrived at on the facts before him. This test is not applicable.

[25] The question I am required to determine is whether the second respondent was right or wrong in concluding as he did. Put differently whether the second respondent correctly found, based on the evidence before him that the respondents were dismissed. In determining this issue I am restricted to only consider the evidence on record that was before the second respondent when he arrived at his finding that the respondents were dismissed.

.....

[66] It is thus my view that the respondents were employed in terms of the Contracts on a limited duration basis which employment would automatically terminate on completion of the project as envisaged in clause 3.3.1 and not so called "assignments". The Contract or "assignment agreement" as the applicant calls it was without doubt an employment contract and could only be terminated in terms of clause 3.3 thereof.

[67] The applicant failed to place any evidence before the second respondent that the project was completed and that the Contracts terminated automatically in terms of clause 3.3.1 as a result. Mr Donaldson in fact conceded that at the time of the arbitration proceedings the project had not been completed. Accordingly, I am of the view that the Contracts did not automatically terminate on 31 March 2013 in terms of clause 3.3.1 and that by giving the respondents notice of termination of the Contracts on 25 March 2013, the applicant terminated the Contracts with notice and this was a dismissal as defined in section 186(1)(a) of the LRA.

The applicant's agency agreement argument

[68] This brings me to the applicant's argument and business model that upon termination of the assignment by the applicant the "agency agreement" comes into operation in terms of which the applicant undertakes to find alternative assignments and that pending these attempts by the applicant the respondents will not receive remuneration and benefits and should not expect that the applicant will enter into any other assignment with them.

[69] As this was the applicant's sole argument before the second respondent at the arbitration proceedings I feel that it is necessary for me to deal with it even though I have held that the respondents were dismissed.

[70] This was the crux of the applicant's case at the arbitration proceedings.

[71] This so called "agency agreement" contained at clauses 1.4 and 1.5 of the Contracts in effect places the respondents at the mercy of the applicant and not only offends the principle of security of employment but also goes against the very notion and definition of an employment relationship where an employer provides work to an employee who renders their services to the employer and is entitled to remuneration. The applicant's answer to this is that if the respondents did not want to linger at home with no pay while the applicant attempts to find alternative placements for them they could have resigned or cancelled the Contracts.

[72] It is this very mischief the amendments to the LRA seeks to address, the abusive practices associated with labour brokers. If the applicant's business model is to be condoned and accepted, it would go against the very values of providing employees with security of permanent employment and would perpetuate the abuse of employees by labour brokers.

[73] The applicant's case was that the respondents were not dismissed and remained employed pending the applicant finding alternative placements. However, the applicant led absolutely no evidence of the steps and attempts it made to find the respondents alternative work. The applicant appears to have expected the respondents to sit at home indefinitely at the back and call of the applicant, waiting for the applicant to find alternative placements for them, not receiving any remuneration and further not to expect that the applicant would in fact enter into another assignment agreement with them.

[74] In National Union of Metalworkers of South Africa and others v Abancedisi Labour Services the employer, a TES, attempted to convince the Supreme Court of Appeal ("the SCA") that the employees who were excluded from the client's premises and told to go home without pay were not dismissed but were suspended indefinitely.

[75] In this case, the employees refused to sign a code of conduct and were excluded from the client's premises. The employees were not allowed back to work at the client and were not paid as they did not work. The limited duration contracts envisaged the continuation of the employment relationship after the conclusion of the assignment at the client and the employer thus argued that they were not dismissed.

[76] The SCA did not accept this argument by the employer.....

Assign Services (Pty) Ltd v CCMA and Others (JR1230/15) [2015] ZALCJHB 298 (8 September 2015)

Principles:

1. The deeming provisions in section 198A(3) of the LRA make the client of a TES the employer of a placed employee for the purposes of the Act. But nothing in this deeming provision invalidates the employment contract between the TES and worker, which remains in place. There is also no reason why the TES is not concurrently vested with the statutory rights and obligations of an employer under the LRA.
2. A court will decline to deal with a matter that entails no concrete dispute between the parties. It is not the function of a court to dispense legal advice.

Facts:

An alleged dispute between a labour broker, Assign Services, and NUMSA in respect of Assign Services' employees placed with its client (Krost Shelving and Racking), was referred to the CCMA. The CCMA was asked to pronounce on a proper interpretation of the 'deeming' provisions contained in sections 198 and 198A in relation to these employees. Section 198A(3) effectively provides that a labour broker's employee earning less than the BCEA earning threshold and placed with a client in work that is not a 'temporary service' as defined (ie not exceeding 3 months or as a substitute for a temporary absent employee), is deemed to be the client's employee.

NUMSA argued that the client should be regarded as the sole employer of the affected employees for the purposes of the LRA, whereas the labour broker argued that the placed employees continued to be employed by it and that a dual employment relationship involving the client was established by the deeming provisions. The CCMA arbitration in Assign Services (Pty) Ltd v Krost Shelving and Racking (Pty) Ltd and National Union of Metal Workers of South Africa (NUMSA)

(2015) ECEL 1652-15 (Unreported) resulted in a finding that the client was the *sole* employer of these employees. This award was taken on review in the Labour Court.

The LC found that the CCMA commissioner had erred in law by making the above finding and overturned the award, but did not substitute the award with any other ruling. The LC's reasoning included that the deeming provisions did not interfere with rights and obligations arising out of the employment contract between the labour broker and the employee, which remained in force even after the employee was deemed the client's employee for statutory purposes under the LRA. The client is only made the employer for the purposes of the LRA, and is not drawn into the network of rights and obligations created by the employment contract between the labour broker and the employee. In that sense, the LC confirmed that a dual employment relationship involving both the labour broker and the client, continued to exist.

In addition, the LC found that the CCMA should in fact never have dealt with this matter as no concrete dispute was referred to it – merely a stated case for determination, and it was not for the CCMA to be giving advice to the parties in the form of an award.

Extract from the judgment:
(Brassey, AJ)

[11] Above I have rehearsed the stances of the parties and, in particular, the concessions they have made. The first concession, I repeat, is that the provision makes the client the employer for the purposes of the Act and for no other purpose; in particular, the client is not drawn into the network of rights and obligations created by the contract between TES and worker. This concession is uncontroversial and was correctly made. The second is that the section does not serve to make the client the employer for any purpose other than the operation of the LRA. If this is equally uncontroversial between the parties, their respective concessions are properly made. Nothing in this deeming provision can be taken to invalidate the contract of employment between TES and worker or to derogate from its terms. They remain firmly in place. If the TES has, as sometimes happens, undertaken to provide the placed worker with training, it must provide the training; if, less plausibly, the TES has contractually accepted that the worker need not report for work before 9 am, he or she cannot be forced to arrive at the client's clock-in time of eight; if the worker has agreed to a covenant in restraint of trade, then the covenant must (subject to the usual scrutiny for unlawfulness) be observed; and so on.

[12] So (and once again I repeat) the only issue, on the stated case at any rate, is whether the TES continues to be an employer of the worker and, by reason of this fact, is concurrently vested with the statutory rights/obligations and powers/duties that the Act generates. I see no reason why this should not be so. There seems no reason, in principle or practice, why the TES should be relieved of its statutory rights and obligations towards the worker because the client has acquired a parallel set of such rights and obligations. The worker, in contracting with the TES, became entitled to the statutory protections that automatically resulted from his or her engagement and there seem to be no public policy considerations, such as pertain under the LRA's transfer of business provisions (s 197), why he or she should be expected to sacrifice them on the fact that the TES has found a placement with a client, especially when (as is normally so) the designation of the client is within the sole discretion of the TES.

.....

[19] The general rule is that a court will decline to entertain a suit that entails no concrete dispute between the parties. It is of little or no moment that one or both sides have a keen interest in the determination and would like to regulate their dealings by reference to it. The principle, which is deeply embedded in our jurisprudence, was expressed thus by Innes CJ in *Geldenhuys and Neethling v Beuthin* 1918 AD 426:

> *'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. And I think we shall do well to adhere to the principle laid down by a long line of South African decisions, namely that a declaratory order cannot be claimed merely because the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.'*

.....

[21] The rule is a salutary one, not just because it is not the function of a court to dispense legal advice, but also because making decisions on abstract questions of law is a task of considerable complexity that is pregnant with the potential for error. If this issue was being entertained by this court sitting as a court of first instance, its proper response would, I believe, have been to decline to consider it. The CCMA commissioner should, in my view, have responded in the same way. State time and money should not have been expended in a process that really entails the giving of legal advice. Be this as it may, I refrain from making this a basis for reviewing the commissioner's award, however, since the point, being raised only by me, is not one he has been invited to deal with. This is a deficiency that, I appreciate, might have been cured by referring the question back to him for consideration, but I have been discouraged from taking this step and countenancing the concomitant delay by the fact that this matter comes before me as a matter of urgency.

[22] In the referral, the commissioner held that Krost, the client, was deemed to be the 'sole employer' of the placed employees. In coming to this conclusion I have found that he erred.

TRANSFER OF BUSINESS

Senne and Others v Fleet Africa (Pty) Ltd (J2888/14) [2016] ZALCJHB 48 (12 February 2016)

Principle:
Following a transfer of a business as a going concern under s197 of the LRA, the affected employees are not required to conclude new employment contracts with the new employer. But whilst a consequence of s197 is that, pursuant to a transfer, the new employer is automatically substituted in the place of the old employer, the timing of the substitution is something to be determined on the facts of each case - it does not follow that the substitution always occurs simultaneously with the transfer of the business from the old employer to the new employer.

Facts:
On 1 April 2001, following the transfer of a business as a going concern in terms of Section 197 of the LRA, employment contracts were transferred from the City of Johannesburg to an entity called Super Fleet Power Plus Performance, and then to the respondent, Fleet Africa (FA). The City of Johannesburg concluded an outsourcing agreement with FA in terms of which the City's vehicles were serviced and maintained. When the outsourcing agreement expired, the business of servicing

and maintaining the City's vehicles was transferred, in terms of S197, back to the City of Johannesburg. This transfer constituted the "second generation outsourcing agreement/second outsourcing agreement".

After the date of transfer of the business back to the municipality, FA concluded voluntary retrenchment agreements with certain employees who had continued rendering services to FA, the parties not being aware at that stage that the transfer was covered by s197 of the LRA. When these employees subsequently claimed employment with the City of Johannesburg as a result of the application of s197, FA claimed the retrenchment agreements were no longer binding. The employees then sought an order that these agreements concluded between them and FA were valid and binding.

The primary issue was the timing of the substitution of the new employer (the City of Johannesburg) in the place of the old employer (FA), as contemplated by s 197(2)(a) of the LRA. FA argued that the City of Johannesburg was automatically substituted in its place as the employer as at the date of the transfer of the business, and as FA was therefore not the employer of the applicants when the retrenchment agreements were concluded, the retrenchment agreements were, consequently, invalid and unenforceable.

The Labour Court held that FA was undoubtedly the employer of the applicants when the retrenchment agreements were concluded, and that the applicants were entitled to enforce the retrenchment agreements and to the relief sought by them. The court said that whilst a consequence of s197 is that, pursuant to a transfer of a business as a going concern, "the new employer is automatically substituted in the place of the old employer", the timing of the substitution is something to be determined on the facts of each case - it does not follow that the substitution always occurs simultaneously (ie at the same time) with the transfer of the business from the old employer to the new employer.

The Court gave examples of when the substitution of the new employer in the place of the old employer does not factually occur simultaneously with the transfer of the business: these included circumstances under which the old and new employers and the affected employees agreed that, after the transfer, the affected employees would continue rendering services to the old employer for a specified period of time, or when the parties at that time were not aware or were not in agreement that their circumstances constituted a transfer of a business under s197 of the LRA.

Extract from the judgment:
(Boyce AJ)

[16] The respondent's contention that the retrenchment agreements are void was predicated on the argument that, since the expiry of the "second generation outsourcing agreement"/"second outsourcing agreement" (on 28 February 2012) constituted a transfer of a business as a going concern, as contemplated by Section 197 of the LRA, the respondent was not the employer of the applicants when the retrenchment agreements were concluded.

[17] This argument by the respondent is devoid of substance quite simply because the existence or otherwise of an employment relationship is a factual question which must be determined on the available evidence regardless of whether there has been a transfer of a business as a going concern in terms of Section 197 of the LRA. Stated differently, the automatic substitution, in respect of contracts of employment, of the new employer in the

place of the old employer, is a consequence which flows, by operation of law, from the transfer of a business as a going concern in terms of Section 197 of the LRA, and the said substitution is a consequence which is separate and distinct from the transfer of the business.

[18] In the matter of Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others (2011) 32 ILJ 2861 (CC), the Constitutional Court (per Jafta J) noted that Section 197 (2) of the LRA lists legal consequences which flow from a transfer of a business, or part of a business, as a going concern. One of these consequences is embodied in Section 197 (2) (a) of the LRA, viz.: "The new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer".

.....

[20] Although Jafta JA did state in the abovementioned extract from the judgment in Aviation Union of SA v SA Airways, that the "simultaneous transfer of business and contracts of employment does not require any declaration by a court", I did not understand the learned Judge to be saying that there is always a simultaneous substitution of the new employer in the place of the old employer when a business is transferred in terms of Section 197 of the LRA. While it is true that, pursuant to a transfer of a business in terms of Section 197 of the LRA, "the new employer is automatically substituted in the place of the old employer", it would seem to me, as a matter of logic, that the timing of the aforementioned substitution is something which is required to be ascertained on the facts of each case. The word "automatically" in Section 197 (2) (a) of the LRA signifies nothing more than that, following a transfer of a business in terms of Section 197 of the LRA, the affected employees are not required to conclude new employment contracts with the new employer, and it does not follow that the legal consequence in question, viz. the substitution of the new employer in the place of the old employer, always occurs simultaneously (viz. at the same time) with the transfer of the business from the old employer to the new employer.

[21] Section 197 (2) (a) of the LRA, moreover, does not stipulate that the substitution of the new employer in the place of the old employer occurs simultaneously with the transfer of the business as a going concern and, although that is often the case, there are obviously situations where the substitution of the new employer in the place of the old employer does not factually occur simultaneously with the transfer of the business. These situations would include a case where the old employer, the new employer and the affected employees agree that, post the transfer of the business as a going concern, the affected employees will continue rendering services to the old employer for a specified period of time. Another such situation could occur when, as happened in the present matter, the old employer, the new employer and the affected employees were not aware, and/or disagreed, that a termination of a "second generation outsourcing agreement"/"second outsourcing agreement" constituted a transfer of a business as a going concern as contemplated by Section 197 of the LRA.

[22] Having regard to the aforegoing, and given that the date when the new employer substitutes the old employer is a factual question, it is plain from the evidence adduced during the present trial that the respondent in casu was, indeed, the employer of the applicants when the retrenchment agreements were concluded……..

SATAWU & Another v MEC: Gauteng for Roads & Transport & Others (J1142/15) [2015] ZALCJHB 204 (15 July 2015)

Principle:

Two factual elements are necessary to trigger s.197, firstly that there has been a transfer of a business, and secondly that the transfer of the business was 'as a going concern'. The operation of the same business by the transferee is of itself not

determinative of the question whether there is a transfer as a going concern: other indicators must support this conclusion, including whether assets, employees or customers were taken over by the new owner. The factors must be considered in an overall assessment and not in isolation. What must be transferred is the business that supplies the service, and not the service itself.

Facts:
Autopax replaced Putco as the bus operator on eight subsidised bus routes operated by the Gauteng Department of Roads and Transport (GDRT) with effect from 1 July 2015, in terms a service provision contract concluded between the GDRT and Autopax. Putco was the previous service provider on these routes, and the bus service to passengers was substantially uninterrupted as a result of the changed service provider.

SATAWU and Putco alleged that the transfer of these services from Putco to Auopax constitutes a 'transfer as a going concern' under s.197 of the LRA, which would automatically substitute Autopax as the employer of all Putco's employees on these services. Autopax and the GDRT disputed this.

Putco alleged that Autopax took over the following:
- the contractual right to perform the services (and the linked government subsidy);
- the eight sets of bus routes;
- the existing bus timetables and fare structure;
- 25 000 passengers (i.e. customers) who use the bus routes on a daily basis;
- the existing bus stops and terminals;
- one of Putco's bus depots (Putco leased it to Autopax);
- a workshop leased from a third party;
- some of the bus drivers.

It was not disputed that Autopax did not take over the following from Putco:
- the busses used by Putco;
- other assets such as diesel stock, fuel storage tanks and dispensing equipment, a standby plant, compressor and mobile ticket office;
- certain premises used by Putco;
- the balance of the affected employees.

The LC referred to the string of previous judgments on whether outsourcing / insourcing arrangements are covered by s.197. In summary, it found that a change in service providers will trigger s.197 in the following circumstances:
- the old service provider was operating a discrete business (i.e. an economic entity of its own) in relation to the client;
- that entity retains its identity after the change in service providers, which will be the case if the new service provider
    i. carries on the same or similar activities,
    ii. with the same employees or business assets used by the old service provider,
    iii. without substantial interruption; and
- business assets in this context has a wide meaning to include, for example, the right of use of the client's assets (for example, a warehouse).

Putco and SATAWU argued that even though the business' primary assets – the buses – were not taken over by Autopax, it continued to operate a discrete business entity that retained its identity after the change in service providers.

The LC confirmed that 2 factual elements are necessary to trigger s.197, namely –

- that there has been a transfer of a business, and
- that the transfer of the business was 'as a going concern'.

On the facts of this case, the LC was clear that a transfer of a business had occurred, even though there was no evidence of a direct transfer between Putco and Autopax, such as a sale agreement between them. It was sufficient that the business, or part of the business, had 'changed hands' between them to the extent that components of the original business had been passed on.

But the LC questioned whether the transfer of the business in this case was 'as a going concern' sufficient to trigger s197, referring to Aviation Union of SA & another v SAA (Pty) Ltd & others CCT 08/11[2011] ZACC31 which stated (para 53) that the operation of the same business by the transferee is in and of itself not determinative of the question whether a transfer as a going concern has taken place. There must be other indicators that support the conclusion that when a business passed to the new owner, it was transferred as a going concern. These indicators include whether assets, employees or customers were taken over by the new owner.

After examining the facts of this case, the LC disputed many of the factual bases upon which Putco alleged that the business had been transferred as a going concern, reminding the parties that what must be transferred is the business that supplies the service and not the service itself. The factors must also be considered in an overall assessment and not in isolation. The LC for example found that taking over some of Putco's drivers to 'top up' Autopax's existing resources, was not an 'impressive factor' in establishing a transfer of a business as a going concern. The majority of Autopax's drivers came from its existing staff, and sourcing additional drivers from the ranks of former Putco employees was more a matter of convenience than need.

The LC concluded (para 76) that considered as a set, the components of the original business that were transferred to the new service provider, Autopax, are too meagre and fragmented to support the conclusion that the transfer of business was as a 'going concern'. The portion of the original business that they represent is largely subsumed by the components, assets and staff that the new service provider brings to the business.

The LC found that there had been no transfer of a business as a going concern under s.197.

Extract from the judgment:
(Whitcher, J)

[19] In summary, on the line of judgments discussed above, where there is a change in service providers, section 197 will be triggered in circumstances where:

19.1. the old service provider was operating a discrete business (i.e. an economic entity) vis-à-vis the client;

19.2. that entity retains its identity after the change in service providers, which will be the case if the new service provider (i) carries on the same or similar activities (ii) with the personnel and / or the business assets used by the old service provider (iii) without substantial interruption; and

19.3. business assets in this context has a wide meaning to include, for example, the right of use of the client's assets (for example, a warehouse).

.....

[26] Two factual elements are necessary to trigger section 197 of the LRA. The first is that there has been a transfer of business. The second is that the transfer of business was as a 'going concern'.

.....

[35] The real issue at stake here, however, is whether there was a transfer of a business as a going concern sufficient to trigger section 197.

[36] In Aviation, this is a second, separate question:

'Although the definition of business in section 197(1) includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the service and not the service itself. Were it to be otherwise, a termination of a service contract by one party and its subsequent appointment of another service provider would constitute a transfer within the contemplation of the section. That this is not what the section was designed to achieve is apparent from its scheme, historical context and its purpose. The context referred to here is the alteration of the common law consequences on employment contracts, when the ownership of a business changes hands.

Consistent with this approach is the fact that the operation of the same business by the transferee is in and of itself not determinative of the question whether a transfer as a going concern has taken place. There must be other indicators that support the conclusion that when a business passed to the new owner, it was transferred as a going concern. These indicators include whether assets, employees or customers were taken over by the new owner.'

[37] The constitutional court cited with approval the view expressed in NEHAWU v University of Cape Town that, in deciding whether a business has been transferred as a going concern, the substance of the transaction trumps its form.

.....

[64] As set out in NEHAWU, the factors tending to indicate a transfer of business as a going concern must all be considered in an overall assessment and not in isolation. I might add that, in this assessment, assets that were not transferred may speak as loudly as those that were.

.....

[68] Taking over some drivers to top up Autopax's existing resources is not an impressive factor in establishing a transfer of business as a going concern. The rump of Autopax's drivers are from its existing staff. Sourcing additional drivers from the ranks of former Putco employees seems more a matter of convenience than need.

.....

[76] In my view, considered as a set, the components of the original business that were transferred to the new service provider, Autopax, are too meagre and fragmented to support the conclusion that the transfer of business was as a 'going concern'. The portion of the original business that they represent is largely subsumed by the components, assets and staff that the new service provider brings to the business.

[77] In the language of City Power and Unitrans, the activities of Putco that were transferred to Autopax do not constitute a discrete, autonomous, demarcated and identifiable business undertaking, thus a going concern.

DISMISSAL

Woolworths (Pty) Ltd v Mabija and Others (PA3/14) [2016] ZALAC 5 (19 February 2016)

Principle:
The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonestly, cannot be visited with dismissal without any evidence as to the impact of the misconduct.

Facts:
The employee was in charge of the offloading process from a truck of supplies. When his other colleagues arrived the next morning, they saw that 'cold chain products' to the value of R3675.00 was left unattended and not put in the refrigerator.

The employee was charged and convicted of gross misconduct in that he failed to comply with the employer's cold chain policy and procedure by leaving cold chain products unattended. He was also convicted of leaving a pallet of long life products on the delivery truck despite indicating that he received it. He was dismissed.

Dissatisfied with the dismissal, he referred a dispute to arbitration at the CCMA which found that the employee had committed both acts of misconduct but that the sanction of dismissal was too harsh. The employer was ordered to reinstate the employee.

The employer launched review proceedings in the Labour Court which found that the commissioner gave no less that nine reasons why the sanction was too harsh. With regard to the breakdown of the employment relationship, the Labour Court said:
'No list of specific acts of misconduct or circumstances which destroy the trust relationship exists. Further, it is not enough for an employer to merely state that the trust relationship has broken down. It is necessary for evidence to be led to prove the breakdown of the trust relationship.'

The LC also found that the trust relationship does not automatically breakdown each time an employee commits misconduct.

The employer appealed to the LAC which ruled in favour of the employer, finding that dismissal need not depend on evidence of the breakdown in the trust relationship.

Extract from judgment:
(Musi JA)
[19] The court *a quo* also found that Snyman's evidence was insufficient because the mere fact that misconduct was committed does not *per se* lead to a break down in the trust relationship. The court *a quo* correctly pointed out that various factors should be considered

before the conclusion that the trust relationship has broken down is reached. The court a quo then said those factors included "the industry the appellant operates in; the nature of the misconduct and its effect on the parties, and whether training and progressive discipline cannot prevent a recurrence of the misconduct."

[20] Snyman did not testify that the trust relationship had been destroyed. He did not testify as to what the impact of this specific incident was on the trust relationship. He dithered.

[21] The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonestly, cannot be visited with dismissal without any evidence as to the impact of the misconduct. In some cases, the outstandingly bad conduct of the employee would warrant an inference that the trust relationship has been destroyed. It is however always better if such evidence is led by people who are in a position to testify to such break down. Even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others in order to determine whether the sanction of dismissal was fair. The Commissioner in this case considered this aspect.

EWN v Pharmaco Distribution (Pty) Ltd (JS654/10) [2015] ZALCJHB 329 (22 September 2015)

Principle:
Even where an employee has agreed to a term and condition of employment to subject herself to medical examination, if the employer cannot establish that this is justifiable under one of the exceptions to the prohibition against medical testing in section 7 of the EEA, that provision will be unlawful and unenforceable.

Facts:
An employee, a pharmaceutical sales representative, was dismissed for a "particularly serious and/or repeated wilful refusal to carry out lawful instructions or perform duties". The instruction she failed to perform was to present herself to a psychiatrist for a medical examination. The employee, who suffers from a bipolar disorder which she maintains was under control, claims that the instruction was unlawful and an act of unfair discrimination based on disability amounting to an act of harassment.

The company contended that the instruction was both reasonable and lawful in terms of the contract of employment, and was necessary to determine if she was "fit to work". The company claimed the employee was required to undergo such assessment "on account of her inappropriate, aggressive and irrational behaviour towards fellow workers and management on inter alia 20 October and 23 October 2009."

The issues the court was required to determine are:
1.1. whether the provisions in the employee's contract of employment requiring her to undergo medical testing are enforceable or void;
1.2. whether her dismissal for failing to submit to a medical examination on the employer's instruction was automatically unfair in terms of s 187 (1)(f) of the LRA, and
1.3. in the event her dismissal was not automatically unfair, whether it was substantively or procedurally unfair.

The LC found that the provisions in the contract were void and unenforceable; and her dismissal was automatically unfair.

Extract from the judgment:
(Lagrange J)
Was the instruction to the applicant permissible?
[38] Before deciding if the dismissal of EWN for failing to submit to a medical examination was automatically unfair or not, the first question which must be addressed is whether the instruction was legally permissible. Section 7 of the Employment Equity Act, 55 of 1998, does permit medical testing of employees, but only in limited circumstances:

"7 Medical testing

1. *Medical testing of an employee is prohibited, unless –*
    a. *legislation permits or requires the testing; or*
    b. *it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.*

2. *Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50 (4) of this Act."*

[39] The first point to notice about the provision is that no exception to the prohibition against medical testing is made on the basis that an employee consented to the medical testing. Section 7 (1) (a) clearly has no application in this case. Consequently, the respondent could only require EWN to undergo a test if the requirements of s 7(1)(b) of the EEA were met. Essentially, Pharmaco argued that the testing was justified given that EWN had consented to undergoing a medical test when reasonably required by it, and her behaviour coupled with the disclosure of her psychiatric condition provided sufficient justification.
.....
[45].....I am not persuaded that the respondent established that its instruction to the applicant to undergo a psychiatric examination to determine if she was fit to do her work was one that was not prohibited in terms of section 7 of the Employment Equity Act, as it failed to establish that it met any of the exceptions to the prohibition.

[46] On the same reasoning, in the absence of being able to establish that clause 17.3 of EWN's contract was justifiable under one of the exceptions to the prohibition in section 7 of the Employment Equity Act, that provision is unlawful and unenforceable.

Gemalto South Africa (Pty) Ltd v Ceppwawu obo Louw and Others (JA 54/14) [2015] ZALAC 36 (27 August 2015)

Principle:
There has to be a rational connection between the purpose of discipline and the alleged misconduct sought to be investigated. Even where employees are in breach of a term of their contract of employment which permits polygraph testing, the enforcement of the term is fair only where there is reason to suspect those employees of involvement in wrongdoing.

Facts:
The employer is involved in the manufacturing and personalizing of secure operating devices such as smart cards and sim cards. These products are sold to most of the banks in the country. Due to the nature of the business and the high security risks, it

operates in high security environment that deals with financial information and secure transaction tools. Standard Bank, one of the employer's biggest clients, sent a letter to the employer alleging that some cards and data had been removed from the employer's premises and as a result of which a loss amounting to R50 000 000 was suffered by Standard Bank. The bank demanded payment of the said amount from the employer. Due to the significance of the claim, the possible damage to the employer's reputation and relationship with Standard Bank, the employer decided to conduct an investigation into the Standard Bank's claim. As part of the investigation, the employer requested all its employees including senior management, who had access to sensitive data, to undergo polygraph tests. A term of the contracts of employment allowed polygraph tests.

The union and its members indicated an unwillingness to participate in the polygraph test process despite several meetings and explanations by polygraph experts. A group of 189 employees signed a petition which was presented to the employer. The petition stated that:

'We are not going to the polygraph tests. As nothing wrong has happened to the Company (loss of cards). The polygraph test is not accurate. Those who want to be tested can go as the polygraph test is voluntary not compulsory. You should explain to us what will happen to those who fail it.'

The employer then issued a letter to 23 individual employees who had clauses in their signed employment contracts agreeing to undergo polygraph tests, noting that despite its attempts to consult them and their union on such tests, they had failed to undergo them. When they did not submit themselves to undergo the tests they were charged for gross insubordination and a breach of the contract of employment, leading to a serious breach of trust. The chairperson of the disciplinary enquiry found the employees guilty of the charge of gross insubordination and found summary dismissal as the appropriate sanction.

Aggrieved by the findings, the employees referred a dispute of unfair dismissal to the CCMA. The commissioner held that the dismissal of the employees was procedurally fair but substantively unfair and awarded compensation. On review the Labour Court found, in essence, that the decision reached by the commissioner fell within a range of reasonableness and dismissed the application for review and made no order as to costs.

On appeal to the LAC it was also held that the commissioner's decision was not unreasonable. The employer's appeal was dismissed with costs by the LAC, which found that the employer's attempt to only target 23 employees out of the 189 who refused to undergo the tests was unfair – it was tantamount to making an example of the 23 employees for the others. The LAC concluded that the dismissal of these employees had little to do with the purpose of the polygraph testing exercise, which was investigating the Standard Bank claim. By only subjecting 23 employees to the polygraph testing out of the many, it was highly unlikely they would uncover the "suspected syndicate". There was therefore no rational connection between the purpose of discipline and the alleged misconduct sought to be investigated.

Extract from the judgment:
(Tlaletsi DJP)

[25] It is common cause that the 23 employees failed to heed the appellant's instruction to subject themselves to polygraph testing. Their failure to comply is per se an act of insubordination. However, the real question to be answered is whether their dismissal was in the circumstances of this case substantively fair. The procedural fairness of their dismissal is not in issue as there is no challenge to the ultimate procedure adopted by the appellant in dismissing them. In determining the substantive fairness for the dismissal, the surrounding circumstances as well as the events that led to the dismissal are factors that deserve consideration.

[26] What distinguishes the 23 dismissed employees from the rest of their 166 colleagues is undoubtedly the fact that the appellant, upon perusal of the personal files or records of all the 189 employees that refused to undergo polygraph test, managed to find, attached to the 23's contracts of employment, clause 18.1 that stated that:

'All employees where circumstances in the Company's discretion require will undergo a lie detector test. This test will be paid for by the company. The company reserves the right to use any information obtained from the test to conduct further investigations.'

But for this distinction, the 23 employees' position was similar to the others in that they were part of a group of employees who collectively did not want to subject themselves to polygraph tests and signed a petition objecting to submit to polygraph testing. The only reason why they became a soft target for discipline is the fact that annexures bearing their signatures could be found.

[27] It is significant to note that the appellants' case had always been that all the employees, without discrimination, were obliged, as management prerogative, to be subjected to polygraph test. Furthermore, that all the employees had a clause 18.1 in the annexed to their contracts of employment. However, these annexures could not be found for other employees because they were either deliberately removed or lost. It was only then decided, based on the perception that it would be a difficult task to prove, in the absence of the said documents, that the rest of the employees were obliged to undergo polygraph testing, that disciplinary proceedings were instituted only against the 23. The latter, only became victims for disciplinary action and subsequent dismissal for the sole reason that annexures to their contracts of employment were not removed or lost. Had that not been the case, they would, like their colleagues, not have lost their employment.

[28] It is therefore not unreasonable to conclude that the dismissal of these employees had nothing to do with the object and purpose of the polygraph testing exercise. What started off as an investigation of the Standard Bank claim ended up not being the reason for the employees' discipline and ultimate dismissal. It is illogical to accept that subjecting only the 23 employees to the polygraph testing out of the many would have assisted the appellant to uncover what it referred to as a "suspected syndicate" or achieve the objective of addressing the Standard Bank claim. There is therefore no rational connection between the purpose of discipline and the alleged misconduct sought to be investigated. Furthermore, there is no causal link between the reason for the dismissal and the alleged losses suffered by Standard Bank. The differentiation between the 23 out of the rest of the 166 employees on this narrow distinction is in my view unfair. It is tantamount to making an example out of the 23 employees for the others.

[29] The 23 employees may have breached a term of their contract of employment. However, in the circumstances of this case, I am not persuaded that the enforcement of the term is fair. The employer wanted to use a contractual obligation to run a blanket polygraph test without any reason to suspect the employees of any involvement in wrongdoing. Once a

blanket approach was not possible, to mechanically test the few who were vulnerable to discipline is an unfair invocation of the employer's rights because it remained dysfunctional to any operational requirement.

[30] For the reasons set out above, it cannot be found that the commissioner's decision is unreasonable and could not have been made by a reasonable decision-maker. The appeal falls to be dismissed. It would be in accordance with the requirements of the law and fairness that costs should follow the result.

Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others (JA49/14) [2015] ZALAC 23 (24 June 2015)

Principle:
An employer may not adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence. A zero tolerance approach will only be fair if the circumstances of the case warrant the employer adopting such an approach.

Facts:
The employee, appointed in 2002, progressed to the position of a supervisor. On 10 November 2009 when she left the store, she was found in possession of uncancelled/unpaid roll-on deodorant in her handbag. She pleaded guilty at a disciplinary hearing to the offence of being in possession of uncancelled/unpaid goods when leaving work. She gave evidence in mitigation of the sanction. She told the hearing that she had gone to see her doctor on 10 November and that the doctor had asked her not to apply deodorant when she came for an appointment. She put the deodorant in her handbag and forgot to clear it before coming into the store. She did not use deodorant every day and this is why she forgot to declare it. She was under the impression that the company would give her a warning for the first offence of this nature and that she would only be dismissed if she transgressed for the third time.

At the CCMA arbitration the commissioner was satisfied that as a supervisor, the employee was aware of the rule that she was required to declare goods in her possession. The commissioner did not accept her version that she had forgotten to declare the deodorant to the security staff when she arrived at work. The commissioner was satisfied that the employer acted consistently and that employees who were found guilty of this offence were dismissed. The commissioner found that the sanction of dismissal was appropriate and therefore the dismissal was substantively fair.

On review at the Labour court the court noted that the employee pleaded guilty on the understanding that she would receive a warning. The court found that the commissioner had not assisted the employee when it became necessary for her to challenge the employer's version. The court regarded this as a very material omission on the part of the commissioner and that it was unfair to turn around and blame the employee for her failure to contest this evidence. The Labour Court was not satisfied with the fact that the fairness of the dismissal had been proved and set aside the arbitration award, reinstating the employee with a final written warning.

On appeal to the LAC, the LC's approach was found to be correct. The LAC took the opportunity to give guidance on zero tolerance policies which make dismissal for the first offence obligatory.

Extract from the judgment:
(Davis JA, Ndlovu JA et Landman JA)

[14] It is common knowledge that retailers are faced with what is termed shrinkage that is partly attributable to misappropriation of stock by their employees. Shrinkage has significant financial implications for retailers. One of the steps taken to counter shrinkage is to require employees, on entering the store, to declare (the terminology used is "cancel") their property unless it is obviously not company stock. A failure to do so constitutes a disciplinary offence. This rule also assists in countering a defence, if an employee is found in possession of stock and charged with theft, that the stock is the lawful property of the employee.

[15] Although the failure to declare the property takes place as a measure to counter theft, the offence created is not one of theft. A repeated breach of this rule may be made a dismissible offence, not because a breach of the rule constitutes theft, although it may lend support to a suspicion of theft, but because a repetition goes to show that the offender wilfully refuses to co-operate with this rule in countering shrinkage and is untrustworthy.

[16] It is difficult to appreciate how a single transgression of this rule, except as regards high value goods, is sufficient to warrant dismissal and all the unfortunate consequences that it embraces. In fact, the nature of the mischief which the rule is aimed at seems to only come to the fore once there has been a previous transgression.

[17] It is also necessary to make some further remarks as regards dismissal for a first offence ie a "zero tolerance" policy. A dismissal will only be fair if it is procedurally and substantively fair. A commissioner of the CCMA or other arbitrator is the initial and primary judge of whether a decision is fair. As the code of good practice enjoins, commissioners will accept a zero tolerance if the circumstances of the case warrant the employer adopting such an approach.

[18] But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were, a "no go area" for commissioners. A zero tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise designed for the refuse bin. See the incisive contribution by André van Niekerk "Dismissal for Misconduct – Ghosts of Justice, Past, Present and Future" in Le Roux R and A J Rycroft (eds) Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges (Juta 2012) 102-119. Commissioners should be vigilant and examine the circumstances of each case to ensure that the constitutional right to fair labour practices, more particularly to a dismissal that is fair, is afforded to employees.

.....

[22] Even assuming that the appellant was pursuing a zero tolerance policy, it was not one that is appropriate for an infringement of this rule without further evidence from appellant for the justification of such an inflexible policy. In any event, the commissioner is required to consider whether the circumstances of the case warrant dismissal. If it does not, then irrespective of the company's policy, the commissioner is at large to set the dismissal aside and replace it with an appropriate sanction.

[23] Although the employee was not a good and truthful witness she pleaded guilty to infringing the rule. This is a mitigating circumstance. Her other circumstances indicate that a

final written warning is called for as opposed to dismissal. Her dismissal for a single transgression was, in these circumstances, unfair. The award of the commissioner is not one that a reasonable commissioner would have made. The commissioner should have replaced the sanction with a final written warning.

[24] I have reached the same conclusion as the court a quo, albeit for slightly different reasons and consequently the appeal must be dismissed.

Western Platinum Refinery Ltd v Hlebela and Others (JA32/2014) [2015] ZALAC 20 (3 June 2015)

Principle:
An employee's duty of good faith towards the employer is breached by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined. The undisclosed knowledge must be deliberate and actual. The duty to disclose is not dependent upon a specific request for relevant information because the wrongdoing might not be known to the employer.

Facts:
The police gave the employer information about the "wealth" of an employee, Hlebela, and his immediate family. The family possessed a house worth some R582,000, bonded for R200,000 and another house acquired for R14,000 which had been substantially improved, and four cars. He was also the owner of a construction business. Hlebela earned R14,000 per month. It was thought that such wealth might be the proceeds of theft because it was not plausible that he could have accumulated such a sum of capital from his salary. His movements around the employer's plant were then monitored electronically, and after it was noticed that he accessed parts of the plant that he was not authorised to, he was charged as follows: 'It is alleged that you have knowledge of the enormous losses of PMGS at PMR but you have made no full and frank disclosure to PMR about what you know that could assist PMR in its investigations herein.' The "losses" refer to unexplained losses of stock over several years.

The employee was dismissed, a sanction confirmed by the arbitrator. The disciplinary enquiry outcome was that the evidence of his wealth did not prove his culpable participation in theft. He was however found guilty of the non-disclosure charge. The "information" not disclosed, relied upon to convict him, was information specified in demands, made to him after he had been charged, to reveal details of his personal financial affairs. He refused, claiming he did so on union advice that he was under no obligation to do so.

The Labour Court reversed the finding and declared that the dismissal was substantively unfair, but it found that reinstatement was inappropriate, and granted compensation equivalent to 12 months' wages. The employer appealed against the decision setting aside the award, and, Hlebela, in turn, cross-appealed against the compensation order, seeking a substituted order of reinstatement.

The LAC held that there simply was no case made against him. The undisclosed information relied on to substantiate the charge was not about wrongdoing and consequent stock losses, but about his personal finances. Even if this information

was pertinent to the enquiry and appropriate to demand from an employee, this information is not of the species of information that could form the substance of culpable non-disclosure pursuant to a duty of good faith. The award convicting him was one to which no reasonable arbitrator could have come upon a proper appreciation of the evidence adduced. It was set aside and reinstatement granted.

The LAC judgment is important for clarifying aspects of the concept of 'derivative misconduct'. It confirmed that derivative misconduct –

- requires proof of actual knowledge of the wrongdoing;
- requires proof that the non-disclosure was deliberate;
- is made more serious by the degree of seriousness of the wrongdoing and the potential impact of the non-disclosure;
- could be made more serious by the seniority of the employee involved;
- need not be dependent upon a specific request for relevant information, as often the wrongdoing might not even be known to the employer.

Extract from the judgment:
(Landman, Sutherland JJA and Mngqubisa-Thusi AJA)

[4] Before addressing the facts, it is appropriate to deal first with the concept of "derivative misconduct" alluded to in the award and in the judgment on review, and in particular, the non-disclosure species of that concept, because, as shall be made plain, serious confusion existed among those responsible for instituting the disciplinary process about the concept and how to apply it appropriately.

[5] The phrases "derived justification" and "derived violation of trust and confidence" were coined by Cameron JA (as then he was in the LAC) in Chauke and Others v Lee Service Centre CC t/a Leeson Motors (Leeson Motors). Later, the label "derivative misconduct" has tended to prevail in several awards given in the CCMA and was used in the judgment of Pillay J in RSA Geological Services (A Division of De Beers) v Grogan N.O (RSA Geological Services). a review of an award reported as NUM and 7 Others v RSA Geological Services (A Division of De Beers).

.....

[8] Several important aspects of these dicta require clarification. Important to appreciate is that no new category of misconduct was created by judicial fiat. The effect of these dicta is to elucidate the principle that an employee bound implicitly by a duty of good faith towards the employer breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined. Uncontroversially, and on general principle, a breach of the duty of good faith can justify a dismissal. Non-disclosure of knowledge relevant to misconduct committed by fellow employees is an instance of a breach of the duty of good faith. Importantly, the critical point made by both FAWU v ABI and Leeson Motors is that a dismissal of an employee is derivatively justified in relation to the primary misconduct committed by unknown others, where an employee, innocent of actual perpetration of misconduct, consciously chooses not to disclose information known to that employee pertinent to the wrongdoing.

[9] Leeson Motors does not elaborate on certain other dimensions of a justified dismissal for non-disclosure in such circumstances. I mention those that seem to be axiomatic.

[10] The undisclosed knowledge must be actual not imputed or constructive knowledge of the wrongdoing. Proof of actual knowledge is likely to be established by inferences from the evidence adduced but it remains necessary to prove actual knowledge. The moral blameworthiness intrinsic in the non-disclosure implies a choice made not to tell, which is incompatible with actual ignorance of relevant facts as a result of incompetence or negligence.

[11] The non-disclosure must be deliberate. In my view, this too, follows logically from the value-choices intrinsic in the concept of a duty of good faith.

[12] More problematically, whilst the duty to disclose is uncompromised by the degree of seriousness of the wrongdoing, ie it ought to apply to late-coming as much as to theft, in my view, whether, in a given case the non-disclosure warrants dismissal, would be related, in part, to the degree of seriousness of the wrongdoing and to the effect of non-disclosure by a person in the position of that employee on the ability of the employer to protect itself against the given wrongdoing.

[13] The rank of the employee is irrelevant to culpability, but higher rank might be material to the degree of blameworthiness and to the appropriate weight to be given to circumstances which might reasonably be taken into account as mitigation, given the role fulfilled by the given employee as regards security and adherence to procedures.

[14] Perhaps obvious, but important to stress in relation to the facts of this case, the disclosure of information relevant to the wrongdoing, pursuant to the duty of good faith, ought not be dependent upon a specific request for relevant information; often the wrongdoing per se might not be known to the employer. Mere actual knowledge by an employee should trigger a duty to disclose. Where a request for information about known wrongdoing or suspected wrongdoings has indeed been made, culpability for the non-disclosure is simply aggravated.

City of Cape Town v Freddie and Others (CA13 /14) [2016] ZALAC 8 (15 March 2016)

Principle:
Racism and racial abuse in the workplace cannot be tolerated. To accuse an employee, without any justifiable cause, as being associated with SA's so-called 'Verwoerdian era' is an offensive racial insult, absolutely unacceptable in the workplace, irrespective of whether the accuser is white or black.

Facts:
Freddie was employed by the Cape Town Municipality in November 1993 as a general worker. By 2012 he was employed as an assistant professional officer. He was dismissed on 5 March 2012 for misconduct in respect of charges summarised as follows:

- Being grossly insubordinate/insubordinate in e-mail communications and in a one-on-one interaction, by acting in an insolent, provocative, aggressive and intimidatory manner towards his management team; and
- By sending his line manager (Robson) a derogatory, insolent, racist, provocative and offensive e-mail.

After refusing to comply with various work instructions from his manager Robson, Freddie embarked on what Robson described as 'a bombardment of emails', which he copied to certain employees within the organization (including Robson himself), accusing Robson of management incompetency and of being a dismal failure. Freddie at one stage confronted Robson in an aggressive and intimidating manner and threatened him, saying he would "deal with him". After a series of emails from Freddie during March and April 2011 and further confrontations between Freddie and Robson, Freddie was suspended. He subsequently sent Robson an email accusing

him of being “a racist of the highest order”, and comparing him to Verwoerd (SA prime minister during the apartheid era).

After his dismissal, Freddie referred a dispute to the bargaining council. The issue for determination by the arbitrator was whether Freddie’s dismissal was substantively fair, in the sense of whether the sanction of dismissal was the appropriate remedy in the circumstances of this case. Procedural fairness was not in dispute.

Whilst the arbitrator found that there was no evidence to substantiate Freddie’s accusations that Robson was a racist, he concluded that Freddie had acknowledged his mistakes and had shown genuine remorse at the arbitration hearing for his conduct. Given these factors, Freddie’s long service, and because he felt there had never been any constructive attempts to resolve the dispute and repair the damaged employment relationship, he found that Freddie’s dismissal was unfair and ordered his retrospective reinstatement.

The employer took the arbitrator’s decision on review, arguing that the arbitrator’s finding that the employment relationship had not broken down irretrievably, disregarded the evidence led. The LC did not agree and found that the arbitrator’s conclusion that Freddie’s dismissal was substantively unfair and that he must be reinstated was “well-reasoned” and did not constitute a decision which a reasonable decision-maker could not reach on the available evidence. The Court noted, however, that given the serious nature of the misconduct Freddie was guilty of, he was not entitled to full back-pay and that his retrospective reinstatement must be subject to a final written warning for 12 months from the date he resumed his duties.

The employer appealed to the LAC, which overturned the LC decision. The LAC found that racism and racial abuse in the workplace cannot be tolerated. To accuse an employee, without any justifiable cause, as being associated with SA’s so-called ‘Verwoerdian era’ is an offensive racial insult, absolutely unacceptable in the workplace, irrespective of whether the accuser is white or black. The LAC found that Freddie’s dismissal was substantively fair.

Extract from the judgment:
(Ndlovu JA)
[50] With the advent of our constitutional democracy, the racial attitudes and practice of discrimination amongst persons on the basis of race, colour, culture or creed is something that ought now to belong in the past. However, it cannot be denied that it constitutes the saddest part of the history of this country. Sadly, it remained a common cause feature in our society. Significantly, our Courts have expressed strong views against racism, particularly in the workplace. In Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others Zondo JP stated the following:
‘Within the context of labour and employment disputes this Court and the Labour Court will deal with acts of racism very firmly. This will show not only this Court’s and the Labour Court’s absolute rejection of racism but it will also show our revulsion at acts of racism in general and acts of racism in the workplace particularly. This approach will also contribute to the fight for the elimination of racism in general and racism in the workplace in particular and will help to promote the constitutional values which form the foundation of our society.’

Sustaining Zondo JP’s approach in the same case (above), Nicholson JA, said the following:
‘It was never contended that the use of the racist epithets in question should not be visited by the sanction of dismissal. Racism is a plague and a cancer in our society which must be

rooted out. The use by workers of racial insults in the workplace is anathema to sound industrial relations and a severe and degrading attack on the dignity of the employee in question. The Judge President has dealt comprehensively with this matter in his judgment and I wholeheartedly endorse everything that he says in this regard.'

[51] Not long ago, the Labour Court in SACWU and Another v NCP Chlorchem (Pty) Ltd and Others, remarked, correctly so in my view, as follows:
'To accuse a person of being racist or to say to a person that he is displaying a racist attitude is racially offensive. I am equally satisfied that these words, objectively viewed, can be regarded as insulting and abusive ….. [It is difficult] to imagine under what circumstances an employee who without just cause or a reasonable basis therefor, and accordingly unjustifiably, accuses another employee of being a racist, or that he or she was displaying a racist attitude, would easily escape dismissal.'
……
[54 Concerning the Verwoerd racist slur e-mail: The former South African Prime Minister Dr Hendrik Frederick Verwoerd is notoriously known, from the perspective of the Black majority in this country, as the architect of apartheid. It is also common knowledge that during the apartheid era, the willy-nilly use of a variety of offensive racial slurs by certain racist white supremacists against Black people (whether it be African, Coloured or Indian) in this country was the order of the day; and this was done without impunity. Some of these racial slurs were within public knowledge in the workplace and I do not intend to list them here. They would better slide into oblivion as a social taboo.

[55] However, it seems to me, given the painful and shameful atrocities perpetrated against the Black people in this country during the so-called Verwoerdian period, one should expect to see all right-minded and peace-loving people not to dare to be even perceived as associating themselves with anything to do with Verwoerd and his lieutenants, as well as his similarly-minded successors. Therefore, for Freddie to describe Robson, without any justifiable cause, as being "even [worse] than Verwoerd" was an offensive racial insult, absolutely unacceptable for any employee to use against any other employee in the workplace, irrespective of whether the accuser is white or black. Besides, it ought to be recalled that the use of racist language against a person or class of persons also constitutes hate speech and is prohibited and outlawed under the Constitution and the law.

[56] In the present instance, there was not the slightest shred of evidence that Robson exhibited a racist attitude toward Freddie or did anything to Freddie which could justifiably be described as racist. In fact, the opposite conduct on the part of Robson was evident. There was unchallenged evidence that Robson was empathetic toward Freddie for not having been appropriately translated in his rank or designation. This was not the attitude of a racist person. Further, in Freddie's e-mails, it appears as if he was dealing with a white man whereas Robson was in fact a Coloured man. It is common knowledge that Coloured people were also oppressed under apartheid, albeit to a lesser degree than African people. Significantly, Venter was the only white man in the Public Participation Unit, headed by Robson, who was coloured. In my consideration of the matter, I am unable to justify the basis on which an employee who conducts himself/herself toward his/her employer in the manner that Freddie did here can escape dismissal.

[57] The aggravating features of this case far outweighed whatever mitigating factors in favour of Freddie. For instance, it has always been said that where the insubordination was gross, to the extent that it was persistent, deliberate and public, a sanction of dismissal would normally be justified…….

[58] Indeed, even the fact of long service in employment does not always spare an employee, who committed a gross misconduct, from dismissal. This Court, in Toyota SA Motors (Pty) Ltd v Radebe and Others, stated the following:

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

Steenkamp and Others v Edcon [2016] ZACC 1

Principle:
Non-compliance with the procedures in section 189A(8) of the LRA may result in the dismissals being unfair, not invalid.

Facts:
During 2013 and 2014, Edcon retrenched over 3000 employees. The retrenchments were covered by s189A of the LRA. Edcon gave the employees notices of termination of their contracts of employment prior to the expiry of the time periods prescribed by section 189A(8) of the LRA and was therefore in breach of the Act.

1331 applicants did not challenge the substantive fairness of their dismissals, and all relied instead exclusively upon the principle established in De Beers Group Services (Pty) Ltd v NUM [2011] 4 BLLR 319 (LAC) and Revan Civil Engineering Contractors & others v National Union of Mineworkers & others (2012) 33 ILJ 1846 (LAC) to assert a cause of action that their dismissals were invalid and sought to be reinstated with full back pay. These judgments had found that an unprocedural retrenchment in breach of s189A is invalid. The effect of these previous judgments was that the dismissals were regarded as 'null and void' – ie they never took place – and the employees must automatically be reinstated retrospectively as if they were never dismissed, without any consideration of the fairness of the retrenchments.

When this case dealing with the same issues arose, the Judge President of the Labour Courts acting in terms of section 175 of the LRA directed that the matter be heard by the LAC sitting as a court of first instance (ie without first being heard by the Labour Court). If the Judge President had not done this, the LC would have been legally bound to apply the previous rulings of the LAC on the legal principles involved. The LAC in Edcon v Steenkamp and Others (JS648/13, JS51/14, JS350/14) [2015] ZALAC 2 (3 March 2015) then took a fresh look at the matter and decided that the previous 2 LAC judgments had been wrongly decided. The LAC found that non-compliance with the procedural provisions of s 189A(8) of the LRA does **not** in itself result in any subsequent dismissals being invalid (as opposed to being unfair).

The employees affected by the LAC's Edcon judgment tried to appeal against it. When the LAC refused to grant leave to appeal, the matter was referred to the Constitutional Court.

In the Concourt proceedings, the retrenched Edcon employees and their union Numsa challenged the LAC decision and sought reinstatement with full backpay. They argued that the Act used the word "must" in regard to the procedures required, and that Edcon was accordingly obliged to comply with the prescribed time periods in the LRA before dismissing the employees and the failure to do so resulted in the dismissals being invalid. Edcon on the other hand argued that the fact that there was

no compliance with the prescribed procedures meant that the dismissals may be unfair, but not invalid.

The Concourt in a majority judgment accepted Edcon's arguments and dismissed the appeal. The Court found that the LRA did not contemplate 'invalid' dismissals and that the procedures with which Edcon failed to comply constituted requirements for the procedural fairness aspect of dismissals, and as such, related to unfair dismissals. The Court pointed out that the concept of an invalid dismissal is foreign to the LRA, and that the applicants should have utilised the unfair dismissal mechanisms provided in the Act instead of seeking to have the dismissals declared invalid. The dismissals could have been found to be unfair but not invalid.

The Court emphasised that the remedies provided in sections 189A(8), (9) and (13) do not contemplate any order declaring dismissals invalid. They include going on strike and applying to the Labour Court for a variety of orders including an order reinstating dismissed employees pending compliance by the employer with the procedural requirements. There is no right under the Act not to be unlawfully dismissed but there is a right not to be unfairly dismissed.

The Court specifically left the door open for the dismissed employees to go back and start the process afresh of challenging the fairness of their retrenchments under the unfair dismissal mechanisms of the LRA if they wished to do so, although they would have to apply for condonation for the late filing of their disputes outside the time limits prescribed in the Act.

Extract from the judgment:
(Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J)
A. Relief sought not contemplated by the LRA
[103] My point of departure is that, if a litigant's cause of action is contractual in nature, the remedy will have to be found within contract law. If a litigant's cause of action is based on the law of delict, the remedy will have to be in the law of delict. The applicants' cause of action is a breach of the procedural requirements laid down in section 189A(8) of the LRA that a relevant employer is required to comply with before it can dismiss employees to which the section applies. On the same principle the relief to which the applicants may be entitled by virtue of that breach, if they make out a proper case, should be sought within the four corners of the LRA. The applicants contend that Edcon's non-compliance with the section 189A(8) procedure before the workers were dismissed rendered their dismissals invalid. They do not contend that the non-compliance rendered their dismissals unfair.

[104] Non-compliance with the section 189A(8) procedure may result in the dismissals being unfair, not invalid. Before a court may declare that a dismissal is invalid, it must first conclude that the dismissal is unlawful. The LRA is legislation that was enacted to give effect to section 23 of the Constitution. What we find in section 23 that is closely related to section 189A is the provision in section 23(1) that "everyone has a right to fair labour practices".

[105] The LRA created special rights and obligations that did not exist at common law. One right is every employee's right not to be unfairly dismissed which is provided for in section 185. The LRA also created principles applicable to such rights, special processes and fora for the enforcement of those rights.....
.....
[136] I conclude that invalid dismissals and a declaratory order that a dismissal is invalid and of no force and effect fall outside the contemplation of the LRA. Such an order cannot

be granted in a case based on the breach of an obligation under the LRA concerning a dismissal. Accordingly, on this ground alone, the appeal falls to be dismissed.

B. LRA remedy for an LRA breach

[137] The second basis for my conclusion that the applicants' appeal should be dismissed is a principle that, for convenience, I call "LRA remedy for an LRA breach". The principle is that, if a litigant's cause of action is a breach of an obligation provided for in the LRA, the litigant as a general rule, should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy. A cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanisms of the LRA to obtain a remedy provided for in the LRA.

.....

C. Applicants limited to section 189A remedies and those remedies are adequate

[145] Under this heading I seek to show that, since the applicants rely upon a breach of an obligation in section 189A, their remedies are limited to those provided for in that section and that those are adequate remedies.

UNFAIR LABOUR PRACTICE

Rainbow Farms (Pty) Ltd v CCMA and Others (C377/2012) [2015] ZALCCT 43 (29 May 2015)

Principle:

Where an appraisal system used to award a discretionary bonus is subjective, and the employer is unable to explain how different elements are measured, the use of that system will be an unfair labour practice.

Facts:

The company in this case paid discretionary bonuses to employees. Five employees – employed as halaal chicken slaughterers - did not receive bonuses as they were rated below 3 out of 5 points in terms of the company's performance management system. The employees referred a dispute to the CCMA. They indicated that the dispute was about an unfair labour practice, but in summarising the facts of the dispute, they said the employer unfairly and unlawfully discriminated and/or employed discriminatory employment practices against them.

At arbitration, the commissioner evaluated the company's "talent management toolkit" setting out its performance management system. He came to the conclusion that the process envisaged by this document was not followed in the case of the five employees. The commissioner was clear that he only dealt with the process followed by the company and was in no position to say whether the ratings given to the employees were correct or not, and if incorrect, what the correct rating should have been. In other words, the commissioner conceded that he was unable to say whether the employee should have received a bonus if the process had been correctly followed. But based simply on the performance appraisal system itself, the commissioner found that the process leading to five employees not receiving a bonus was an unfair labour practice *"relating to the provision of benefits to the employees"*. He ordered the company to pay each of them compensation equivalent to one month's wages.

The employer applied to the Labour Court to have the CCMA award reviewed and set aside. As part of the review application, the employer challenged the CCMA's jurisdiction to arbitrate the dispute, as the employees had referred to a "discriminatory employment practice" in their initial referral to conciliation. The employer argued that it was accordingly an unfair discrimination dispute.

The LC did not agree, as it was clear that despite the above description, they had referred the dispute as an alleged unfair labour practice. The court referred to the LAC judgment in ***Apollo Tyres*** that found employer conduct relating to the provision of benefits may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction, where the employer exercises a discretion that it enjoys under the contractual terms of a scheme conferring the benefit. The LC held that the decision reached by the arbitrator – that the appraisal for the purpose of a discretionary bonus was subjective and therefore unfair – was one which a reasonable arbitrator could reach. The employer's review was accordingly dismissed.

Extract from the judgment:
(Steenkamp J)
[8] The arbitrator considered the process envisaged by the company's "talent management toolkit" setting out its performance management system. He came to the conclusion that the process envisaged by this document was not followed in the case of these five employees.

[9] The arbitrator came to the following conclusion:
"I'm satisfied that the process conducted by the respondent [i.e. the company] leading to the applicants [the employees] not receiving a performance bonus was seriously flawed and amounted to unfair conduct by the employer relating to the provision of benefits to the employees. In other words, the respondent has committed an unfair labour practice.
I note that I have only dealt with the process followed by the respondent. I am in no position to say whether the ratings given to the applicants were correct or not, and if incorrect, what the correct rating should have been. I'm therefore unable to say whether the applicants should have received a bonus if the process had been correctly followed……."

[10] The arbitrator ordered the company to pay each of the employees one month's wages, subject to standard PAYE deductions.
…….
Jurisdiction
[12] The test to consider whether the ruling on jurisdiction is reviewable is simply whether the arbitrator was right or wrong. The reasonableness test in *Sidumo* does not apply.

[13] It is so, as *Mr Kirby-Hirst* was at pains to stress, that the employees referred to a "discriminatory employment practice" in their initial referral to conciliation. But, at that stage already, they referred to their dispute as an unfair labour practice dispute. And when the dispute remains unresolved and they referred it to arbitration – this time with the assistance of their trade union – they made it clear that the dispute was that of an alleged unfair labour practice relating to the provision of benefits as envisaged by s186(2)(a) of the LRA.

[14] The arbitrator quite correctly referred to the decision of the Labour Appeal Court in ***NUMSA v Driveline Technologies (Pty) Ltd*** to say the parties are not bound by the manner in which the conciliated Commissioner characterised the dispute on the certificate of outcome. He also followed the authority of this court in Bombardier that a certificate of outcome has no bearing on jurisdiction. That conclusion cannot be faulted.

'Benefit'

[15] The arbitrator's ruling that the discretionary 'bonus could be included under the term 'benefit' in s 186(2)(a) is also not open to review. The approach in *Umhlatuze Municipality*, to which he referred, has now been endorsed by the LAC in Apollo Tyres:

"I also agree, with qualification, with the Labour Court's conclusion that there are at least two instances of employer conduct relating to the provision of benefits that may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit." … "In my judgment 'benefit' in s 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion."

[16] On this aspect, too, the arbitrator correctly found that the CCMA had jurisdiction to arbitrate the unfair labour practice dispute.

.....

Conclusion

[21] The arbitrator correctly found that the CCMA had jurisdiction to hear the unfair labour practice dispute. Having heard and evaluated the evidence, he came to the conclusion that the employer had committed an unfair labour practice. He ordered the employer to pay the employees in an amount that fell within his powers. The award is not so unreasonable that no other arbitrator could have made it.

DISCRIMINATION

South African Municipal Workers Union and Another v Nelson Mandela Bay Municipality (P483/11) [2015] ZALCPE 70 (24 November 2015)

Principle:

In a wage discrimination claim an employee must demonstrate is that there is a causal nexus between the differentiation on the basis of her gender or sex and the treatment accorded to her in respect of the grading of her post and the concomitant remuneration. Where other reasonable inferences can be drawn from the facts, this *causal nexus* will not be established.

Facts:

The employee successfully applied for the position of Assistant Director: Planning and Co-ordination in the Human Settlement Directorate at grade 15. She was the only female assistant director appointed in the directorate while the remaining four assistant directors were male. Save for one of them, who was employed at grade 16, these assistant directors, including the employee, were appointed at grade 15. Two of them were appointed at the same time as the employee.

The employee claimed she had been discriminated against on account of her being female. Her complaint was that (a) she was remunerated at a lower salary notch than the two men appointed at the same time as she was; and (b) one of the assistant directors was on grade 16 and remunerated at that same grade while she was on grade 15. The employer blamed administrative chaos for the differences and said the two males appointed at the same time were existing employees and this also justified the difference in pay.

The Labour Court rejected the employee's discrimination claim based on gender. The Court held (it is important to note that the Court was applying the pre 2014 amendment EEA Act) that in a wage discrimination claim an employee must demonstrate that there is a *causal nexus* (a connection between two things which causes the event) between the differentiation on the basis of gender and the treatment accorded to her in respect of the grading of her post and the concomitant remuneration. The court said that where other reasonable inferences can be drawn from the facts, this *causal nexus* will not be established. It accepted that the administrative chaos (which the court said was "gender neutral"!) and prior employment with the same employer may have been the real *causal nexus*, and that it could not be inferred that it was because the employee was female.

Extract from judgment:
(Phatshoane AJ)

26. In this case the disparate treatment would occur if it is established that the employer treated the complaining employee less favourably on the basis of sex or gender by placing her on a lower remuneration scale for performing the same or similar work as her male comparators. It was not controverted that the assistant directors in the Human Settlement Directorate are performing the same or similar work, some with added responsibilities. It was also not in dispute that there are salary disparities amongst these directors. What remains for the employee to demonstrate is that there is a causal nexus between the differentiation on the basis of her gender or sex and the treatment accorded to her in respect of the grading of her post and the concomitant remuneration. In other words, that being female was a sine qua non for the less remuneration she earned. It has been held in a number of decisions in this Court that a mere say so of discrimination is not adequate for the onus to shift to the employer to prove that the discrimination was fair. In Mangena & others v Fila SA (Pty) Ltd & others (supra) at 669-670the Court pronounced:

"[7] This court has repeatedly made it clear that it is not sufficient for a claimant to point to a differential in remuneration and claim baldly that the difference may be ascribed to race. In Louw v Golden Arrow[(2000) 21 ILJ 188 (LC)] Landman J stated at 197B:
'Discrimination on a particular "ground" means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less [than] that [of] Mr Beneke's salary because of his race '.

This formulation places a significant burden on an applicant in an equal pay claim. In Ntai & others v SA Breweries Ltd (2001) 22 ILJ 214 (LC), the court acknowledged the difficulties facing a claimant in these circumstances and expressed the view that a claimant was required only to establish a prima facie case of discrimination, calling on the alleged perpetrator then to justify its actions. But the court reaffirmed that a mere allegation of discrimination will not suffice to establish a prima facie case (at 218F, referring to Transport & General Workers Union & another v Bayete Security Holdings (1999) 20 ILJ 1117 (LC))."(My emphasis)

……

37. I am not swayed that the difference in gender or sex was a dominant reason for the differentiation. There are other reasonable inferences that could be drawn from the facts, including what Mr Mapu and Mr Mahashe referred to as administrative chaos, which is gender neutral, which could be attributed to the disparity. On the whole it cannot reasonably be inferred that the differentiation in remuneration was on the basis of the fact that Ms Tetyana is female. That causal nexus is absent in this case. In my view, SAMWU and Ms Tetyana did not establish the existence of discrimination as contemplated in s 6 of the EEA.

Duma v Minister of Correctional Services and Others (C604/2012) [2016] ZALCCT 6 (2 February 2016)

Principle:
The ground of geographical location as a basis to prejudice an employee (by paying them less for the same work as another employee in a different location) has the ability to impair the dignity of that person in a manner comparable to the listed grounds (under s6(1) of the EEA) and amounts to discrimination.

Facts:
Zameka Duma is employed by Correctional Services. In August 2012, having failed to succeed in having a dispute arbitrated as an unfair labour practice relating to promotion, she referred an unfair discrimination dispute to the LC, claiming that she was unfairly discriminated against on the arbitrary ground of the geographic location of her post. She claimed that, in her position as Western Cape Senior Correctional Officer, she was paid less than comparable positions in other provinces. Importantly, rather than attempting to justify any such remuneration differences that existed between posts in different regions, it appears the employer in its defence chose to deny that it had discriminated against Mrs Duma.

The LC was required to apply the unfair discrimination definition before it was amended in 2014 to include 'discrimination on any other arbitrary ground', but it is clear from the judgment that it was influenced by these subsequent amendments in coming to its conclusions. In summary, it found that Mrs Duma had met the onus of proving that she had been unfairly discriminated against, based on the following submissions:

- she was treated arbitrarily on a ground that impacted on her dignity;
- the employer had not shown that it was necessary to distinguish between the comparable posts in different provinces, or that there was a purpose in doing so;
- she had been prejudiced financially as a result of the discrimination;
- any distinction between employees based solely on the area of the country in which they work, is "given our history, an anathema to the society envisaged by the Constitution."
- the EEA aims to give effect to the right to equality and the eradication of discrimination.

The LC awarded Mrs Duma compensation based on the difference between the remuneration she actually received and what she should have received had she been correctly graded, retrospectively for the three years before she lodged her LC claim and up to the present. It was accepted that the claim for the period prior thereto had prescribed. Going forward, the employer was ordered within a calendar month to adjust her current remuneration to the required level.

Extract from the judgment:
(Rabkin-Naicker J)
[14] In the alternative, the applicant submits that each failure to pay what was due was a separate act of discrimination and the running of prescription was interrupted on 20 November 2009, alternatively 1 June 2012. Reliance is placed on the judgment in SA Broadcasting Corporation Ltd v CCMA & Others (2010) 31 ILJ 592 (LAC) in particular the following dictum:

"While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example where an employer selects an employee on the basis of race to be awarded a once-off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no end and is therefore ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination.

[28] Hence in the present matter the date of dispute does not have to coincide with the date upon which the unfair labour practice/unfair discrimination commenced because it is not a single act of discrimination but one which is repeated monthly. In the circumstances the dispute being labelled as ongoing was an accurate description of the 'dispute date' and the decision arrived at by the commissioner that there was no need for the respondent to seek condonation was correct."

.....

[19] Duma relies on section 6(1) of the Employment Equity Act and on an unspecified unspecified ground therein. Section 6(1) provided that:

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

[20] An applicant bringing a claim in terms of this provision must prove:

20.1 That there was differentiation which amounted to discrimination. If it is on a ground specified in section 6(1), the discrimination is established. If it is not on a specified ground then whether or not there has been discrimination will depend on whether, objectively, the grounds are based on attributes and characteristics which have the ability to impair the fundamental human dignity of people in a comparably serious manner;

20.2 That the differentiation amounting to discrimination is unfair discrimination. If the discrimination is on a specified ground, unfairness is presumed. If on an unspecified ground, unfairness will have to be established by the applicant. The EEA makes it clear that it is not unfair discrimination for an employer to treat an employee differently on a specified ground, or an analogous ground, if that is based on affirmative action or an inherent requirement of the job.

[21] The basis for the differentiation at issue, i.e. the fact that Duma is employed by a national organisation in one province and not another, appears on the stated case before me to be entirely arbitrary. As submitted by Mr Bosch on her behalf, arbitrariness has long been recognised as one of the hallmarks of discrimination. The amended EEA reflects this by prohibiting discrimination in section 6(1) on any "arbitrary ground". I agree that the ground of geographical location as a basis to prejudice an employee (by paying them less for the same work as another employee in a different location) has the ability to impair the dignity of that person in a manner comparable to the listed grounds and amounts to discrimination. My view is fortified by the fact that the amended EEA, although not applicable to this case, provides in section 6(4) that:

"(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is

directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination."

……

[23] In this matter, there appears to be little more than a bald denial by the respondents that unfair discrimination has taken place. It is recorded by the respondents in the stated case that: "The Respondents deny that the manner in which Duma was treated was motivated by discrimination on arbitrary grounds i.e. it denies that it discriminated against Duma." Nor is the issue of the purpose of the differentiation between the Western Cape posts and the posts in other provinces dealt with. It would appear that the respondents, in their defence of the matter, are more concerned with the remedy the applicant seeks and whether it is competent for the court to grant that relief.

[24] On the other hand, the submissions on Duma's behalf that it must be accepted that the discrimination against her were unfair are compelling. These include that:

24.1. She was treated arbitrarily on a ground that impacted on her dignity;
24.2. The respondents have put up nothing to show that it was necessary to differentiate between Managers:Legal Services in the Western Cape differently from their counterparts in other provinces. There is no apparent purpose for the distinction in treatment;
24.3. The applicant has been prejudiced financially over a number of years given that the effect of the discrimination was that she was not remunerated at the correct levels;
24.4. Any distinction between employees based solely on the area of the country in which they work is, given our history, anathema to the society envisaged by the Constitution;
24.5. The EEA is premised on amongst others giving effect to the right to equality and the eradication of discrimination.

[25] I therefore accept that Duma has met the onus of proving that the discrimination was unfair. She seeks an order praying for "retrospective correction of her post" i.e. that she ought to have been placed at level 10, alternatively level 9, and translated through the various levels and grades accordingly. Given that I have found that her claim can only be considered to have arisen in 2009, there is a limit on the retrospective effect of any order that this court may make. There is nothing before me that establishes that level 10 should have been the level at which she should have been employed prior to translation in terms of the OSD process.

Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others (C687/15) [2016] ZALCCT 14 (19 April 2016)

Principles:

1. It is not unfair discrimination where an employer adopts and applies a rule in terms of which newly appointed employees start at a rate lower than existing long-serving employees.
2. It is not fair for an arbitration to run without the complainant being required to identify - and then being held to- the unlisted arbitrary ground of discrimination relied upon.

Facts:

In accordance with a collective agreement with the FAWU, the employer paid newly appointed employees for the first two years of their employment at 80% of the rate paid to its longer serving employees. The Commissioner found that, by applying this to the seven members represented by WAR, the employer had unfairly discriminated against them in breach of section 6 of the EEA. He ordered the payment of damages and the correction of the remuneration rate of the employees concerned "to 100% ratio of the entry level applicable…"

The employer appealed to the Labour Court against the arbitration award (the first appeal under the new s10(8) of the EEA, introduced by the 2014 amendments). The LC found that the differentiation complained of was not irrational and was not based on an arbitrary or unlisted ground, and was not unfair. The court held that the Commissioner ought to have dismissed the claim. The Commissioner's award was reversed and substituted by an order dismissing the claim.

The principle established in this case is that it is not unfair discrimination where an employer adopts and applies a rule in terms of which newly appointed employees start at a rate lower than existing long-serving employees.

In giving judgment, the LC indicated that litigants who allege discrimination on some or other arbitrary ground, without identifying such ground, should take note that the mere 'arbitrary' actions of an employer do not, as such, amount to discrimination within the accepted legal definition of the concept. Complainants must identify the listed or unlisted arbitrary ground of discrimination relied upon. It is not fair to the employer for an arbitration to run without the complainant union being required to identify – and then being held to – the unlisted arbitrary ground of discrimination relied upon.

Extract from the judgment:
(Steenkamp J:)

[19] To establish pay discrimination it is necessary for a complainant to show that:

19.1 the work performed by the complainant is equal or of equal value to that of a more highly remunerated comparator; and
19.2. such difference in pay is based on a prohibited ground of discrimination.

[20] In order to prove that the conduct complained of "amounts to discrimination" in terms of section 11(2)(b), the complainant must identify the listed or unlisted arbitrary ground of discrimination relied upon; establish that that ground is an "other arbitrary ground"; and prove that that ground is the reason for the disparate treatment complained of. As this Court observed in *Ntai & Others v SA Breweries Ltd* :

> *"Litigants who bring discrimination cases to the Labour Court and simply allege that there was 'discrimination" on some or other 'arbitrary' ground, without identifying such ground, would be well advised to take note that the mere "arbitrary' actions of an employer do not, as such, amount to 'discrimination' within the accepted legal definition of the concept."*

.....

[22] In an unfair discrimination claim where the act or omission is shown to constitute differentiation between people or categories of people, the Court embarks on the following two-stage analysis, as laid down in the seminal decision of the Constitutional Court, *Harksen v Lane N.O.*:

> *"(i) Firstly, does the differentiation amount to 'discrimination"? If it is on a specified ground, then the discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it is found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses on the impact of the discrimination on the complainant and others in his or her situation."

[23] See also: *Ntai & Others v SA Breweries Ltd*:

"It is only when such differentiation is based on or linked to an unacceptable ground that it becomes discrimination within its pejorative meaning."

[24] And in *IMATU & ano v City of Cape Town* the Court added:

"The impact of the discrimination complained of on the complainant is generally the determining factor regarding the unfairness of alleged discrimination. Factors which must be taken into account include: the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage; the nature of the provision or power and the purpose sought to be achieved by it; the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."

.....

[32] Differentiation on the basis of "being newer employees" is not an unlisted arbitrary ground of discrimination; and a practice of paying newer employees at a lower rate for a two year period is in any event neither irrational nor unfair. The Code of Good Practice on Equal Pay / Remuneration for Work of Equal Value specifically states that it is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following factors:

"the individuals' respective seniority or length of service".

.....

[44] It therefore emerges that the Commissioner's approach rests on nothing more than a finding that it amounts to unfair discrimination for the Appellant to pay a newly appointed employee previously employed by a labour broker at a rate lower than the rate paid to existing long-service employees, no matter how short the period of previous employment with the labour broker.

[45] That cannot be correct. Nothing in the EEA precludes an employer from adopting and applying a rule in terms of which newly appointed employees start at a rate lower than existing long-serving employees. This applies whether or not the newly appointed employee had previous substantial experience, whether with the employer concerned or some other employer. It also applies whether or not the employee had, in the past, rendered services to the employer concerned via a labour broker.

.....

[49] The arbitrator's award, if correct, has the startling implication that it is impermissible in terms of the EEA for a South African employer to give effect to a collective agreement which prescribes differential rates for employees with different periods of service with it. The award is simply wrong in this regard, and giving effect to such agreements does not constitute "discrimination" on an unlisted "arbitrary ground", much less "unfair" discrimination.

[50] Differential treatment is ubiquitous in modern life and in the workplace. The EEA does not regulate such differential treatment at all unless and until it is established that it is both "not rational" and constitutes "discrimination". (To constitute "discrimination" the

differentiation must take place on a listed ground or on any "other arbitrary ground", as contemplated to in section 6(1)) .
.....

[56] Where a collective agreement stipulates different pay levels for employees with different periods of service with the employer concerned, this is not arbitrary differentiation (as contemplated in para 25 of *Prinsloo*); nor is "length of service" (or being a "new employee") an unlisted ground meeting the test just referred to.

[57] Differentiation in respect of terms and conditions of employment on the basis of length of service with the employer concerned is, on the contrary, a classic example of a ground for differentiation which is rational and legitimate and, indeed, exceedingly common.

EMPLOYMENT EQUITY

Solidarity v Minister of Safety and Security and Others (J879/12) [2016] ZALCJHB 15 (26 January 2016)

Principle:

1. Rather than relying on national census figures of the general population for the purposes of the EEA, an employer must compare the economically active portion of the population – both nationally and provincially - against the composition of the workforce.
2. Whether numerical targets in a EE plan can be construed as quotas will depend on the rigidity with which they should be pursued, which will depend on the interpretation of the wording of the plan. An EE plan should contain a provision that tells decision makers under what circumstances the pursuit of the targets can yield to other considerations when recommending or making an appointment.

Facts:

This was an application to challenge the validity of the South African Police Service Employment Equity Plan applicable from 1 January 2010 until 31 December 2014. The applicants sought a declarator that the plan was invalid and of no force and effect because it contravenes sections in the EEA, the SAPS Act, PAJA and the Constitution. By the time final submissions were made in September 2014, the 2010 – 2014 plan had virtually run its course. The relief sought was primarily declaratory.

Secondly it was to restrain SAPS from implementing the plan by applying quotas based on demographic representation, or to make appointments based on such criteria. The Labour Court held that while declaratory relief is competent in relation to whether the plan itself met the requirements of the EEA or breached the right to equality, it is not appropriate to make an order relating to the implementation of the policy, especially given the question mark that hangs over the extent to which it was implemented in practice. That is an issue concerning its implementation and will turn on what happened in the case of specific appointments.

The Labour Court found that the EE plan did contravene the EEA, having relied on the national population census estimates and not having considered both the national and regional economically active population figures.

Extract from the judgment:
(Lagrange J:)
Compliance of the plan with the EEA
The reliance on national demographic targets
[51] It is clear from the provisions of section 42(a)(i) of the EEA and the regulations discussed that the intention of the EEA was that the comparator against which underrepresentation would be measured should be the 'relevant' national and provincial economically active population. The first point to note is that it is perfectly legitimate to have regard to national demographics in terms of the EEA and s 195 of the Constitution, but it is not sufficient to simply rely on national census figures of the general population for the purposes of the EEA. Rather, it is the economically active portion of the population against which the composition of the workforce must be compared. In so far as it is the economically active population that is under consideration, both the national and regional economically active population figures must be considered in terms of s 42(1)(a)(i). Plainly, in relying only on the national population census estimates, SAPS plan did not consider either of these standards in identifying the numerical targets in its plan. At least in these respects, the plan does not comply with the EEA.
…….
The use of numeric targets for sub-groups of racially disadvantaged persons
[53] Is it permissible to identify numeric targets for subcategories of the designated group of 'black people'? The relevant definitions are contained in s 1 of the EEA and state:
"'designated groups' means black people, women and people with disabilities;…
'black people' is a generic term which means Africans, Coloureds and Indians;…"

[54] One of the purposes of the EEA is "… to achieve equity in the workplace by …implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce." The applicants effectively argue that the designated group of 'black people' is indivisible and whenever targets are set for the advancement of members of that group the targets should relate to the group as a whole and not subcategories thereof. In my view, there is an irreconcilable conflict between this argument and the argument that regional demographics are a necessary and relevant standard when setting numerical targets. Part of the argument in favour of the use of regional demographics is the uneven distribution of subcategories of black people in provincial populations and that a failure to recognise this could result in disproportionately advancing the interests of one category of racially disadvantaged persons at the expense of other categories of black people resulting in a provincial workforce composition that is out of kilter with the racial composition of the province.

[55] In the concurring three-judge minority judgement in Barnard, the following observations were made which are pertinent in this regard:
"[88] In addition, the Act aims to advance several different 'designated groups'. The Act defines 'designated groups' to mean 'black people, women and people with disabilities', and 'black people', in turn, encompasses black Africans as well as persons previously designated coloured and Indian. Employers 'must' implement affirmative action measures that benefit people from all designated groups. So no affirmative action decision is consistent with the purpose of the Act unless it considers the advancement of each of the different categories of persons designated by the Act. A decision that redresses racial disadvantage but grossly aggravates gender disadvantage, for example, might be impermissible, as might a decision that advances only one disadvantaged racial group while limiting the others." (references omitted).
…….
The use of numeric targets in the plan
[58] Does the use of numerical targets in the plan amount to the imposition of quotas in breach of section 15(3) of the EEA? Achieving the goal of a public service which is broadly

representative of the diverse South African population can hardly be pursued without identifying the specific racial and gender composition of the workforce which would correspond to that ideal, which necessarily entails the numeric expression thereof. Indeed, s 15(3) and s 20(2) of the EEA mandate the use of numerical goals. The key question is whether compliance with the plan necessitates that any promotion or appointment made by the SAPS must demonstrably advance the achievement of the numerical goals identified in the plan.

[59] In Correctional Services the LAC addressed the question of when numerical employment targets used in an employment equity plan could be construed as quotas prohibited by section 15(3):

[40] A 'quota' is defined in The Concise Oxford Dictionary, to the extent that it is relevant to this dispute, as 'a fixed number of a group allowed to do something eg. Immigrants entering the country'. [41] Much of the debate before this court turned on the distinction between a quota, which in terms of the EEA, is an impermissible mechanism, and the permissible concept of numerical targets. The key distinguishing factor between these two concepts turns, it appears, on the flexibility of the mechanism. An inflexible set of numbers with which the designated employer is required to comply 'come what may' constitutes a quota and would therefore be in breach of s 15(3) of the EEA. By contrast, a plan based on designated groups filling specified percentages of the workforce, but which allowed for deviations therefrom so that there was no absolute bar to present or continued employment or advancement of people who do not fall within a designated group (s 15(4)) would pass legal muster. Similarly, a plan which provides that the numbers provided for in the plan constitute a goal to be achieved over a defined period would be congruent with the EEA. Of course, even in this case, a target may be designed to achieve a defined goal in a specified period, after which, absent some room for flexibility, the target could become a quota. If the plan is inflexible, then it must be struck down. See in this connection SA Restructuring & Insolvency Practitioners Association v Minister of Justice & Constitutional Development & others (2015 WCC case no 4314/2014)."

……

[62] In this instance, unlike in the Correctional Services matter there is no provision in the SAPS plan setting out the circumstances in which a deviation from the plan would be acceptable. Any member of SAPS management dealing with appointments or promotions would find no guidance in the plan as to when, or on what basis, it would be acceptable to make recommendations or decisions on employment or promotion that did not advance the numerical representation goals of the plan, and which also would not negatively affect their own performance assessment or possibly result in disciplinary action being taken against them……

[63] In Correctional Services the LAC also mentioned, though it does not seem to have been raised in the case before it, that a plan in which the numeric targets are only a goal to achieve over a period of time would also be congruent with the EEA. Does that mean, as in this case, where the targets change from year to year during the five year duration of the plan that, the various annual numeric targets do not amount to quotas? Any equity plan must have a time frame or time frames for achieving numeric objectives. The issue whether those numerical targets can be construed as quotas will always depend on the rigidity with which they should be pursued, which will depend on the interpretation of the wording of the plan. In the case of the SAPS plan, there is nothing in the wording which suggests that the stipulated 'realistic' targets were merely figures that SAPS was aiming to achieve rather than fixed objectives which could result in poor performance assessments or even disciplinary sanctions if not met.

COLLECTIVE AGREEMENTS

Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others (JA103/2014) [2016] ZALAC 11 (24 March 2016)

Principle:
The principle of majoritarianism found in s 23(1)(d) of the LRA, read with s 65(1)(a) of the LRA, which prohibits minority employees from striking if provided for in a collective agreement which has been extended to be binding on them, is not contrary to the Constitutional right to strike and bargain collectively.

Facts:
As a result of the 2013 annual wage negotiations in the mining industry, the Chamber entered into a collective agreement with NUM, Solidarity and UASA that was extended to cover all employees, including AMCU members, in terms of s23 of the LRA. This was subsequently challenged by AMCU. Each of the mining companies who were part of the Chamber of Mines (Harmony, Anglo Gold and Sibanye) owns more than one mine. At certain of the individual mines of those companies AMCU had a majority membership and at others it did not, but overall AMCU did not have the majority membership at most of the companies' mines.

The main issue in the Labour Court and on appeal to the LAC was whether each individual mine of the respective mining companies, constituted a "*workplace*", as defined in s213 of the LRA. AMCU contended that they were – and therefore where AMCU was the majority union, the collective agreement with NUM did not apply. But AMCU also argued that if the individual mines were not separate workplaces, then s23(1)(d)(iii) of the LRA was unconstitutional (this is the section in terms of which a collective agreement can be extended to members of minority unions).

The Labour Court held on the facts that the individual mines of the respective companies did not constitute an independent workplace and that the sections under attack, including s23(1)(d)(iii) of the LRA, are constitutional. The LC found that the agreement had been validly extended to other employees in the respective workplaces, including AMCU's members.

The LC's decision was taken on appeal to the LAC. At the LAC, the Union argued that by virtue of the principle of majoritarianism contained in s23(1)(d) of the LRA, minorities in the workplace may be bound by a collective agreement entered into between the employer/employers and the majority of employees, or the representatives of that majority. S23(1)(d) read with s65(1)(a) of the LRA effectively means that minorities are also precluded from striking in respect of the subject matter of the agreement which is binding upon them. The objection to this consequence was primarily based on the notion that s23(1)(d) does not have the safeguards which s32 of the LRA does(dealing with the extension of bargaining council collective agreements) in relation to the extension of collective agreements to non-parties.

The LAC upheld the Labour Court's judgment confirming that the principle of majoritarianism found in s23(1)(d) (read with s65(1)(a) which prohibits minority employees from striking if covered by a collective agreement that has been extended

to apply to them), is not contrary to the Constitutional right to strike and to bargain collectively.

Extract from the judgment:
(Coppin J)

[83] In summary then, the definition of "*workplace*" in section 213 of the LRA is applicable to section 23(1)(d) of the LRA. The word "*workplace*" in that section, means the "*place or places where the employees of an employer work*". The fact that an employer has more than one place of work does not mean that each of those places of work is a "*workplace*".

[84] In terms of section 213, if an employer carries on or conducts more than one operation – that is independent of the other by reason of its size, function or organisation, the place or places where the employees work in connection with each independent operation, constitutes a workplace for that operation.

[85] Whether each mine of the respective employer or each such mine where AMCU had a majority, constituted a 'workplace' of the employees of the employer, was a question, not of interpretation, but of fact. To constitute a separate 'workplace' it had to be established that the mines (of each respective employer) were independent operations by reason of their size, function or organisation. In this instance, appellants merely made the allegation, but failed to substantiate it. On the contrary, it was established on the papers that each employer carried on its respective mines as a single independent operation.

[86] The court *a quo* correctly found that the collective agreement bound the members of AMCU who were employed by the respondent employers, and by extension, bound AMCU as the trade union of those employees. The collective agreements contemplated in section 23 are not the same as those contemplated in section 32. The latter are collective agreements concluded within a bargaining council, while the former are collective agreements concluded elsewhere.

……..

[104] In this matter, the complaint is essentially that by virtue of the principle of majoritarianism, which is contained in section 23(1)(d) of the LRA, minorities in the workplace may be bound by a collective agreement entered into between the employer/employers and the majority of employees, or the representatives of that majority, in the workplace. Section 23(1)(d) read with section 65(1)(a) of the LRA effectively means that minorities (employees and their unions who are bound in the sense contemplated by section 23(1)(d)), are also precluded from striking in respect of the subject-matter of the agreement which is binding upon them. The objection to this consequence is primarily based on the notion that section 23(1)(d) does not have the safeguards which section 32 of the LRA has in relation to the extension of collective agreements to non-parties.

[105] Section 23(1)(d) of the LRA is but one instance in the LRA where the legislature had chosen to apply the principle of majoritarianism. There is nothing unconstitutional about the principle itself. It is a useful and essential principle applied in all modern democracies, including the Republic of South Africa. It has been recognised as an essential and reasonable policy choice for the achievement of orderly collective bargaining and for democratisation of the workplace and the different sectors. In *Kem-Lin Fashions CC v Brunton and Another,* this Court (per Zondo JP) expressed itself on the topic as follows:

> '*The legislature has also made certain policy choices in the Act of which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining*

as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable but also a proliferation of trade unions in one workplace or in a sector should be discouraged.'

……

[107] It is also correct, as the second respondent has submitted, that the weight of academic authority has endorsed the Legislature's choice of majoritarianism as essential for collective bargaining.

[108] This principle is also recognised in international law and, in particular, in the applicable conventions and recommendations of the International Labour Organisation ("*ILO*").

……

[112] The principle of extending collective agreements to minorities or non-member workers in the workplace is not contrary to international law. …….

……

[117] It would be impractical if minority workers were not bound to collective agreements concluded at workplace level between the employer(s) and trade unions who represented the majority of the employees, simply because they were not parties to that collective agreement. Furthermore, to require unanimity amongst all employees, despite different trade union membership or affiliation would be unrealistic. To prohibit extension of the collective agreement to the minority employees, who were not parties to the collective agreement, so that they are not bound by it, would not only undermine the enforcement and therefore the effectiveness of the collective agreement, but also be destructive of collective bargaining *per se*, to peace in the workplace and to the achievement of fair labour practices. Such consequences are clearly not in conformity with the LRA and the Constitution.

[118] The extension of such collective agreements on the basis of majoritarianism is not only rational, but is also reasonable. It is a means of ensuring not only that collective bargaining is successful, but that it brings about peace and order in the workplace.

[119] Section 23(1)(d) of the LRA expressly allows for employees, who are not members of the trade unions who are party to the collective agreement, to be bound by the agreement if the requirements or conditions stipulated in that section are met. Those employees must be identified in the agreement, which must specifically bind them and the trade unions, who are party to the agreement, must have as their members the majority of the employees employed by the employer in the workplace.

[120] The binding of non-parties is not only necessary to achieve the objectives of section 23(1)(d), but also of the broad purposes of the LRA, referred to earlier, including effective and orderly collective bargaining. The mechanism provided by section 32 for the extension of collective agreements concluded in bargaining councils is not a less restrictive means at all.

AUSA and Others v SAA Soc Ltd and Others (J1506/15) [2015] ZALCJHB 258 (17 August 2015)

Principle:
As a matter of legal principle, a retrenchment agreement can validly be extended to non-party employees in terms of s 23(1)(d) of the LRA.

Facts:
This was an application to interdict SAA and SAAT from proceeding with a large-scale retrenchment exercise pending compliance with a fair procedure. SAA had

entered into a collective agreement with NTM, UASA and SACCA (who jointly represent some 80% of employees in the SAA workplace) and SAA management employees (through their representatives). The agreement relates only to SAA, and not to SAAT. In terms of the agreement, the parties reached consensus on: the existence of an economic rationale for the retrenchment; selection criteria; the termination date; severance pay; the timing of dismissals, and so on. Importantly, the retrenchment agreement reflects that it is extended to non-party employees in terms of section 23(1)(d) of the LRA.

The essential question in this matter was whether a retrenchment agreement concluded with unions representing the majority of employees in the workplace, and extended in terms of section 23(1)(d), serves to settle any dispute that non-union members and minority union members have about the retrenchment process.

The Labour Court held that as a matter of legal principle, a retrenchment agreement can validly be extended to non-party employees in terms of section 23(1)(d). On the facts of this matter, it held that it was permissible to do so.

Extract from the judgment:
(Myburgh, AJ)

[25] In the light of this and the parties' submissions, three questions stand to be determined. The first question is whether, as a matter of legal principle, a retrenchment agreement can validly be extended to non-party employees in terms of section 23(1)(d). If the answer is in the affirmative, then the second question is whether, on the peculiar facts of this matter, it was permissible to do so. If the answer is also in the affirmative, then the third and final question is whether this puts paid to the applicants' claim in relation to SAA.

[26] To begin with the first question, in two judgments this court has answered it in the affirmative. The first is Tsetsana v Blyvooruitzicht Gold Mining Co Ltd [1999] 4 BLLR 404 (LC), where Jammy AJ held:

"The applicant's contention that he is not bound by the terms of agreements concluded by a trade union of which he is not a member, is without substance or foundation. The retrenchment agreement of August 1997 is unquestionably a collective agreement which binds, inter alia, employees who, although not members of a registered trade union which is a party to it, are employed in the workplace to which it applies and in which that trade union enjoys majority representation of the employees there employed."

[27] The second is Sigwali & others v Libanon (A division of Kloof Gold Mine Ltd) [2000] 2 BLLR 216 (LC), where Ngwenya AJ held:

"In casu, it is common cause that NUM represented the majority of the employees in respondent's business. It is not disputed that the agreement identifies the employees affected by it with sufficient particularity. Even if it was disputed, it is my view that the agreement clearly identifies the employees as set out in section 23(1)(d)(i). Consequently in my view the agreement concluded between the NUM and respondent binds not only those employees who are members of the NUM but also non-members as contemplated above."

[28] While it may appear objectionable that section 23(1)(d) can be used in this way, so as to deprive individuals (and thus their unions) of the right to challenge the fairness of a retrenchment process, the section permits all collective agreements to be extended in terms thereof – and is not limited in its scope to only agreements that do not involve a deprivation of rights. Indeed, most collective agreements extended in terms of section 23(1)(d) involve depriving non-party employees of some or other right – for example, the right to strike.

[29] The fact that this is permissible is underscored by section 189(1)(a), which has been interpreted as meaning that an employer and a majority union can enter into a collective

agreement upfront to the effect that, in the case of a retrenchment exercise, the employer will only consult with the majority union. Where it then does so, any retrenchment agreement concluded with the majority union will then bind non-union and minority union members. The LAC put this as follows in Aunde South Africa (Pty) Ltd v NUMSA [2011] 10 BLLR 945 (LAC):
"Where an employer consults in terms of agreed procedures with the recognised representative trade union in terms of a collective agreement which requires the employer to consult with it over retrenchment, such an employer has no obligation in law to consult with any other union or any individual employee over the retrenchment. If such a consultation exercise culminated in a collective agreement that complies with the requirements of a valid collective agreement, all employees including those who are not members of the representative trade union that consulted with the employer are bound by the terms of such collective agreement irrespective of whether they were party to the consultation process or not."

STRIKES & LOCKOUTS

Mvelatrans (Pty) t/a Bojanala Bus Services v Jackson and Others (JA72/13) [2014] ZALAC 68 (23 October 2014)

Principle:
Where employees are not represented by a union and where there is no strike committee or discernible communication channels between the employees, the employer must prove that the employees were aware of the ultimatum or that they would reasonably or in all likelihood have been aware thereof and that they did not comply. Knowledge of the ultimatum is important for a finding that there was no compliance with it.

Facts:
Employees embarked on an unprotected strike from 11am on 17 November 2009 to 20 November 2009. On 20 November 2009, the Labour Court declared the strike an unprotected strike and interdicted the strikers from participating in it. During the afternoon of 20 November 2009, the appellant issued an ultimatum requesting the strikers to return to their work-stations by 15h00. The strikers failed or refused to do so and they were subsequently issued with notices to attend a disciplinary hearing to face charges of failing to comply with a court order, and failure to adhere to an ultimatum.

The employees refused to take part in the hearing which proceeded in their absence and they were subsequently found guilty and dismissed. Conciliation at the South African Road Passenger Bargaining Council (SARPBAC) failed. The SARPBAC issued a certificate to the effect that the dispute was unresolved and that it may be referred to the Labour Court.

At the Labour Court it was conceded by the employees that the ultimatum was communicated to them at approximately 13h00 along with the fact that an interdict had been granted against the unprotected strike. They also agreed that the court order and ultimatum were read out to the striking employees at both depots, by members of the SAPS who also translated the documents, and that copies of the ultimatum were also handed out to the employees. They also did not challenge the fairness of the ultimatum. They gave various reasons why some of the individual

employees did not adhere to the ultimatum and that the others did adhere to the ultimatum, and returned to their workplaces after it was read out. They also contended that some adhered to the ultimatum but were locked out thereby making it impossible for them to report to their respective workstations. They alleged that their dismissal was substantively unfair because there was no valid basis for the employer to selectively dismiss them when other employees who participated in the strike were not dismissed.

The Labour Court found that even on the employer's version – that the ultimatum was read at approximately 13h00 – the dismissals were still unfair. The court was of the view that two hours to return to work was insufficient, because the strikers were not given proper opportunity to consider whether they should return to work and what the consequences of a failure to return to work would be. According to the court, the fact that the strikers were no longer union members required the employer to give them time to consult with their families.

The employer appealed against the LC judgment. The Labour Appeal Court took the view that the evidence showed that some employees had time to report to work after the ultimatum was read and that some dismissed employees' evidence as to why they did not report to work was not plausible. Their dismissals were accordingly substantively fair. But those employees whose evidence was found to be plausible for not reporting to work, were reinstated. The appeal was accordingly partly upheld.

Extract from the judgment:
(Musi JA)
[55] .....the purpose of an ultimatum is to get workers who are participating in unlawful industrial action back to work. Although the participation in an unprotected strike remains a serious misconduct, workers can avoid the ultimate sentence, which is dismissal, by complying with an ultimatum. Those who comply with the ultimatum may not be dismissed, because compliance is an act of atonement. Those who do not comply may be dismissed, after being heard, because non-compliance is an unacceptable act of defiance, especially where the employer had obtained a court order declaring the strike illegal and therefore unprotected. It has been said that an ultimatum is as much a means of avoiding a dismissal as a prerequisite to affecting one. See Modise and Others v Steve's Spar Blackheath [2000] 5 BLLR 496 (LAC) at para 149 and 150.

[56] The ultimatum must be fair and geared at achieving its primary purpose of getting the workers back to work. Whether an ultimatum was fair will depend on the facts of the particular case…
.....
[59] … Approximately 600 workers were on strike. 560 were at their workplaces at 15h00. This shows that the overwhelming majority adhered timeously to the ultimatum. There is in any event no evidence from any of the parties – except for the mistake in the affidavits of Niemandt and Snyders – that the ultimatum was read at 15h00. The court *a quo's* finding that the ultimatum was read at 15h00 is, with respect, incorrect.

[60] Only eight out of the 600 employees contended in the pleadings, that the ultimatum was unfair because they did not have sufficient time to consider their options. None of them testified about this. None of them testified that they needed more time to consider their options or discuss their situation with their families – assuming that this would be a justified or legitimate request. There is no evidence that the time given to comply with the ultimatum was too short. On the contrary, even those who contended that the ultimatum was unfair

testified that they had no problem to comply with it. In my view, the court *aquo's* finding that the respondents had insufficient time to consider their options is without factual foundation.
.....
[62] In any event, in circumstances like these, where the employees were not represented by a union and where there was no strike committee or discernible communication channels between and amongst the employees, there must be some indication that the employees were aware of the ultimatum. The employer must therefore prove that the employees were aware of the ultimatum or that they would reasonably or in all likelihood have been aware thereof and that they did not comply therewith. Knowledge of the ultimatum is important for a finding that there was no compliance therewith. It would then be incumbent on the individual respondent to tender an explanation as to why s/he was not aware thereof and why s/he did not comply therewith. Where the employees are represented by a union other considerations, which are not relevant for purposes of this judgment, will apply.....

Verulam Sawmills v AMCU & Others (J1580/15)[2015] ZALCJHB 359 (20 October 2015)

Principle:
The LC and LAC have endorsed the principle of union accountability for the unlawful conduct of its members during the course of a strike. The Court will not hesitate to grant a punitive costs order as a mark of the Court's disapproval of the offending party's misconduct.

Facts:
The dispute resulted from a protected wage strike in July 2015 by AMCU members employed at the Company's sawmill operations in Mpumalanga. In the run up to the strike, the parties concluded a picketing rules agreement in terms of s69 of the LRA, which appointed the AMCU regional organiser as the strike control convenor and which specified that he was to be available to be contacted at all times.

During the strike, the Company sought a LC order compelling the strikers and AMCU to comply with the picketing rules agreement, and interdicting and restraining the strikers from engaging in various unlawful acts in contravention of the agreement. AMCU consented to this order being granted by the LC, save for a costs order being granted against it. All that then remained in dispute between the parties was whether the Company was entitled to a punitive costs order against AMCU as a result of having to bring the court application.

The LC granted the Company a costs order against the Union on an "attorney and client" scale, a level over and above the normal costs orders granted by the Court. The Court took the view that the Union had not taken sufficient action to attempt to curtail the unlawful actions of its members during the strike. The Company's allegations included the following breaches of the agreed picketing rules:

- Strikers carrying weapons including machetes;
- Picketing outside the designated area;
- Stopping vehicles and removing commuters from public transport;
- Prohibiting employees from entering the workplace;
- Blockading the entrance to the Company premises;
- Damaging a Company vehicle;
- Threatening the managing director that he would not leave the premises, chanting slogans referring to shooting the employer.

The situation deteriorated to the extent that the Company was forced to shut its operations completely and the SAPS riot squad was called in. Repeated letters to the AMCU regional organiser appointed as the strike control convenor elicited little response, and the company then launched its interdict proceedings after warning the Union that it would be doing so.

The LC quoted from a line of recent judgments that have endorsed the principle of union accountability for the unlawful conduct of its members during the course of a strike.

Extract from the judgment:
(Myburgh, AJ)
Union accountability for the conduct of its members

[10] This court has previously indicated that unions are at risk of a punitive costs order where their members conduct themselves unlawfully during a protected strike, and where the union itself does not take all reasonable steps to prevent this. As Van Niekerk J put it in Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others (2012) 33 ILJ 998 (LC):

> *"This court must necessarily express its displeasure in the strongest possible terms against the misconduct that the individual respondents do not deny having committed, and against unions that refuse or fail to take all reasonable steps to prevent its occurrence. Had the applicant not specifically confined the relief sought to an order for costs on the ordinary scale, I would have had no hesitation in granting an order for costs as between attorney and own client." (Own emphasis.)*

[11] This dictum accords with others in which this court and the LAC have endorsed the principle of union accountability for the unlawful conduct of its members during the course of a strike. The following quotes from some of the more well-known judgments will suffice.

a. In In2Food (Pty) Ltd v Food & Allied Workers Union & others (2013) 34 ILJ 2589 (LC), Steenkamp J held:
"The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members."

b. On appeal to the LAC in Food & Allied Workers Union v In2Food (Pty) Ltd (2014) 35 ILJ 2767 (LAC), Sutherland AJA (as he then was) held:
"The respondent's thesis that a trade union, as a matter of principle, has a duty to curb unlawful behaviour by its members indeed enjoys merit. Indeed, the principle of union accountability for its actions or omissions is beginning to gain recognition …

c. In Xstrata SA (Pty) Ltd v AMCU & Others (J1239/13) [2014] ZALCJHB 58 (25 February 2014), Tlhotlhalemaje AJ held:
"It has become noticeable that unions are readily and easily prepared to lead employees out on any form of industrial action, whether lawful or not. The perception that a union has no obligation whatsoever to control its members during such activities, which are invariably violent in nature cannot be sustained."

[12] These judgments make it abundantly clear that, in the context of the pandemic of unprotected strike action and strike violence in South Africa, the courts are inclined to hold unions accountable for the unlawful conduct of their members, and impose on them obligations to control their membership. This being a potential means of attempting to address the pandemic.

.....

[21] With reference to all of the above, I am satisfied firstly, that the strikers materially breached the picketing rules agreement and engaged in various acts of unlawful conduct (this having given rise to the court order of 7 August 2015), and, secondly, that AMCU itself did not take all reasonable steps to prevent such conduct and ensure compliance with the picketing rules agreement. (Consequently, the company was forced into bringing the urgent application, only for AMCU to then concede to the substantive relief sought by the company.)

[22] As held in Tsogo Sun, this court will not hesitate in such circumstances to grant a punitive costs order against the union concerned. This is consistent with the general principles applicable to the award of a punitive costs order (such as costs on an attorney-and-client scale), which include that such an order is warranted where the conduct of the party concerned is vexatious and unreasonable. The order is granted as a mark of the court's disapproval of the offending party's conduct – in this case, both the strikers and AMCU itself.

Algoa Bus Company (Pty) Limited v Transport Action Retail And General Workers Union (Thor Targwu) and Others (P368/13) [2015] ZALCPE 31 (7 May 2015)

Principle:
The fact that an award of compensation against the union might cause it further financial damage is not of itself a reason for not granting relief. Whilst an important question that has to be considered is whether the effect of a particular award of compensation against a union is likely to seriously compromise its ability to function, this does not mean a union can expect to remain immune from the financial consequences of reckless conduct by its members or office bearers.

Facts:
This LC judgment deals with a trade union's liability for an employer's damages suffered as a result of an unprotected strike. The LC awarded the employer R1,4 million damages, payable by the Union and its members employed by the Company. The Court ordered that these damages should be paid by the Union in instalments of at least R5,280.00 per month, coupled with each affected employee having R214,50.00 deducted from their salaries per month, until the debt was paid off. They were also ordered to pay the employer's legal costs.

The Union's members were employed as Company drivers and participated in an unprotected strike for 7 days in response to disciplinary action pending against certain members who were subsequently dismissed. The evidence available showed, on a balance of probabilities, that the union did little if anything to discourage its members from participating in the strike or to distance itself from the strike.

The employer obtained an interdict in its attempts to end the strike, which was not adhered to, and warned the Union and its members that it may lodge a damages claim for financial losses sustained during the strike. The strike was not a spontaneous event and there was no effort by the Union to restore labour peace, except on the basis that the strikers' demands in relation to the suspended members should be conceded to. The LC expressed the view that the strike was not in response to unjustified conduct by the applicant and served no collective bargaining purpose - the employer's disciplinary action was legitimate and that process should have run its course without the pressure of industrial action.

The Union provided unconfirmed financial statements as evidence of its poor financial condition, but the LC commented that the fact that an award of compensation against the Union might cause it further financial damage was not in itself a reason for not granting relief. Whilst the LC considered whether the effect of the compensation award against the Union was likely to seriously compromise its ability to function, bearing in mind that it had responsibilities to members in other workplaces, this did not mean that the Union could expect to remain immune from the financial consequences of reckless conduct by its members or office bearers.

The Court felt that the negative effect of the damages award could be ameliorated by making it repayable over an extended period, and commented that there was nothing to suggest the Union could not raise a special temporary levy from all members to cover the extra expenditure. Considering their members' actions such as their failure to follow any procedures, their persistence with the strike and failure to heed the Court's order, the financial burden of the installment payments was not unduly burdensome.

The Court also recognized that the nature of the employer's business meant that the financial impact of the strike on it was direct: it lost fares and subsidies for the duration of the action. There was no way these could be recovered by, for example, working additional hours after the strike. The demand for transport for those days was not one that would accumulate and could be satisfied on a deferred basis later.

This judgment provides a very useful example of how the factors listed in section 68(1)(b) of the LRA – the criteria for deciding on *'just and equitable compensation for any loss attributable to the (unprotected) strike or lockout'* - are considered and applied by the LC. It should provide a yardstick for parties considering launching or defending similar action, showing how the diverse basket of factors such as the extent to which the strike was premeditated, whether the action was in response to unjustified conduct by another party, the interests of orderly collective bargaining and the financial positions of the parties involved, are weighed up and applied by the LC.

Extract from the judgment:
(R Lagrange, J.)

[7] The evidence available also showed, on a balance of probabilities, that the union did little if anything to discourage its members from participating in the strike or to distance itself from the strike. Broad allegations of attempts to persuade strikers to return to work were made but are so lacking in any specificity as to be of no evidentiary value at all. More particularly, even if I accept that initially, the union might not have been fully aware of the strike, there can be no doubt that it was fully apprised of the situation by 24 January 2013. By 25 January 2013 when the interdict was granted, there could have been no more doubt in the mind of the union officials that the strike was in progress and was unprotected. Immediately after the interdict was obtained, the applicant also pointedly drew the respondents' attention to the fact that a damages claim for losses sustained during the strike could be made. That ought to have limited any one reading that letter to the fact that the applicant would not necessarily confine itself simply to having the strike declared unprotected or taking disciplinary action, but that it might seek to recover any financial losses.

[8] The strike was not a spontaneous event which just began in response to some action by the applicant on 23 January 2013. In essence, it was a response to disciplinary action

pending against certain members who were subsequently dismissed. In any event, even if it had been spontaneous, there was no effort by the union to restore labour peace except on the basis that the strikers' demands in relation to the suspended members should be conceded to. The disciplinary action in the circumstances was legitimate and that process should have run its course without the pressure of industrial action. Consequently, I do not think there is a case to be made that the strike was in response to unjustified conduct by the applicant. The strike also served no collective bargaining purpose.

[9] Importantly, once the Court order was obtained interdicting the strike, it was not adhered to. All in all, the strike endured for seven and a half days, a significant period within which the respondents had an opportunity to reflect on their actions. After the interdict was handed down on 25 January 2013, there could have been no doubt left about the status of the strike and the interdict ought to have made it easier for the union to persuade members to end the strike, especially when it was coupled with the applicant notifying the union of its intention to claim damages.

[10] The union provided unconfirmed financial statements for 2011 and 2012, marked "for discussion purposes only" as evidence of its poor financial condition. Undoubtedly, if those unofficial documents were an accurate reflection of the union's financial position at that time, the union was barely scraping by. Although it is not part of the evidence presented by the union in these proceedings, the comments of the general secretary from the bar when she was explaining her attendance at the proceedings, suggest the situation is even worse presently. However, the fact that an award of compensation against the union might cause it further financial damage is not in and of itself a reason for not granting relief. In my mind, an important question that has to be considered is whether the effect of a particular award of compensation against a union is likely to seriously compromise its ability to function, bearing in mind that it will usually have responsibilities to members in other workplaces, whose right to effective representation by, and participation in the affairs of, a functioning union ought not to be seriously compromised by the unlawful conduct of a section of the membership or of a local organiser. However, this does not mean a union can expect to remain immune from the financial consequences of reckless conduct by its members or office bearers.

[11] In this instance, even on the union's version, it is apparent that it was already in a financially perilous situation and that an order of compensation against it, though adding to its financial woes, would just be one more additional burden. There was also no credible evidence of how the order of compensation would affect its collective bargaining capability. A related factor to consider in this regard is whether the imposition of an award of compensation can be ameliorated by making it repayable on extended terms, which is what I have done in this case. Notwithstanding the unconfirmed financial reports it produced, the union did not dispute the applicant's contention that it had a membership that ought to have yielded subscription income of just over approximately R 100,000 per month. Further, there is nothing to suggest the union could not raise a small special temporary levy from all members to cover the extraordinary expenditure.

SACCAWU v Sun International (J1951/15) [2015] ZALCJHB 341 (6 October 2015)

Principle:
The interpretation to be given to section 76(1)(b) of the LRA is that the statutory right of an employer to hire replacement labour during a lockout is restricted to the period during which a protected strike pertains, and not after it has ceased.

Facts:
The union embarked on a limited duration protected strike and issued a notice in terms of Section 64 of the LRA on 21 September 2015. The notice informed the respondent that the strike would start on 25 September 2015. Further, it stated that the employees would return to their work stations from 05H45 on 28 September 2015. Their demands for wage increases, minimum working hours and housing subsidy were contained in the notice. On 22 September 2015, the employer issued a notice of a lock out.

The crisp issue for determination was whether in terms of section 76(1)(b) of the LRA, an employer may continue to use replacement labour after a strike has ended. The union conceded that the lock-out was protected. However, it submitted that an employer's right to use replacement labour must be "in response to a strike" and once a strike has ended, section 76(1)(b) of the LRA no longer applies.

This was an application to interdict the use of replacement labour after the end of a protected strike and during the continuation of a protected lock-out. In interpreting section 74(1)(b) of the LRA, the LC said the statutory right of an employer to hire replacement labour during a lockout is restricted to the period during which a protected strike pertains, and not after it has ceased. The judgment in Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd (1999) 20 ILJ 896 (LC) was accordingly not followed.

Extract from the judgment:
(Rabkin-Naicker J)
[6] Section 76 of the LRA provides a follows:
"76 Replacement labour
1. *An employer may not take into employment any person-*
    a. *to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or*
    b. *for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.*

2. *For the purpose of this section, 'take into employment' includes engaging the services of a temporary employment service or an independent contractor."*

[7] The respondent, in lengthy heads of argument, has submitted that on a proper interpretation of section 76(1)(b), taking into account the interpretation clause contained in the LRA, that it is entitled to use replacement labour in a context in which the employer reacts to a strike by means of a protected lock-out, even after the end of such strike. It would be anomalous it submits, that an employer is entitled to meet a union's "attack" (in the form of strike action) by way of a "counter-attack" (in the form of a lock-out), but with its right to an effective counter-attack being limited by a factor of the attacker's choosing – the duration of the hostilities.

[8] The respondent thus argues that its right to employ replacement labour occurs at the stage that the employer acts in reply to a strike and endures until the protected lock out ceases. It relies on Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd (1999) 20 ILJ 896 (LC), a matter on all fours with this one,.....

[9] The applicant union has referred the court to the matter of National Union of Technikon Employees v Technikon SA (2000) 21 ILJ 1645 (LC) in which Pillay AJ (as she then was) stated obiter in reference to section 74(1)(b) that:

> *'[9] A literal interpretation of the words, 'in response to' means that whenever an employer wishes to employ replacement labour, it can only qualify to do so if its lock-out is at that stage in response to a strike. If the strike ends then so must the employment of replacement labour. (my emphasis)*

[10] The above judgment was overturned on appeal in Technikon SA v National Union of Technikon Employees, and the applicant drew the court's attention to the following paragraphs of that judgment per Zondo JP (as he then was) to support its case:

> *"[42] The rationale behind s 76(1)(b) is that if an employer decides to institute a lock-out as the aggressor in the fight between itself and employees or a union, it may not employ temporary replacement labour. That is to discourage the resort by employers to lock-outs. The rationale is to try and let employers resort to lock-outs only in those circumstances where they will be prepared to do without replacement labour (ie when they are the aggressors) or where they are forced to in self-defence in the sense that the lock-out is 'in response to' a strike by the union and the employees - in other words, where the union and the employees are the aggressors.*
>
> *[43] The policy is one that also says to unions and employees: Do not lightly resort to a strike when a dispute has arisen because, in the absence of a strike, the employer may not employ replacement labour even if it institutes a lock-out but, if you strike, the employer will be able to employ replacement labour - with or without a lock-out. The sum total of all this is that the policy is to encourage parties to disputes to try to reach agreement on their disputes and a strike or lock-out should be the last resort, when all reasonable attempts to reach agreement have failed. (my emphasis)*

.....

Evaluation

[13] Subsection (1)(b) of Section 76 of the LRA is one of the exceptions to the prohibition of the use of replacement labour by an employer in terms of the provision. No replacement labour can be used by an employer where it initiates a lock-out in terms of the LRA, but the exception provides that it may do so *"in response to a strike"*. The plain meaning of *'in response to'* is *'in reply or reaction to"*. However, for our purposes it is necessary to determine whether the phrase should be read to mean 'whether the strike has ceased or not." Or as Landman J put it, whether given the nature of the lock-out as a defensive one, the 'concomitant right' to employ replacement labour, accrues at the stage the defensive lock-out is implemented, and endures until the lock-out ceases. The question to answer is whether the exception to the prohibition in section 74(1)(b) is instead to be given the restrictive interpretation the applicant seeks.

.....

[17] The constitutionally protected right to strike is not equivalent to the statutory right to lock-out as provided by the LRA. This principle must be borne in mind in approaching the interpretation of section 76(1)(b). The interpretation of that provision should not lend itself to a limitation of the right to strike, bearing in mind that there are no internal limitations of that right in the Constitution. In addition, I take cognisance of the ILO Committee of Experts' considerations in reference to the Convention of the Right to Organise and Collective Bargaining Convention (no 98) of 1949 which are reported as follows:

> *"The Committee considers that if the right to strike is to be effectively guaranteed, workers who participate in a lawful strike should be able to return to work once the strike has ended and the fact of making their return to work subject to certain time limits or the consent of the employer is an obstacle to the effective exercise of this right"*

[18] In SATAWU and Others (supra), the Constitutional Court stated:

> *'[44] The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a*

manner least restrictive of the right if the text is reasonably capable of bearing that meaning. '

[19] Given all of the above, I have decided not to follow the Agrinet judgment. I find that the interpretation to be accorded to section 76(1)(b) of the LRA is that the statutory right of an employer to hire replacement labour is restricted to the period during which a protected strike pertains, and not after it has ceased.....

Transport and Allied Workers Union of South Africa v PUTCO Limited [2016] ZACC 7

Principle:
The LRA does not permit the lock-out of employees who are not party to a dispute. The "employees" referred to in section 64(1)(c) of the LRA are employees who were party to the dispute that was referred for conciliation in terms of section 64(1)(a).

Facts:
Industry wage negotiations for 2013 having gridlocked at the Bargaining Council, SATAWU and TOWU notified employers that their members would be embarking on a strike. Before the strike commenced, TAWUSA advised PUTCO that its members would not take part in the strike. The strike subsequently commenced on 19 April 2013. On the same day, PUTCO addressed a notice to the Bargaining Council, TAWUSA and non-unionised employees, notifying them that it intended to lock out all of its employees from Sunday, 21 April 2013 at 09h00 (lock-out notice).

TAWUSA's general secretary wrote to PUTCO's senior executive for corporate services, to inquire about the applicability of the lock-out to TAWUSA members. In a follow up email PUTCO confirmed that the lock-out notice was a response to the strike notices issued by SATAWU and TOWU, the trade unions representing their members at the Bargaining Council. TAWUSA's position was that it was not a member of the Bargaining Council and was not, therefore, a party to the dispute that resulted in the lock-out. In the circumstances TAWUSA members were not on strike and would report for duty as normal and expect PUTCO to ensure their safety.

Aggrieved by the purported lock-out instituted by PUTCO, TAWUSA launched an urgent application in the Labour Court. It sought an interdict to prevent PUTCO from maintaining the lock-out. The Labour Court held in favour of TAWUSA. It found that a lock-out must be directed to employees with a demand from the employer – since no demand was made to it by PUTCO, it could not be locked out. It further reasoned that section 64(1)(c) of the LRA required trade unions to be given notice only if they were a party to a dispute. As it was common cause that TAWUSA was not a member of the Bargaining Council, and thus not a party to the dispute, it could not be locked out. The Labour Court granted an interim order halting the lock-out insofar as it related to TAWUSA's members and awarded costs.

PUTCO successfully took the matter on appeal to the Labour Appeal Court (Putco (Pty) Limited v Transport And Allied Workers Union of South Africa and Another (JA106/13) [2015] ZALAC 14 (5 May 2015)). That Court held that there was a demand made to TAWUSA that it had expressly rejected. The Court found that TAWUSA was a party to the dispute by virtue of the interest that it had in the outcome of the negotiations at the Bargaining Council and the benefits it stood to reap from the collective agreement reached there. The Court noted that it was a

minority union and the will of the majority union would prevail during the negotiations; this was "in sync with the general scheme of the LRA."

TAWUSA appealed to the Constitutional Court which found in its favour. The CC found that the LRA does not permit the lock-out of employees who are not party to a dispute, and the "employees" referred to in section 64(1)(c) of the LRA, are employees who were party to the dispute that was referred for conciliation in terms of section 64(1)(a). The CC said that just because all parties had an interest in the Bargaining Council's activities does not end the inquiry. TAWUSA was not party to the Bargaining Council and it had no ability to put pressure on the other trade unions at the Bargaining Council to accept the employer's demand. TAWUSA was not party to the dispute and so they could not be locked out in terms of the LRA. Just because TAWUSA stood to benefit from the dispute's resolution at the Bargaining Council did not make it a party to the dispute. In addition, just because TAWUSA might be bound by the collective agreement and would thus "reap the benefits of the wage negotiations should the majority union's demand[s] be accepted", was not enough to make it a party to the dispute.

Extract from the judgment:
(Khampepe J)
[30] The central issue is whether section 64(1) read with section 213 of the LRA permits an employer to lock out members of a trade union that is not a party to a bargaining council where a particular dispute has arisen and has been referred for conciliation.

Lock-outs in terms of the LRA
[31] A lock-out is one of the tools that the LRA provides to an employer in order to resolve disputes between an employer and employees. Section 213 of the LRA defines a lock-out as-
"the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion".

[32] The purpose of a lock-out in terms of section 213 is to compel employees whose trade union is party to certain negotiations to accede to an employer's demand. Its object is to end a stalemate reached as a result of an impasse in negotiations between employer and employee in respect of matters of "mutual interest". A resolution of a dispute can be reached only between adversaries. As a matter of logic, then, there must be a dispute between an employer and employees or their trade union before a lock-out is instituted. Accordingly, any exclusion of employees from an employer's workplace that is not preceded by a demand in respect of a disputed matter of mutual interest does not qualify as a lockout in terms of section 213 of the LRA.

[33] In the present matter, PUTCO's lock-out notice was made "in support of the employer wage proposals in the wage negotiations in the [Bargaining Council]". In oral argument, it was contended on PUTCO's behalf that the lock-out notice given to TAWUSA constituted a demand in respect of a matter of mutual interest. It was further contended that Mr Mankge's assertion that TAWUSA members would "not sign any new conditions which [PUTCO] seek[s] to impose by way of unlawful lockout" constituted a rejection of PUTCO's demand and that PUTCO was accordingly entitled to lock out TAWUSA members. These submissions raise two questions:

a. Was there a matter of mutual interest between the parties?

b. Did PUTCO's lock-out notice constitute a demand for the purposes of section 213 of the LRA?

Was there a matter of mutual interest between the parties?
[34] In accordance with section 213, an employer cannot lock out employees in respect of any issue, but only in connection with those issues that are of interest to both employer and employees. In the present case, there are matters of mutual interest relating to wages and other conditions of employment. In particular, the outcome of ongoing negotiations at the Bargaining Council was of interest to both PUTCO and TAWUSA, as the conclusion of a collective agreement would have implications for both parties. However, that both parties had an interest in the Bargaining Council's activities does not end the inquiry. A lock-out can be lawful only if it is pursuant to a demand.

Did PUTCO's lock-out notice constitute a demand for the purposes of section 213 of the LRA?
[35] The LRA requires an employer to make a perspicuous demand to employees before resorting to locking them out. After all, the purpose of a lock-out is to compel employees to accept the employer's demands. For this reason, and because of the circumstances outlined below, PUTCO's assertion that its lock-out notice constituted a demand is flawed. The recognition agreement required that negotiations in respect of wages and other conditions of employment be undertaken at the Bargaining Council. A corollary to this is that demands in respect of wages and other conditions of employment could only be made at the Bargaining Council. PUTCO's lock-out notice acknowledged this requirement: it was made "in support of the employer wage proposals in the wage negotiations [at the Bargaining Council]". The notice could not, therefore, have constituted a demand.

[36] Moreover, to accept PUTCO's construction would be to put the carriage before the horse. A lock-out notice cannot constitute both a notice and a demand at the same time. The LRA clearly distinguishes between a notice and a demand and does not use the two interchangeably. The purpose of a lock-out notice is to inform a union and its members of an impending lock-out. In other words, recourse to a lawful lock-out must already be available. An employer is not entitled to resort to a lock-out if it has not yet made a demand to those employees who are to be excluded from the employer's workplaces.
.....
[38] TAWUSA is not party to the Bargaining Council. Its ability to put pressure on the other trade unions at the Bargaining Council to accept the demand made by an employer organisation is accordingly nought. There can be no lock-out unless there is an underlying disagreement. Therefore, as TAWUSA was not party to the dispute, they cannot be locked out in terms of the LRA. In light of this interpretation, the Labour Appeal Court's finding that TAWUSA's lock-out would achieve "systematic, consecutive group or individual capitulation" is misconceived.

[39] I accept that a demand was made in the form of employer wage proposals at the Bargaining Council. This demand was made by the employers' organisation, which includes PUTCO, to trade unions who were members of the Bargaining Council. It is common cause that TAWUSA was not a member. It follows that no demand was made to TAWUSA, nor was it in a position to accede to the demands PUTCO had made to the trade unions that were present at the Bargaining Council.

[40] Section 213 makes it apparent that the LRA does not permit a lock-out without a demand being directed at employees. But, as has been shown above, no demand was made to the members of TAWUSA as they were not party the Bargaining Council. The purported lock-out of TAWUSA members accordingly fell outside the scope of the definition of a lock-out in section 213. It amounted to an unlawful exclusion of TAWUSA members from PUTCO's workplaces not contemplated by the LRA.....

BCEA

TFD Network Africa (Pty) Ltd v Singh N.O and Others (C 571/11) [2015] ZALCCT 40 (6 May 2015)

Principle:
Section 17(2)(b) of the BCEA is applicable not only to employees who regularly do night work but also to all employees who work after 18h00. An employer must ensure that transportation is available between the workplace and the employee's place of residence on each occasion when that employee has to work beyond 18h00. Ensuring transport *'is available'* does not mean that the employer has to provide the transport. However the availability of public transport in the vicinity of an employee's residence may, in certain circumstances, not necessarily be enough to relieve the employer of its duty. The LC must follow *"a common-sense, purposive approach"* in deciding whether there is compliance with section 17(2)(b).

Facts:
The employee was a truck driver. In terms of his contract of employment he agreed to work overtime when required to do so. The main agreement concluded in the National Bargaining Council for the Road Freight and Logistics Industry also provides for overtime work. The employer instructed the employee to work overtime from 1700 until 1900 on 6 and 7 December 2010. (His normal dayshift ended at 1700). He worked until 1800 on both days but refused to work until 1900. He said that the last bus that normally dropped him off near his residence in Lentegeur in Mitchell's Plain left shortly after 1800. If he took the last bus to Mitchell's Plain at 1900, it would drop him off at the Mitchell's Plain town centre, far from his residence. He would then have to walk home through a dangerous crime area.

The employee was called to a disciplinary hearing to face allegations of gross insubordination and breach of contract. He had a previous final written warning for similar misconduct. He was dismissed.

The employee referred an unfair dismissal dispute to the Bargaining Council. The arbitrator found that his dismissal was unfair and ordered the company to reinstate him. The arbitrator found that, in terms of s 17 of the BCEA, any work performed after 1800 was considered night work; that the employer was obliged to ensure that transport was available to the employee's place of residence; that the available transport was "not suitable" to the employee; and the fact that the employee was prepared to work until 1800 showed that he did not have the intention to be "deliberately insubordinate".

The employer took this decision on review to the Labour Court. The court looked at the purpose of s 17(2)(b) of the BCEA and found that the conclusion reached by the arbitrator was not so unreasonable that no other arbitrator could have come to the same conclusion. The employee did refuse to work overtime beyond 1800 in circumstances where the employer could not ensure that transportation was available between the workplace and his place of residence. He made it clear to the employer that that was the reason for his refusal. The finding by the arbitrator that he did not have the intention to be deliberately insubordinate, is not unreasonable. In those circumstances, the fact that he had a prior final written warning for a similar offence becomes irrelevant.

Extract from the judgment:
(Steenkamp J)

[6] What does it mean to say that transportation must be available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift?

[7] Two issues may immediately be disposed of:
7.1. Transportation need only be "available"; the employer need not provide transport if there is public transport available.
7.2. If the employee's full shift falls in the hours after 18:00 and before 06:00, there is no doubt that the subsection applies.

[8] The difficult situation arises in a situation such as this one: Must the employer ensure that transport is available to a dayshift employee who is required to work overtime beyond 18:00? And what does it mean to say that it must be available between the workplace and the employee's "place of residence"? Does it need to take the employee to her doorstep? A block away? A kilometre away, or 5 km?

[9] These questions are untested. The Court cannot take comfort in precedent. It has to consider the purpose of the legislation and the mischief that the legislature (and the Bargaining Council) tried to combat. The Explanatory Memorandum to the Basic Conditions of Employment Bill does not spell it out. The Court must follow a common-sense, purposive approach. The learned authors in Du Toit et al, *Labour Relations Law: A Comprehensive Guide* say that the purpose of the regulation of night work is to avoid or minimise health risks. In my view, that must also include risks to the safety of workers, including their commute to and from work. Indeed, the authors of that work say:
"For safety reasons, transport for employees performing night work must be 'available' between the workplace and the employees' residences at the commencement and conclusion of their shift [s 17(2)(b)]. No clear duty is placed on the employer to provide such transport where other transport exists. However, it would seem that the availability of public transport in the vicinity of an employee's residence may, in certain circumstances, not necessarily be enough to relieve the employer of a duty to provide transport."

[10] It is a notorious fact that Lentegeur is in the midst of the Cape Flats ganglands. Now consider the hypothetical example of a young female employee who works a nominal dayshift starting at 1100 and ending at 2000. There is public transport available to the Mitchell's Plain town centre. From there she has to walk, say, 2 km through the gang infested badlands of Lentegeur to her home in the dark. This is not an area where the good citizens of Lentegeur take an evening stroll along the promenade. The streets are ruled by guns and Okapi knives. Can it be said that this employee is not entitled to transport, because she works dayshift? I think not.
.....
[13] I conclude, therefore, that s 17(2)(b) envisages that an employer must ensure that transportation is available between the workplace and the employee's place of residence on each occasion where that employee has to work beyond 1800, and not only where that employee regularly performs night work or where his or her shift falls predominantly during the hours after 1800 and before 0600.