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INDUSTRIAL LAW JOURNAL

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JUDGMENTS

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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Transfer of Business as Going Concern

In *Atlas Packaging (Pty) Ltd v Palierakis: In re Palierakis v Atlas Carton & Litho CC (in liquidation) & others* (at 109) the Labour Appeal Court confirmed that, in the case of the transfer of an insolvent business, s 197A(1)*(b)* of the LRA 1995 only applies if there has been a genuine scheme of arrangement or compromise to avoid the winding-up of the business.

In *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd & another* (at 128) the Labour Appeal Court found that, where a transfer takes place as a result of official conduct that may be ultra vires, the consequences of the transfer remain until the impugned conduct is properly set aside. It also found that, on an examination of the totality of the business operated by the transferor, no transfer as a going concern had occurred because the transferee could not operate the same business without significant additional investment.

Sexual Harassment

The Labour Appeal Court has found that an older, male employee's inappropriate sexual advance to a younger, female contractor outside the workplace constituted sexual harassment. Underlying this unwelcome advance lay a power differential that favoured the employee due to both his age and gender, and the mere fact that his conduct was not physical, that it occurred during a single incident, that it was not persisted in, and that it took place outside the workplace did not negate the fact that it constituted sexual harassment. The Constitution afforded the female contractor, and other women, the protection to engage constructively and on an equal basis in the workplace without interference upon their dignity and integrity (*Campbell Scientific Africa (Pty) Ltd v Simmers & others* at 116).

In *Dheaneshwer and Tri Media* (at 272) a CCMA commissioner found that, where a newly employed young woman had been sent sexually suggestive

and inappropriate text messages by a senior manager, this has rendered her continued employment intolerable. She had been constructively dismissed and was entitled to compensation.

Collective Agreements

The Labour Court was of the view that a bargaining council collective agreement governed by ss 31 and 32 of the LRA 1995 is an agreement of a special type, and it cannot 'morph' into a s 23 collective agreement when it is found to be non-compliant with the bargaining council's constitution (*City of Cape Town v Independent Municipal & Allied Trade Union & others* at 147).

Strikes, Lock-outs and Pickets

The Labour Court was satisfied in *National Union of Metalworkers of SA on behalf of Members v Videx Wire Products (Pty) Ltd & others* (at 171) that the union's demand relating to productivity bargaining amounted to a demand for higher wages; that such a demand could only be negotiated at national level under the auspices of the bargaining council; and that consequently the union and its members could not strike over the demand.

In *SA Commercial Catering & Allied Workers Union v Sun International* (at 215) the Labour Court considered the exception to the prohibition on the use of replacement labour by an employer which initiates a lock-out. In contrast to an earlier decision of the Labour Court, the court interpreted the words 'in response to a strike' in s 76(1)*(b)* of the LRA 1995 to mean that an employer's statutory right to hire replacement labour is restricted to the period during which a protected strike pertains and does not continue after the strike has ceased.

In *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union & others* (at 246) the Labour Court had to determine costs after an interdict had been granted compelling the union and its members to comply with a picketing rules agreement and interdicting the union's members from engaging in unlawful and violent conduct during the course of a protected strike. The court found that the union was obliged to take all reasonable steps to prevent violent conduct and ensure compliance with the picketing rules agreement. As it had failed to do so, the court granted a punitive costs order against the union.

Registar of Labour Relations — Revocation of Designation

Following the revocation of his designation as Registrar of Labour Relations by the Minister of Labour, Mr Crouse approached the Labour Court to review and set aside her decision. It found, inter alia, that the minister's decision constituted administrative action and was subject to review under the Promotion of Administrative Justice Act 3 of 2000; alternatively, that the minister's decision was subject to review on the principles of legality. It found further that the minister

had ignored materially relevant facts and as a consequence her decision was unreasonable, alternatively irrational; and procedurally unfair. The impugned decision was set aside and Mr Crouse was reinstated in his position as Registrar of Labour Relations (*Public Servants Association of SA & another v Minister of Labour & another* at 185).

Bargaining Council — Recovery of Costs of Arbitration

The Labour Court has found that, when the SALGBC seeks to recover costs of arbitration proceedings between two litigating parties to the council, it can only do so if a costs award has been made in its favour by an arbitrator. It is not appropriate for the SALGBC to rely on s 33A of the LRA 1995 to enforce costs awards — it must rely on the execution provisions of its main agreement, alternatively s 143 of the LRA to do so (*SA Local Government Bargaining Council v Ally NO & another* at 223).

Residual Unfair Labour Practice — Promotion

In *KwaZulu-Natal Department of Transport v Hoosen & others* (at 156) the Labour Court found that, where a public service employee is permitted to remain in an upgraded post with a higher salary and rank designation when returning from deployment to another unit, this constitutes a promotion. In this matter the promotion of an employee who did not meet the minimum qualifications for the post was unfair as it impeded the career prospects of his colleagues who were wrongly blocked from ascending to that post.

Unfair Discrimination — Arbitrary Ground

The employer offered a provident fund, which included savings, retirement, funeral and disability schemes, to all employees who had completed five years' service. Certain employees who had less than five years' service contended that this conduct was arbitrary and constituted unfair discrimination in terms of s 6 of the Employment Equity Act 55 of 1998. A CCMA commissioner agreed with the employees, finding that there was no objective basis for the cut-off period of five years. The differentiation was arbitrary and lacking in logic and constituted unfair discrimination (*Ndlela & others and Philani Mega Spar* at 277).

Dismissal — Comments on Social Media

An employee was dismissed for making offensive comments on Facebook regarding her pending retrenchment. A bargaining council arbitrator found that, in circumstances where the employee was emotional distressed, unprepared and overwhelmed by the announcement of her potential retrenchment and where she regretted making the comment and removed the post the next day, the making of the post on Facebook did

not constitute serious misconduct justifying dismissal (*Robertson and Value Logistics* at 285).

Protected Disclosure

In *Nxumalo v Minister of Correctional Services & others* (at 177) the Labour Court refused to grant an urgent interdict to stop disciplinary proceedings against the employee on the grounds that he had made a protected disclosure. The court was satisfied that the transcript relied on by the employee did not contain information that disclosed or tended to disclose forms of criminal or other misconduct, and was therefore not the subject of protection under the Protected Disclosures Act 26 of 2000.

Reinstatement

Where a bargaining council arbitrator had refused to award reinstatement for the substantively unfair dismissal of two employees merely because of the unexplained lengthy delay in finalising the matter, the Labour Court on review confirmed that a lengthy period of delay is not a bar to reinstatement but may affect its practicability. It was satisfied that in this matter there was no evidence of the impracticability of reinstatement and that the arbitrator ought to have ordered the employer to reinstate the employees (*Zuma & another v Public Health & Social Development Sectoral Bargaining Council & others* at 257).

Practice and Procedure

The Labour Court found, in *Chauke v Safety & Security Sectoral Bargaining Council & others* (at 139), that it is not permissible to raise an exception in motion proceedings before the court.

In *Makuse v Commission for Conciliation, Mediation & Arbitration & others* (at 163) the Labour Court confirmed that, where there has been a flagrant failure to comply with prescribed time-limits and the applicant for condonation has given no compelling explanation for the egregious delay, condonation may be refused without considering the prospects of success.

Quote of the Month:

Myburgh AJ, commenting on the implicit obligation on a union 'to take all reasonable steps' to ensure compliance by its members with the terms of a picketing rules agreement, in *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union & others* (2016) 37 *ILJ* 246 (LC):

'To my mind, this is a fundamentally important obligation. Not only are picketing rules there to attempt to ensure the safety and security of persons and the employer's workplace, but if they are not obeyed and violence ensues resulting in non-strikers also withholding their labour, the strikers gain an illegitimate advantage in the power play of industrial action, placing illegitimate pressure on employers to settle. Typically, one

of two things then happens — either the employer gives in to the pressure and settles at a rate above that reflecting the forces of demand and supply (which equates to a form of economic duress) or the employer digs in its heels and refuses to negotiate or settle while the violence is ongoing (which inevitably causes strikes to last longer than they should). Either way, the orderly system of collective bargaining that the LRA aspires to is undermined — and ultimately, economic activity and job security are threatened.'

INDUSTRIAL LAW JOURNAL

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*The Right to Equality versus Employer 'Control' and Employee 'Subordination': Are Some More Equal Than Others?**

Darcy du Toit**

Abstract

The growing discourse on 'labour rights as human rights' has clarified important areas of convergence as well as tension between these two emancipatory disciplines. The most basic of all human rights is the right to equality, whereas the starting point of labour law is the inequality between worker and employer, not only in terms of bargaining power but also in terms of the worker's legal subordination within the employment relationship. Though rooted in the law of property, this inequality is implicit in all labour legislation and is also expressed in the entrepreneurial rights of the employer to which the worker's job security (or very existence as a worker) is subject.

The article considers some implications of this contradiction. It notes that the classic labour law response to the *power* imbalance in the workplace, the promotion of collective bargaining, does not challenge the *legal* hierarchy. 'Equality in the workplace' translates, essentially, into equal treatment of workers by employers but not of worker and employer. All human rights vested in citizens or denizens (for example, the right to information or freedom of assembly) are refined, adjusted or limited through the filter of labour law to leave the inequality of the worker undisturbed.

This raises questions about the boundaries of labour law as an emancipatory discipline. While hierarchy is an intrinsic feature of employment in a market-based economy, the same does not follow in respect of 'work'. Economic and legal

* This article was presented at the 2nd Labour Law Research Network Conference, Amsterdam, 25-27 June 2015. My thanks go to Musavengana Machaya, research assistant at the Social Law Project, University of the Western Cape, for his help in tracing sources and the useful comments he provided.

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arguments in support of the employer's power of command only explain or justify it to a limited extent. The article suggests an understanding of employees' right to equality in the workplace indivisibly integrated with their fundamental rights beyond the workplace, limited not by the pre-emptive rights of the employer but, in essence, only by the inherent requirements of the productive process itself.

> '"That which distinguishes an agent from a servant is not the absence or presence of a fixed wage or the payment only of commission on business done, but rather the freedom with which an agent may carry out his employment."
>
> 'We can therefore conclude that the definition we have given [of "employment"] is one which approximates closely to the firm as it is considered in the real world.'
>
> R H Coase 'The Nature of the Firm' *Economica* (November 1937) 4 (16) 386 at 404, quoting F Raleigh Batt *The Law of Master and Servant* 2 ed (Pitman 1933) 7.

1 Introduction

Part of the problem about employee subordination and employer control is that it does not present itself as a problem at all. It is, in fact, a self-evident and defining feature of the employment relationship as opposed to an independent contracting relationship. Take it away and the employee ceases to be an employee. But that already indicates the significance of the issue: society as we know it has developed on the basis of employment as the dominant form of work in terms of production as well as subsistence for most people. Employment, and with it the subordination of a large part of the working population, appears as something of an immutable reality without which society cannot exist.

The reason why it is a problem, this article will argue, is the inconsistency between the legal norm of inequality in employment, on the one hand, and the right to equality which is — for good reason — embedded in many international human rights instruments and national constitutions, on the other. Of course, the extent of the inconsistency is debatable; the degree of the employee's subordination (and the employer's control) as well as the content of the right to equality are open to interpretation. And the fact that subordination is not generally seen as a problem suggests that the interpretive exercise can narrow the gap between the employee's subordination and the right to equality to a point where it becomes unproblematic. The article will try to assess whether such a view is justifiable from a human rights perspective and, possibly, a labour law perspective.

It will also be argued that the rule of subordination must be seen in the context of a series of further rules asserting the primacy of the

employer's interests and increasing the inequality between employer and employee. Several of the rights associated with what is misleadingly termed 'managerial prerogative', or the employer's entrepreneurial freedom, make inroads on or take precedence over the rights of employees in ways that would normally be unthinkable between contracting parties. This is so not only at the individual level but even at the collective level, where the rights of trade unions — envisaged in labour law as mitigating the inequality between worker and employer — are trumped by employers' rights in some critical respects. Though structurally there may be no connection between the evolution of the contract of employment and that of the notion of 'fairness' to which modern labour law aspires, it is suggested that there is this overlap: both are premised on the subordination of the employee. If this is so, both individual and collective labour rights must be tailored so as not to disturb the employer's ultimate power of command.

This proposition has many ramifications, starting with the relationship between human rights and labour law, which has given rise to a growing body of scholarship over the past 20 years.[1] Given the potential vastness of the topic, the article will focus on some specific aspects — the right to equality, the nature of the employee's subordination to the employer and certain examples of the adjustment of collective labour law to the realities of the employment relationship — before considering whether change is possible. The focus will furthermore be on South African labour law although, given its close correspondence with international labour law, most of the rules and questions discussed are likely to resonate with comparable rules and questions in other systems.

2 The Right to Equality

The right to equality is affirmed in numerous international instruments. Of particular relevance in the present context is its formulation in the Philadelphia Declaration, where the opening proposition in describing the goal of 'social justice' reads as follows:

> 'All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.'[2]

[1] See, for example, Virginia Leary 'The Paradox of Workers' Rights as Human Rights' in Lance Compa & Stephen Diamond (eds) *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press 1996); (1998) 137 (2) *International Labour Review* Special Issue: Labour Rights, Human Rights; Philip Alston '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15 (3) *EJIL* 457; Kevin Kolben 'Labor Rights as Human Rights?' (2010) 50 *Virginia Journal of International Law* 449; Guy Mundlak 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet?' (2012-2013) 34 *Comp Lab L & Pol'y J* 217; Virginia Mantouvalou 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151.

[2] 'Declaration concerning the Aims and Purposes of the International Labour Organisation', adopted at the 26th session of the ILO, Philadelphia, 10 May 1944, para II*(a)*. The aim of 'social justice' is also stated in the Preamble to the ILO Constitution.

The formulation is important because it situates labour rights (elaborated in paragraph III of the Declaration) in the context of 'social justice', reflecting an integrated understanding of fundamental rights as being mutually supportive, each being essential to the objectives of freedom and dignity.[3]

The South African Bill of Rights[4] is constructed in a similar way. The right to equality is set out in s 9, discussed below. But the starting point is that the principles embodied in the Bill of Rights 'must be read holistically with an integrated approach'.[5] This means that the content of specific rights does not depend on their interpretation in isolation but on their construction in the context of the Bill of Rights as a whole.[6] Labour rights, thus, must be interpreted consistently with the further rights contained in the Bill of Rights, including the right to equality.

These labour rights are set out in s 23 of the Constitution. Firstly, s 23(1) states that '[e]veryone has the right to fair labour practices'. This provision, which is practically unique in the world, is understood as the defining source of the rights and freedoms of individual workers embodied in legislation as well as in common law, including the contract of employment. The remainder of s 23 defines the collective rights of workers and employers, including the right to form, join and participate in trade unions and employers' organisations, to engage in collective bargaining and, in the case of workers, to strike.[7] It follows from what has been said that these individual and collective rights are infused with the right to equality, including that of workers and employers.

Before considering the implications of this proposition it must be noted that, over and above the principle of integrated interpretation,

[3] In contrast to the later approach of prioritising certain labour rights as being more 'fundamental' than others, reflected in the ILO's *Declaration on Fundamental Principles and Rights at Work* (1998) in which the conventions concerning freedom of association, forced labour, equality of employment and opportunity, and child labour were singled out as being 'fundamental principles and rights that were either directly or indirectly contained in the ILO Constitution' — ILO *Fundamental Rights at Work and International Labour Standards* (ILO 2003) 3. In fact, given the integrated nature of the idea of 'social justice', it is submitted that there is *no* basic right that is not 'indirectly contained' in the ILO Constitution. For discussion, see Alston n 1 above.

[4] Chapter 2 of the Constitution of the Republic of South Africa 1996 (Constitution).

[5] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 37, with reference to the 34 'Constitutional Principles' adopted by the Constitutional Assembly with which the Constitution had to comply.

[6] See, for example, the judgments of the Constitutional Court in *Ferreira v Levin NO and Others* and *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) paras 57, 170; *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC) para 153.

[7] The use of the term 'worker' rather than 'employee' throughout s 23 means that these rights apply not only to employees but also to those not covered by employment legislation, such as soldiers: see *SA National Defence Union v Minister of Defence & another* 1999 (4) SA 469 (CC); (1999) 20 *ILJ* 2265 (CC). The term is also broad enough to include workers performing dependent labour who do not qualify as 'employees'.

the right to equality is embedded in the Constitution at an even more fundamental level. Section 1 of the Constitution states that the Republic of South Africa is founded on a number of 'values', in the first place those of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'. This places the state under a duty not only to protect but to promote the foundational values of dignity, equality and freedom.[8] Similarly, courts 'must interpret legislation so as to give effect to these fundamental values and to the specific provisions of the Bill of Rights which encompass them'.[9] In the rich body of constitutional case law that has evolved in South Africa since 1994, including that cited above, the courts have had occasion to deal with the interpretation of a wide variety of rights. But what is true of other rights is true of labour rights as well: the employee's right to fair labour practices must be interpreted not only 'subject to' the right to equality but in a manner that promotes the value of equality to the greatest possible extent.

The importance of equality manifesting itself both as a right and as a foundational value is that 'rights' contained in the Bill of Rights are subject to limitation in terms of s 36, the operative part of which reads:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . .'[10]

This is presumably the basis on which it would be sought to justify a constitutional challenge to the subordination of the employee to the employer. Thus, the widely prevalent if not universal subordination of the employee to the employer in 'open and democratic' societies around the world would no doubt be a strong argument in support of the status quo.[11] Foundational values, however, are not subject to the same limitation. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[12] the full bench of the Western Cape High Court explained the distinction as follows:

[8] *Jordan and Others v S and Others* 2002 (11) BCLR 1117 (CC) para 105; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) para 72.

[9] *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC) para 45.

[10] s 36(1). 'Relevant factors' is explained as including the 'nature of the right', 'the importance of the purpose of the limitation', 'the nature and extent of the limitation', 'the relation between the limitation and its purpose', and 'less restrictive means to achieve the purpose' of the limitation.

[11] Article 7:610 para 1 of the Dutch Civil Code, for example, defines the contract of employment as 'an agreement under which one of the parties ("the employee") engages himself towards the opposite party ("the employer") to perform work for a period of time in service of this opposite party in exchange for payment'. The term 'in service' is understood to mean the subordination of the employee.

[12] 1999 (3) SA 173 (C).

'As Mahomed DP (as he then was) said in *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153, ". . . the guarantee of equality lies at the very heart of the Constitution (and) it permeates and defines the very ethos on which the Constitution is premised" (At para [20].) A breach of this right can only be sanctioned if there is a clear and sustainable justification therefor. This becomes a more difficult onus to discharge in the case of foundational values such as equality. To consider a limitation to be viable, it would have to represent in the first place an important purpose.'[13]

The implication is that breach of an employee's right to equality may only be justified if it not only has a 'clear and sustainable justification' but, over and above this, a purpose important enough to override a value that 'permeates and defines the very ethos on which the Constitution is premised'. It will be considered later whether an employer's power of command could be said to represent such a purpose. Suffice it at this point to note that the only countervailing constitutional right from which an employee's subordination could be said to derive is the employer's freedom of trade, occupation and profession.[14] Unlike the right to equality, this freedom does not correspond directly to a foundational value. It is an essential aspect of the foundational value of freedom but, being no more than a particular aspect, cannot outweigh the right to equality. That being so, the limitation imposed on the right to equality can only be justified if it passes the twofold test outlined above.

3 The Employee's Subordination

Perhaps the most powerful and famous summation of the peculiar nature of the employment relationship is that of Kahn-Freund:

'[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment".'[15]

This means in the first place that the employee must obey (carry out) the employer's lawful instructions.[16] 'Lawful' means that the instruction must relate to the duties which the employee is bound (has

[13] ibid 186-7 (paragraph break omitted). The remedy granted by the High Court was amended on appeal but the court's reasoning in the quoted passage was not questioned: see *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), where the impugned limitation of the right was found unjustifiable in terms of s 36(1) without reference to the underlying value.

[14] s 22 of the Constitution. It reads: 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

[15] Davies & Freedland *Kahn-Freund's Labour and the Law* 3 ed (Stevens 1983) 18.

[16] For a practical exposition of South African law on this question, see John Grogan *Workplace Law* 10 ed (Juta 2009) 55-7.

agreed) to perform.[17] Needless to say, there is no corresponding duty on the employer to carry out 'lawful' instructions by the employee as to the performance of the employer's duties.

This one-sided subordination of the employee marks a clear deviation from the contractual norm that parties are expected to perform their duties without the right of the other to 'instruct' them, and begs the question why the same norm should not apply in the employment relationship. The legal answer is simple: had the employee been free to carry out her or his agreed duties like any other party to a contract, the contract would not have been a contract of employment. But, from the standpoint of substantive equality, this begs a further question: why is it necessary to subordinate one party to the other, through the medium of the employment contract, to do work which, notionally, could have been done without subordination through the medium of a different contract?

There are different possible answers to this question. Bamu[18] sums up what may be termed an economic answer. The 'assumption that the employment relationship necessitated submission and subordination on the part of the employee', she writes,

> 'was closely related to Coase's theory on the emergence of the capitalist firm as a result of a trade-off between two possible modes of organising production. These were contracting on the market outside the firm on the one hand, and internal co-ordination of production by the entrepreneur within the firm on the other. The capitalist firm was established as a result of a choice to integrate productive functions under the entrepreneur's control. According to Coase, the firm was therefore constituted by the establishment of employment relationships whereby workers agreed to obey the directions of the employer in exchange for remuneration'.[19]

Interrogating this analysis falls beyond the scope of this article, except to note the obvious question: *why* should workers agree to 'obey the directions of the employer in exchange for remuneration'? The equally obvious answer would seem to be that they do so because there is no alternative; the option of working as independent contractors, in other words, is not on offer. This is explained by the fact that the employer is not only a person (natural or legal) but also an accumulation of resources — embodying, in Marxist terminology, 'ownership of the means of production' — which, to a large and growing extent, has given employers a commanding position in the economic process. This, in turn, gives them the de facto power to require workers to exchange

[17] It is sometimes added that the instruction must be 'reasonable'. Whether this is a separate requirement is debatable, since it is doubtful whether an instruction can be both 'lawful' and 'unreasonable'. Thus, in *Pretorius v Minister van Handel en Nywerheid* [2005] 7 BLLR 730 (T) it was held that lawful instructions cannot amount to 'harassment'.

[18] Pamhidzai Bamu *Contracting Work Out to Self Employed Workers: Does South African Law Adequately Recognise and Regulate this Practice?* (unpublished PhD thesis, University of Cape Town 2011).

[19] ibid 29; footnotes omitted. The reference is to Coase — see introductory quotation to this article above.

their services for remuneration as subordinates ('employees') in the manner described by Coase rather than notional equals (independent contractors).[20] Labour law calls it 'inequality of bargaining power', allowing the employer to offer the worker employment on a 'take it or leave it' basis.[21]

A legal rationale begins to emerge from the fact that an employment contract, if it is at all longer term, is by its nature 'incomplete' in that the parties (or the employer) cannot foresee every contingency that may arise in the future and cannot stipulate what precisely will be required of the employee under changing circumstances. Adhering strictly to contractual principles would require the parties to renegotiate the terms of employment whenever anything changes. In the interests of efficiency the employer therefore needs the power — which may be delegated to managers — to 'direct' employees from day to day.[22] Patently absent from the equation are any democratic principles or rules of good governance replicating, in a manner appropriate to the workplace, those which apply to the exercise of state power or the governance of corporations.[23] Collins observes that 'employment law has developed a distinctive interpretation of these liberal values to the workplace'.[24] It is this 'interpretation', involving the denial of equality between the contracting parties, which is under discussion.

A historical explanation for this phenomenon is that the contract of employment is more than just a 'figment of the legal mind'; it is an amalgam of contract and the medieval master-and-servant relationship based on status rather than agreement.[25] Selznick sums it up as follows:

> 'The main contribution of the old [law] to the new was the traditional authority of the master to control the workman . . .. By the end of the nineteenth century the employment contract had become a very special sort of contract — in large part a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion.'[26]

This conclusion is consistent with those of Kahn-Freund, Coase and others. It is also consistent with historical experience in a country such

[20] For a scholarly overview of the background to these propositions, see Barney Jordaan in A Rycroft & B Jordaan *A Guide to South African Labour Law* 2 ed (Juta 1992) 10-32.

[21] Hugh Collins *Employment Law* 2 ed (Oxford University Press 2010) 6-8.

[22] ibid 9-11. See the discussion of 'working practices' below.

[23] Deakin et al note that the 'formal' power of employers may be supplemented by other norms, 'many of which have a fairness dimension', and that 'it may be in the enlightened self-interest of employers to offer job security and worker voice in order to improve contractual outcomes' — 'Do Labour Laws Increase Equality at the Expense of Higher Unemployment? The Experience of Six OECD Countries, 1970–2010' Centre for Business Research, University of Cambridge Working Paper 442 (2013) 3. The point here is that it remains in the employer's discretion whether to do so or not; the employee has little say in the matter.

[24] Collins n 21 above 11.

[25] A Fox *Beyond Contract: Work, Power and Trust Relations* (Faber & Faber 1974) cited by Jordaan n 20 above 28.

[26] P Selznick et al *Law, Society, and Industrial Justice* (Russell Sage Foundation 1969) 123 cited by Jordaan n 20 above.

as South Africa where the abolition of slavery in 1834 was followed by a system of 'apprenticeship' whereby 'emancipated' slaves in the Cape Colony were 'indentured' to their former owners for a period of four years.[27] This, in turn, was followed by the Master and Servant Ordinance of 1842[28] whereby former 'apprentices' were transformed into 'servants' who were, inter alia, subject to criminal punishment if they disobeyed their masters' instructions or otherwise breached the terms of their contracts. Similar legislation followed in the colonies of Natal and the former Boer republics, the Transvaal and the Orange Free State.[29] These statutes remained in force until 1974,[30] leaving the employer dependent on contractual remedies rather than criminal sanctions in exercising its power of control.

4 Subordination and the Duty of 'Respect'

How far does the duty of subordination go? In practice the issue is often whether a particular instruction was lawful and reasonable and/or whether the employee was guilty of insubordination in refusing to obey it. Such disputes tend to focus narrowly on the question of the lawfulness of the employer's instruction without reference to the employee's right to equality and dignity.[31]

[27] T R H Davenport *South Africa: A Modern History* (Southern Book Publishers 1977) 46-7. Children, especially girls, as young as three years old were made to be 'apprentices' — J Loos *Echoes of Slavery: Voices from South Africa's Past* (David Philip 2004) 120-4.

[28] Order in Council dated 27 August 1842, superseded by the Masters and Servants Act 15 of 1856. For early cases see *Boyes v Southey* (1871-1872) 2 Roscoe 118; *Alexander v Perry* (1874) 4 Buch 59; *Falconer v Juta* (1879) 9 Buch 23; *Baker v Dormer* (1880-1882) 1 SC 253; *Denny v South African Loan, Mortgage, and Mercantile Agency Co (Ltd)* (1880-1881) 1 EDC 20; *Distin v Williamson* (1880-1881) 1 EDC 20; *Sayers v Thorne* (1889-1890) 7 SC 243; *Queen v Eayrs* (1894) 11 SC 330; *Queen v Wentworth* (1895-1896) 10 EDC 94.

[29] (Natal) Ordinance 2 of 1850; (Transvaal) Law 13 of 1880, Proclamation 21 of 1902, Act 27 of 1909; (Orange Free State) Ordinance 7 of 1904. For early case law see *Eriah (Appellant) and J W Hathorn (Respondent)* 1869 NLR 203; *Umbulawa (Appellant) v Frederica Prüfer (Respondent)* (1891) 12 NLR 59; *Fick and Others v Rex* 1904 ORC 25; *Rex v Mgapa Nkubene* 1910 ORC 38. In one of the last cases to be decided in terms of the Rhodesian Masters and Servants Act Ch 268, *S v Collett* [1978] 3 All SA 625 (RA), a whipping administered by an employer to an employee in lieu of criminal prosecution was found to be unlawful. However, the sentence of five months' imprisonment imposed on the employer was reduced on appeal to a wholly suspended sentence.

[30] By s 51, Second General Law Amendment Act 94 of 1974. This followed a major strike wave among African workers in 1973 which the state was unable to suppress and was accompanied by other limited reforms which culminated in the recognition of African workers as 'employees' in 1979 and their admission to the legal employment dispensation. International political and trade union pressure also played a part in this — D du Toit *Capital and Labour in South Africa: Class Struggles in the 1970s* (Kegan Paul International 1981) 335. Ironically, strikers in 1973 were initially faced with criminal charges in terms of the masters and servants laws — ibid 243.

[31] See, for example, *CWIU & another v SA Polymer Holdings (Pty) Ltd t/a Megapak* [1996] 8 BLLR 978 (LAC); *Maneche & others v CCMA & others* (2007) 28 *ILJ* 2594 (LC); *Seardel Group Trading (Pty) Ltd t/a Romatex Home Textiles v Petersen & others* (2011) 32 *ILJ* 439 (LC). In a number of insubordination cases where constitutional rights have been invoked, employees have tended to rely on the right to freedom of expression, assembly, demonstration, picketing and trade union organisation. This leaves open the scope of lawfulness of an employer's instructions when weighed up against employees' right to equality.

But it goes beyond the nature of instructions. The Labour Appeal Court (LAC) has described subordination as 'the hallmark of the contract of employment, giving rise to a duty to obey lawful and reasonable orders and to show respect to the employer, superior employees, and the employer's customers'.[32]

Grogan explains more fully what he terms the employee's duty 'to be respectful and obedient':

> 'Employees are obliged to respect and obey their employers because lack of respect renders the employment relationship intolerable and disobedience undermines the employer's authority . . .. Modern theories of the employment relationship, which emphasise the dignity of employees, did not make a serious impact on South African labour law until labour courts began deciding on such issues after 1980. However, the labour courts still require all employees to show a reasonable degree of respect and courtesy to their employers, and to obey their employers' reasonable and lawful instructions.'[33]

'Respect', the author emphasises, 'does not mean deference or obeisance'. What it does mean is 'a duty to behave in a manner compatible with the subordinate position in which the employee by definition stands vis-à-vis the employer'.[34] The employee's duty will be breached, and dismissal will be justified, if the conduct in question suggests 'that the employee has repudiated the employer's lawful authority'.[35] In other words, insubordination may also entail defiance of an employer's authority without disobeying an instruction.[36]

This suggests a degree of deference that cannot be explained merely by the rational implications of the performance of the employee's contractual obligations. In a leading case expounding the 'dominant impression' test for identifying an employment relationship, the then Appellate Division of the Supreme Court held that, in addition to the employee's subordination in the sense of a duty to carry out lawful instructions, an employment contract places the employee 'at the beck and call of the employer . . . to render his personal services at the behest of the latter'.[37] The phrase denotes a degree of compliance of a personal nature that does not seem explicable merely by the performance of an agreed function.[38] Rather, one is left with the impression of an organic,

[32] *SA Polymer Holdings (Pty) Ltd t/a Megapak* n 31 above 982.

[33] Grogan n 16 above 56.

[34] ibid.

[35] ibid.

[36] *Palluci Home Depot (Pty) Ltd v Herskowitz & others* (2015) 36 *ILJ* 1511 (LAC). Grogan illustrates this by explaining that '[m]ere failure on occasion to greet the employer or superiors will not place employees in breach of their obligation to show respect' — Grogan n 16 above. The implication is that repeated failure to greet the employer or superiors could amount to misconduct justifying dismissal. While this may appear bizarre from an equality perspective, the point is that it appears less bizarre from a labour law perspective.

[37] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 61.

[38] According to the Cambridge Dictionary 'beck and call' means 'always willing and able to do whatever someone asks' — see http://dictionary.cambridge.org/dictionary/british/at-sb-s-beck-and-call.

imprecisely defined *legal* inequality perpetuating, in an attenuated form, the socio-economic difference in rank between master and servant and going well beyond the purely functional power of the employer to 'direct' employees in the performance of their duties. Davidoff speaks of 'democratic deficits' and sums it up as follows:

'The term subordination describes the social condition of being under the control of another (to some extent), of having a boss that you have to answer to, of lacking the ability to influence the way the work is performed and choose the work to be performed. All of this can be broadly described as democratic deficits in the relationship of the employee vis-à-vis his or her employer.'[39]

5 Balancing the Right to Equality against Competing Rights

Taken together, does this amount to an impermissible limitation of the employee's right to equality? This inquiry cannot take place in the abstract. Before invoking the proportionality test contained in s 36 of the Constitution, it is necessary to determine the extent of the right to equality in the employment context.

The starting point is that the Constitution guarantees the right to equality not only in a formal but in a substantive sense.[40] Section 9(2) encapsulates this by stating that '[e]quality includes the full and equal enjoyment of all rights and freedoms'. Kentridge, in a much-cited passage, sums up what this means:

'Equality is not simply a matter of likeness. It is, equally, a matter of difference. That those who are different should be differently treated is as vital to equality as is the requirement that those who are like are treated alike. In certain cases it is the very essence of equality to make distinctions between groups and individuals in order to accommodate their different needs and interests.'[41]

Thus, it is necessary to take account of the fact that employees and employers are differently placed and cannot be treated identically. They perform different roles in the productive process, both of which are protected by the Bill of Rights. What the right to equality guarantees is that, in doing so, their 'full and equal enjoyment of all rights and freedoms' may not be impaired. The contractual subordination of the employee to the employer, in other words, may not infringe the employee's right to dignity, privacy, freedom of religion, belief and opinion, expression, movement or any of the other basic rights guaranteed by the Constitution. Conversely, the boundaries within

[39] Davidoff uses the term 'democratic deficits' to describe the inequalities between worker and employer. Guy Davidoff 'Who is a Worker?' (2005) 34 *Industrial Law Journal* (UK) 57 at 61-2.

[40] Section 9(2) states, 'Equality includes the full and equal enjoyment of all rights and freedoms.'

[41] Janet Kentridge 'Equality' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (Juta 1996) 14-3.

which the employee's right to equality is protected can only be determined by 'balancing' it against other, possibly competing, rights.

This raises a need for at least two caveats. The first is that there is a vast literature and body of case law dealing with the topic of competing rights, which cannot be dealt with adequately within the confines of this article.[42] The second is that, by its nature, such an exercise can only be conducted on a case-by-case basis with reference to specific facts. What will be attempted here is only to consider the approach to be followed in assessing the extent of the employee's right to equality in relation to the employer's rights in a given situation.

The basic challenge, it has been argued, comes from the employer's entrepreneurial and property rights.[43] In general, the purpose of seeking a balance between competing rights is not to establish 'which right is paramount above the other but how to interpret the two competing rights in such a manner that there is harmony instead of conflict'.[44] In the employment context, it is submitted, this means that the employee's subordination should be given as narrow a meaning as is compatible with its stated purpose, namely that of achieving efficiency by enabling the employer to 'direct' the employee where necessary.[45] On this basis 'subordination' attains a measure of voluntarism in that the employer's role becomes one that is necessary for and supportive of employees' performance of their duties. By the same token, there would be no scope for inferring a duty of 'respect' or deference beyond carrying out necessary instructions. The aim should be to construe 'lawful' instructions on this basis in order to leave intact the employee's right to equality and dignity, in contrast to doing work that actually requires direction.

An illustration of such an exercise in the employment context is provided by the judgment of the High Court in *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union & others*,[46] a 'shopping mall' case in which an interdict was sought to prevent noise made by pickets involved in a dispute with a tenant from causing nuisance to other

[42] For an overview from a South African perspective see Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (Juta 2013) 143-5. For a detailed overview from a Canadian perspective see Ontario Human Rights Commission 'The Shadow of the Law: Surveying the Case Law Dealing with Competing Rights Claims' http://www.ohrc.on.ca/en/shadow-law-surveying-case-law-dealing-competing-rights-claims.

[43] It is assumed that the right to fair labour practices does not come into it; as noted above, this right extends to employers as well as employees and, thus, itself represents a notional balance between the parties' other competing rights.

[44] *Khabisi NO and Another v Aquarella Investment 83 (Pty) Ltd and Others* 2008 (4) SA 195 (T) para 1.

[45] This is in accordance with the principle that any legal limitation of a basic right must be interpreted narrowly; ie in such a way as to limit the basic right as little as possible. For its application in a European context, see *Johnston* v *Chief Constable of the Royal Ulster Constabulary* C-222/84 [1986] ECR 1651 (ECJ).

[46] (2010) 31 *ILJ* 2539 (KZD). See also *Standard Bank of SA v CCMA & others* (2008) 29 *ILJ* 1239 (LC) where the intersection of the constitutional rights to equality , the right to human dignity, the right to choose a trade, occupation or profession freely, and the right to fair labour practices was considered in the context of a dismissal based on incapacity.

tenants. Although not involving the issue of subordination directly, the approach followed by the court is instructive. It characterised the issue as follows:

'The dispute is whittled down to the lawfulness of the exercise of constitutional rights [by the union] only. Do sections 16, 17 and 23 of the Bill of Rights permit SACCAWU [the union] and its members to picket as loudly as they wish in furtherance of their freedom of expression, collective bargaining and demonstration rights, even if they commit nuisance to others? Do these constitutional rights trump and annihilate the rights to property, to trade and a healthy environment? Or, does the doctrine of proportionality apply to balance competing rights to determine what constitutes lawful picketing?'[47]

Put like that, the answers to the first two questions clearly had to be 'no' and that to the third question 'yes'. Having referred to Canadian case law, Pillay J held as follows:

'In the opinion of the court, SACCAWU and its members can exercise their rights reasonably without interfering with Growthpoint, its tenants and the public. Interference with their rights to the extent that tenants cannot conduct business and in fact lose business is an unacceptable and unjustifiable limitation on their right to their property, to trade and to a healthy environment.'[48]

Applying similar reasoning to the contract of employment, any assertion of the employer's power of control must stop short of constituting an 'unacceptable and unjustifiable limitation' of employees' right to equality. If that power is construed in purely functional terms, as suggested above, it is possible that this may be the case.

On this approach, therefore, the exercise is confined to determining the *extent* of the parties' respective rights as opposed to testing any *limitation* of the employee's right to equality in terms of s 36. Such a test, it is submitted, will only become necessary in a context where the employer's exercise of its power of control — for example, in imposing a dress code — is challenged as going beyond the limits of its right to give necessary instructions and constituting an impermissible infringement of the employee's rights.

6 Some Further Implications of Subordination

It has been noted that the asymmetry of the employment relationship is not limited to the employee's subordination. Rather, the reality of subordination pervades the contract as a whole, tilting other terms implied by common law in the employer's favour and further weakening the employee's position.

This is illustrated by the mutual and, hence, seemingly neutral duty of 'good faith'. While on the face of it unexceptionable, it nevertheless

[47] *Growthpoint* n 46 above para 41.

[48] ibid para 60. The court added, 'The limitation on SACCAWU and its members is only to lower their noise level. They are not precluded from demonstrating, picketing, carrying placards, singing and chanting softly' — para 61.

translates into very specific duties placed on the employee to 'further the employer's business interests' and avoid any conflict of interest with the employer.[49] Self-evidently, no corresponding duty rests on the employer to devote itself to its subordinate's interests beyond the payment of remuneration, providing reasonably safe working conditions and compliance with specific duties prescribed by legislation.

A few other examples of the ramifications of the employer's dominant position must suffice:

6.1 *Working practices*

Neither the employer nor the employee can unilaterally change a term of the contract of employment. However, a distinction is drawn between 'working practices' (or 'work practices') and contractual terms. The courts have consistently held that a 'mere' change of work practices that are not regulated by contract or law falls within 'managerial prerogative' and does not amount to a breach of contract.[50] Should employees consider a change unfair, their options are limited. If a change falls into one of the categories of 'unfair labour practice' specified in the Labour Relations Act (LRA), [51] it would be possible to refer it to arbitration to determine whether it was unfair.[52] A change which amounts to a 'matter of mutual interest' and which affects more than one employee would entitle the employees to strike.[53] Beyond this, failure to comply with a change determined by the employer would amount to a refusal to obey a lawful instruction, or gross misconduct, which may justify dismissal.[54]

6.2 *Disciplinary powers*

The employer has the unilateral power to determine rules of conduct in the workplace, subject only to law and employees' contractual rights. The Code of Good Practice: Dismissal appended to the LRA interprets this as meaning that '[a]ll employers should adopt disciplinary rules

[49] *Pelunsky v Theron* 1913 WLD 34; Grogan n 16 above 49-51.

[50] For example, changes to shift systems fall within the employer's discretion — see *SA Police Union & another v National Commissioner of the SA Police Service & another* (2005) 26 *ILJ* 2403 (LC); *Apollo Tyres SA (Pty) Ltd v National Union of Metalworkers of SA & others* (2012) 33 *ILJ* 2069 (LC).

[51] Act 66 of 1995 (LRA).

[52] Potential unfair labour practices relevant in the present context are confined to employer conduct involving promotion, demotion, probation, training or the provision of benefits — s 186(2)*(a)* of the LRA. Changes to shift patterns and the like would therefore not be covered.

[53] In terms of s 64 of the LRA — see *City of Johannesburg Metropolitan Municipality & another v SA Municipal Workers Union & others* (2011) 32 *ILJ* 1909 (LC).

[54] Thus, in *Verity v University of the Witwatersrand* (2009) 30 *ILJ* 2518 (LC), a university administrative officer was dismissed for poor time-keeping over a period after her head of department changed her starting time from 08h30 to 08h00.

that establish the standard of conduct required of their employees'.[55] Such rules are often detailed and may resemble legislation, providing for formal disciplinary procedures and sanctions to be imposed on employees found 'guilty' of breaching a rule. The ultimate test, in the case of dismissal, is only that the rule must be 'valid or reasonable'.[56] Such rules may be incorporated into employees' contracts of employment, expressly or by implication.

6.3 *Suspension*

Suspending an employee on full pay does not amount to breach of contract because the contract of employment does not oblige the employer to provide the employee with work to do, unless otherwise agreed. Suspension can, however, tarnish an employee's reputation and doing so unfairly can amount to an unfair labour practice.[57] Case law has established that suspension with pay will not be unfair if the employer has a reasonable apprehension that a legitimate business interest would be harmed by the employee's continued presence in the workplace.[58] Cheadle explains it as follows:

'It is suspension pending disciplinary action that requires considered review. There are two abuses: arbitrary decisions and the inordinate periods of suspension. Suspension is the employment equivalent of arrest. The only rationale for suspension is the reasonable apprehension that the employees will interfere with the investigation or repeat the misconduct. It follows that it is only in exceptional circumstances that an employee should be suspended pending a disciplinary enquiry. The employee suffers palpable prejudice to reputation, advancement and fulfilment. These limited reasons for suspension and this prejudice make a compelling case for regulation. And because any such regulation will have a minimal interference with operational decisions, there is no efficiency trade off.'[59]

Fairness further entitles an employee to be heard before he or she is suspended. However, this need not involve a formal hearing; fairness may be satisfied if the employee is allowed to make representations beforehand or even after being suspended, provided the employer keeps an open mind.[60]

Within the paradigm of employee subordination even this brief overview of case law shows that the employer's power to suspend is

[55] In the Netherlands, according to Konijn, the employer's disciplinary capacity is recognised in principle but any sanction beyond a reprimand or cancellation of a privilege must be expressly authorised by the employment contract or a collective agreement — Y Konijn *Cumulatie of exclusiviteit? Een onderzoek naar de invloed van privaatrechtelijke leerstukken op de arbeidsovereenkomst* (Boom Juridische Uitgevers 1999) 269-70.

[56] Code of Good Practice item 7*(b)*(i). See also the extract from *Sidumo* n 6 above para 74.

[57] s 186(2)*(b)* of the LRA.

[58] See, for example, *Mabilo v Mpumalanga Provincial Government* (1999) 20 *ILJ* 1818 (LC).

[59] Halton Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663 at 683-4.

[60] *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 *ILJ* 2033 (LAC); *Dladla v Council of Mbombela Local Municipality (2)* (2008) 29 *ILJ* 1902 (LC).

accepted as a normal incident of the employment relationship. Within a paradigm of contractual equality, however, it would be anything but normal. The contract of employment is classified as a species of letting and hiring.[61] It is difficult to conceive of any other contract of lease where a reasonable suspicion of breach by one party will unilaterally entitle it to 'suspend' the other party without obtaining a court order.[62] And, once again, the asymmetry of the relationship means that the onerous consequences of suspension fall on the employee. Thus, an employee who has been suspended pending a disciplinary inquiry may not accept employment with another employer without repudiating the contract of employment,[63] whereas the employer is free to replace the suspended employee with a substitute.

6.4 *Dismissal for operational requirements*

An employer is not expected to employ an employee whose services are not, or no longer, required and may dismiss an employee in this unfortunate position on the basis of its operational requirements. International law and the LRA require only that the reason for the dismissal, assuming it is based on operational requirements, must also be a 'fair' one and that a fair procedure must be followed.[64] The procedural requirements are extensively defined in the LRA[65] and account for the bulk of litigation arising from this species of dismissal. A more difficult question, however, is when the employer's reason for dismissal is deemed to be 'fair' (or, in the words of Convention 158, 'valid' or 'sufficient').[66]

The South African labour courts have developed a delicate balancing act. It is accepted that the court must not be 'deferential' to the employer's decision[67] but, equally, that it is not for the court to 'second-

[61] That is, locatio conductio operarum or letting and hiring of services.

[62] An equivalent might be a landlord unilaterally denying a tenant access to leased premises against suspension of the tenant's duty to pay rent, while the landlord investigates possible breach of contract by the tenant.

[63] Unless the contract allows the employee to take on other employment simultaneously — see *Solidarity & another v Public Health & Welfare Sectoral Bargaining Council & others* (2013) 34 *ILJ* 1503 (LAC). The prohibition would seem to apply also if the employee were to work without remuneration for the second employer.

[64] Article 4 of the ILO Termination of Employment Convention 158 of 1982 speaks of a 'valid' reason.

[65] ss 189 and 189A of the LRA.

[66] See n 64 above. Article 9(3) of the Convention states: 'In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the [impartial bodies dealing with a challenge] shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.' Art 1 refers to collective agreements, arbitration awards, court decisions, laws or regulations.

[67] *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (2001) 22 *ILJ* 2264 (LAC).

guess' an employer's operational decision. In a judgment that has been generally followed for almost 20 years the meaning of 'fairness' was summed up as follows:

'For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but . . . has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision . . . but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham . . .. It is important to note that when determining the rationality of the employer's ultimate decision . . . it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.'[68]

Despite the final clause of the passage cited above it has been accepted that, after consultation, '[t]he alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer's margin of appreciation to the employee in the exercise of its managerial prerogative'.[69] Once again, the principle of contractual equality is trumped by the employer's power of control.

7 'Developing' the Contract of Employment to Promote Fairness?

Section 8(3)*(a)* of the Constitution states that a court, 'in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'. For a period following the advent of constitutionalism, the Supreme Court of Appeal (SCA) did seek to create some kind of equitable balance between employer and employee in order to give effect to the right to fair labour practices. An unspoken premise appeared to be that the parties should be treated as contractual equals or, at least, that the employer's power of control should be curtailed. Thus, it was held that there is a mutual duty of 'trust and confidence' between employer and employee[70] as well as a mutual duty of 'fair

[68] *SA Clothing & Textile Workers Union v Discreto (A Division of Trump & Springbok Holdings)* (1998) 19 *ILJ* 1451 (LAC) para 8.

[69] *SA Transport & Allied Workers Union v Old Mutual Life Assurance Company SA Ltd* (2005) 26 *ILJ* 293 (LC) para 85. Similarly, dismissal may be justified even if the operational problems are a result of poor management — *Benjamin v Plessey Tellumat SA Ltd* (1998) 19 *ILJ* 595 (LC).

[70] See *Council for Scientific & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A). In this case, however, it was held that the attitude of an employee amounted to breach of this duty and justified his dismissal.

dealing'.[71] More controversially, it was found that the common law had been developed to incorporate a general right to fairness in dismissal.[72]

However, it was subsequently made clear that there is no scope for developing the common law by creating contractual remedies duplicating those contained in the LRA.[73] This much appears from s 8(3)*(a)* of the Constitution itself (see above). The rationale is that, given the enactment of legislation such as the LRA precisely to give effect to the right to fair labour practices, it is not for the courts to revisit ground already covered by the LRA.

True, the LRA says nothing about the subordination of the employee; it does no more than require the employer to act fairly in the exercise of its powers. To that extent there may be scope for the courts to interrogate the employee's duty of subordination. But it can equally be said that the legislature was well aware of the common law and chose to leave it unchanged. There is, after all, a presumption that legislation changes the common law only where it does so expressly or by necessary implication.[74] On this aspect of the employment relationship the Constitutional Court has said the following:

'The Constitution and the LRA seek to redress the power imbalance between employees and employers. The rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organisations. Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal. It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to a dispute. Dismissal disputes are often emotionally charged. It is therefore all the more important that a scrupulous even-handedness be maintained.'[75]

In essence, this amounts to not giving any 'preferential status' or *additional* discretion to the employer over and above the regulatory powers which it already has. But it also stops short of questioning those powers. Instead, the focus is shifted to the manner in which the Constitution and the LRA 'seek to redress the power imbalance'. But the limitations placed on the employer's disciplinary powers by the LRA

[71] In *Murray v Minister of Defence* (2008) 29 *ILJ* 1369 (SCA) it was held that a naval officer, not subject to the LRA, was protected against constructive dismissal on this basis. The extent to which this right applies to employees covered by the LRA was left open in *SA Maritime Safety Authority v McKenzie* (2010) 31 *ILJ* 529 (SCA).

[72] *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 28 *ILJ* 1499 (SCA); *Boxer Superstores Mthatha v Mbenya* (2007) 28 *ILJ* 2209 (SCA). This was in sharp contrast to the position in the UK — see *Johnson v Unisys Ltd* [2001] ICR 480 (HL); *Eastwood v Magnox Electric Plc; McCabe v Cornwall County Council* [2004] UKHL 35; *Edwards v Chesterfield NHS* and *Botham v MOD* [2011] UKSC 58.

[73] *SA Maritime Safety Authority* n 71 above paras 55ff. At issue in this matter was a claim for breach of contract arising from the employee's dismissal, seeking a more generous remedy than that available in terms of the LRA.

[74] *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC); and see J R de Ville *Constitutional & Statutory Interpretation* (Interdoc Consultants 2000) 170-1.

[75] *Sidumo* n 6 above para 74.

are minimal, leaving the employer with greater unilateral discretion than would normally be the case in a contractual relationship.

8 Collective Labour Law

The crux of the argument so far is that the employee's subordination falls beyond the redress envisaged by the LRA; in the individual employment relationship it does no more than place certain limits on the exercise of the employer's contractual rights in the name of 'fairness'. In line with the classic theory of labour law, it seeks primarily to address the power imbalance between employer and employee by enabling workers to organise and bargain collectively. This is summed up in Kahn-Freund's statement that

'[t]he main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[76]

The effect is to shift the bargaining process to a different level but not to redress the fundamental inequality reflected in the employer's power of control and the employee's subordination which will continue throughout the employment relationship, even after a bargain has been struck. Hepple & Veneziani draw attention to the problem:

'It was the "father" of German labour law, Hugo Sinzheimer, who argued that the special function of labour law . . . was to ensure some kind of substantive and not purely formal legal equality between employer and employee. Sinzheimer's conception became, in Kahn-Freund's words, a "part of the common property of lawyers in Europe". This was realised in all European countries before the Second World War by protective legislation . . ..'[77]

What stands out is that 'equals' do not need protection against each other; 'substantive equality' would surely remove the need for 'protective legislation'. Ensuring equality, in other words, remains work in progress. The way this is happening, Hepple & Veneziani point out, can be seen in attempts to

'shift the traditional focus on the "protective" purposes of labour law (which implies that this is given by a paternalistic state to vulnerable individuals or groups) towards an emphasis on "rights" to decent conditions of work, fair pay, job security, participation in trade unions and collective bargaining and so on. Rights, rather

[76] Davies & Freedland n 15 above 18.

[77] 'Introduction' in Bob Hepple & Bruno Veneziani (eds) *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945-2004* (Hart Publishing 2009) 5. The authors cite Van der Heijden's expressive term 'inequality compensation' to describe this function of labour law — see Paul van der Heijden 'Post-Industrial Labour Law and Industrial Relations in The Netherlands' in Lord Wedderburn et al *Labour Law in the Post-Industrial Era: Essays in Honour of Hugo Sinzheimer* (Dartmouth 1994) 135-6.

than "protection" are increasingly seen as a means of redressing the inequality in bargaining power between employer and worker.'[78]

In South Africa there can be no question about the focus on workers' rights. As noted already, s 23 of the Constitution guarantees individual labour rights as well as the right to engage in collective bargaining and, in the case of workers, to strike. In this it follows the classic Kahn-Freundian approach. In its certification of the Constitution the Constitutional Court explained the significance of the right to strike in this context, but also appeared to go further:[79]

'Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out.'

This recognises that the employer's true power has little to do with collective bargaining but resides in a variety of 'weapons' which, ultimately, derive from its legal and contractual powers of control over the productive process. However, the right to fair labour practices cuts both ways, embodying 'fairness' to the employer as well as the employee. In practice it is assumed to incorporate the employer's power of control as a given which labour law may not limit unduly. Apart from anything else, the constitutional right to freedom of trade, occupation or profession[80] would seem to stand in the way.

The LRA gives effect, as it must, to the right to collective bargaining and to strike within this paradigm. It does so in a way that is broadly in line with the relevant ILO conventions and collective bargaining law in other countries.[81] As elsewhere, the effect is to import the fundamental inequality between employer and employee into their collective relationship.

Two South African examples may be noted. The discretion of employers when it comes to dismissing employees for operational reasons has already been discussed. This power also impacts on the

[78] Hepple & Veneziani n 77 above 15. From what has been said, it may be added that the inequality which labour law seeks to redress, and 'substantive equality' in any meaningful sense, should not be limited to bargaining power but must extend to the broader, 'organic' inequality alluded to above, without which bargaining power can hardly be equal. This argument is developed below.

[79] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* n 5 above para 66.

[80] s 22 of the Constitution.

[81] See chs 2, 3, 4 and 5 of the LRA.

ability of trade unions to engage in collective bargaining or to strike. Operational requirements, even if caused by a protected strike or its consequences, may justify the dismissal of the strikers. In *SA Chemical Workers Union & others v Afrox Ltd*[82] the Labour Appeal Court explained this as follows:

'A right to strike is predicated on the very existence of an enterprise providing employment for the employees who wish to exercise that right. The employer's right to fair labour practices in the form of a right to a fair dismissal based on operational requirements . . . must come into play when the exercise of the right to strike threatens the continued operation of the employer's enterprise.'

The result, according to Maserumule, is that

'when the strike is about to achieve its purpose of coercing an employer into submitting to the workers' demands, such an outcome is avoidable by immediately initiating consultations on the basis that the continuance of the strike is negatively affecting the viability of the employer's enterprise. So even where workers exercise their right to strike, the effectiveness of the right can be completely blunted by invoking operational requirements as a reason to dismiss them.'[83]

A second example is that, in certain circumstances, an employer can effectively impose its own bargaining demands by the implicit threat to dismiss employees who do not accept those demands. This is despite the fact that the LRA was recently amended to prevent this from being done overtly.[84] Dismissal is now defined as being 'automatically unfair' if the 'reason' is 'a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer'.[85] However, this does not limit an employer's power to dismiss employees for operational reasons. Where collective bargaining has ended in deadlock, nothing prevents an employer from initiating consultation about dismissals based on operational requirements due to its stated need to implement the changes it desires, in which those changes may be on the table as an alternative to dismissal.[86]

Limitations of a different nature were reflected in a recent judgment of the Labour Appeal Court. In *ADT Security (Pty) Ltd v National Security & Unqualified Workers Union & others*[87] the issue was whether a trade union, having obtained permission in terms of the Regulation of Gatherings Act 205 of 1993 (RGA) to hold a 'gathering', was entitled to march to the employer's head office in support of its demands for

[82] (1999) 20 *ILJ* 1718 (LAC) para 29.

[83] Puke Maserumule 'A Perspective on Developments in Strike Law' (2001) 22 *ILJ* 45 at 51.

[84] By the Labour Relations Amendment Act 6 of 2014. This was in response to criticism of the decision of the Labour Appeal Court in *Fry's Metals (Pty) Ltd v NUMSA & others* (2003) 24 *ILJ* 133 (LAC) (upheld by the Supreme Court of Appeal), and a line of judgments which followed, that an employer may fairly dismiss employees who refuse to agree to operational changes which the employer deems necessary, provided such dismissal is final.

[85] s 187(1)*(c)* of the LRA.

[86] It is also settled that dismissal may be justified not only to save an enterprise but also to increase its profitability — *Fry's Metals (Pty) Ltd* n 84 above para 33.

[87] (2015) 36 *ILJ* 152 (LAC).

organisational rights. Significantly, the march was to take place while the employees were off duty. The employer, however, applied to the Labour Court for an interdict prohibiting the gathering on the ground that it was unlawful in the first place because it 'circumvented the provisions of the LRA'.[88] The Labour Court dismissed this application and allowed the march to proceed. On appeal, however, the LAC upheld the employer's case. The crux of its reasoning was that

> 'the existence of a purpose-built employment framework in the form of the LRA and associated legislation implies that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters'.[89]

The court also found that 'the legislature could not have intended for the right to a gathering or picket which is afforded to "everyone" by the RGA, to apply in employment related matters which are expressly provided for within the LRA'.[90] On that basis the court concluded that '[t]he dispute here [is] one concerning organisational rights and should accordingly be dealt with in accordance with the procedure contemplated in s 22 of the LRA'.[91] That procedure called for the dispute to be referred to conciliation or, if that failed, to arbitration.

This judgment is consistent with the recognition of labour law as a specialised framework of rights and duties. But the effect, once again, is to limit a fundamental right in the employment context in such a way as to limit a challenge to the employer's power of control. Supporters or family members, say, of the ADT employees could freely have exercised their rights in terms of the RGA. The employees themselves could not do so because of the need to strike a balance between their right to freedom of assembly and the rights and interests of the employer, as encapsulated in the LRA. Others could have demonstrated, but they could not.

Why does labour law recast the right to freedom of assembly in this more limited form? An explanation is alluded to in the judgment. Section 210 of the LRA, the court noted, provides that

> '[i]f any conflict relating to matters dealt with in this Act arises between this Act and the provisions of any other Act, save for the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail'.[92]

The purpose, clearly, is to ensure that no requirement of any other statute may detract from the right to fair labour practices as set out in the LRA. Equally clearly, there is a 'conflict' between the relatively straightforward regulation of the right to freedom of assembly in the RGA and the procedures laid down in the LRA. The employees in this

[88] ibid para 8.
[89] ibid para 18, citing *Chirwa v Transnet Ltd & others* (2008) 29 *ILJ* 73 (CC) para 41.
[90] ibid para 17.
[91] ibid para 30.
[92] ibid para 15.

matter would have been permitted to demonstrate in terms of the RGA but for the LRA; the right to strike and hence to picket is excluded in the case of disputes that may be referred to arbitration,[93] which is the route prescribed by the Act in disputes of this nature. The primacy of the LRA and the right to fair labour practices which it embodies thus served not to protect but to exclude a right which the employees would otherwise have enjoyed.

The irony arises, once again, from the fact that the right to fair labour practices is two-sided. Given the adversarial interests bound up in the relationship, what is fair to one side may be disadvantageous to the other, for such is the nature of compromise. However, it has gone unquestioned that 'fairness' to the employer must take account of the employee's subordination. While limitations have been created — for example, of the employer's right to dismiss at will — beyond a certain point the employer's power of control in pursuing its business interests and the employee's corresponding subordination are non-negotiable.

Thus, in the *ADT* case (where the march in question took take place during employees' lunch hour) counsel for the employer put forward the following argument:

'[A]lthough the employees are not obliged to render services during non-working hours, their breaks cannot absolve them from remaining loyal to the employer. In addition, employees have a duty to maintain the integrity of the employer-employee relationship, and off-duty misconduct may entitle an employer to cancel the contract. Therefore, by protesting, the employees breached their duty of good faith and loyalty, and as a result committed misconduct under common law.'[94]

The court agreed:

'The duty of good faith extends even outside normal working hours. Accordingly, it cannot be an excuse to say workers were merely picketing during their lunch hour which they had sacrificed. There can be no doubt that picketing at the employer's head office even during their lunch hour could impact on the employer's good will and reputation.'[95]

9 Conclusion

This inquiry has not been exhaustive. It has been suggested that there is scope for development of the contract of employment along the lines discussed above, not to replicate existing statutory rights (since there are none) but to refine the meaning of the employee's duty 'to be respectful and obedient' in the context of the employee's basic rights to equality and dignity balanced appropriately against the employer's

[93] s 65(1)*(c)* of the LRA. The right to picket is regulated by s 69 of the LRA. A protected picket can only be in support of a protected strike, requiring prior conciliation and notice, and includes provision for agreement on picketing rules which either party can request the CCMA to facilitate.

[94] *ADT Security* n 87 above para 21.

[95] ibid para 31.

competing rights. The implications for collective labour law remain to be considered.

Such an exercise should take account of the fact that equality is not only the subject of a constitutional right; it is also a foundational value which must inform the interpretation of all other basic rights and law in general. The employer's competing rights do not enjoy the same status. More than this, the foundational value of equality must also inform the employer's right to entrepreneurial freedom. It means that this freedom — apart from being balanced against the employee's competing rights — must itself be infused with the principle of equality. In other words, it cannot be interpreted simply as implying the subordination of the employer's employees; rather, it must at the same time assert their equality to the fullest possible extent and require justification of any derogation from that equality.

Beyond legal reasoning there are contextual factors, perhaps more tentative but no less compelling in the longer term, why such an exercise would be appropriate. Labour law has been in a state of flux since the onset of globalisation and the proliferation of non-standard employment, a process that has been deepened by the crisis of 2008 and its aftermath. Non-standard employment, however, cannot remain the focus indefinitely. This article suggests that the standard model of employment itself should be part of the focus. Part of the reason lies in the problems bound up with systemic subordination, discussed above. No less important, however, are the problems bound up with entrepreneurial freedom that have become increasingly evident in recent decades.

The disastrous impact of inadequately regulated industrial production and consequent patterns of consumption on the environment has been given much attention.[96] More closely connected to the theme of this article is the global crisis of 2008 and its aftermath. While its causes were complex, distinguished economists have pointed to the role of deregulatory policies in preparing the ground for the crisis, triggered by the 'sub-prime bubble' which burst in 2007.[97] Put simply, the argument is that untrammelled entrepreneurial freedom allows powerful players to pursue short-term private interests in defiance of economic rationality and at the expense of longer-term social interests. Hence there is a need for 'greater equality, stronger regulation, and

[96] See, for example, Thomas L Friedman *Hot, Flat and Crowded* (Allen Lane 2008) ch 5.

[97] Which, in turn, can be linked to the dominant 'free market' economic paradigm — see Julian Reiss *Philosophy of Economics: A Contemporary Introduction* (Routledge 2013) 4-6. See also Dominique Plihon 'Global Regulation in the Aftermath of the Subprime Crisis' in Patricia Crifo & Jean-Pierre Ponssard (eds) *Corporate Social Responsibility: From Compliance to Opportunity?* (Editions de l'Ecole Polytechnique 2010).

a better balance between the market and government'.[98] Labour law is part of the institutions designed to check this. As and when this discourse develops, it may favour a climate where the inequality of the employment relationship and its wider implications may also come under scrutiny.[99]

In South Africa this takes us back to the foundational nature of equality as a value permeating the Constitution as a whole.[100] It implies that the issue is not so much motivating the need for equality in the employment relationship; it is the inequality between employer and employee that is in need of 'clear and sustainable justification'.[101] Such justification can hardly be found beyond the limits of employees' actual need for direction by employers in the performance of their duties, in contrast to alternative forms of work organisation such as independent contracting and the cooperative model[102] which, at very least, suggest 'less restrictive means to achieve the purpose'[103] of the limitation on the right to equality imposed by employer control. Subordination and inequality beyond this functional limit, it is submitted, is unconstitutional.

For, as Devenish has put it, 'in an interpretative conflict the core values of, *inter alia*, equality, freedom and dignity should triumph over a particular purpose inferred from a specific provision of the Constitution, thereby rendering the interpretation compatible with the overall purpose of the Constitution . . . as a constitution of liberty'.[104]

[98] Joseph E Stiglitz 'The Ideological Crisis of Western Capitalism' (Project Syndicate 6 July 2011) http://www.project-syndicate.org/commentary/the-ideological-crisis-of-western-capitalism. For further discussion see Darcy du Toit & Elsabe Huysamen '"When Bubbles Burst": An Analogy for the Current State of the Global Economy and of Labour Law?' paper presented at the International Labour Law and Social Protection Conference on 'The Changing Face of Work: Challenges for Regulation' University of Johannesburg August 2012; Darcy du Toit (ed) *Exploited, Undervalued — and Essential: Domestic Workers and the Realisation of their Rights* (Pretoria University Law Press 2013) 9-26.

[99] The argument can also be developed in terms of Polanyi's theory that a self-regulating market 'could not exist for any length of time without annihilating the human and natural substance of society' and, hence, causes society to protect itself through 'a network of measures and policies . . . integrated into powerful institutions designed to check the action of the market relative to labor, land and money'— from Karl Polanyi *The Great Transformation: The Political and Economic Origins of Our Time* (1944, republished Beacon Press 2001), cited in Ronaldo Munck 'Globalisation, Labour and the Polanyi Problem; Or, The Issue of Counter-hegemony' http://www.theglobalsite.ac.uk/press/402munck.htm.

[100] See section 2 above.

[101] *National Coalition for Gay and Lesbian Equality and Others* n 13 above.

[102] For discussion of this model in a labour law context, see Darcy du Toit & Thierry Galani Tiemeni 'Do Cooperatives Offer a Basis for Worker Organisation in the Domestic Sector? An Exploratory Study' (2015) 36 *ILJ* 1677.

[103] s 36(1)*(e)* of the Constitution.

[104] G E Devenish *A Commentary on the South African Constitution* (Butterworths 1998) 101. The 'particular purpose' in this context would be that inferred from the employer's entrepreneurial freedom (s 23) and right to fair labour practices to the extent that this implies the subordination of the employee.

Reinterpreting the employment contract on this basis, and revisiting collective labour law to ensure consistency with the right to equality, might well amount to what Hepple terms a 'transformative equality' scheme, going beyond the realm of what the courts can do or even of ordinary legislative amendment if it is to be meaningful. Democratic participation, Hepple argues, will be required 'to ensure a "fit" or "proportionality" between the aims of [such a] scheme and the means used to achieve those aims, and to recognise that restorative justice is a process in which conflicting interests have to be reconciled'.[105] Crucially, it is suggested that 'most schemes fail because of the conflicts in a market-based economy between the right to private property and the right to equality, and also because of the inherent limits of law as an instrument of social change'. For this reason

> '[t]he response to this must be through dialogue and participation of those whose interests are affected in the process of change, and there need to be mechanisms to ensure the accountability of those who represent these interests'.[106]

Trade unions will have a major part to play in such dialogue and participation. In general, however, there has been limited interaction between the labour movement and the human rights movement in the advancement of labour rights as a category of human rights.[107] In South Africa this is reflected in the limited priority placed by trade unions on pursuing discrimination claims as opposed to wage claims. Arguably, it is also reflected in trade unions' outright hostility to statutory worker participation in the form of 'workplace forums' as a means of placing a check on managerial discretion.[108]

This leaves open the question of how precisely the necessary 'dialogue and participation' is to be pursued if the existing 'equality deficit' in labour law is to be overcome. The South African legislative system possesses institutions of social dialogue, in the form of sectoral bargaining councils where policy changes can be initiated as well as the tripartite National Economic Development and Labour Council, where all proposed changes to labour legislation must be debated, and

[105] Bob Hepple 'Transformative Equality: The Role of Democratic Participation' — paper presented at Labour Law Research Network conference, Barcelona, June 2013 28. See also Hepple & Veneziani n 77 above 157- 60; and see Wessel le Roux 'Advancing Domestic Workers' Rights in a Context of Transformative Constitutionalism' in Du Toit n 98 above 31.

[106] Hepple n 105 above.

[107] Mundlak points to the contrasting traditions of the two movements, with the human rights movement seeking to enforce basic rights by means of litigation and the labour movement attuned to negotiation in a context of give and take — Guy Mundlak n 1 above 217. This in itself indicates pragmatic acceptance of the status quo in the labour movement. See also Kolben n 1 above.

[108] See ch 5 of the LRA. Although the South African workplace forum system — loosely based on the German 'works council' model — is unique in giving trade unions de facto control over workplace forums, there is a firm view on the part of most unions that management will use any alternative structure to subvert the position of unions. It is suggested that this view says much about unions' assessment of their own organised strength at workplace level.

the parliamentary portfolio committee on labour, where institutional and public participation would be possible if and when these issues are placed on the agenda. It remains to be seen how such an agenda might be shaped and, if it is, whether the institutional framework will be adequate to its task.

Restructuring Triangular Employment: The Interpretation of Section 198A of the Labour Relations Act

Paul Benjamin*

Abstract

The Labour Relations Amendment Act of 2014, which came into effect on 1 January 2015, amended s 198 and introduced a new s 198A to prevent abusive practices associated with the placement of workers by temporary employment services (labour brokers). Employees earning below the earnings threshold set by s 6(3) of the Basic Conditions of Employment Act who are placed with clients for more than three months, other than as substitutes, are deemed by s 198A(3)*(b)* to be employees of the clients for the purposes of the LRA. This article examines the judgment in *Assign Services (Pty) Ltd v CCMA & others* in which the Labour Court set aside a ruling by a CCMA arbitrator that the effect of s 198A(3)*(b)* was to make the client the 'sole' employer for the purposes of the LRA. It argues that the comments by the court on the nature of the contractual relationship between TESs and the workers they place are inconsistent with the jurisprudence of the Labour Appeal Court and were, in any event, not necessary for the court's decision.

1 Introduction

Few recent cases in the Labour Court have been as widely publicised and attracted as much attention as *Assign Services (Pty) Ltd v CCMA & others*.[1] The case concerns the interpretation of s 198A(3)*(b)* of the LRA which 'deems' workers placed with a client by a temporary employment service (TES) for more than three months to be employees of the client.

The parties, trade union National Union of Metalworkers of South Africa (NUMSA) and a TES, Assign Services, submitted a stated case to the Commission for Conciliation, Mediation and Arbitration (CCMA) as a 'test case' in an attempt to settle the controversy that has arisen over the interpretation of the 'deeming' section. NUMSA argued that the client becomes the sole employer of these workers for the purposes of the LRA. Assign, on the other hand, argued that the TES continues to be the employer for all purposes and may, for instance, terminate the employee's services on behalf of the client.

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[1] (2015) 36 *ILJ* 2853 (LC). Leave to appeal against the judgment was refused.

An arbitrator at the CCMA upheld NUMSA's argument but this award was set aside in the Labour Court in a judgment by Brassey AJ on account of it containing material errors of law. The court queried the wisdom of a case raising such complex issues of interpretation being referred to arbitration in isolation from an actual dispute. It also refused to give a ruling in favour of Assign's construction of the 'deeming' provision.

The decision is the first judgment emanating from the Labour Court on the amendments to s 198, and on the new s 198A that came into effect on 1 January 2015. At the time of writing, it remains the only such decision. This article examines the case and, in particular, seeks to analyse the extent to which it creates precedents binding on CCMA and bargaining council arbitrators.

In the course of its judgment, the court commented on the nature of the contractual relationship between TESs and the workers they place and the implications of this for the interpretation of ss 198 and 198A. These comments have attracted considerable publicity and, in particular, have been viewed as endorsing the dual employment argument favoured by TESs.

The argument advanced in this article is that the comments on these issues are not binding rulings. Firstly, it is submitted that the court's assumption that contracts between TESs and the workers they place are common law contracts of employment is contrary to binding Labour Appeal Court (LAC) authority. Secondly, it is argued that this line of reasoning is not necessary to the decision to review the arbitrator's finding and the comments are therefore obiter dicta (statements that do not constitute binding authority).

Before analysing the *Assign Services* decision it will be useful to give a brief overview of the history of provisions regulating temporary employment services in South Africa.

2 Regulating Triangular Employment in South Africa[2]

The concept of a 'labour broker' was introduced into South African law by amendments to the Labour Relations Act 28 of 1956 made by the Labour Relations Amendment Act 3 of 1983. Definitions of a 'labour broker' and a 'labour broker's office' were inserted into the Act introducing language that remains in the statute to this day. A labour broker was defined as a person who for reward procures and provides[3] persons to work, or provides services for a client and who remunerates

[2] For a fuller account of these developments see P Benjamin 'The Law and Practice of Private Employment Agency Work in South Africa' ILO Sectoral Activities Working Paper 292 (2013) http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_231442.pdf.

[3] For reasons of simplicity, the term 'place' is used to convey the statutory phrase 'procure and provide' and the worker concerned is referred to as a 'placed worker'.

those persons. Significantly, if these three elements were present, s 1(3)*(a)* expressly 'deemed' labour brokers to be the employers of workers they provided to their clients. The rationale for the introduction of these provisions provided in the accompanying Explanatory Memorandum was that firms within the growing labour broker sector had structured their relationships with the workers that they placed with clients so that these employees were not receiving the protection of statutory wage-regulating measures.[4]

The provisions regulating labour brokers were consolidated into s 198 of the LRA 1995. Section 198(1) retains the concept of a labour broker, renamed a temporary employment service.[5] Section 198(2) repeats the contents of s 1(3)*(a)* of the 1956 Act, providing that TESs are the employers of workers they place to work with their clients. The 1995 Act also introduced a significant innovation by making the client jointly and severally liable for breaches of the Basic Conditions of Employment Act 75 of 1997 (BCEA), sectoral determinations, collective agreements and arbitration awards. An initial proposal to extend joint and several liability for unfair dismissal and unfair labour practices was included in the draft LRA Bill, but removed during negotiations at the National Economic Development and Labour Council (NEDLAC).[6]

The extent of labour broking continued to grow, particularly from 2000 onwards.[7] Since 2002, the regulation of labour broking has been one of the most significant controversies in the labour market. This controversy can be traced to a strike in October 2002 by 4 000 workers at the century-old East Rand Proprietary Mines (ERPM) gold mine east of Johannesburg. Almost the entire mine's workforce was employed by a labour broker[8] rather than by the mine owners. The

[4] M Brassey & H Cheadle 'Labour Relations Amendment Act 2 of 1983' (1983) 4 *ILJ* 34 at 37.

[5] This change was introduced into the Bill as a result of representations by the Association of Personnel Service Organisations (APSO) during the parliamentary portfolio committee hearings. Despite this change in statutory terminology, the term 'labour broker' has remained in usage. The terms are used interchangeably in this article.

[6] Two provisions that had been introduced in 1983 were not included in the 1995 LRA. These were the requirement for labour brokers to register with the Department of Labour and the provision that the place of work of such employees was deemed to be the client's premises. It would appear that these two omissions were inadvertent rather than deliberate policy decisions, during a major revision of labour legislation in South Africa conducted over a short period.

[7] It was estimated in 1995 that about 3 000 labour brokers were placing an estimated 100 000 employees annually (G Standing, J Sender & J Weeks *Restructuring the Labour Market: The South African Challenge: An ILO Country Review* (Geneva ILO1996)). In late 2010, the National Association of Bargaining Councils estimated that 780 000 employees were placed by TESs in the private sector, representing 6.5% of the total workforce. However, this was an extrapolation from bargaining council figures. Figures provided by the Confederation of Associations in the Private Employment Sector (CAPES) in 2013 estimated that the number of agency employees was in the vicinity of one million. These figures in all likelihood underestimate the full extent of agency employment as they do not take into account placements by smaller agencies that do not belong to the industry associations.

[8] A Bezuidenhout 'New Patterns of Exclusion in the South African Mining Industry', in A Habib & K Bentley (eds) *Racial Redress and Citizenship in South Africa* (Cape Town HSRC Press 2008).

striking workers demanded that the labour broker pay them money it had received from the mine, which they believed to be part of their wages. Until shortly before the strike, most of the workers apparently believed that they were employed by the mine.

A research project, commissioned by the Department of Labour in the wake of this incident, argued that strategies of externalising work (in particular outsourcing and labour broking) were the major driver of the informalisation of work in South Africa, rather than casualisation by hiring temporary and part-time workers.[9] Labour broking had been utilised by firms to reduce standard employment in order to reduce labour costs and minimise risks associated with employment. The report concluded that agency workers were paid significantly less than those employed directly by the firms where they worked and had no security of employment. The report identified the legislative provisions regulating labour brokers as a priority for policy and legislative reform. It was tabled in NEDLAC in 2004, but by 2007 no report or recommendation had emerged from NEDLAC's deliberations.

Certain South African firms expanded their operations to Namibia and the issue of labour broking became a major political controversy in that country. In 2007 its Parliament amended the country's legislation to prohibit triangular employment.[10] A 2008 report commissioned by the Department of Labour drew attention to this and suggested that labour brokers who act as employers of sub-contracted lower-paid workers should be outlawed.[11] This proposal quickly gained traction and was embraced by the then Minister of Labour, and was adopted as a campaign by the labour movement, particularly the Congress of South African Trade Unions (COSATU). The official policy of the African National Congress (ANC) remained that labour broking and other forms of non-standard work should be regulated in order to avoid the

[9] A Bezuidenhout, S Godfrey & J Theron (with M Modisha) 'Non-standard Employment and its Policy Implications', report submitted to the Department of Labour (2004) http://www.swopinstitute.org.za/files/bezuidenhout_et_al_non-standard_employment.pdf.

[10] This prohibition was subsequently declared to be unconstitutional by the Namibia Supreme Court on the basis that it infringed the right of labour hire firms to carry on a trade as enshrined in article 21 of the Namibian Constitution (see *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia & others* (2011) 32 *ILJ* 205 (NmS)). For a fuller account of developments in Namibia see P Benjamin 'To Regulate or to Ban: Controversies over Labour Broking in South Africa and Namibia' in K Malherbe & J Sloth-Neilsen (eds) *Labour Law into the Future: Essays in Honour of Darcy du Toit* (Juta 2012) 189-210.

[11] Webster E et al (2008) *Making Visible the Invisible: Confronting South Africa's Decent Work Deficit* http://www.labour.gov.za. The authors of the report made two further recommendations that have not received much traction in local debates. They proposed that the Department of Labour should explore a successful system of regulating labour standards via supply chains. They further proposed that the department should facilitate the introduction of labour market intermediaries (LMIs) who do not replace employers through a commercial contract but, instead, recruit among the unemployed, especially the youth, train them and then place them in decent jobs. This latter recommendation was echoed in the report of the National Planning Commission which proposed public subsidies for institutions which train and place individuals in employment.

abuse of workers.[12] In contrast, the Confederation of Associations in the Private Employment Sector (CAPES), the organisation representing businesses operating as TESs, argued in favour of self-regulation, adopting the view that the legislative model was adequate and that the problem lay more broadly with the enforcement of labour legislation.

A 2009 report by the CCMA, based on its experience in conciliating disputes involving labour brokers and other forms of outsourced labour, confirmed the findings of the Department of Labour's 2004 study. It concluded that where employers contract out operations (whether to labour brokers or independent contractors), there is usually inequity between contracted workers and permanent employees regarding job security, equal treatment, equitable pay and benefits. These inequities generally result in a demand from contract employees to become permanently employed.[13] Data produced by CAPES confirmed that agency employees received less remuneration than direct employees, but attributed this primarily to the fact that they were excluded from benefits such as provident funds and medical aid schemes.

In late 2010, the Department of Labour published a Bill containing amendments to the LRA. The Bill proposed repealing s 198 which regulates labour broking in its entirety by inserting a new definition of 'employer' and amending the definition of 'employee'. It also proposed making employers liable for the labour practices of all sub-contractors that they engaged. A draft Employment Services Bill that dealt with the regulation of private employment agencies would prevent these agencies placing their employees to work for others. The intention of these proposed amendments was to prevent triangular employment relationships and effectively prevent TESs from being employers, but without an explicit prohibition on the operation of temporary employment services, as this might give rise to a constitutional challenge. The publication of these Bills was accompanied by a Regulatory Impact Assessment (RIA) which had been requested by the cabinet as a result of controversies over the approach adopted.[14] The Bill was opposed by organised employers as well as trade unions[15] and was withdrawn in early 2011.

A fresh policy process to review labour legislation commenced at NEDLAC in mid-2011 and draft legislation was submitted to Parliament

[12] For instance, the ANC's 2009 election manifesto states, 'In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, [government will] introduce laws to regulate contract work, subcontracting and outsourcing, address the problem of labour broking and prohibit certain abusive practices.'

[13] CCMA Report on Difficulties with Labour Brokers (unpublished 2009).

[14] P Benjamin, H Bhorat & C van der Westhuizen *Regulatory Impact Assessment of Selected Provisions of the Labour Relations Amendment Bill 2010, Basic Conditions of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010, Employment Services Bill 2010*, Small Business Project (2010) http://www.labour.gov.za/downloads/legislation/bills/proposed-amendment-bills/FINAL_RIA_PAPER_ 13 Sept 2010. PDF15.

[15] ibid.

in early 2012. This process culminated in significant changes to the law dealing with non-standard employment that came into effect on 1 January 2015.

The Explanatory Memorandum accompanying the LRA Amendment Bill tabled in Parliament in 2012 describes the amendments to s 198 and the new s 198A in the following terms:

> 'Section 198 has been amended, and a new section and further provisions introduced into the LRA, in order to address more effectively certain problems and abusive practices associated with temporary employment services (TESs), or what are more commonly referred to as "labour brokers". The amendments further regulate the employment of persons by a TES in a way that seeks to balance important constitutional rights. The main thrust of the amendments is to restrict the employment of more vulnerable, lower-paid workers by a TES to situations of genuine and relevant "temporary work", and to introduce various further measures to protect workers employed in this way.'

These amendments retain the framework for regulating TESs introduced in 1983, and modified in 1995. The provisions dealing with joint and several liability are significantly strengthened for all placed workers and a new set of protections are introduced for lower-paid employees[16] that will restrict agencies to employing these workers to perform work of a temporary nature.

An employee placed by an agency and who works for a user enterprise for longer than three months is deemed to be the employee of the user enterprise for the purposes of the LRA. This gives the employee protection against unfair dismissal and unfair discrimination — against the user enterprise. These employees must be treated for the purposes of employment in the same manner as other employees of the user enterprise, unless the employer can justify the differentiation. In order to prevent TESs defeating this provision by terminating assignments within the three months, the law provides that the termination of an assignment to avoid the employee becoming the client's employee is a dismissal, which can be challenged as an unfair dismissal.

3 The Contractual Issue

The *Assign Services* judgment proceeds from the assumption that the contract between a TES and the employee it places with its client is 'indubitably' a contract of employment. This assumption, first articulated in paragraph 5 of the judgment and repeated several times, is fundamentally flawed and leads to substantial misinterpretations of the provisions being considered. In particular, it leads the court to misconstrue the rationale for the enactment of s 198 of the LRA, and its predecessor s 1(3) of the 1956 LRA. The court articulates its view that:

[16] ie those earning below a threshold established in terms of the Basic Conditions of Employment Act 75 of 1997.

'Section 198, the operative clause as now amended, begins by placing it beyond doubt that the TES, the employer of the placed worker at common law, is equally the employer "for the purposes of this Act".'[17]

On the contrary, the purpose of s 198 is to identify the employer of a placed worker under the LRA, because the conventional tests of employment, both common law and statutory, are inadequate in the circumstances of triangular employment. Triangular employment (ie the placement of a worker by a TES with a client) results in uncertainty as to the identity of the employer which has the consequence of leaving placed employees without the protection of labour law. Section 198(2) provides as follows:

'For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.'

Section 198(2) is a 'deeming' clause: the placed worker is an employee of the TES, irrespective of the character of its relationship with the TES, provided that he or she is not an independent contractor vis-à-vis the client.[18]

4 The Implications of *Lad Brokers (Pty) Ltd v Mandla*

The court's approach is not consistent with the most significant LAC case on point, *LAD Brokers (Pty) Ltd v Mandla*.[19] In *LAD Brokers*, the court was faced with the argument that because a TES had elected to define its relationship with an employee that it had placed to work with a client as one of independent contracting, the worker was not an employee of the TES for the purposes of the LRA. The Labour Court had held that, despite the express wording of the contract, the TES exercised sufficient control over the placed worker for the placed worker to be its employee. Van Dijkhorst JA expressly disagreed with this approach. He stated that:

'I would hold that the respondent [ie the placed worker] was not subject to such supervision and control of the appellant [ie the TES] as would create an employment relationship and thereby disregard the clear wording of the contract between them.'[20]

In other words, he finds that at common law, there is no contract of employment between the TES and worker it is placing with a client. The Labour Court's finding in *Assign Services* that this relationship is indubitably one of employment is clearly in conflict with this approach.

[17] *Assign Services* n 1 above para 9.

[18] The language of s 198(2) differs from s 1(3) of the LRA 1956 in that it does not use the word 'deem'. This is, in all probability, attributable to the 'plain language' drafting style adopted in the LRA 1995 and does not amount to a substantive change.

[19] 2002 (6) SA 43 (LAC); (2001) 22 *ILJ* 1813 (LAC).

[20] ibid para 25.

The LAC in *LAD Brokers* then goes on to examine the statutory framework. It concludes that the issue of whether or not the placed worker is an employee for the purposes of s 198 must be determined by reference to the relationship between the worker and the client. In the course of his judgment, Van Dijkhorst JA points out that uncertainty as to the identity of the employer arises where services are rendered to one person (the client) and remuneration is paid by the other party (the TES).[21] As a consequence, he continues, determining whether the service provider (placed worker) is an employee or an independent contractor in relation to the TES 'is therefore as an end in itself a futile exercise'.[22] This amounts to a finding that s 198 is not a confirmation of the common law positon. The approach of the Labour Court in *Assign Services* therefore contradicts the LAC's finding on issues of both contractual and statutory interpretation.

Irrespective of the precise implications of the *LAD Brokers* decision, it is evident from an examination of the relevant statutory provisions that a TES can operate without concluding contracts of employment with the workers it places as employees. The requirements implicit in s 198(1)[23] are significantly less onerous than the test for establishing employment, either at common law or in terms of the relevant statutory definitions. This much is also evident from Brassey AJ's very substantial contribution to labour law scholarship. In his commentary on the LRA,[24] he (or one of his co-authors) writes about s 198(1) as follows:

'The worker need not necessarily be an employee of the supplier. The same test would apply to him as applies to any other person who works for another and it might reveal him to be an independent contractor.'

The approach in *Assign Services* fails to distinguish between the statutory attribution of responsibility as employer where a relationship of triangular employment exists and the separate issue of whether the test for employment at common law has been met. The purpose of s 198(2) is not merely to confirm the common law contractual position: its effect is to render the TES as the employer, irrespective of the status of its contract with the worker.

5 The 'Two Masters' Rule

'"No man can serve two masters", says the Bible, and with this the law concurs.'

This 'principle' is cited[25] without reference to any authority and it is suggested that the doctrine does not form part of South African

[21] ibid para 27.

[22] ibid para 30.

[23] ie placing workers to work for clients for a fee and remunerating those workers.

[24] M Brassey *Employment and Labour Law: Commentary on the Labour Relations Act* vol 3 (Juta Revision Service 2, 2006) A9–2.

[25] *Assign Services* n 1 above para 17.

law. The biblical phrase of course does not refer to serving temporal masters; it warned followers of Jesus Christ against serving both 'God and mammon'.[26]

What does this mean in the context of employment? What it cannot mean is that an employee cannot work for two employers, whether in terms of one or more employment relationships. The fragmentation of the employer has resulted in numerous situations in which two distinct entities may exercise control over, or direct aspects of, an employee's work. Our courts have frequently held that there is no bar to an employment relationship in which there are two employers. [27]

A recent work of scholarship on the concept of the employer confirms that the rule that 'no man can serve two masters' does not form part of English common law. The author, Jeremias Prassl, suggests that the association of the 'two masters' rule with employment law is derived from the notion of 'exclusive service' which was the test used under master and servants law to distinguish a master and servant relationship from one of independent contracting. A servant was one who had undertaken to serve his or her master exclusively. The concept has long been replaced by tests such as that of 'control' as the basis for making the distinction between contracts of employment and independent contracting.[28]

The court uses the 'two master's' principle to propose that the source of control over an employee must always be singular so as avoid irresolvable conflicts. As indicated, there is no common law or statutory authority to support this proposition. However, it is suggested that what is required to avoid conflicts of the type adverted to is that a single employer should be identified to exercise the rights and responsibilities in respect of each aspect of the employment relationship. This is the current position: for instance, the effect of the Occupational Health and Safety Act 85 of 1983 and the Mine Health and Safety Act 29 of 1996 has been that a TES is not the employer for purposes of occupational health and safety.

6 United Kingdom Law

For the reasons adverted to in the *LAD Brokers* judgment, the issue of identifying the employer in a triangular employment relationship has been one with which courts in a number of jurisdictions have struggled.

[26] The full text as found in Matthew 6:24 King James' version of the Bible is:

'No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.'

[27] *Boumat Ltd v Vaughan* (1992) 13 *ILJ* 934 (LAC), followed in *Camdon's Realty & another v Hart* (1993) 14 *ILJ* 1008 (LAC), holds that the existence of two employers is consistent with the definition of employment in the LRA 1956. This approach has also been adopted under the LRA 1995 in *Footwear Trading v Mdlalose* (2005) 26 *ILJ* 443 (LAC).

[28] J Prassl 'Autonomous Concepts in Labour Law: The Complexities of the Employing Enterprises Revisited' in A Bogg et al (eds) *The Autonomy of Labour Law* (Hart 2015).

South Africa's enactment of legislation clarifying the identity of the employer has meant that South African courts have not had to approach this issue through the prism of contractual principles. This is not the case in the UK, where there is no equivalent legislation and a large body of case law.

UK courts and tribunals have held at different times that a placed worker is an employee of the agency, an employee of the client, an employee of both and an employee of neither. The leading decision on the issue by the Court of Appeal, *Dacas v Brook Street Bureau (UK) Ltd*,[29] concerned an agency employee who had been assigned to work for a local authority as a hostel cleaner for six years. The agency was responsible for discipline and remuneration while the local authority controlled her work on a day-to-day basis.

She was dismissed by the agency for misconduct at work and referred a claim of unfair dismissal to the employment tribunal. The tribunal held that she was not an employee of the agency because it did not exercise control over her work, and not an employee of the local authority because she had no contract with it. On appeal, the Employment Appeal Tribunal (EAT) ruled that she was an employee of the agency. The agency appealed against this ruling to the Court of Appeal and the employee cross-appealed, seeking confirmation that she was employed by the agency. The Court of Appeal overturned the EAT decision and stated that in cases such as these tribunals should examine whether there was an implied contract of employment between the employee and the client for whom he or she worked.[30] The absence of an express contract of employment, it held, was not a bar to such a finding. The Court of Appeal has continued to apply this approach in subsequent cases although it has restricted the circumstances under which a contract can be implied between the placed worker and the client by applying the ordinary contractual principles for establishing a contract by implication.

What this brief examination of English law shows is that the assumption that the relationship between a TES and its employees can be easily and inevitably characterised as one of employment is mistaken.

7 Interpreting Section 198A(3)*(b)*

Section 198A is the vehicle through which additional protections are introduced for lower-paid placed workers (those earning below the BCEA threshold). The section distinguishes between those performing temporary services who remain the employees of the TES and those

[29] [2004] EWCA Civ 217.

[30] The Court of Appeal could not rule that the local authority was an employer because this aspect of the EAT ruling had not been appealed against.

who are not and who are deemed to be employees of the client. This is evident from the structure of sub-section (3):

'For the purposes of this Act, an employee —

(a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or

(b) not performing such temporary service for the client is —

(i) deemed to be the employee of that client and the client is deemed to be the employer; and

(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.'

Sub-paragraph *(a)* confirms that the TES is the employer; sub-paragraph *(b)* specifies the new approach introduced for lower-paid workers who are not performing temporary work. The effect is that s 198A(3)*(b)* replaces s 198(2) as the operative clause determining the identity of the employer of those workers for the purposes of the LRA. Sections 198(2) and 198A(3)*(b)* are both 'deeming' provisions: once the relevant statutory requirements are satisfied they determine the identity of the employer for the purposes of the LRA without the need to use common law tests. The two sections cannot operate at the same time.

The court's assumption that the contractual relationship between the TES and placed workers is one of employment leads it to conclude incorrectly that s 198(2) confirms the common law position, while s 198A(3)*(b)* is a 'deeming' clause.

Once s 198A(3)*(b)* comes into effect, placed workers become employees of the client for all purposes under the LRA. If the terms of the employee's placement are indefinite, the client will be obliged to retain the worker in its employment until such time as a fair dismissal takes place. Besides unfair dismissal and unfair labour practice protection against the client for whom they are working, workers will be covered by its collective agreements applicable to their category of work.

Section 198A(5) provides that the worker must be treated no less favourably than the client's other employees performing the same or similar work. For most vulnerable workers falling under s 198A(3) *(b)*, this will mean a significant improvement in terms and conditions of employment. This provision seeks to remove the major incentive to use workers placed by TESs on a long-term basis. It will be more expensive for the client to pay workers the same as other employees and, in addition, pay the TES its fee. However, it may elect to do so.

The client may choose, subject to any contractual obligations, to terminate its relationship with the TES in respect of the employee and pay the employee directly. If it does so, the agency that placed the worker will cease to be a TES in respect of that worker because it no longer meets the requirement in s 198(1) of remunerating the worker.

The client's choice in this regard has no impact on the rights of these employees under the LRA. If the relationship between the client and the TES is terminated in respect of that employee, he or she continues

to be an employee of the client. The worker's continued employment with the client in no way depends on the TES's relationship with either the client or the worker continuing. However, if the TES is involved because it is continuing to remunerate the employee, it will be jointly and severally liable for any default by its client. Likewise, the client will be jointly and severally liable for any default by the TES of its (the TES's) responsibilities.

What are the implications of the employee's contractual arrangement with the TES continuing? In practice, this is likely to have a very limited impact because TESs by their nature do not exercise control over the day-to-day work of the workers they place. The continuation of what in essence are residual obligations between the TES and the employee in no way compromises the right of the employees to enforce all rights granted to the employee by the LRA. These will be rights that flow purely from a contract of employment between the TES and the placed worker. The existence of this contract will have to be established without recourse to s 198(2), once the worker has been 'deemed' to be an employee of the client. Nevertheless, there may be circumstances in which these contractual obligations may be enforced through the LRA.

The court raises the possibility that the TES may wish to place an employee in a more lucrative position elsewhere. This creates no practical or legal problems. If the employee wishes to take up that position, he or she (like any other employee) may resign from employment with the client. This would be a favourable outcome for the employee, which the law has no interest in seeking to prevent.

The rights flowing from contract may become of particular significance if employment with the client ends. Take the case of an employee placed by a TES on a six-month fixed term contract. At the end of that period, the employee would be entitled to return to the TES and request another assignment. Depending on the extent of the obligations on the TES to search for an alternative placement, this may or may not be of real benefit to the employee.

In paragraph 18, the court wonders whether the relationship between the client and the employee will terminate by operation of the principle of supervening impossibility of performance if the TES terminates its relationship with the employee and the client has not concluded a contract of employment with that employee. As the court states, this is not an issue it was required to engage with to resolve the matter before it.

This line of inquiry ignores the fact that the client is required to continue to employ the worker in terms of s 198A(3)*(b)* and offer the employee terms and conditions of employment on the whole not less favourable to the employee than those applicable to its other employees performing the same or similar work. The continuing obligation to employ derives from statute and not from contract. As the preceding

discussion indicates, a contract of employment with the TES is not required to bring either s 198(2) or s 198A(3)*(b)* into operation.

Our courts have repeatedly held that the absence of an express contract of employment is not a bar to the existence of an employment relationship. If the client/employer is unwise enough not to provide the employee either with written particulars of employment or a written contract, disputes may arise as to those terms which may give rise to litigation. However, there is no reason why the termination by the TES of its contract with the placed worker should have any impact on the ongoing employment of the worker by the client/employer. As these are lower paid workers their terms will in many instances be derived from collective agreements or standardised conditions of service and the potential for dispute is not as significant as the court seems to imply.

At the heart of the *Assign Services* judgment is the proposition that the fact that the contractual arrangement between the TES and a worker persists must imply that there is no alteration to the TES's statutory rights and obligations. It is suggested that there is an alternative explanation that accords with the reality of the statute. This is that it was not necessary to restrict these contractual arrangements in order to achieve the purposes of the legislation as set out in the Explanatory Memorandum. These are, in essence, to prevent the use of triangular relationships as a device to employ lower-paid workers on an ongoing basis without security of employment and at lower rates than other employees. Had a continuing contractual arrangement been expressly prohibited, it would have raised the possibility of an attack on the provision on the basis that it inter alia restricted the constitutional rights of TESs, in particular, their right to practice their trade. It is suggested that s 198A and the other amendments give effect to the right to fair labour practices without raising the prospect of such an attack.

8 Joint and Several Liability

As indicated previously, the 1995 LRA retained the formulation that a TES is the employer of persons it places with clients as employees, if it assumes responsibility for remunerating the employees. However, in a significant change to the law, the client was made jointly and severally liable for breaches of the BCEA, sectoral determinations, collective agreements and arbitration awards. This provision has generally been viewed as a response to the emergence of 'fly-by-night' labour brokers who were avoiding their obligations as employers. An initial proposal to extend joint and several liability to unfair dismissal protection was not included in the final version of the Act.

Joint and several liability has been described as allowing a creditor to 'select his target' from among the joint and several debtors.[31] It is

[31] *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1982 (3) SA 618 (D) 622.

then up to the target who has been sued to recoup from the co-debtors amounts that he or she has been required to pay the creditor in excess of his or her share of the debt.[32] How this is effected is no concern of the creditor.

It was envisaged that joint and several liability would give employers a significant incentive to ensure that any TES whose services they used would comply with its obligations under the law. However, its efficacy has foundered because jurisdictional issues under the LRA have precluded employees from bringing proceedings against both the TES and the client in the same forum. This is because the employee may only bring proceedings in the CCMA, a bargaining council or the Labour Court against an employer and s 198(2) has been viewed as precluding the client from being cited as an employer, provided that the TES is the employer. This was seen as effectively precluding an employee from instituting proceedings against the client in the same forum.

Section 198(4) which establishes the principle of joint and several liability has been retained and is now supplemented by s 198(4A) which seeks to remedy the shortcomings identified, in the following terms:

'(4A) If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A (3)*(b)* —

(a) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;

(b) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service or the client, as if it were the employer, or both; and

(c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either.'

Subsection *(a)*, in particular, has been relied upon to argue for the 'dual employer' model favoured by TESs.[33] The argument runs that if the joint and several liability persists beyond an employee being deemed an employee of the client in terms s 198A(3)*(b)*, then the TES must be a co-employer. It is suggested that this is not the case. The most logical interpretation of s 198(4A)*(a)* is that the joint and several liability of the TES only persists if the client elects to retain its relationship with the TES. This will be the case as long as it is the TES, rather than the client, who remunerates the employee. This continuing joint and several liability of the TES is consistent with the purpose of making the long-term use of triangular employment for the employment of low-paid workers an unattractive proposition. However, the TES's joint and several liability does not elevate it to being an employer, just as the

[32] R H Christie *The Law of Contract in South Africa* 5 ed (2006) 255-7.

[33] See, for instance, para 4.5 of the arbitration award.

client's joint and several liability, where it is not the employer, does not elevate it to being an employer.

If the client remunerates the employee directly, the agency that had acted as the TES no longer satisfies the requirements of s 198(1) and its joint and several liability ceases. If a TES wishes to avoid joint and several liability for employees who have been deemed to be employees of the client, it can do so by inserting a provision in its contracts with its clients that the clients will assume responsibility for the payment of remuneration after the worker concerned is deemed to be its employee.

The court attaches significance to the inclusion of the words 'as if it were the employer' in sub-paragraph *(b)* as supporting its contention that the TES remains a statutory employer. However, these comments do not take account of the fact that s 198(4A) applies, in addition, to situations in which the client is not the employer because the employee is above the earnings threshold or is performing temporary services. The amendments do not prevent the TES from assuming responsibility for employer obligations under the BCEA; however, the client will be jointly and severally liable and the employee can recover underpayments from either, as explained above. As claims that may arise out of the BCEA are primarily financial, it is sufficient protection for the employee that both the TES and the client are jointly and severally liable.

9 Context

In the course of the judgment, the court points out that at first glance, the parties appear to be arguing against their interest. It also further states that neither party could provide it with a justification for the TES argument. While the court cannot be criticised for not taking notice of the broader context of the debate over the regulation of labour brokers, the rationale for the parties' perspectives is not difficult to ascertain.

The union case is guided by its goal of marginalising the influence of labour brokers. Having failed to persuade the government to prohibit triangular employment, the unions are seeking the most restrictive construction of the new provision. Assign Services is arguing the case that best suits the business interests of TESs and least impacts on their ability to conduct their business as usual. As is well known, the government was not able to obtain agreement on its proposals for regulating labour brokers. It was too little for labour and too much for the TESs. In this sense, therefore, the policy battle has continued in the legal realm.

TESs, through their industry association, CAPES, have consistently pushed to retain as much of their lucrative market as possible. CAPES resists regulation and has challenged the right of trade union and employer parties to bargaining councils to conclude collective

agreements regulating TESs in their sector. The most significant of these challenges — against the Motor Industry Bargaining Council — included the argument that a collective agreement regulating the percentage of employees that TESs may provide was not a matter of 'mutual interest' to employers and trade unions in the sector and violated ss 18 (freedom of association), 22 (freedom of trade, occupation and profession) and 23 (labour relations) of the Constitution.[34] These arguments were rejected in the Gauteng High Court.

At the heart of the current controversies is whether work through TESs amounts to job creation or job displacement. CAPES argues that labour brokers have created more than one million jobs and are the largest source of job creation since the end of apartheid. This oft-repeated claim is misleading as it assumes that TESs are a sector of the economy in the same way as, for example, mining or manufacturing. That is not the case. The business of a TES is to place employees to work in another business. The fact that placed workers remain employees of the TES is a legal construct and a statistical anomaly.

10 Implications

What are the implications of the court's ruling for arbitrators? It has held that the effect of s 198A(3)*(b)* is not that the client becomes the *sole* employer of a placed worker for the purposes of the LRA. However, it is unlikely that the ruling will have any practical effect in cases in which employees seek to enforce any rights acquired under s 198A against the client for whom they are working. Any relief to which they are entitled is not dependent on the client being the sole employer.

Equally, the court rejected the argument advanced by Assign to the extent that it sought to claim that the TES retains the right to exercise employer functions on behalf of the employer. This ruling is likely to have significantly more practical effect. For instance, if the client relies on decisions made by the TES to justify a dismissal, the *Assign Services* judgment requires that these be disregarded.

Arbitrators are not required to hold that all contracts between TESs and placed workers are contracts of employment. To the extent that this may be an issue in any case, they would have to examine the relevant contract in the light of the applicable tests. In practice, it is unlikely that this issue will arise in arbitration proceedings. Nor are arbitrators required to accept that the rule that 'no man may serve two masters' forms part of our law. On both these issues, the judgment in *Assign Services* is contrary to binding LAC authority.

[34] *CAPES & Others v Motor Industry Bargaining Council* (Case No 46476/2011 per Fourie J dated 27 November 2013). An appeal against this matter to the SCA was dismissed on the basis that the issue had been rendered moot.

When faced with a matter involving triangular employment, the correct starting point for an arbitrator will be to determine which of ss 198(2) or 198A(3)*(b)* is applicable to the worker concerned. This may involve the determination of factual issues, in particular, the earnings of the worker and the period for which they have worked. Once this has been done, the identity of the employer will have been established.

*Should s 197 of the LRA be Amended to Automatically Protect Employees when Labour Intensive Services are Outsourced or when a New Service Provider is Appointed?***

Ian Davis*

Abstract

It is common practice for private or public employers to enter into arrangements with service providers in terms of which the employer outsources, to the service provider, certain labour intensive services, such as catering, cleaning, gardening or security. These services may previously have been performed by employees of the outsourcing organisation, or they may have been contracted out to another service provider and the outsourcing organisation is now seeking to change providers or to bring the services back in-house. Although the intention of s 197 of the LRA is to provide protection to employees when a business is transferred as a going concern, the extent to which the definitional elements of s 197 apply when labour intensive services are outsourced, particularly for a second time, or are insourced, is uncertain. Accordingly, labour intensive service workers may be exposed to uncertainty and potential abuse. This article proposes, in light of developments in the UK, including the provisions in the Transfer of Undertakings (Protection of Employment Regulations) of 2006, amending s 197 to apply automatically in circumstances in which labour intensive services are outsourced.

1 Introduction

In modern commercial practice, it is common for private or public employers to outsource certain non-essential services to a service provider. This practice exposes an employee to the risk of retrenchment or being placed in a new employment relationship that is legally insecure.[1] Section 197 of the Labour Relations Act (LRA) [2] attempts to regulate the labour law consequences of such transactions, by providing that the contracts of employment of the old employer transfer automatically to the new employer. The Constitutional Court[3] and the

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[1] C Todd, D du Toit & C Bosch *Business Transfers and Employment Rights in South Africa* (2004) 25.

[2] Act 66 of 1995.

[3] *National Education & Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) (*NEHAWU*); *Aviation Union of SA & another v SA Airways & others* (2011) 32 *ILJ* 2861 (CC); *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd & others* (2015) 36 *ILJ* 1423 (CC).

Labour Appeal Court[4] (LAC) have recently clarified s 197's application to outsourcing agreements. However, despite these clarifications, the extent to which s 197 will operate in these circumstances, or where the outsourcing party later changes its service provider ('second generation' outsourcing), or insources the activity, remains contested, especially in the context of labour intensive activities.[5]

This article considers the judicial approach to s 197 of the LRA and argues that the prevailing interpretation of s 197 leaves space for vulnerable workers involved in labour intensive activities to be left unprotected by the provision. Consequently, it suggests that more comprehensive protection may be afforded to these workers if s 197 were to apply automatically where an outsourcing party engages in a change in service provider. Such a policy shift will provide increased legal certainty to all parties involved in such transfers and give better effect to the right to fair labour practices.

First, the concept of outsourcing will be contextualised and defined. This will be followed by an analysis of South Africa's judicial approach to s 197 of the LRA in respect of outsourcing and subsequent changes in service providers. The focus will be on the negative consequences relating to labour intensive service workers. In light of legislative reforms in the United Kingdom, the article will consider the possibility of applying s 197 protection automatically where there is a subsequent change in service provider in order to protect this vulnerable category of service worker. In the final analysis, the article will motivate why such a shift in policy is a more effective means of protecting labour intensive service workers in the outsourcing context.

2 What is Outsourcing?

2.1 *Outsourcing*

The practice of outsourcing is a common and global phenomenon that flows from the industrial restructuring of businesses.[6] Each legal system has regulated the process differently.[7] 'Outsourcing' is not a term of art.[8] It is, however, a concept that purports to describe a process by

[4] *TMS Group Industrial Services (Pty) t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd & others* (2015) 36 *ILJ* 197 (LAC).

[5] F Coetzee, A Patel & R Beerman 'Section 197 of the Labour Relations Act — Some Comments on Practical Considerations When Drafting Agreements' (2013) 34 *ILJ* 1658.

[6] S Mills 'The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?' (2004) 25 *ILJ* 1203.

[7] For example, Zambia's Industrial and Labour Relations Act 27 of 1993 does not provide any protection to employees during a business transfer. This may be contrasted with Australia's Workplace Relations Act of 1996 that provides for the transfer of employees in certain circumstances. See further: D du Toit 'The Transfer of Enterprises and the Protection of Employment Benefits in South and Southern Africa' (2004) *Law, Democracy and Development* 85.

[8] M Wallis 'It's Not Bye-bye to "By": Some Reflections on Section 197 of the LRA' (2013) 34 *ILJ* 779 at 795; Todd et al n 1 above.

which a business transfers its non-essential services to a third party, who in turn conducts those activities for that business.[9] The third party is usually a service provider that specialises in the provision of specific services for the outsourcing institution. Many outsourced services often involve labour intensive activities that require little use of the business's assets, tangible or otherwise, for their performance. These include catering, cleaning, gardening and security services.[10] The provision of these services, which frequently forms the subject of an outsourcing transaction, often involves low skilled workers, a particularly vulnerable category of worker.[11]

The process of outsourcing has inevitable employment law consequences. The transfer of a service to a service provider places the employees who originally worked for the outsourcing institution in an uncertain legal position. Either they face a dismissal based on operational requirements,[12] or they may be transferred to the new service provider. If a transfer occurs, the employees are placed in a triangular relationship of employment where no contractual nexus exists between the employees and the outsourcing party.[13] Instead, the service provider is their new legal employer and is contractually obliged to provide the service to the outsourcing institution.[14] Yet the employees involved in fact continue to perform their services for the outsourcing institution's benefit.[15] The most distinctive change in an outsourcing transaction, therefore, is the identity of the employer.[16]

The process of outsourcing removes employees from the responsibility of the outsourcing party.[17] Hence, the transferred employees may only assert their rights against the service provider, as their new employer.[18] Furthermore, the change in identity of employer may have negative psychological consequences for the outsourced employees.[19] This may result in low worker productivity and resentment towards the old

[9] M Belcourt 'Outsourcing — The Benefits and the Risks' (2002) 16 *Human Resource Management Review* 270.

[10] Wallis n 8 above 795; C Wynn-Evans 'In Defence of Service Provision Changes?' (2013) 42 *Industrial Law Journal* (UK) 152 at 154; C Bosch 'Transfers of Contracts of Employment in the Outsourcing Context' (2001) 22 *ILJ* 840 at 851.

[11] Wallis n 8 above 794.

[12] ibid 780-1.

[13] G Davidov 'Joint Employer Status in Triangular Employment Relationships' (2007) 42 *British Journal of Industrial Relations* 727 at 729.

[14] ibid.

[15] Davidov n 13 above 730.

[16] J Theron, S Godfrey & M Visser 'Keywords for a 21st Century Workplace' (2011) *Development and Labour Monograph Series* 27-8.

[17] Theron et al n 16 above 28.

[18] ibid.

[19] F-L Cooke, J Earnshaw, M Marchington & Jill Rubery (2007) 'For Better or for Worse: Transfer of Undertakings and the Reshaping of Employment Relations' (2007) 15 *International Journal of Human Resource Management* 276 at 277.

and new employers.[20] The externalisation of the worker is further exacerbated during 'second generation' outsourcing transactions.

2.2 *'Second generation' outsourcing*

Since the relationship between the outsourcing party and the service provider is based on a contract, it is in the normal course of events that a termination date is agreed to. Consequently, the outsourcing party may either: (i) renew the contract with the initial service provider; (ii) find a new service provider to provide the service; or (iii) insource the service, by incorporating the service back into the business. Since the decision to be made lies solely with the outsourcing party, the employees that were employed by the initial service provider are placed in a precarious and uncertain position.[21]

The Labour Appeal Court (LAC) has identified this situation as the 'problem of outsourcing' in the following terms:

> '[That is] . . . the case where an activity is not carried out by A on its own behalf but is carried out instead by B on behalf of A. The activity which is carried out then ceases to be carried out by B on behalf of A and is then carried out by C, the new contractor on behalf of A.'[22]

In these situations an employee's employment security is particularly vulnerable. In the first instance, the outsourcing party who contracts with the new service provider is not the legal employer of the current employees of the first service provider.[23] Hence, it calls into question whether the employees who were outsourced originally should be transferred to the new service provider or face retrenchment.[24] From a commercial perspective, the decision taken by the outsourcing party will invariably be based on commercial efficacy instead of on protective labour considerations.[25] It follows that the law should attempt to reconcile the commercial and employment law interests at stake throughout such a transaction.

3 The Legal Position

3.1 *Vulnerability under the common law*

Under the common law, when a business is transferred to a new owner, the contracts of employment between the employees and the business are terminated.[26] Hence, there is no provision for the continuity of

[20] ibid.
[21] Bosch n 10 above 842.
[22] *TMS* n 4 above para 24.
[23] Davidov n 13 above.
[24] Todd et al n 1 above 27.
[25] Belcourt n 9 above 271.
[26] *Aviation Union* n 3 above para 39.

employment of employees during a business transfer.[27] In order to retain the former employees, the new business owner would have to enter into new employment contracts. Yet, he or she is under no obligation to do so.[28] Hence, the common law gives effect to the freedom of contract, allowing businesses to restructure themselves without regard to the continuity of the affected employees' employment. [29] Legislative reform in this area of the law was therefore necessary in order to protect an employee's security of employment. The legislature responded by enacting s 197 of the LRA.

3.2 *Section 197 protection*

Section 197 of the LRA alters the common law position and attempts to give effect to the right to fair labour practices in the context of business transfers and restructuring exercises.[30] Accordingly, when s 197 is found to apply to a business transfer transaction, certain protective consequences will apply. [31]

Firstly, the new employer is automatically substituted for the old employer, with respect to all of the employees' contracts of employment.[32] Hence, the employees transfer with the business, and identify with a new employer. Secondly, all the rights that the employees had prior to the transfer remain in force and are enforceable against the new employer post transfer.[33] Thirdly, the continuity of the employees' employment cannot be interrupted.[34] Finally, the new employer must employ the employees on terms that are 'on the whole not less favourable'[35] to those which pertained previously.[36]

By protecting the existence of the employment contract before and after the business transfer, the affected employees' employment is secured. The only distinct change that is made to the contract is the identity of the employer. At the minimum, therefore, the section ensures that employees' wages, working hours and job descriptions will remain essentially unchanged.[37] Yet, the section does not preclude the alteration of the contract by mutual agreement post transfer. Moreover, the unequal bargaining power of the service provider and the employees make such alterations likely.

[27] Todd et al n 1 above 6.
[28] ibid.
[29] J McMullen *Business Transfers and Employee Rights* 2 ed (1992) 3.
[30] *NEHAWU* n 3 above para 46.
[31] s 179(1) of the LRA.
[32] s 197(2)*(a)* of the LRA.
[33] s 197(2)*(b)* of the LRA.
[34] s 197(2)*(d)* of the LRA.
[35] s 197(3)*(a)* of the LRA.
[36] Section 197(3)*(a)* of the LRA would apply where a new service provider attempts to alter the employment contracts of the employees concerned during a transfer.
[37] Todd et al n 1 above 16.

Furthermore, the section does not account for the inevitable change of the employment relationship that ensues post transfer.[38] Such a change is disruptive as an employment contract is considered to be 'relational' between the employer and employee.[39] Where an employee is outsourced, the change in identity of the employer affects this relationship.[40] As such, s 197's protective consequences offer much needed protection to an employee in both original and 'second generation' outsourcing transactions.

3.3 *The applicability of s 197 to outsourcing and 'second generation' outsourcing transactions*

In order for s 197 to apply to an outsourcing exercise, the transaction in question must constitute a 'transfer of a business as a going concern'.[41] These definitional elements of s 197 have generally been accepted as being met where there is an 'out and out' sale of a business. [42] Notably, the Constitutional Court in *NEHAWU*[43] accepted in principle that s 197 can be applied to the outsourcing of services to a third party service provider.[44] Section 197's application to 'second generation' outsourcing transactions, however, has given rise to debate, [45] although, as the Constitutional Court clarified the position in *Aviation Union*,[46] s 197 may apply to 'second generation' outsourcing transactions. [47]

Yet, despite the decision in *Aviation Union,* s 197 protection does not apply automatically to the outsourcing of a service or to a subsequent change in service provider.[48] Rather, the transaction in question needs to meet the definitional elements of s 197 as a 'transfer of a business as a going concern'. [49] Accordingly, it remains possible that certain outsourcing transactions may not satisfy the current test for s 197's application. In particular, outsourcing transactions involving labour intensive activities may fail to meet the current definitional elements

[38] Cooke et al n 19 above 279.

[39] ibid.

[40] ibid 281.

[41] s 197(1) of the LRA; *City Power* n 3 above para 35.

[42] Coetzee et al n 5 above; A van Niekerk & N Smit (eds) *Law@Work* 3 ed (2015) 349; Wallis n 8 above 779.

[43] *NEHAWU* n 3 above.

[44] ibid n 3 above para 71.

[45] Van Niekerk & Smit (eds) n 42 above 349; Wallis n 8 above 779-80; *Aviation Union* n 3 above paras 88-99, 102-3.

[46] *Aviation Union* n 3 above.

[47] ibid para 103.

[48] ibid para 111.

[49] s 197(1) of the LRA; *City Power* n 3 above para 35.

of s 197.[50] As a result, significant numbers of vulnerable workers in triangular employment relationships may be left with no protection once a new service provider is appointed. It is therefore instructive to consider the current judicial interpretations of s 197's applicability to these circumstances to identify gaps in the section that may leave vulnerable workers unprotected.

3.4 *The judicial approach to s 197 outsourcing and subsequent service provider changes*

In *Aviation Union*, South African Airways (SAA) had chosen to outsource certain of its management and operational facilities to LGM South Africa Facility Managers and Engineers (LGM).[51] In terms of the agreement, LGM was to perform the service to SAA for ten years and the employees of SAA were accordingly transferred to LGM by operation of s 197.[52] In order to provide the services to SAA, LGM was given access to SAA's premises, computers and network.[53] At the end of the agreement, LGM was to transfer these components back to SAA or to a new service provider appointed by SAA.[54]

At the agreed time, SAA terminated the agreement with LGM.[55] Hence, the service provided by LGM along with the assets required to perform the service were either to be transferred back to SAA or to a new service provider.[56] The question was whether s 197 was applicable to this transfer.[57]

Both the minority and the majority of the court agreed that s 197 may in principle apply to 'second generation' outsourcing transactions.[58] This is to be determined with objective reference to the facts of each case.[59] At the same time, however, both judgments drew a distinction between a transfer of a business as a going concern and that of a

[50] The LAC held in *SA Municipal Workers Union & others v Rand Airport Management Co (Pty) Ltd & others* (2005) 26 *ILJ* 67 (LAC) para 20 that the outsourcing of Rand Airport's gardening and cleaning services was 'capable' of falling within the ambit of s 197. However, Jafta J in *Aviation Union* n 3 above para 52 has since stated that 'although the definition of business in s 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'. In addition, the validity of the LAC's decision in *SAMWU* has been criticised by Van Niekerk & Smit n 42 above 343 'for confusing form and substance'. Accordingly, s 197's application to labour intensive services remains uncertain.

[51] *Aviation Union* n 3 above para 6.

[52] ibid para 7.

[53] ibid para 8.

[54] ibid.

[55] ibid para 10.

[56] ibid.

[57] ibid para 13.

[58] ibid paras 48, 52, 105, 106.

[59] ibid para 47.

simple contracting out of a service, where there is a change in service provider.[60]

Jafta J, on behalf of the minority, held that in order for a 'transfer' to occur, components of the original business must be conveyed to the new service provider.[61] The Constitutional Court endorsed the approach to a 'going concern' adopted in the *NEHAWU* case.[62] This required that regard must be had to the substance and not the form of the transaction and that various factors should be considered.[63] These include whether the assets or customers of the business transfer and whether the same business is carried on post transfer.[64]

Notably, Jafta J explicitly stated that it 'is the business that supplies the service and not the service itself'[65] that must be transferred to the new service provider. Hence, simply cancelling one service agreement with the first service provider and then entering into a subsequent service agreement with a second and distinct service provider would not necessarily constitute a transfer in terms of s 197.[66] More is required, for example the transfer of physical assets from the outgoing service provider to the new service provider.[67]

Yacoob J, on behalf of the majority, held that if the outsourcing institution did not offer the service from the outset, but rather contracted for the service from a service provider initially, a second outsourcing agreement with a new service provider would not constitute a transfer of a business as a going concern.[68] Instead, the outsourcing party is engaging in a purely contractual agreement to procure a service to which s 197 was inapplicable.[69] Hence, it would be the responsibility of the new service provider to procure its own employees and infrastructure in order to provide the service.[70] The majority and minority therefore drew similar distinctions between the simple contracting out of a service and that of a business transfer that is hit by s 197. Since substantial physical components that were required to provide the service would either be transferred to SAA or to the new service provider, the majority found s 197 to be applicable.[71]

The Labour Court in *Harsco Metals SA (Pty) Ltd & another v Arcelormittal SA Ltd & others*[72] had the opportunity to consider the

[60] ibid paras 52, 106, 107.
[61] ibid para 48.
[62] ibid para 50.
[63] *NEHAWU* n 3 above para 56.
[64] ibid.
[65] *Aviation Union* n 3 above para 52.
[66] ibid para 48.
[67] ibid.
[68] ibid para 106.
[69] ibid para 107.
[70] ibid.
[71] ibid paras 121, 122.
[72] (2012) 33 *ILJ* 901 (LC).

distinction drawn in *Aviation Union*. In this case, Harsco had provided certain slag management services to Arcelormittal. At the end of this agreement, Arcelormittal did not renew Harsco's contract. Instead, two new service providers were appointed to provide the service.[73]

The Labour Court noted that Harsco, as the outgoing service provider, was not going to 'pack its bags and move on'.[74] Instead it was to leave behind human and non-human assets.[75] Moreover, the new service providers were going to provide a substantially similar service to that previously supplied by Harsco.[76] This, and the fact that certain of Harsco's components to conduct the service were to transfer to the new service providers, made s 197 applicable.[77]

The court, following *Aviation Union,* distinguished between the simple contracting out of a service and a business transfer to which s 197 applies.[78] Hence, the court expressly remarked that if the new service providers decided not to take on Harsco's old employees and to utilise the assets of the client, then s 197 would have been inapplicable.[79]

This finding may be contrasted to *Franmann Services (Pty) Ltd v Simba (Pty) Ltd & another.*[80] In this case, Simba, a temporary employment service, had provided Franmann with 683 employees for a period of 12 years.[81] Simba subsequently terminated the contract owing to the fact that it was to discontinue its employment service operations.[82] The question was whether the 683 affected employees would transfer to the newly appointed service provider, Capital Outsourcing Group (COG), when Simba's contract terminated.[83]

Van Niekerk J held that the test to determine whether a transfer of a business as a going concern has occurred is whether the components of the entity that is transferred remain substantially the same after the transfer.[84] Since the only entity that could be transferred was the supply of labour, Simba could transfer no additional infrastructural components to COG.[85] In this way, no physical business could form the subject matter of the transfer other than the supplied workers. In addition, Simba was no longer to provide such services to anyone else.[86]

[73] ibid paras 7–8.
[74] ibid para 21.
[75] ibid.
[76] ibid para 24.
[77] ibid para 39.
[78] ibid para 38.
[79] ibid.
[80] (2013) 34 *ILJ* 897 (LC).
[81] ibid para 2.
[82] ibid para 3.
[83] ibid para 4.
[84] ibid para 12.
[85] ibid para 15.
[86] ibid paras 15–16.

Hence the Labour Court found that the transaction in question was a simple contract to provide a service to which s 197 did not apply.[87]

The LAC in *TMS Group Industrial Services (Pty) t/a Vericon & others v Unitrans Supply Chain Solutions (Pty) Ltd & others*,[88] however, recently provided an alternative interpretation of the distinction drawn in *Aviation Union*. In this case, Nampak had contracted with Unitrans to supply it with warehousing services.[89] At the termination of that agreement, Nampak changed the provider of the service to TMS who would replace Unitrans, and necessarily utilise Nampak's infrastructure to provide the service.[90] It was unclear whether s 197 was applicable to the transaction.[91]

Davis JA on behalf of the unanimous LAC expressly referred to the 'service provision change' regulations in English Law.[92] In terms of these regulations, any change in a service provider will give rise to the transfer of a business.[93] Yet, the LAC nevertheless relied on the European case of *Abler v Sodexho MM Catering GmbH* [94] in order to justify s 197's application.[95] In *Abler,* the European Court of Justice (ECJ) had held that where a provided service requires the use of the outsourcing institution's equipment and the premises of the outsourcing party, it is the transfer of that physical infrastructure to the new service provider that constitutes a transfer of an undertaking.[96] Hence, Davis JA acknowledged that where a provision of a service is intrinsically linked to the equipment and use of the outsourcing party's infrastructure, there is a sufficient business entity that is capable of being transferred.[97]

Consequently, where facilities to provide the service are handed over from the old service provider to the new service provider, the 'going concern' requirement of s 197 will be met.[98] Since the facilities and infrastructure that were utilised by the outgoing service provider were going to be used by TMS to perform substantially the same activity, the LAC found that there was sufficient evidence to justify a transfer of a business as a going concern.[99]

Recently, the Constitutional Court has had another opportunity to consider the applicability of s 197 to outsourcing transactions. In *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd & others*,

[87] ibid para 17.
[88] *TMS* n 4 above
[89] ibid para 2.
[90] ibid paras 6, 30.
[91] ibid para 8.
[92] ibid para 22.
[93] ibid.
[94] [2004] IRLR 168 (ECJ).
[95] *TMS* n 4 above paras 25-7, 30.
[96] *Abler* n 94 above paras 35-6.
[97] *TMS* n 4 above paras 27, 36.
[98] ibid para 31; *CIR v Smith's City Group Ltd* 1992 (14) NZTC paras 9, 143.
[99] *TMS* n 4 above.

City Power had contracted with Grinpal for the supply of prepaid metering systems to Alexandra Township.[100] Upon cancellation of the contract, it was agreed that Grinpal would hand over to City Power all the necessary 'infrastructure, software and databases relating to the project'.[101] It was uncertain whether the employees of Grinpal who were involved in the project would also transfer to City Power.[102] In order to justify the application of s 197 to the transaction, the unanimous Constitutional Court made explicit reference to the assets and infrastructure of the business that was going to be passed on to the next service provider (City Power).[103]

4 Analysis

4.1 *The limited scope of s 197*

The decision in *City Power* confirms the requirement that physical and/or other material components of the business, which exist apart from the workers who provide the service, must transfer to the new service provider in order for s 197 to apply. This reiterates the position in both judgments in *Aviation Union* that considered the transfer of physical components of the business to be material to the transaction.[104] It also flows from the definition of 'going concern' in *NEHAWU,* which requires the court to consider the substance and not the form of the transaction.[105]

The LAC in *TMS* attempts to harmonise the distinction in *Aviation Union* between the simple contracting out of a service and a transfer of a business as a going concern. Without explicit reference to these distinctions, Davis JA endorsed a policy of providing workers involved in outsourcing activities with broad statutory protection during a business transfer.[106] In order to determine whether protection is granted, the court must make a sensible engagement with the facts in each case.[107] This clearly opens the possibility for the outsourcing or the 'second generation' outsourcing of labour intensive activities to be hit by s 197 of the Act.

Despite this finding, however, the LAC relied on the fact that the new service provider would utilise the assets of the outgoing service provider, in order to make the change in service provider subject to s 197.[108] In effect, it applied a similar test to *Aviation Union*, which

[100] *City Power* n 3 above para 5.
[101] ibid para 6.
[102] ibid para 7.
[103] ibid para 39.
[104] *Aviation Union* n 3 above para 48.
[105] *NEHAWU* n 3 above para 36.
[106] *TMS* n 4 above paras 34-5.
[107] ibid para 35.
[108] ibid paras 27, 30.

focused on the transfer of physical assets involved in the transaction to make s 197 applicable.[109] It follows that it is not clear whether the ratio in *TMS* could have assisted the 683 vulnerable employees involved in *Franmann,* since the transfer involved no tangible, or other, assets of the company.[110]

The result is that an employee's security of employment is made dependent on the material assets that may or may not form the subject matter of the transaction. The employee's material contribution or role in providing a service alone cannot constitute grounds for a transfer of a business as a going concern under s 197 of the LRA.[111] Faced with a similar position arising out of the provisions in European Law, the United Kingdom responded through legislative reform.

4.2 *Considering European law: Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice*

In European Law, the Acquired Rights Directive 2001/23/EC regulates the employment law consequences of business transfers.[112] South African courts frequently refer to the directive for guidance, as the requirements for the directive's applicability to a business transfer are analogous to s 197 of the LRA.[113]

In *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice*,[114] the European Court of Justice (ECJ) held that the mere termination of an outsourced service contract and the subsequent contracting out with a new service provider to deliver the same service could not trigger the applicability of the directive.[115] The ECJ required tangible and non-tangible assets to form the subject matter of the transaction.[116] Thereafter in *Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen*,[117] the ECJ explicitly noted that absent a transfer of 'significant tangible assets'[118] to the new contractor, the directive could not apply. Hence labour intensive activities have been generally excluded from the application of the directive.[119] Notably, such an approach allowed for outsourcing institutions to structure their transactions in certain ways

[109] *Aviation Union* n 3 above paras 120-2.

[110] *Franmann Services* n 80 above paras 15-16.

[111] *Harsco Metals* n 72 above para 16.

[112] Acquired Rights Directive 2001/23/EC.

[113] *TMS* n 4 above 21. This approach can be contrasted with Wallis's view n 8 above 797, where he argues that 'foreign jurisprudence is not a safe guide' for the interpretation of s 197 of the LRA.

[114] [1997] IRLR 255 (ECJ).

[115] ibid para 15.

[116] ibid.

[117] [2001] IRLR 171 (ECJ).

[118] ibid para 43; J McMullen 'An Analysis of the Transfer of Undertaking (Protection of Employment) Regulations 2006' (2006) 35 *Industrial Law Journal* (UK) 113 at 120.

[119] McMullen n 118 above 115, 121.

in order to subvert the application of the directive.[120] Parties to an outsourcing transaction could arrange that no assets formed part of the subject matter of the transaction and could validly decline to accept the affected employees into their employment.[121]

The South African judicial approach to s 197 of the LRA has led to a similar distinction to that drawn by the ECJ in *Süzen*. The courts' temptation to focus on the tangible assets that make up the subject matter of the transaction has led to uncertainties regarding the status of labour intensive employees in outsourcing and 'second-generation' outsourcing transactions. Moreover, making s 197's application dependent on the particular facts surrounding each transaction provides little certainty for businesses that validly attempt to engage in an outsourcing exercise.[122] It is no surprise, therefore, that many cases concerning s 197 arrive at court through an urgent application.[123]

This position has negative consequences for the outsourcing party, the transferee and the employees concerned. For the employees involved in labour intensive activities, their security of employment may depend solely on the features of the transaction in which they enjoy no contractual privity. For the outsourcing party and the transferee, the uncertainty surrounding s 197's applicability may inhibit the efficacy of the outsourcing transaction, and result in unnecessary legal expenditure. Therefore, it is useful to consider an alternative policy approach, which may ameliorate these deficiencies.

5 Revisiting the Scope of Section 197

5.1 *'Service provision changes'*

In response to the approach in *Süzen,* the Labour Party in the United Kingdom introduced the concept of 'service provision changes' in its 2006 amendments to the Transfer of Undertakings (Protection of Employment) Regulations.[124] As amended, the regulations explicitly include 'service provision changes' in the definition of a transfer of an undertaking.[125] Accordingly, where there is any change in the identity of one service provider with another, the affected employees will transfer automatically to the new service provider's employment.[126]

[120] S Deakin & G Morris *Labour Law* 6 ed (2012) at 239; Wynn-Evans n 10 above 158-60, 175.

[121] Deakin & Morris n 120 above 239.

[122] N Coetzer & R Harper 'Interpreting Section 197 after *Aviation Union of SA v SA Airways* — An Analysis of Recent Case Law Relating to Transfers of Undertakings (2013) 34 *ILJ* 2506 at 2513.

[123] ibid 2506, 2509.

[124] Transfer of Undertakings (Protection of Employment) Regulations SI 2006/246 (TUPE). Notably, 'service provision changes' have been retained in the 2014 amendment to the TUPE regulations.

[125] reg 3(1)*(b)* of TUPE.

[126] McMullen n 118 above 120.

The 'service provision change' regulations only apply if the transaction meets two requirements. Firstly, there must be an organised group of employees which has as its principal purpose the carrying out of activities on behalf of a client.[127] Secondly, the contract must be ongoing and not of a short-term nature.[128] Therefore, where an outsourcing party of a labour intensive service decides to change its service provider, the employees' employment contracts will automatically transfer to the new service provider, retaining their employment security throughout the change in service provision.[129] Moreover, the provisions also apply in situations where the outsourcing party contracts out a service for the first time or where it is later insourced.[130]

The purpose of introducing the 'service provision changes' in the United Kingdom was expressly to include labour intensive workers within the scope of TUPE's protection and to ensure TUPE's application to outsourcing and 'second generation' outsourcing transactions.[131] Wynn-Evans[132] and McMullen[133] have both argued that at a minimum, the regulations have the potential to ameliorate the harsh consequences faced by labour intensive service workers that flow from the *Ayse Süzen* position. This in turn can create increased legal certainty with regard to the majority of business transfer transactions.[134]

In light of the current judicial approach to s 197 of the LRA, the 'service provision change' regulations of the United Kingdom may arguably provide a viable and fair alternative approach to business transfers in the South African context.

5.2 *Section 197 — a possible shift in focus?*

Where employees have not been transferred to a new employer, the definitional requirements in s 197 of the LRA have generated some uncertainty and require the courts to reflect on the extent to which there are other components of the business that are being transferred, in order to justify s 197's applicability to the transaction.[135] Such a construction of the section provides a tenuous basis for an employee's continuity of employment. In effect, the cases may result in the exclusion from s 197 protection of workers whose jobs do not require the use of assets for their performance. Accordingly, vulnerable employees engaged

[127] reg 3(3)*(a)*(i) of TUPE; *TMS* n 4 above para 22.

[128] reg 3(3)*(a)*(ii) of TUPE; *TMS* n 4 above para 22.

[129] regs 4(1), 4(2) of TUPE.

[130] ibid.

[131] Wynn-Evans n 10 above 160.

[132] ibid 167, 169.

[133] McMullen n 118 above 118. For a recent account on the judicial interpretations of the service provision change regulations in the United Kingdom see further John McMullen 'Service Provision Change Under TUPE: Not Quite What We Thought' (2012) 41(4) *ILJ* 471.

[134] Wynn-Evans n 10 above 178.

[135] See specifically *Aviation Union* n 3 above para 120.

in labour intensive activities such as catering, cleaning, gardening and security services are less likely to be protected by s 197 where the services they perform are outsourced than those employees who, to perform their work, rely on the tangible or intangible assets that are being transferred. Distinguishing between employees affected by a business transfer on the basis of their use of the physical assets of the outsourcing party is arbitrary.[136] The criteria determining s 197's applicability should therefore move away from a definitional focus on physical or other assets that form the subject matter of the transfer. Rather, it is preferable to apply the protective consequences of the section automatically to any change in service provider. Such a shift, it is submitted, could have protected the 683 employees in *Franmann* who subsequently faced retrenchment at transfer.[137]

In light of the approach in the United Kingdom, applying s 197 automatically where there is a change of service provider may ameliorate some of the negative consequences for labour intensive activities that flow from the distinction made in *Aviation Union*.[138] This would create increased judicial certainty regarding s 197's applicability and give due recognition to the vulnerability that workers experience in triangular employment relationships.

Such a change to s 197's applicability, however, must adequately accommodate the two diametrically opposed interests involved in an outsourcing transaction.[139] On the one hand, the employees affected by the outsourcing exercise seek to secure their employment, rather than face a dismissal based on operational requirements.[140] On the other, the outsourcing institution seeks to externalise the provision of the service, in order to cut costs and attain efficiency.[141]

Importantly, the LAC has noted that there may be valid economic reasons for allowing for the unrestricted transfer of businesses in the free market.[142] Businesses are driven to outsourcing services due to potential commercial efficiencies and possibilities for growth.[143] These are valid economic goals.[144] A service provider's effective business strategy may, however, be undermined where it automatically inherits employees who have poor work performance ratings from the previous service provider.[145] Moreover, service providers may be saddled with

[136] C Bosch 'Aluta Continua, or Closing the Generation Gap: Section 197' (2007) 28 *Obiter* 84 at 93.

[137] *Franmann Services* n 80 above 17.

[138] Wynn-Evans n 10 above at 167 notes that the United Kingdom 'service provision change' regulations directly ameliorated the *Ayse Süzen* distinction.

[139] *NEHAWU* n 3 above para 52.

[140] ibid.

[141] ibid.

[142] *Foodgro, A Division of Leisurenet Ltd v Keil* (1999) 20 *ILJ* 2521 (LAC) para 11.

[143] Belcourt n 9 above.

[144] G Driver 'Commercial Perspective on Section 197 of the LRA' (2000) 21 *ILJ* 9 at 15.

[145] ibid 14.

a surplus of employees post transfer.[146] Hence service providers with no previous employment relationship with the transferred worker may have to bear the burden of their retrenchment where a surplus of employees exists.[147] However, these consequences might only occur in limited factual instances, and Wynn-Evans notes that such commercial drawbacks cannot serve to outweigh the protective purpose of transfer legislation.[148]

Moreover, applying s 197 automatically to outsourcing and any subsequent change in service provider transactions has the potential to level the playing field for service providers competing for tenders.[149] In this way, it has been argued, the 'service provision change' regulations could allow small- to medium-sized service provider firms to compete with larger ones, as they would receive a transfer of employees, which they otherwise would have to seek out themselves.[150] In addition, the automatic application of s 197 does not represent a blanket ban on the practice of outsourcing. Rather, it represents a policy shift towards increased legal certainty and a more effective mode of protecting a vulnerable section of workers in outsourcing transactions.[151]

The Constitutional Court has consistently stated that the protection of vulnerable workers is the underlying purpose of s 197 of the LRA and the right to fair labour practices.[152] Similarly, the LAC has indicated that commercial transactions need to be conducted 'in conjunction with other goals, namely those of social justice, labour peace and the democratisation of the workplace'.[153] This indicates that the effective regulation of outsourcing transactions in order to protect the interests of vulnerable workers is a justifiable undertaking.

This view is supported by the LAC's direct reference to the 'service provision change' regulations in *TMS*.[154] Davis JA noted that while a business transfer may result in the justifiable retrenchment of employees, the policy behind s 197 is to provide a special kind of statutory protection to outsourced employees.[155] In this sense, it is preferable to extend the application of s 197 broadly, in order to curb the possibility of retrenchment.[156]

Of course it may be possible for the courts to protect labour intensive service workers by purposively interpreting the definitional elements of

[146] ibid.

[147] ibid.

[148] Wynn-Evans n 10 above 169.

[149] ibid 159, 169. Wynn-Evans notes that the 'service provision changes' sought to create a 'level playing field' amongst service provider contractors in the United Kingdom.

[150] ibid 169.

[151] McMullen n 118 above 122.

[152] *NEHAWU* n 3 above 46; *Aviation Union* n 3 above paras 35-8.

[153] *Foodgro* n 142 above para 11.

[154] *TMS* n 4 above para 22.

[155] ibid 35.

[156] ibid.

s 197 to include the change of a service provider. However, in light of the clear and unambiguous allowance in *Aviation Union* for a party freely to contract out a service in certain circumstances without triggering the application of s 197, such a stance is unlikely to be taken. Legislative reform[157] would be required to ensure that the protective purpose of s 197 of the LRA is extended, as a matter of course, to workers involved in labour intensive services. Such reform should be informed by the increased legal certainty and employee protection offered by the 'service provision change' regulations in the United Kingdom.

6 Conclusion

This article has sought to highlight gaps in the protection of vulnerable workers arising out of the judicial interpretation of s 197 in the context of the outsourcing, and 'second generation' outsourcing, of labour intensive services. In essence, employees alone are not sufficient to constitute a transfer of a business as a going concern. Rather, the application of s 197 requires something more — some form of asset or infrastructure or utilisation thereof — to form the subject matter of the transaction.[158] This approach could serve to exclude labour intensive service workers from s 197's protection. Such an approach is arbitrary and provides a tenuous basis upon which to justify the termination of employment at a business transfer.

Applying s 197 automatically to such transactions would ensure that a vulnerable category of worker does not fall through the definitional cracks of s 197. Consequently, it may ameliorate the harsh consequences that flow from the distinction between a transfer of a business and a simple contracting out of a service, drawn in *Aviation Union*.[159] Moreover, it offers an appropriate balance between the commercial efficacy of outsourcing and the need to protect vulnerable workers from an unnecessary retrenchment. In the final analysis, the automatic application of s 197 when outsourcing occurs or at the subsequent change of a service provider offers a viable legislative alternative to s 197 in its current form. Such a shift in the current application of s 197 will provide increased legal certainty to all parties involved in outsourcing transactions and give better effect to the right to fair labour practices.

[157] Wallis n 8 above at 806–7 notes that any change to the application of s 197 of the LRA must be conducted through the legislature and must not be left to the courts.

[158] Physical assets of the business are, as highlighted above, ordinarily used to justify that a transfer of a business as a going concern has occurred.

[159] *Aviation Union* n 3 above para 63.

Notes

Who Needs to Notify the Employer of Impending Strike Action? A Discussion of *SA Transport & Allied Workers Union & Others v Moloto & Another* 2012 (6) SA 249 (CC); (2012) 33 *ILJ* 2549 (CC)

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1 Introduction

The courts have often been tasked with defining the limits of the right to strike when interpreting the provisions of the Labour Relations Act 66 of 1995 (LRA). The difficulty for the courts invariably turns on the need to balance the economic interests of the employer and the rights of employees to exercise their constitutional right to strike as provided in s 23(2)*(c)* of the Constitution. One of the issues which has proved contentious is the procedural requirement of a strike notice. Section 64(1)*(b)* of the LRA requires that at least 48 hours' notice of the commencement of the strike must be given to the employer. The provision is silent on the question whether the notice should include details of the scale and scope of the strike action, as well as who is required to issue the strike notice. The purpose of the requirement to issue a strike notice, and thus how it should be interpreted, was the broad issue to be decided in *SA Transport & Allied Workers Union & others v Moloto NO & another* 2012 (6) SA 249; (2012) 33 *ILJ* 2549 (CC). The specific issue was whether employees who were not identified in the strike notice were entitled to go out on strike on the strength of that notice, or whether they were required to issue a separate strike notice to the employer before embarking on protected strike action.

2 The Facts

SATAWU was the majority union at Equity Aviation, representing about 725 of a total of 1 157 permanent employees. SATAWU and Equity Aviation had signed a recognition agreement in terms of which SATAWU was recognised as the collective bargaining agent for all Equity Aviation employees. There was an agency shop agreement in place, in terms of which non-union employees were obliged to pay an agency fee.

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In 2003 wage negotiations between SATAWU and Equity Aviation deadlocked. SATAWU referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and attempts at conciliation proved unsuccessful. A certificate of non-resolution was issued and on the same day SATAWU issued a notice of intention to strike. The notice read as follows:

'We intend to embark on strike action on 18 December 2003 at 08H00. Please confirm that we will meet to discuss a Picketing Agreement on the 17 December 2003.'

Equity Aviation had been assured by the minority trade unions active in the workplace that they were not party to the dispute and that their members would not be joining the strike. On 18 December 2003 approximately 725 SATAWU members, plus 60 non-SATAWU employees, embarked on strike action. The dispute in the case centred on the non-union employees who participated in the strike. Equity Aviation took the view that those employees who were not SATAWU members were not covered by the strike notice and warned them that they were therefore engaged in unprotected strike action for which they could be dismissed. They were subsequently dismissed for an unauthorised absence from work.

SATAWU contended that the dismissals were automatically unfair in terms of s 187(1)*(a)* of the LRA, arguing that the employees had been engaged in protected strike action. The matter was referred to the Labour Court. It progressed through the Labour Appeal Court (LAC) and the Supreme Court of Appeal (SCA) to the Constitutional Court, which finally disposed of it.

3 Issue for Consideration

The issue in the case was whether the strike notice issued by the majority trade union at Equity Aviation served to satisfy the requirement of giving notice in terms of s 64(1)*(b)* of the LRA in respect of non-members of the majority trade union. If it did then the strike that the employees had embarked on was protected, and their dismissals for participation in the strike were automatically unfair. If it did not then the strike was unprotected, and the dismissals were not automatically unfair. The case turned on the proper interpretation of s 64(1)*(b)* of the LRA.

4 Labour Court Decision (*SA Transport & Allied Workers Union & Others v Equity Aviation Services (Pty) Ltd* (2006) 27 *ILJ* 2411 (LC))

In the Labour Court the first issue to be decided was whether the applicants were members of SATAWU or not. If they were members, the strike notice would apply to them and this would dispose of the

case. The evidence showed that the dismissed employees had submitted stop order forms to Equity Aviation on the eve of the strike, but that the forms had not yet been processed by the company. The company argued that the effect of clause 3.3 of the collective agreement was that the applicants should not be regarded as members of the trade union. Clause 3.3 provided that the sole measure of union representivity would be the number of stop orders lodged at any time for the relevant employees (para 20). In the event of the dismissed employees being held not to be SATAWU members, the second issue for determination was whether the strike notice issued by SATAWU covered the dismissed employees. The company argued that the strike notice was not valid in respect of the non-union employees because SATAWU could only act as the agent of its members by giving notice of the intention to strike. It argued further that in any event, it was an implied requirement of s 64(1)*(b)* that the strike notice would only be valid in respect of those employees who had referred the dispute and on whose behalf the notice had been given.

The Labour Court rejected the company's submissions. In the first place, Ngcamu AJ found that the employees were SATAWU members at the material time. The court reasoned that membership of the union was determined with reference to the union's constitution, and not with reference to whether the employer had processed and implemented stop orders for those employees. The court noted that the collective agreement provided that stop orders would be indicative of the union's representivity, but held that the concepts of representivity and membership were distinct. The court explained that whether the stop orders had been properly lodged would be relevant to determining representivity but not membership. The court accepted that the trade union would not have sent the stop order forms to the employer if it had not accepted the employees as trade union members (para 24).The court held that a trade union was entitled to increase its membership during the course of a strike (para 25). Accordingly, the court held that the applicants were members of the trade union at the material time. (The court did not specify what the 'material time' for assessing union membership was.) Thus, the strike notice covered the employees; they were therefore engaged in protected strike action and their dismissals were automatically unfair.

The court held further that even if the employees were not SATAWU members at the material time, they were still covered by the strike notice issued by SATAWU and therefore entitled to join the strike, despite the fact that the strike notice made no reference to non-members. In this regard the court followed, by analogy, the reasoning in *Afrox Ltd v SA Chemical Workers Union & others (1)* (1997) 18 *ILJ* 399 (LC) in which it had been held that once a union had referred a matter for conciliation on behalf of its members, all its members acquired the right to embark on strike action regardless of whether they were affected by the dispute

or not, and regardless of whether they were in different bargaining units (para 38). The *Afrox* decision was confirmed in *Chemical Workers Industrial Union v Plascon Decorative Inland (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC), and *SA Clothing & Textile Workers Union v Free State & Northern Cape Clothing Manufacturers' Association* (2001) 22 *ILJ* 2636 (LAC).

The court held that it had to adopt a purposive interpretation of the provisions of s 64(1)*(b)* and accepted the purpose of the section as set out by the LAC in *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction, Building & Allied Workers Union (2)* (1997) 18 *ILJ* 671 (LAC) at 677A–D, which was to 'give the employer advance warning of the proposed strike so that an employer may prepare for the power play that will follow . . .'. The court found that Equity Aviation had been so warned (para 36). It held that s 64(1)*(b)* did not place any limitation on who should give notice, nor on whose behalf it should be given. It found further that the section neither required that the notice give an indication of how many employees would go on strike nor of the unions to which they belonged (paras 30, 31). It stated that 'to require a notice of strike from each of the 63 applicants is too technical and is not a statutory requirement' (para 42). To limit the right to strike to those whose union had issued a strike notice would be a limitation over and above the limitations on the right to strike prescribed by the LRA and as such the effect would be to deny the employees their fundamental right to strike (paras 32, 34).

The Labour Court thus found that the employee applicants were dismissed for participation in a protected strike and that their dismissals were therefore automatically unfair. Leave to appeal was granted, and the matter was referred to the LAC.

5 Labour Appeal Court Decision (*Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & Others* (2009) 30 *ILJ* 1997 (LAC))

On appeal, the disputed issue was whether the Labour Court had correctly classified the dismissal as automatically unfair. This turned on the question whether the Labour Court had correctly classified the strike action of the dismissed employees as unprotected. This in turn depended on whether the dismissed employees were members of the union at the material time, and/or whether they were covered by the strike notice issued by SATAWU. The argument that the dismissed employees should have separately referred the dispute for conciliation was not pursued by the applicants (para 13).

The LAC unanimously found that SATAWU had failed to discharge the onus of proving that the dismissed employees were their members at the time of the strike (para 15). SATAWU had not led any evidence to show that the relevant procedures in their constitution had been complied with (para 19).

However, the court was split on the question whether the notice of intention to strike issued by the union also entitled non-union employees to strike.

The majority of the court penned two concurring judgments (per Khampepe ADJP, and Davis JA), upholding the decision of the Labour Court on the merits of the case. Zondo JP wrote a minority judgement.

The majority held that the non-union employees were permitted to join the strike on the strength of the strike notice issued by SATAWU. The court held that this approach would not undermine orderly collective bargaining. Khampepe ADJP emphasised that the plain meaning of statutes should be given effect to. Thus, she reasoned, since there was no requirement in the plain language of s 64(1)*(b)* that the strike notice should identify precisely who was to go on strike, this requirement should not be introduced by the court. She found that to require the dismissed employees to have issued separate strike notices would be unduly technical and impractical, that it would lead to an absurdity which the legislature could not have contemplated (para 174), and that it would constitute a further and unjustified limitation on the right to strike (para 175).

Davis JA agreed, but added that the plain language of the statute was not inimical to the purpose underlying the provision, which he identified as being to promote orderly collective bargaining. He reasoned that the manner in which the strike notice was framed was just another weapon in the arsenal of the union to level the playing fields between employer and employee. He referred to the *Plascon Decorative Inland* case (above) in which the LAC held that giving s 64(1)*(a)* its ordinary meaning was calculated to promote orderly collective bargaining. Davis JA held that this observation was equally relevant to the interpretation of s 64(1)*(b)*. He stated that the objective of promoting orderly collective bargaining is served if 'when collective bargaining fails and a strike commences … a notice is provided by a significant group of workers within the bargaining unit'. He did not define what would constitute a 'significant' group of employees, but found that the notice issued by SATAWU was sufficient to achieve this purpose. Therefore, he found that the strike was protected and it followed that the dismissal of the employees was automatically unfair (para 175).

Zondo JP framed the issue differently to the majority, asking whether it was 'competent in law for a trade union, by what it says in the strike notice, to limit the number or categories of the targeted employees who will commence striking on the date given in the strike notice' (para 33). In casu, he found that the use of the pronoun 'we' in the strike notice implied that it would be only SATAWU members who would participate in the strike action (para 26). Just as it was permissible for trade unions to limit the right to strike of non-union employees by way of a collective agreement with the employer, so they should be held to any limitations on the strike action implied by their strike

notice (para 94). This finding is inconsistent with a previous decision by Zondo JP in which (in giving effect to a plain reading of the text of the LRA) he held that where additional procedural requirements for protected strike action had been agreed with the employer, the trade union was not necessarily bound by them: it could elect to follow the agreed procedures, or to follow those provided for in the LRA (*County Fair Foods (Pty) Ltd v Food & Allied Workers Union & others* (2001) 22 *ILJ* 1103 (LAC) para 13).

Zondo JP distinguished the case of *Afrox (1)* (above) in which it had been held that once a trade union had referred a matter for conciliation on behalf of its members, all of its members acquired the right to embark on strike action regardless of whether they were affected by the dispute or not and regardless of whether they were in different bargaining units (paras 38), on the basis that the principle established by the *Afrox (1)* case (above) applied only to s 64(1)*(a)* of the LRA (that is, the requirement that the dispute be referred for conciliation prior to strike action). It was therefore not binding precedent in casu. He found that the principle should not be extended to the second conceptually distinct requirement for protected strike action — that is, the strike notice. In similar vein, he also distinguished the cases of *Plascon Decorative (Inland) (Pty) Ltd* (above); *Free State & Northern Cape Clothing Manufacturers' Association* (above), and *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others* (2004) 25 *ILJ* 2135 para 29.

Zondo JP went to great lengths to explain his approach to interpreting s 64(1)*(b)* of the LRA. In the first place he correctly emphasised that s 3 of the LRA requires that the provisions of the Act must be interpreted to give effect to its primary objects, in compliance with the Constitution and in compliance with the public international law obligations of the Republic (para 39). He took the view that the effect of s 3 was that 'unlike those cases in which the literal theory of interpretation applies, a person applying the provisions of the LRA need not first find that the language of the statute is not clear or is unambiguous or that giving provisions of the LRA the ordinary or natural meaning will lead to an absurdity before he can interpret provisions of the LRA in such a way as to give effect to the primary objects of the LRA'. He added that this did not mean disregarding the language used in the statute (para 40). Secondly, he identified that the common law establishes that 'the approach that must be adopted in construing any provision of the LRA is purposive interpretation' (para 43). He examined the nature of purposive interpretation at length (paras 45-67) and concluded that 'one of the rules of purposive construction is that it can be used even if the language of the statute … is clear and unambiguous' (para 63). He explained further that 'purposive construction is concerned with giving a sensible or reasonable interpretation to statutory provisions …' (para 65). Against that background Zondo JP considered the meaning

of s 64(1)*(b)* in the context of the facts before him. He held that the approach argued by the union (to the effect that s 64(1)*(b)* did not require anything other than that 48 hours' notice of the strike be given to the employer) was premised on a literal interpretation of its terms (para 84). He rejected this interpretation as failing to give effect to the objects of the LRA, particularly the promotion of orderly collective bargaining (para 86).

Zondo JP found that the purpose of s 64(1)*(b)* was to enable the employer to prepare for the strike and to make the necessary contingency arrangements in the interests of orderly collective bargaining. This meant that the strike notice was required to identify who was to go out on strike. He found that it would be disorderly for employers not to be able to ascertain the extent of the possible strike action from the strike notice and to allow trade unions to 'ambush' the employer with a strike which was bigger than indicated in the strike notice. He reasoned that employers should be able to rely on the strike notice to assess the probable size of the strike and thus to decide whether to accede to the demands made by the strikers, and to make the necessary arrangements to protect its business if the strike were to go ahead.

Zondo JP illustrated the point by way of example whereby a small number of employees in a large workplace obtain a certificate from the CCMA or bargaining council declaring their dispute of mutual interest to be unresolved. Accordingly these employees would have licence to issue a notice to their employer of the intention to proceed with strike action. The employer would not deem the strike to have a serious impact on its business and would not be prepared should the rest of the employees in the business wish to participate in the strike action in support of the small number of non-unionised employees' dispute (paras 87-90). He held that if the principle were extended to secondary strikes and protest action, the problems with that approach and the unfairness to employers would be even more vividly illustrated (paras 106-8).

Zondo JP held that as a general rule 'when a strike notice has been issued, whether or not another one would be required to be issued depends upon whether or not the strike notice that has been issued is sufficiently wide to cover all categories of workers employed by the same employer who may wish to participate in the strike to which the strike notice relates' (para 91).

In a judgment decided after the LAC decision, but without reference to it, the Labour Court followed Zondo JP's approach (see *Transnet Ltd v SA Transport & Allied Workers Union & others* (2011) 32 *ILJ* 2269 (LC)). Zondo JP's approach was vindicated in the SCA, but was ultimately shown to be the incorrect approach by the Constitutional Court.

The SCA granted special leave to appeal against the LAC's decision and the case was duly heard by the SCA.

6 Supreme Court of Appeal (*Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & Others* (2012) (2) SA 177 (SCA); (2011) 32 *ILJ* 2894 (SCA))

Lewis JA delivered a judgment with which all the judges of the SCA concurred. The issue was framed as being 'whether, where a union has given the requisite notice on behalf of its members, and has embarked on strike action, other employees who are not members of that union need to give notice in order for their strike action to be lawful' (para 3). The argument that the dismissed employees were in fact members of SATAWU was not pursued in this court.

The SCA rejected the approach taken by the majority of the LAC, and preferred the minority view of Zondo JP.

The SCA accepted (para 12) the need for a purposive interpretation of the LRA (following *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC) and agreed (following *S v Zuma and others* 1995 (2) SA 642 (CC)) that constitutional rights should not be unnecessarily limited (para 24). It held that the primary objects of the LRA include providing a framework for and promoting orderly collective bargaining and promoting the effective resolution of labour disputes, and that s 64(1)*(b)* is 'clearly designed for just that purpose' (para 13). The SCA further held that 'the question is whether employees who have not given notice of a proposed strike defeat orderly collective bargaining when they participate in a strike where other participants have given notice' (para 13).

The SCA accepted that the purpose of s 64(1)*(b)* was as decided in the case of *Ceramic Industries (2)* (above), that is, to give the employer notice of the power play to follow (para 14). However, the SCA found that it was not necessary to 'read in' to s 64(1)*(b)* the requirement that those going on strike should be identified. Rather, this was a logical interpretation of the wording of the section in order to give effect to its purpose, being to warn 'of the power play that will follow, in such a way that the employer can make informed decisions' (para 26).

The SCA thus found that every employee who intends to go on strike must notify the employer of that intention personally or through a representative for the strike action to be protected. It found that to hold otherwise would lead to disorderly collective bargaining and 'usher in an era of chaotic collective bargaining in our labour dispute resolution system' (para 28).

Therefore, since the applicants were not members of SATAWU, or mentioned in the strike notice, they were not covered by the strike notice. Their strike action was therefore unprotected, and their dismissals were not automatically unfair. The SCA therefore overturned the decision of the LAC, and found in favour of Equity Aviation (para 28). Leave to appeal to the CC was granted, and the matter was referred to the CC.

7 Constitutional Court (*SA Transport & Allied Workers Union & Others v Moloto & Another* 2012 (6) SA 249 (CC); (2012) 33 *ILJ* 2549 (CC))

By the time the matter was heard in the Constitutional Court, Equity Aviation was bankrupt, and the liquidators were thus cited as the respondent.

The fundamental question to be decided by the Constitutional Court was 'whether the dismissed employees met the provisions of s 64(1)*(b)* of the Act by engaging in a strike when only SATAWU issued a strike notice on behalf of its members' (para 13). There was no doubt that the case raised a constitutional issue as 'it relate[d] to a proper interpretation and application of the provisions of the [LRA] which was enacted to give effect to the fundamental right to strike, among other objects' (paras 10, 45).

The court was split and issued a minority and majority judgment. The minority judgment (per Maya AJ, and concurred in by Mogoeng CJ, Jafta J and Skweyiya J) followed the decision of the SCA. The minority found that the silence of s 64(1)*(b)* regarding who must issue the strike notice and who it must cover created an 'ambiguity that cannot be cured by a literal approach to the wording of the section' (para 27). Accordingly, it invited a 'purposive' interpretation of the section (para 20). The minority of the court held that the purpose of the strike notice is 'more than a mere trigger for the 48-hour window period that precedes the commencement of a strike, but rather a mechanism meant to enable an employer to prepare properly for the impending power play' (para 24).

The minority held that although strike action is by its nature disruptive, the 'volatility of industrial action must . . . rank highly among the issues that the Act's primary objects, of promoting collective bargaining and effective resolution of labour disputes, seek to address' (para 33). The minority stressed that the LRA's purposes included achieving 'peaceful labour relations in an orderly democratic workplace and a thriving economy and that the right to strike is an extension of the collective bargaining process. An interpretation that results in chaos and disturbs the desired balance of labour relations that is fair to both employees and employers is untenable' (para 33).

Consequently, the minority reasoned, the strike notice should necessarily identify who was to participate in the strike (para 34).

The majority decision (per Yacoob ADCJ, Froneman and Nkabinde JJ and concurred in by Cameron and Van der Westhuizen JJ) overturned the decision of the SCA. The majority focussed on the facts of the case before it and turned to examine the strike notice in its factual context.

It found that when one took account of the fact that SATAWU was recognised by the employer as the collective bargaining agent for all its employees, that there was an agency shop agreement in place, and that the dispute was referred as one concerning the wages of all the employer's

employees, it was clear that the employer could not reasonably have been taken by surprise by the extent of the strike (paras 47, 49, 50, 51). Further, the court held that 'the dismissed strikers and other employees were part of the collective bargaining process, through the union, right from the outset' (para 50). The recognition agreement meant that for the purposes of the wage negotiations, the union represented not only its own members but also the dismissed strikers (para 49).

The court then considered whether the strike notice issued by SATAWU was legally required to contain any more information than it did. The court highlighted that the right to strike was based on the recognition of the disparity in the social and economic power held by employers and employees (para 57). It held that nothing more than necessary should be read into the statutory limitations on the right to strike (para 54), that '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' (paras 43, 52).

The court distinguished the case of *Ceramic Industries (2)* (above) in which it had been held that the notice required by s 64(1)*(b)* should specify the time 'in exact terms when the proposed strike would commence', holding that it was based on a literal interpretation of the words in the section providing for at least 48 hours' notice. In contrast the court preferred a purposive interpretation of s 64(1)*(b)*. It explained that the legislature had not seen fit to set out any information in s 64(1)*(b)* regarding what details should be in the strike notice and that it was therefore inappropriate for the court to speculate about such issues. The court held that 'the procedural pre-conditions and substantive limitations of the right to strike in the [LRA] contain no express requirement that every employee who intends to participate in a protected strike must personally or through a representative give notice of the commencement of the intended strike, nor who will take part in the strike' (para 43).

The court referred to the general objectives of the LRA and emphasised the promotion of orderly collective bargaining. It held that 'to require more information than the time of its commencement in the strike notice will run counter to the underlying purpose of the right to strike in our constitution — to level the playing fields of economic and social power already generally tilted in favour of employers' (para 86).

The court therefore found that the employees had been dismissed for engaging in protected strike action, and that their dismissals were automatically unfair.

8 Comment

The broad framework in terms of which the provisions of s 64(1)*(b)* of the LRA must be interpreted is not controversial. Section 39(2) of the

Constitution provides that 'when interpreting any legislation . . . every court . . . must promote the spirit, purport and objects of the Bill of Rights'.

Section 3 of the LRA enjoins everyone who applies the LRA to interpret its provisions to give effect to its primary objects in compliance with the Constitution and in compliance with the public international law obligations of the Republic. In *Chirwa* (above), the court explained that this meant that 'where a provision of the LRA is capable of more than one plausible interpretation, one of which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA' (para 110).

The primary objects of the LRA are set out in s 1 of the Act. They are to give effect to and regulate the fundamental rights conferred by s 23 of the Constitution; to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation; to provide a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; to formulate industrial policy; and to promote orderly collective bargaining, collective bargaining at sectoral level, employee participation in decision making in the workplace and the effective resolution of labour disputes.

What is interesting is how the different judges applied the interpretive framework to decide if s 64(1)*(b)* of the LRA required non-members of the union which issued the strike notice to issue their own strike notice before they could embark on protected strike action.

The Labour Court, the majority of the LAC and the majority of the Constitutional Court favoured an approach which focused on the express wording of the section and which did not read into the section limitations on the right to strike which the legislature had not seen fit to include (Labour Court para 31, LAC para 170, Constitutional Court paras 43, 52).Thus the strike notice issued by SATAWU covered the non-members of SATAWU, who were therefore engaged in a protected strike and had been automatically unfairly dismissed.

The minority of the LAC, the SCA and the minority of the Constitutional Court on the other hand reasoned that in order to promote orderly collective bargaining it was necessary to read into s 64(1)*(b)* the requirement that all those intending to embark on strike action must issue a strike notice. Thus, since it was common cause that the strike notice issued referred only to SATAWU members, it was necessary that the non-members of SATAWU issue their own strike notice before going out on strike. The applicant employees were therefore engaged in an unprotected strike and had not been automatically unfairly dismissed.

All of the judges, except the majority of the LAC, considered the purpose of the strike notice in reaching their conclusions. It was

accepted that the purpose was as set out in the case of *Ceramic Industries (2)* (above) that is, 'to give an employer advance warning of the proposed strike so that an employer may prepare for the power play that will follow'(702F–I).

The majority of the Constitutional Court found that this purpose was achieved by the strike notice even if the exact parties who were to embark on the strike action were not detailed in the notice (para 78). The majority held that the express wording of s 64(1)*(b)* 'does not ask for the exclusion of uncertainty in strike action, except for certainty when the strike will start' (para 85). They held further that 'to require more information than the time of its commencement . . . in order to strengthen the position of the employer, would run counter to the underlying purpose of the right to strike in our constitution — to level the playing fields of economic and social power already generally tilted in favour of employers' (para 86). This is, inter alia, because 'it requires little imagination to see that the opportunity for objection to the validity of the strike notice will be greatly increased if fuller information is required in the notice on the basis that it allows the employer to prepare for the power play of the strike' (para 84). In the end, the court held that 'interpreting the section to mean what it expressly says is less intrusive of the right to strike; creates greater certainty than an interpretation that requires more information in the notice; serves the purpose of the Act — specifically that of orderly collective bargaining — better; and gives proper expression to the underlying rationale of the right to strike, namely, the balancing of social and economic power' (para 74).

This view was not shared by the minority of the LAC, the SCA and the minority of the Constitutional Court who took the view that if the strike notice was not required to notify the employer of who was going to go on strike, this would promote disorderly collective bargaining and 'usher in an era of chaotic collective bargaining in our labour dispute resolution system' (SCA para 28).

Crucial to the reasoning of the majority of the Constitutional Court was the nature of strike action in South Africa. The court noted that the right to strike is protected as a fundamental right in the Constitution without any express limitation (para 43) and that it is based on the recognition of the disparity in social and economic power between employers and employees (para 57). The court described it also as an aspect of associational freedom and held that it may serve to reinforce other social and political rights as well (para 58). It also held that it was an integral part of the collective bargaining process (para 59). For these reasons the court found that it was essential that the right be limited as little as possible.

The court's decision was also strongly influenced by the factual context of the case, and for this reason the precedential impact of the case may be muted. The court emphasised that the union was a majority union with an agency shop agreement in place to facilitate bargaining

and that the wage dispute concerned all the employees (para 50). It found that the employees were identifiable as a result of the context in which the notice was given. In a different context, say, for example, in the context of the scenario Zondo J painted in the LAC, more detail in the strike notice may be held to be necessary. Likewise it could pertain in the case of a secondary strike where the secondary employer would not necessarily have insight into the nature of the dispute and who it affects.

In our view the decision of the majority of the Constitutional Court is correct.

The right to strike enjoys a high degree of protection in South African law. The Constitutional Court has declared it to be 'of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees' and found that 'it is through industrial action that workers are able to assert bargaining power in industrial relations' (*National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 *ILJ* 305 para 13).

The notice requirement in s 64(1)*(b)* has generally been interpreted broadly by the courts so as not unduly to limit the right to strike. So, for example, in *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of SA & others* (1999) 20 *ILJ* 677 (LC) para 19 the Labour Court found that nothing in the LRA required strikers to commence their strike on the day stipulated in the notice; and in *Transportation Motor Spares v National Union of Metalworkers of SA & others* (1999) 20 *ILJ* 690 (LC) para 30 it was held that it is not necessary to issue a fresh notice if a strike has been suspended and workers subsequently decide to recommence strike action. Further, *Afrox (1)* (above) is authority for the fact that employees are free to join or leave the strike at any time without giving notice to the employer.

9 Conclusion

The majority decision of the Constitutional Court is consistent with the jurisprudence of previous decisions, where the courts have not been willing to read into s 64 any additional requirements to those expressly mentioned in the section and where the courts have effectively endorsed a trade union's right to employ surprise tactics in the strike arena.

The major implication of the Constitutional Court decision is that it provides confirmation that trade unions and employees may use the element of surprise as a legitimate strike tactic, since the principle established by the case is that a strike notice need not indicate precisely who is going to strike. Perhaps this principle is subject to the proviso that the employees going on strike must be identifiable from the notice read in the context of the developments leading up to the issuing of the notice, as a result of the Constitutional Court having emphasised the factual context of the case, including the existence of an agency shop agreement.

Insufficient Service Notice for Conciliation Before Litigation: An Analysis of *National Union of Metalworkers of SA v Intervalve (Pty) Ltd & Others* (2015) 36 *ILJ* 363 (CC)

Simphiwe Phungula*

1 Introduction

In terms of s 191(1) of the Labour Relations Act 66 of 1995 (LRA), if there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute to the relevant bargaining council or the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation within 30 days of such dismissal. If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or commission received the referral and the dispute remains unresolved, the employee may refer the dispute to the Labour Court for adjudication (s 191(5)) if the reason for the dismissal is the employee's participation in a strike that does not comply with the provisions of chapter 4 of the Act (ie it is unprotected).

In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd & others* (2015) 36 *ILJ* 363 (CC) the Constitutional Court was called upon to interpret s 191 in order to determine whether the union had satisfied the requirements laid down by this section. In so doing the court considered two issues: (i) whether referral of a dismissal dispute is a precondition for the Labour Court's jurisdiction, and (ii) whether the National Union of Metalworkers of SA (NUMSA) complied with s 191.

2 The Facts

On 20 April 2010, 204 employees, who were members of NUMSA, were dismissed by their employer for participating in an unprotected strike. The dismissal was based on strike action by employees at the shared premises of Steinmuller Africa (Pty) Ltd, Intervalve (Pty) Ltd, and BHR Piping Systems (Pty) Ltd. All three companies shared the same human resources (HR) services. HR communicated with the employees using a document which carried the names of all three companies and was signed by a single member of management acting on behalf of all three companies. The three companies also had common shareholders, directors, and payroll administration. NUMSA timeously referred the dismissal dispute to the bargaining council for conciliation, citing only Steinmuller as an employer. At conciliation, Steinmuller's attorneys stated that the company was not the employer of some of the

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dismissed employees. Conciliation failed to resolve the dispute. Three months later NUMSA referred the dispute to the bargaining council for a second time alleging that Steinmuller, alternatively Intervalve, alternatively BHR or alternatively KOG Fabricators (Pty) Ltd t/a Bellows Africa was the employer. As the second referral fell outside the 30-day cut-off for referrals, NUMSA applied for condonation but, for reasons not disclosed in court, this was refused. NUMSA, relying on the first referral, then referred a statement of claim to the Labour Court seeking relief against Steinmuller. Seven months later, NUMSA brought an application in the Labour Court to join Intervalve and BHR as respondents in the unfair dismissal. The application was granted by the Labour Court but with leave to appeal, leading to the appeal to the Labour Appeal Court (LAC) and then finally to the Constitutional Court.

NUMSA argued that the plain meaning of s 191 of the LRA is that only the dispute itself need be referred for conciliation and such referral need not mention every employer. Therefore, where a dispute involved more than one employer, there was no requirement that each employer should be a party to conciliation. Additional employers could be joined later in the proceedings, because the court has the discretion to join parties to an already commenced matter. NUMSA further argued that even if it were wrong in its interpretation of s 191, it had substantially complied with the requirements of s 191 by citing Steinmuller, as Steinmuller, Intervalve and BHR shared the same HR service. However, Intervalve and BHR argued that s 191(3) requires that the employee must satisfy the council or commission that a copy of a referral has been served on the employer. They contended that actual service on every employer is a prerequisite for Labour Court jurisdiction.

3 Labour Court Decision (*National Union of Metalworkers of SA obo Members v Steinmuller Africa (Pty) Ltd & Others* (2012) 33 *ILJ* 1885 (LC))

The issue before the Labour Court was whether Intervalve and BHR could be joined to the dispute in circumstances in which the dispute with Steinmuller had been conciliated without the two other companies being cited regarding such conciliation. Relying on rule 12 of the Labour Court Rules, Steenkamp J granted an order joining Intervalve and BHR on the basis that they had a substantial interest in the proceedings. In terms of rule 22(2)*(a)*, a party may apply, on notice to every other party, for an order joining any party as a party in the proceedings, if the party to be joined has a substantial interest in the subject matter of the proceedings. The court held that 'the fact that an entity was the employer of a dismissed employee in the proceedings in which that dismissal is challenged, quite obviously constitutes

a sufficient legal interest in the proceedings' (para 21). The fact that Intervalve and BHR were the employers of some of the dismissed employees and shared HR services was considered sufficient to justify their joinder (para 22). The court further held that it was unnecessary for NUMSA to proceed with different referrals arising from the same dismissal, because this would lead to a multiplicity of actions and a waste of costs that joinder is meant to prevent (para 24). The judge observed that the joinder rule would serve no purpose if NUMSA had to refer separate disputes against Intervalve and BHR for conciliation and to require the union to do so would be to 'stretch formalism to breaking point' (J Grogan 'Joined At The Hip: Shadow Over Substance in Dismissal Disputes' (2015) 31 (2) *Employment Law* 3).

Intervalve and BHR further argued that joinder was inappropriate at that stage of the proceedings because conciliation had already taken place. Citing *Mokoena & others v Motor Component Industry (Pty) Ltd & others* (2005) 26 *ILJ* 277 (LC) and *Selala & another v Rand Water* (2000) 21 *ILJ* 2102 (LC), the court rejected this argument and held that it did not matter that BHR and Intervalve had not been cited in the referral for conciliation, because the court had the power to join parties to an unfair dismissal claim even after conciliation had taken place. However, the court in *SA Commercial Catering & Allied Workers Union obo Members v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* (2011) 32 *ILJ* 410 (LC) took a different view to that held in the Mokoena and Selala cases, and held that referral for conciliation was a prerequisite for joinder in terms of rule 22, and such referral should be for each dispute (paras 11, 12).

However, Steenkamp J considered Entertainment Logistics as differing from Steinmuller. In distinguishing the facts of *Steinmuller* and *Entertainment Logistics*, Steenkamp held (paras 35–6):

> '[I]t must be clear from the above extract that the facts in *Entertainment Logistics* are quite distinct from those in the case before me. In that case, three acts of dismissal gave rise to three disputes; the employees occupied different positions; they were dismissed after separately and differently constituted disciplinary enquiries; and they were dismissed for participation in different types of industrial action. The dismissals, in the words of Van Niekerk J, gave rise to "separate and distinct disputes". In the present case, all employees were dismissed for participation in the same strike. Importantly, they were dismissed pursuant to collective disciplinary procedures handled by the shared HR services of Steinmuller, BHR, and Intervalve. Identical letters of dismissal were prepared by the shared HR services. And those employees who were re-employed, were re-employed without distinction as to their employer.'

Based on this distinction, the court found that if NUMSA had to refer separate disputes for conciliation, only to apply for consolidation of proceedings afterwards, that would obviate the need for joinder (para 38). It said further, 'It is difficult to conceive of the purpose of rule 22 if it were not to be applicable to the current set of circumstances' (para 38). The court then ruled that the requirements for joinder, as set out

in rule 22, had been satisfied. BHR and Intervalve were joined as the respondents in the proceedings.

4 Labour Appeal Court Decision (*Intervalve (Pty) Ltd & Another v National Union of Metalworkers of SA obo Members* (2014) 35 *ILJ* 3048 (LAC))

The issue before the court was whether the Labour Court had jurisdiction to entertain the dispute between NUMSA on the one hand and Intervalve and BHR on the other. If not, the issue of joinder would not arise. The court held that where the dispute between the parties was one in which the dismissal was based on a non-procedural strike, the dispute had to be referred to conciliation within 30 days of the date of dismissal and, if the matter was not resolved, the dispute could be referred to adjudication in the Labour Court within 90 days after the issuing of a non-resolution certificate. Non-compliance with the 90-day period could be condoned on good cause shown (para 12). The court held that NUMSA had referred the matter against Intervalve and BHR for conciliation, but outside the prescribed period, and condonation had not been not granted by the bargaining council. Therefore no dispute against Intervalve and BHR had been referred for conciliation (para 14).

Intervalve and BHR, relying on *National Union of Metalworkers of SA & others v Driveline Technologies (Pty) Ltd & another* 2000 (4) SA 645 (LAC); (2000) 21 *ILJ* 142 (LAC), argued that the Labour Court had no jurisdiction to entertain the dispute between them and NUMSA (para 14). In *Driveline* Zondo AJP (as he then was) with Mogoeng AJA (as he then was) concurring, held that 'the wording of s 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or be referred to the Labour Court for adjudication' (para 73). NUMSA, relying on Mokoena and Selala, argued that where a dispute involved more than one employer, there was no requirement that each employer should be a party to conciliation as the Labour Court had jurisdiction to join parties to an already commenced matter (para 15).

The Labour Appeal Court did not share NUMSA's view. In his judgment, Waglay JP held that the view expressed in both Mokoena and Selala, that the Labour Court had discretion to condone non-compliance with s 191 of the LRA when a dispute should be referred to conciliation, was wrong. The court held that rules that provide for the conduct of proceedings in a court could not override the clear provisions of the LRA. The court distinguished *Mokoena* and *Selala* from the facts before it, and pointed out that in *Mokoena* the application for joinder was for a business take-over where an employer had been placed in the shoes of the previous employer. Therefore, the joinder was not granted on the basis of the court's discretion, but on the basis of the

law in terms of s 197(9) of the LRA (para 16). The court further pointed out that in Selala the application concerned a co-employee who had been appointed to a position which the applicant alleged should have been his. Therefore, it was necessary to join the co-employee before the applicant could proceed, because the rights of the co-employee were affected (para 17). It did not matter that the co-employee had not attended conciliation because there was no dispute between the co-employee and the applicant, and therefore the joinder was only granted as the rights of the co-employee were affected.

The court finally dealt with a right to have a day in court. It held that this right should not be exercised at a litigant's pleasure without complying with the provisions of the LRA. The court pointed out that failure to comply with the steps that were required to be followed to enforce a right and later to argue that those steps violated a constitutional right could not help NUMSA. It held that the Act was clear and made provisions which had to be complied with. That was not unconstitutional, and therefore NUMSA could not argue that it was denied its day in court because it had failed to comply with the provisions of the LRA (para 24).

Based on the LRA and the interpretation of the case, the court found that the Labour Court did not have jurisdiction to entertain the dispute between NUMSA and Intervalve and BHR. Rule 22 did not create a right and it was only there to accommodate an existing right (para 22). Therefore, NUMSA's failure to comply with s 191 meant that the Labour Court did not have jurisdiction over the dispute for joinder. The appeal was upheld.

5 Constitutional Court Decision (*National Union of Metalworkers of SA v Intervalve (Pty) Ltd & Others* (2015) 36 *ILJ* 363 (CC))

There was no doubt that the case raised a constitutional issue as it related to a proper interpretation and application of the provisions of the LRA, and specifically s 191. The court had to decide whether the referral of a dismissal dispute for conciliation was a precondition for the Labour Court's jurisdiction, and whether NUMSA complied with s 191 (para 24).

The court split and issued a majority and minority judgment. The majority judgment by Cameron J (with Mogoeng CJ, Moseneke DCJ, Khampepe J, Zondo J, and Leeuw J concurring) upheld the decision of the SCA. The majority found that s 191(5) required preconditions to be met before the dispute could be referred to the Labour Court for adjudication, namely the referral of a dispute to conciliation (para 32). The court found that the referral requirement had been deeply rooted in South African labour law and could not be tampered with (para 32).

The court criticised the minority's approach in Driveline which relied on s 157(4)*(a)* to find that referral for conciliation was not a precondition for Labour Court jurisdiction to adjudicate a dispute. Cameron J held that s 157(4)*(a)* read with s 157(4)*(b)* means that the court could refuse to determine a dispute when no certificate had been issued because no conciliation meeting had taken place (para 34). According to Cameron J, this applied even more so in circumstances where the dispute had not even been referred to conciliation, as s 157(4)*(a)* required an attempt 'to be made to try and resolve a dispute through conciliation before resorting to other methods' (para 34). Accordingly, the court found that referral for conciliation was a precondition that should be met, and therefore NUMSA had to refer the dispute with Intervalve and BHR for conciliation (para 40).

The court had then to decide whether such referral had actually occurred. In other words it had to decide whether the Steinmuller conciliation referral encompassed also Intervalve and BHR. Cameron J, citing *Maharaj v Rampersad* 1956 (4) SA 638 (A), held that the question was not whether NUMSA had 'substantially' complied with s 191, but whether it had complied (para 44). In order to answer this question, the court had to interpret s 191(3) which stipulates that the referral must be served on the employer.

Cameron J found that 'the obvious objective [of this section] is to enable the employer to participate in the conciliation proceedings' (para 47). It was not enough for NUMSA to argue that it had served the notice on the employer's agents. The court held that Steinmuller, Intervalve and BHR were three separate legal entities, and this could not be willed away because there was an overlap in their corporate operations (para 54). The court held that the objective of s 191 was to put each employer on notice that consequences might occur if the dispute involving it was not effectively conciliated (para 52). In this regard, the court held that citing one employer for referral does not embrace another uncited employer (para 53).

The court further held that this would be different if the corporate forms were fake. However, it did not find anything to suggest that Steinmuller, Intervalve, and BHR were formed as a sham (para 55). The court found rather that the logic of events counted against NUMSA. When NUMSA referred the dispute to the shared HR service, the referral was addressed to Steinmuller alone and that gave Intervalve and BHR a reason to believe that they were not implicated (para 56). Furthermore, the court found that Intervalve and BHR could not be blamed, because at the first meeting Steinmuller's representatives pointed out to NUMSA that Steinmuller was not the employer of all the employees listed in the referral (para 57). In this regard, the court held that NUMSA had not complied with s 191(3) and the Labour Court was correct in finding that the referral had not embraced Intervalve and BHR.

However, this was not the end of the case, because the court had still to decide whether Intervalve and BHR had waived their entitlement to be served separate notices of the conciliation process. NUMSA based its argument on representation. It argued that the companies had acted as one entity when they had dismissed the employees (para 66), and that they had created confusion in the workforce about who the true employer was (para 68). However, the court rejected this argument, and held that to accept that Intervalve and BHR had waived their entitlement to be served separately would require a leap that was impossible to make (para 62). The appeal was then dismissed with no order as to costs.

Zondo J concurred with Cameron J. In his reasoning he interpreted the word 'dispute' to mean that in the case of a dismissal dispute, something more than the mere fact that a dismissal had occurred was required, before it could be said that a dispute existed (para 89). He further held that 'no dispute about fairness or otherwise of a dismissal arises in a situation where an employer dismisses an employee and that employee does not dispute the fairness of that dismissal but accepts that dismissal and walks away' (para 89). He pointed out that if two employees, A and B, belonged to the same union and were dismissed by employer C in a joint disciplinary hearing because of the same conduct, and they both disputed the fairness of the dismissal, this constituted two different disputes, namely the one between A and C, and the other between B and C (para 91). The two employees might refer their separate dismissal disputes to conciliation jointly by way of a single referral or separately (para 92). However, if A referred his dismissal to conciliation and B did not, B could not at a later stage apply to be joined in the arbitration or adjudication because the dismissal dispute arose on the same facts (para 92). Applying this to the facts, Zondo J found that if this 'principle applies to two employees of the same employer, it must apply with even more force to a case, such as the present, where the employees were employed by different employers' (para 94), that is, Steinmuller, Intervalve, and BHR. The court then held that in law such dismissals could not be said to have given rise to one dismissal dispute (para 96). The court found that the first referral had not included the dispute between Intervalve and its employees, nor between BHR and its employees (para 106).

Zondo J further dealt with the issue of 'substantial' compliance. The court found there had been no 'substantial' compliance by NUMSA (para 131). He held:

> 'To say that there was substantial compliance with s 191(1) would mean that there was compliance with the requirement for the referral of the dismissal disputes involving Intervalve and BHR to the bargaining council for conciliation. Substantial compliance with s 191(3) would mean that there was compliance with the requirement that the bargaining council or CCMA "must satisfy itself that a referral has been served on the employer"' (para 131).

The court was not persuaded to accept that there had been substantial compliance, because it was clear that the first referral of the dispute cited Steinmuller. The court held that either the disputes involving Intervalve and BHR had been referred to conciliation or not. It was unacceptable that there was 'almost a referral' or an 'imprecise referral' (para 134). The court further held that the identities of Steinmuller's representatives were not relevant when deciding whether disputes between Intervalve and its employees and between BHR and its employees had been referred to the bargaining council for conciliation (para 135). Consequently, because s 191(1) had not been satisfied, there was no compliance with s 191(3) (para 135).

The minority judgment of Nkabinde J (with Froneman J, Jafta J, Madlanga J, and Van der Westhuizen J concurring) would have set aside the decision of the LAC. The minority held that conciliation and arbitration proceedings should be consistent with the provisions of the LRA while taking into account the Bill of Rights and values of the Constitution (para 156). In this regard, the court held that s 191(3) appears to have more than one meaning, and therefore when s 191(1) was read with s 191(3), this should be done in a manner least restrictive of the promotion of the effective resolution of the labour dispute (para 171).

While agreeing that conciliation required the referral of a dispute and, as such, parties should be granted an opportunity to represent themselves, Nkabinde J criticised the LAC and the main judgment for having construed s 191 stringently. The judge held that the LAC and the main judgment had failed to take into account that the dispute before the court was the same as the one which had already been conciliated by the bargaining council (para 175). Nkabinde J further held that the construction failed to take into account that an attempt to resolve the dispute had been achieved despite the fact that Intervalve and BHR had not been served with the first referral (para 175). The judge accepted that NUMSA had substantially complied with the purpose and legislative scheme of the LRA.

Nkabinde J viewed NUMSA's conduct as effective when measured against the object of the LRA (para 179). The judge held that a consideration of factors such as the shared HR services, identical letters of dismissal, participation by employees in the same strike, and the same legal representation linked the question of compliance to the purpose of s 191 (para 179). Since Steinmuller, Intervalve, and BHR shared HR services and legal representation, Nkabinde J held that Intervalve and BHR had participated in the conciliation process (para 182).

Nkabinde J also did not agree with the LAC that Intervalve and BHR had no substantial interest in the dispute. The fact that all three companies formed part of the same group and had the same shareholders and directors meant that Intervalve and BHR had a direct and substantial interest in the dispute (para 189). Accordingly, Nkabinde J held that the

LAC should have decided there was a direct and substantial interest and upheld the Labour Court's decision (para 189).

Froneman J agreed with most of the main judgment's exposition of law, but concurred with the dissenting judgment. He did not agree with the 'narrow' interpretation of s 191, as expounded by the main judgment. He rejected the view that 'a mistaken reference to a party in a referral notice [would necessarily] spell non-compliance' (para 195). The judge found no practical prejudice in the mistake made by NUMSA because there had been notice of the referral to Intervalve and BHR, albeit informally (para 196). Accepting NUMSA's case would not threaten the fundamental principles of law, but rather would discourage any reliance on formal technicalities in order to avoid dealing with the true merits of underlying labour disputes (para 197).

6 Comments

When one applies the provisions of the LRA, the interpretation of such provisions must give effect to the Act's primary objects, including complying with the Constitution and the public international law obligations of the Republic (s 3). Should provisions of the LRA be capable of more than one plausible interpretation, one of which advances the objects of the LRA and the other which does not, a court must prefer the one which will give effect to the primary objects of the LRA (*Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC) 110).

It is interesting that different judges came to different conclusions regarding compliance with s 3, when they had to determine whether NUMSA had complied with the provisions of s 191 of the LRA. The Labour Court granted an order for the joinder of Intervalve and BHR to the dispute on the basis that it was unnecessary for NUMSA to proceed with different referrals arising from the same dismissal, and that this would lead to a multiplicity of actions and wastage of costs that joinder was meant to prevent (para 24). The judge observed that the joinder rule would serve no purpose if NUMSA had to refer separate disputes against Intervalve and BHR for conciliation, and to require the union to do so would be to 'stretch formalism to breaking point' (Grogan above).

However, the LAC did not share the same view as the court a quo. The LAC was not prepared to accept that NUMSA had complied with the provisions of s 191, and therefore it had no jurisdiction to grant a joinder order or to hear the matter as such. The court held that s 191(5) was a precondition that should have been met before such a dispute could be arbitrated or referred to the Labour Court for adjudication (para 73).

The view of the LAC was accepted by the majority in the Constitutional Court. The majority found that s 191(5) set out

preconditions that had to be met before the dispute could be referred to the Labour Court for adjudication, namely the referral of a dispute to conciliation (para 32). With regard to the issue of whether NUMSA had substantially complied with s 191 by serving the notice to the shared HR, the court held that either the disputes involving Intervalve and BHR had been referred to conciliation, or not. It was unacceptable that there was an 'almost' referral or an 'imprecise' referral (para 134).

In my view, both the LAC and the majority Constitutional Court decisions are correct. If one looks at the concept of the separate legal personality of a company, it is clear that a company becomes a separate legal person from its members once it has been formed (F H I Cassim et al *Contemporary Company Law* 2 ed (2014) 31; R C Williams *Concise Corporate and Partnership Law* 2 ed (1997) 74). Therefore, to hold that Steinmuller, Intervalve and BHR were all served with the notice would be wrong. All three companies attained their separate legal personality when they were formed. It does not matter if they shared the same HR services; what matters is that they had separate legal personalities. The following example illustrates this point. Suppose three companies are formed and share the same HR services. One of the companies enters into contracts with creditors, and the directors act recklessly and fraudulently. The creditors may apply to court to render such a company liable for its debts. Should the company fail to pay its debts, the creditors may apply to court for the court to pierce the corporate veil and render such directors personally liable for the debts of the company. Other companies will not be liable because they have a separate legal personality from the insolvent company.

The same principles apply in the case of NUMSA and Intervalve. When the court ascertained the objective of s 191, the separate legal personality was paramount because the dispute that affects the employer must be put to each employer party individually on notice that it may be liable for legal consequences if the dispute involving it is not effectively conciliated (Naidoo 'Joinder v Jurisdiction' (2015) 550 De Rebus 39). Since the companies had separate legal personalities, citing one employer could not be said to have embraced other uncited employers. NUMSA was wrong when it did not cite Intervalve and BHR in the initial referral. It was made aware of this mistake at the meeting, but it further failed to rectify its mistake timeously. Noticing that it had no other option, NUMSA tried as a last resort to approach the court for a joinder order.

The minority judgment in the Constitutional Court criticised the majority judgment as too stringent. Nkabinde J held that a consideration of factors such as the shared HR services, identical letters of dismissal, participation by employees in the same strike, and the same legal representation linked the question of compliance to the purpose of s 191 (para 179). Froneman J concurring did not agree with a 'narrow' purpose of s 191, as was held by the main judgment,

and argued that accepting NUMSA's case would not threaten the fundamental principles of law, but rather would discourage any reliance on formal technicalities in order to avoid dealing with the true merits of underlying labour disputes (para 197).

The minority judgment is correct in stating that any reliance on formal technicalities should be discouraged. Of course one may argue that where there is a 'tiny' non-compliance with formal technicalities of service, the law should not be strictly enforced, otherwise the party which did not comply would be prejudiced. However, in this case the majority court was correct in holding that formal technicalities needed to be complied with. Zondo J asked two important questions about substantial compliance with s 191(1) and s 191(3). The answer went against NUMSA. According to Zondo J, substantial compliance meant both that there was compliance with the requirement for the referral of the dismissal disputes involving Intervalve and BHR to the bargaining council for conciliation, as well as with the requirement that the bargaining council or CCMA must satisfy itself that a referral has been served on the employer (para 131). Neither of these requirements was met by NUMSA. If NUMSA knew that it had substantially complied with s 191(1) in its first referral, it would not have issued the second referral that was amended to include Intervalve and BHR. Therefore, it would be incorrect to say NUMSA complied with s 191(1). As a result it also did not comply with s 191(3).

Furthermore, if the court had taken a different view, problems would have arisen in the future. The decision of the majority will protect employees in that employers will be unable play 'hide and seek' with employees when issues involving more than one employer sharing HR services arise. As long as the employee cites an employer and gives notice to that employer, such employer will not be able to say that it is not the employer unless it is so. The finding will assist an employee to identify the true employer, because all they need to do is serve a notice on a specific employer who may either be a true employer or not. The burden will rest on such employer to accept the notice because it is the true employer. If it is not the real employer, the employer will have to inform an employee of this.

7 Conclusion

The major implication of the Constitutional Court decision, which is consistent with that of the LAC, is that the proper fulfilment of s 191 of the LRA is a prerequisite when deciding whether the Labour Court has jurisdiction to hear a dismissal dispute. The case stresses the importance of conciliation when challenging the fairness of dismissal. The decision of the Constitutional Court places emphasis on the right of employers to be properly served with a notice concerning court

proceedings against it, while it also protects employees from any delays where more than one employer is involved in the issue.

The employer — as a juristic person — is protected by a separate legal personality. Because of the decision of the Constitutional Court, nobody can hide behind the fact that there is an error when a notice for resolution is served on the employer. If more than one employer is involved, a proper service and citation of employers is paramount. Without the proper citation, the employee will not be able to seek joinder through rule 12 because the court will not have jurisdiction to hear the matter.

Furthermore, employees are also protected by the decision of the Constitutional Court. No employer in a matter will be able to hide behind the complexity of employers' identities. The employer will be compelled to deny involvement if it is indeed not the employer of the employee claiming unfair dismissal. This will prevent delays and costs that the employee may incur when issuing a notice to the employer.

Derivative Misconduct and an Employee's Duty of Good Faith: *Western Platinum Refinery Ltd v Hlebela & Others* (2015) 36 *ILJ* 2280 (LAC)

Kershwyn Bassuday*

1 Introduction

In South African labour law the concept of 'derivative misconduct' is used to classify the problem an employer may face when there is clear evidence of misconduct, but it is not possible to pinpoint the individual employees who are culpable. The courts have held that a duty of good faith requires an employee who might have knowledge of the culprit to step forward and disclose this to the employer. This note will look at a recent Labour Appeal Court (LAC) case (*Western Platinum Refinery Ltd v Hlebela & others* (2015) 36 *ILJ* 2280 (LAC)) which illustrates the implication for employees when this principle of good faith applies.

2 Derivative Misconduct

Grogan writes (see J Grogan Dismissal 2 ed 332) that the LAC in *Food & Allied Workers Union & others v Amalgamated Beverage Industries Ltd* (1994) 15 *ILJ* 1057 (LAC) first suggested the idea of 'derivative misconduct' and held (1063) that in the workplace, policy considerations require

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more from an employee than that he or she merely remains passive in circumstances where misconduct is evident and that his or her failure to assist in the investigation may itself justify disciplinary action. The notion above takes into account the operational requirement of the employer to curb misconduct, and if a remedy can be found via a derivative misconduct dismissal, that should be available to an employer.

Sutherland JA in *Western Platinum Refinery* states that the concepts of 'derived justification' and 'derived violation of trust and confidence' were coined by Cameron JA in *Chauke & others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 *ILJ* 1441 (LAC). In Leeson Motors a panel beating workshop dismissed a shop steward for gross negligence. This angered the other employees who then embarked on acts of sabotage, which included damaging vehicles which were booked in for repair. After a few incidents of sabotage, the employer gave the employees an ultimatum and asked them to identify the culprits or the entire group would be dismissed. The employees in the department where the damage took place refused to cooperate with the employer and the employer dismissed them. The LAC upheld the dismissal. The court held that the refusal of the employees to assist the employer in a matter where at least one of the employees had knowledge of the incidents, as inferred by the evidence, was a form of 'derivative misconduct'. The silence of the employees could warrant the conclusion that they either knew who the culprits were or were party to the misconduct and an inference of common conspiracy could be drawn. Since Leeson Motors, the term 'derivative misconduct' has taken hold in labour matters.

In *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan NO & others* (2008) 29 *ILJ* 406 (LC), the Labour Court had to determine whether the dismissal of virtually the entire staff of a mineral laboratory was appropriate after a large amount of mineral sample was discovered down a borehole on the laboratory property. The employer was alerted to this misconduct by an anonymous whistle blower, but was unable to identify the culprits. The employer then conducted interviews with the laboratory employees, all of whom initially denied knowledge of the dumping of the minerals. One employee later admitted to dumping some sample and implicated three colleagues. It was found that there was enough evidence to implicate them as well as charge those employees who had worked overtime when the incident happened. The employer then charged all the remaining employees as well, as it argued that they were at least guilty of derivative misconduct because they had failed to inform the employer of the identity of the perpetrators. The Labour Court held that the dismissal of the remaining employees for derivative misconduct was fair.

Grogan A, in the arbitration which preceded the above Labour Court matter (see *National Union of Mineworkers & others and RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 *ILJ* 410 (ARB)), stated that there were two requirements for proof of derivative

misconduct: first, that the employee knew or could have acquired knowledge of the wrongdoing; second, that the employee had failed without justification to disclose that knowledge to the employer, or to take reasonable steps to help the employer acquire that knowledge.

In *Western Platinum*, Sutherland JA qualified the statement of Grogan and held the view that the negligent ignorance of circumstances involving an instance of misconduct of which an employee ought to have been aware should found a basis for culpability in the realm of negligence itself and not intrude into the area of a breach of good faith.

Sutherland JA went on to bolster the decision in *Leeson Motors* and laid down the following factors which would assist in the determination whether a dismissal for derivative misconduct was appropriate:

(a) The undisclosed knowledge must be actual and not imputed or constructive knowledge of the wrongdoing. This knowledge must be adduced by evidence. The moral blameworthiness intrinsic to the non-disclosure implies a choice made not to tell.
(b) The non-disclosure must be deliberate, which shows a lack of good faith.
(c) Whether, in a given case, the non-disclosure warranting dismissal is related, in part, to the degree of seriousness of the wrongdoing and to the effect of the non-disclosure by a person in the position of that employee on the ability of the employer to protect itself against the wrongdoing.
(d) The rank of the employee is irrelevant to culpability, but might be important to the degree of the blameworthiness.
(e) There need not be a specific request for the information by the employer; mere actual knowledge by an employee should trigger a duty to disclose. When a request to disclose has been made and not fulfilled, culpability for the non-disclosure is simply aggravated.

Sutherland JA applied these principles to the facts of the present case.

3 The Factual Matrix

In *Western Platinum*, the employee, Mr Hlebela, was an operator at the employer's platinum refinery. Suddenly, in relation to stock losses, which had occurred for decades, the South African Police Service (SAPS) informed the employer that Mr Hlebela was a person of interest in their investigations of the stock losses. The SAPS could not provide any evidence that Mr Hlebela had committed misconduct in relation to the stock losses, but relied instead on the fact that Mr Hlebela had two houses (one worth R582 000), four cars, and was also the owner of a business, Ceba Construction CC, as the link necessary to implicate him in the stock losses. It was thought that since the employee earned only R14 000 per month, it was not possible for him to accumulate such 'wealth' (para 22).

The employer subsequently placed the employee under surveillance and it was found that Mr Hlebela had been in areas of the refinery to which he had access privileges on his staff card, but which were areas in which he had no apparent reason to be. The court asked why an employee would be given an access card to enter areas that he ostensibly was forbidden to enter. A satisfactory answer could not be given. Based on this information the employer inferred that the movements of the employee were suspicious and Mr Hlebela was charged with the culpable involvement of theft and the non-disclosure of information relating to the wrongdoing (paras 25-6). At the disciplinary hearing it was held that that the accumulation of Mr Hlebela's wealth could not be attributed to his involvement in the stock losses, but he was found guilty on the non-disclosure charge.

The court found that the prosecutors in the disciplinary enquiry had not formulated the charges against Mr Hlebela properly. It pointed out that the 'information' not disclosed and relied upon to convict him was information specified in demands made to him after he had been charged and related to details of his personal financial affairs and not to evidence concerning the actual stock losses. Sutherland JA held that as the information required of the employee related to his personal circumstances, it could not form the substance of culpable non-disclosure pursuant to a duty of good faith, even if it was pertinent to bringing the culprits to book. The court held (para 28):

'Even an unreasonable refusal to disclose the employee's personal finances and a reasonable inference that he did so to conceal the manner of their acquisition is not capable of being logically linked to the fact that he has actual knowledge of wrongdoing by others. When the employer is thwarted by a non-disclosure to procure information, it cannot be argued that the employer can infer proof of what it suspects.'

During the disciplinary hearing and the arbitration, the prosecutors, the court held, had led no evidence to substantiate the contentions used in implicating and convicting the employee and thus there was simply no case made against him. The award in convicting Mr Hlebela was not one a reasonable arbitrator could have come to on a proper appreciation of the evidence before him or her.

4 Duty of Good Faith to Disclose Information

A well-established common law principle is that an employee holds a position of trust and confidence with regard to his or her employment relationship with the employer. In *Robinson v Randfontein Estates Gold Mining Co Ltd* (1921) AD 168, the court typified the duty owed by an employee to an employer as a fiduciary one in which one person stands in a position of confidence to another, to protect the other's interests (paras 177-80).

Harms JA held in *Council for Scientific & Industrial Research v Fijen* 1996 (2) SA 1 (A); (1996) 17 *ILJ* 18 (A) 26:

'It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the "innocent party" to cancel the agreement.'

Harms JA reiterated the widely accepted view that the employer may dismiss an employee if the employer finds that the employment relationship has become one devoid of trust and is intolerable.

The courts, acknowledging that the relationship between the employer and employee is one of trust, have held that it is an implied term of the contract of employment that the employee will act in good faith towards his or her employer and that he or she will serve his or her employer honestly and faithfully (see *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks & others* (2004) 25 *ILJ* 1391 (C); *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler* 1971 (3) SA (W) 867).

In *Murray v Minister of Defence* 2009 (3) SA 130 (SCA); (2008) 29 *ILJ* 1369 (SCA) the court placed much importance on the trust and confidence that the employer should have in an employee. The court took the view that such trust and confidence underpinned the entire employment relationship, and without those elements the continued employment relationship became intolerable.

The court in *Leeson Motors* held that silence on the part of the employee when requested by the employer to disclose information was inconsistent with the employment relationship of confidence and trust.

In *Western Platinum* Sutherland JA held that derived justification for dismissal stems from an employee's failure to offer the employer reasonable assistance in bringing guilty employees to book (para 33). Dismissal is usually targeted at those who have perpetrated the misconduct but employees who are silent make themselves guilty of a derivative violation of trust and confidence. The court went some way towards limiting the scope of the duty of trust and good faith required by the employee and employer relationship outlined in the jurisprudence explored above. It held that despite there being a duty of good faith towards an employer by an employee, this duty does not extend boundlessly to the realm of an employee's private area of life or personal finance (see para 28). It went on to state that even if the explanations of the employee are evasive or inadequate, in these circumstances it is not sufficient to say that the duty of trust and confidence has been broken and thus there is scope for a derivative misconduct dismissal: the prosecutors and employers must have enough evidence to implicate the employee in question (para 29).

5 Conclusion

It is trite in our law that an employee has a duty of good faith towards his or her employer and must disclose knowledge of events or

misconduct when the employer requests this, or even without such a request. However, this does not mean that an employee must disclose all knowledge that he or she has, such as personal facts, even if this does have some bearing on the misconduct. Sutherland JA in Western Platinum has posited a set of factors that must be present before an employer can demand information from an employee, including whether the information is of such a nature that non-disclosure might be detrimental to the employee in question.

In some instances dismissal for derivative misconduct may contain elements of unfairness — depending on the perspective from which one approaches the situation. The factors laid down in *Western Platinum* go some way towards setting parameters which should ensure that dismissal for derivative misconduct occurs only in situations that clearly justify it.

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COLLECTIVE AGREEMENT

Not valid agreement in terms of bargaining council constitution—Agreement not binding on parties to council. *City of Cape Town v Independent Municipal & Allied Trade Union & others* (2016) 37 *ILJ* 147 (LC)

Sections 31 and 32 of LRA 1995—Special type of collective agreement—Distinction between such agreement and collective agreement governed by s 23—Bargaining council agreement cannot morph into agreement in terms of s 23 where it is found to be non-compliant with bargaining council constitution. *City of Cape Town v Independent Municipal & Allied Trade Union & others* (2016) 37 *ILJ* 147 (LC)

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CONSTRUCTIVE DISMISSAL

SEXUAL HARASSMENT

Newly employed employee sent sexually suggestive and inappropriate text messages by senior manager she believed to be owner of business—Employee unaware of

grievance procedure and manager to whom she mentioned unhappiness instead assisting her with wording resignation letter—Continued employment intolerable—Dismissal proved. *Dheaneshwer and Tri Media* (2016) 37 *ILJ* 272 (CCMA)

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Strike context—Violent and unlawful conduct during protected strike—Picketing rules agreement in place—Union not taking all reasonable steps to prevent violent conduct and ensure compliance with picketing rules—Employer forced to bring urgent application and union conceding to substantive relief sought by company—Punitive costs order appropriate. *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union & others* (2016) 37 *ILJ* 246 (LC)

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UNFAIR DISCRIMINATION

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Employee dismissed for making offensive comment on Facebook regarding her retrenchment—Comment only partially incorrect and not constituting defamation or bringing employer into disrepute—Employee not guilty of serious misconduct—Dismissal not appropriate sanction. *Robertson and Value Logistics* (2016) 37 *ILJ* 285 (BCA)

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Labour Court proceedings—Late referral of dispute—Unreasonable delay—Flagrant or gross failure to comply with prescribed time periods—No compelling explanation for egregious delay—Condonation may be refused without considering prospects of success. *Makuse v Commission for Conciliation, Mediation & Arbitration & others* (2016) 37 *ILJ* 163 (LC)

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Retrospectivity—Period—Court has discretion which must be fairly exercised. *Zuma & another v Public Health & Social Development Sectoral Bargaining Council & others* (2016) 37 *ILJ* 257 (LC)

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Promotion—Public service employee—Employee permitted to remain in upgraded post with higher salary and rank designation when returning from deployment to another unit—This constituting act of promotion. *KwaZulu-Natal Department of Transport v Hoosen & others* (2016) 37 *ILJ* 156 (LC)

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ADMINISTRATIVE ACTION

Rationality—Minister of Labour revoking designation of Registrar of Labour Relations—As general rule employment issues in public sector not constituting administrative action, but rule not invariable—Exception in case of high-ranking public servant who holds statutory office in public interest—Minister's decision constituting administrative action and subject to review on grounds of rationality—Whether rational objective basis justifying connection made by administrative decision maker between material properly available and conclusion arrived at—Minister failing to

consider relevant material facts in arriving at decision—Decision unreasonable and subject to review. *Public Servants Association of SA & another v Minister of Labour & another* (2016) 37 *ILJ* 185 (LC)

LABOUR COURT

Section 158(1)*(h)* of LRA 1995—Minister of Labour revoking designation of Registrar of Labour Relations—Minister's decision constituting administrative action and subject to review on grounds of rationality. *Public Servants Association of SA & another v Minister of Labour & another* (2016) 37 *ILJ* 185 (LC)

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Newly employed employee sent sexually suggestive and inappropriate text messages by senior manager she believed to be owner of business—Employee unaware of grievance procedure and manager to whom she mentioned unhappiness instead assisting her with wording resignation letter—Continued employment intolerable—Dismissal proved. *Dheaneshwer and Tri Media* (2016) 37 *ILJ* 272 (CCMA)

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Unwelcome and inappropriate conduct of sexual nature—Employee making inappropriate sexual advance to younger female contractor outside work—Underlying such advances lay power differential that favoured employee due to age and gender—Merely because advance not physical and only single incident not negating fact that it constituted sexual harassment. *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 *ILJ* 116 (LAC)

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Section 158(1)*(h)* of LRA 1995—Minister of Labour revoking designation of Registrar of Labour Relations—Minister's decision constituting administrative action and subject to review on grounds of rationality. *Public Servants Association of SA & another v Minister of Labour & another* (2016) 37 *ILJ* 185 (LC)

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Demand relating to productivity bargaining—Demand amounting to demand for higher wages and forming subject-matter for collective bargaining under auspices of bargaining council—Demand standing outside confines of area of protected strike. *National Union of Metalworkers of SA on behalf of Members v Videx Wire Products (Pty) Ltd & others* (2016) 37 *ILJ* 171 (LC)

PROTECTED STRIKE

Violent and unlawful conduct during strike—Strikers materially breaching picketing rules and union not taking all reasonable steps to prevent violent conduct and ensure compliance with rules—Courts will not hesitate in such circumstances to grant punitive costs order against union. *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union & others* (2016) 37 *ILJ* 246 (LC)

UNPROTECTED STRIKE

Demand—Demand relating to productivity bargaining—Demand amounting to demand for higher wages and forming subject-matter for collective bargaining under auspices of bargaining council—Demand standing outside confines of area of protected strike—Strike unprotected. *National Union of Metalworkers of SA on behalf of Members v Videx Wire Products (Pty) Ltd & others* (2016) 37 *ILJ* 171 (LC)

TRANSFER OF BUSINESS AS GOING CONCERN

GOING CONCERN

What constitutes going concern—Overall assessment depends on examination of totality of business—No transfer as going concern where transferee cannot operate business without significant additional investment. *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd & another* (2016) 37 *ILJ* 128 (LAC)

What constitutes going concern—Where business consists of infrastructure to provide service and mechanism to generate revenue both must be transferred. *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd & another* (2016) 37 *ILJ* 128 (LAC)

TRANSFER OF BUSINESS

What constitutes transfer of business as going concern—Section 197 of LRA 1995—Where transfer takes place as result of official conduct that may be ultra vires consequences of transfer remain until impugned conduct properly set aside. *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd & another* (2016) 37 *ILJ* 128 (LAC)

TRANSFER OF INSOLVENT BUSINESS

Section 197A of LRA 1995—Section 197A(1)*(b)* only applies if there has been scheme of arrangement or compromise—Court entitled to examine substance and purpose of agreement between old employer and new employer to determine its true nature. *Atlas Packaging (Pty) Ltd v Palierakis: In re Palierakis v Atlas Carton & Litho CC (in liquidation) & others* (2016) 37 *ILJ* 109 (LAC)

Section 197A of LRA 1995—Whether sale of business constituting scheme of arrangement or compromise triggering application of s 197A—Primary purpose must be avoidance of winding-up order, otherwise s 197A not applicable. *Atlas Packaging (Pty) Ltd v Palierakis: In re Palierakis v Atlas Carton & Litho CC (in liquidation) & others* (2016) 37 *ILJ* 109 (LAC)

ATLAS PACKAGING (PTY) LTD v PALIERAKIS: In re PALIERAKIS v ATLAS CARTON & LITHO CC (IN LIQUIDATION) & OTHERS

LABOUR APPEAL COURT (JA108/14)

10 September; 21 October 2015

Before DAVIS JA, COPPIN JA and SAVAGE AJA

Transfer of business as going concern—Transfer of insolvent business—Section 197A of LRA 1995—Section 197A(1)(b) *only applies if there has been scheme of arrangement or compromise—Court entitled to examine substance and purpose of agreement between old employer and new employer to determine its true nature.*

Transfer of business as going concern—Transfer of insolvent business—Section 197A of LRA 1995—Whether sale of business constituting scheme of arrangement or compromise triggering application of s 197A—Primary purpose must be avoidance of winding-up order, otherwise s 197A not applicable.

The appellant, Atlas Packaging, appealed to the Labour Appeal Court against an order of the Labour Court dismissing its preliminary point that a dispute concerning an unfair dismissal claim by the respondent should be determined in terms of s 197A(1)*(b)* of the LRA 1995 (see *Palierakis v Atlas Carton & Litho (in liquidation) & others* (2014) 35 *ILJ* 2839 (LC)).

The respondent had been dismissed for operational reasons by Atlas Carton. Some months later Atlas Carton and Atlas Paper concluded a business sale agreement with Atlas Packaging. Almost a year after that, Atlas Carton and Atlas Paper were placed into voluntary liquidation which was later converted into compulsory liquidation. It was the contention of Atlas Packaging that, although the transfer of the business from Atlas Carton took place as a going concern, the provisions of s 197 of the Act did not apply, as the dispute was governed by s 197A. Under that section, unlike under s 197, all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee and anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer. Critical to the application of s 197A, however, is that there must have been a scheme of arrangement or compromise entered into between the appellant and Atlas Carton to avoid the winding-up of the latter for reasons of insolvency. The appellant contended that there had been.

The contractual arrangements between the appellant and Atlas Carton had not used the provisions of s 311 of the Companies Act 61 of 1973. The court considered how a common-law compromise or scheme of arrangement would apply in the context of s 197A but found that it was unnecessary to decide that point conclusively. The court first had to decide whether there was a genuine scheme of arrangement or compromise, which had been entered into to avoid the winding-up of Atlas Carton. The primary purpose of the arrangement or compromise must be the avoidance of a winding-up order. After considering the doctrine relating to simulated transactions the court concluded that it was manifestly entitled to examine the substance and purpose of the agreement in order to determine its true nature.

Having then examined the substance and purpose of the agreement, the court concluded that its purpose was not to nurse Atlas Carton back to commercial health so that it could avoid an order of winding-up, but, at worst, an attempt to circumvent the provisions of s 197 of the LRA and, at best, an asset stripping exercise. It was not, however, a compromise or arrangement, even within the meaning of the common law. The transaction was therefore a sham and did not fall within the scope of s 197A.

The appeal was dismissed with costs.

Appeal to the Labour Appeal Court from a decision of the Labour Court. The facts and further findings appear from the reasons for judgment. The judgment of the court below is reported at (2014) 35 *ILJ* 2839 (LC).

Annotations

Cases

Commissioner of Customs & Excise v Randles Brothers & Hudson Ltd 1941 AD 369 (applied)

Lomati Landgoed Beherende (Edms) Bpk, ex parte; Ex parte Lomati Landgoed (Edms) Bpk 1985 (2) SA 517 (W) (considered)

NBSA Centre Ltd, ex parte 1987 (2) SA 783 (T) (considered)

Palierakis v Atlas Carton & Litho (in liquidation) & others (2014) 35 *ILJ* 2839 (LC) (upheld on appeal)

Roshcon (Pty) Ltd v Anchor Auto Body Builders CC & others 2014 (4) SA 319 (SCA) (applied)

Statutes

Companies Act 61 of 1973 s 311

Labour Relations Act 66 of 1995 s 197, s 197A, s 197A(1)*(b)*

Attorney A Christophoran for the appellant.

Adv N Lombard for the first respondent.

Judgment reserved.

Davis JA:

Introduction

[1] This is an appeal against an order of Molahlehi J of 20 June 2014* in which he dismissed a preliminary point raised by appellant that a dispute concerning an alleged unfair dismissal claim of respondent stands to be determined in terms of s 197A(1)*(b)* of the Labour Relations Act 66 of 1995 (LRA).

[2] Briefly, the background can be described thus: Respondent was dismissed for operational reasons by first respondent (Atlas Carton) on 14 April 2010. On 29 September 2010, first respondent (Atlas Carton) and second respondent (Atlas Paper) concluded a business sale agreement with appellant. On 5 August 2011, Atlas Carton and Atlas Paper were placed into voluntary liquidation which was later converted into compulsory liquidation on 7 September 2011. Appellant contends that, although the transfer of the business from

*Reported as *Palierakis v Atlas Carton & Litho (in liquidation) & others* (2014) 35 *ILJ* 2839 (LC) — Eds.

Atlas Carton took place as a going concern, the provisions of s 197 of the LRA do not apply, as the dispute is governed by s 197A of the LRA.

[3] The significance of this argument is that, in the event that s 197A of the LRA is found to be applicable, respondent would have no claim against appellant because the latter would bear no liability in respect of the alleged claim. By contrast, if the decision of Molahlehi J is upheld, the matter would have to proceed further on the merits of the alleged dismissal as well as in respect of a determination of quantum.

Appellant's case

[4] Appellant's case is based on s 197A of the LRA which provides:

'197A Transfer of contract of employment in circumstances of insolvency
(1) This section applies to the transfer of a business —
(a) if the old employer is insolvent; or
(b) if a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.
(2) Despite the Insolvency Act, 1936 (Act 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of s 197(6) —
(a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration;
(b) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;
(c) anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;
(d) the transfer does not interrupt the employees' continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.
(3) Section 197(3), (4), (5) and (10) applies to a transfer in terms of this section and any reference to an agreement in that section must be read as a reference to an agreement contemplated in s 197(6).
(4) Section 197(5) applies to a collective agreement or arbitration binding on the employer immediately before the employer's provisional winding-up or sequestration.
(5) Section 197(7), (8) and (9) does not apply to a transfer in accordance with this section.'

[5] Critical to appellant's case is the contention, based upon s 197A(1)*(b)*, that there was a scheme of arrangement or compromise entered into between appellant and Atlas Carton to avoid the winding-up of the latter for reasons of insolvency.

[6] It is common cause that the contractual arrangements between appellant and Atlas Carton did not make use of the provisions of s 311 of the Companies Act 61 of 1973, the relevant portion of which provides:

'Where any compromise or arrangement is proposed between a company and its creditors or any class of them, or between a company and its members or

any class of them, the court may, on application of the company or any creditor or member of the company, or in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, the judicial manager, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such matter as the court may direct.'

[7] However, in *Henochsberg on the Companies Act 71 of 2008*[1] at 536-(7) it is contended that specific reference is not made to s 311 of the Companies Act of 1973 in s 197A, which, on this line of argument is intended to apply not only to a compromise or scheme of arrangement implemented in terms of s 311 of the 1973 Companies Act, but also in respect of common-law arrangements and compromises.

[8] I remain uncertain as to how a common-law compromise or scheme is to apply in the context of s 197A. In *Henochsberg on the Companies Act 71 of 2008*, there is cited, as support for his proposition, the judgment in *Ex parte NBSA Centre Ltd* 1987 (2) SA 783 (T) (*Ex parte NBSA*) as well as an earlier judgment in *Ex parte Lomati Landgoed Beherende (Edms) Bpk; Ex parte Lomati Landgoed (Edms) Bpk* 1985 (2) SA 517 (W).

[9] Unquestionably, Coetzee DJP in *Ex parte NBSA* accepted that not every so-called arrangement is an arrangement in terms of s 311. However, Coetzee DJP went on to say at 802B that 'only an arrangement *between* the company and its members or creditors or a class thereof can be an arrangement. When members' shares are to be transferred to or to be obtained by a third person or other members of the company this question arises. In every case it will have to be determined on a consideration of all the relevant aspects of the scheme and the surrounding facts whether it is such an arrangement *between* the company and its members or creditors'.

[10] In this dictum, the learned judge clearly envisaged that a court would have no jurisdiction to recognise some other form of arrangement outside of the provisions of s 311. Most certainly these two judgments do not afford definitive support for the contention that s 197A can be interpreted to include a compromise or scheme which is not implemented in terms of s 311 of the Companies Act, but rather under the common law.

[11] Nonetheless, for reasons that will become apparent, it is not necessary to decide this question definitively. A prior question arises in this case, namely, was there a genuine scheme of arrangement or compromise, which had been entered into to avoid the winding-up of Atlas Carton.

[12] In evaluating the relevant contract, a court must be cognisant of the doctrine regarding simulated transactions. This doctrine was definitively expounded in *Commissioner of Customs & Excise v Randles Brothers & Hudson Ltd*,[2] where Watermeyer JA said:

[1] P Delport *Henochsberg on the Companies Act 71 of 2008* vol 1 (LexisNexis 2011).
[2] 1941 AD 369.

'I wish to draw particular attention to the words "a real intention, definitely ascertainable, which differs from the simulated intention", because they indicate clearly what the learned Judge meant by a "disguised" transaction. A transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it. A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by the Courts according to its tenor, and then the only question is whether, so interpreted, it falls within or without the prohibition or tax.

A disguised transaction in the sense in which the words are used above is something different. In essence it is a dishonest transaction: dishonest, in as much as the parties to it do not really intend it to have, *inter partes*, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties. The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or is subject to the tax, and so they dress it up in a guise which conveys the impression that it is outside of the prohibition or not subject to the tax. Such a transaction is said to be *in fraudem legis*, and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.

Of course, before the Court can find that a transaction is *in fraudem legis* in the above sense, it must be satisfied that there is some unexpressed agreement or tacit understanding between the parties. If this were not so, it could not find that the ostensible agreement is a pretence. The blurring of this distinction between an honest transaction devised to avoid the provisions of a statute and a transaction falling within the prohibitory or taxing provisions of a statute but disguised to make it appear as if it does not, gives rise to much of the confusion which sometimes appears to accompany attempts to apply the maxim quoted above.'[3]

[13] From this approach to the proper classification of a contract, a court is manifestly entitled to examine the substance and purpose of the agreement in order to determine its true nature. See for more recent authority *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC & others* 2014 (4) SA 319 (SCA) at 332–4.

[14] It follows that the threshold question which arises in this case requires that this court looks into the true nature and substance of the contract between appellant, Atlas Carton and one Nicolas Gargassoulas, which the appellant alleges was a scheme of arrangement or compromise entered into to avoid the winding-up of Atlas Carton. From the papers, it is clear that Mr Gargassoulas controlled both the corporate entities which were parties to this agreement.

[15] It is now necessary to drill down into the fundamentals of the agreement. In terms of the agreement, Atlas Carton agreed to sell to the appellant 'the business as a going concern including the subject-matter. The business was defined as the packaging material business currently carried on by the seller as a going concern at the premises'. The subject-matter was defined as including the current assets, the fixed assets, goodwill, the intellectual property rights, the

[3] at 395–6.

right, title and interest in and to the contracts, the sold liabilities and the employees. It excluded 'any benefit or risk to the seller arising pursuant to the Mondi litigation and any other assets or liability not specifically mentioned or referred to in this clause'.

[16] The purchase price was in an amount equivalent to the net asset value. Net asset value was defined as follows:

> '"Net asset value" — the net asset value of the seller as at the effective date, determined with reference to the effective date accounts and which shall comprise —
> 1 the aggregate value of the fixed assets and current assets of the seller at the effective date (excluding goodwill, intellectual property rights and other intangible assets) less —
> 1.1 the total of all provisions (made in terms of generally accepted accounting practice) in respect of such assets; and less
> 1.2 the sold liabilities.'

[17] Sold liabilities were defined as follows:

> 'The liabilities of the seller to be assumed by the purchaser and comprising —
> 1 the trade liabilities of the seller in respect of the business as at the effective date, incurred in the ordinary, normal and regular course of business, including without limitation, all employee related liabilities;
> 2 the amount owing by the seller by way of bank overdraft as at the effective date;
> 3 the member's loans;
> 4 any third party loans owing by the seller and any other non-current liabilities of the category described in the base date accounts;
> 5 the liability of the seller and the business in respect of taxation;
> 6 any claims against the seller and/or the business in respect of product liability or breach of contract, the cause of which arose or was incurred prior to the effective date, but specifically excluding the amounts (including legal costs), owing by the seller pursuant to the Mondi litigation.'

[18] The agreement provided that the purchaser would discharge the sold liabilities as defined as and when they fell due for payment. However, specific provision was made for the repayment of the member's loan; that is the loan to Mr Gargassoulas. In this connection, the agreement provided:

> 'The purchaser hereby undertakes to assume the member's loans and repay same to Gargassoulas or to any third party to whom Gargassoulas may cede his claim as and when it is in a position to do so, and to this end, the same terms and conditions that applied to the repayment of the member's loans by the seller, shall apply mutatis mutandis to the purchaser. The purchaser undertakes at its costs to pass and cause to be registered in favour of Gargassoulas or to any third party to whom Gargassoulas may cede his claim a special and general notarial bond over the business and the fixed assets in an amount of R5,000,000 to secure the repayment of the member's loans, such bond to be registered by 2010.'

[19] One final clause requires attention. Clause 19 dealt specifically with employees. It reads as follows:

> 'It is recorded that as the business is sold as a going concern, in terms of s 197A of the Labour Relations Act 1995, all contracts of employment between the

employees and the seller as at the effective date shall continue in force between the purchaser and the employees without interruption of the employees' continuity of employment.

The seller hereby indemnifies the purchaser and holds it free and harmless against any and all claims which may be made against the purchaser by any employee in respect of unpaid salary, leave pay and any other employee related benefits to the employee's employment by the business prior to the effective date including all legal costs which may be incurred by the purchaser in the defence thereof and in the enforcement of this indemnity.'

The application of s 197A

[20] It is now possible to return to s 197A which applies to a transfer of a business, pursuant to a scheme of arrangement or compromise which has been entered into to avoid winding-up. When the agreement, which I have described, is read as a whole, it is clear that the only certainty that flowed therefrom was that Atlas Carton would, indeed, be wound up. Upon the conclusion of the agreement, Atlas Carton's entire business structure had been transferred to appellant. The purchase price was structured so that, given the valuation of the fixed assets in the amount of R4.2 million which was to be valued at the lower of the actual cost price and the market value thereof, Atlas Carton would have no assets, no infrastructure and presumably, little, if any, cash.

[21] While an arrangement connotes a far wider class of agreement than a compromise, which is an agreement to settle a dispute over rights or to modify undisputed rights where a difficulty exists over their enforcement, within the context of the specific wording of s 197A there can be little doubt that the entire arrangement or compromise must have, as its primary purpose, the avoidance of a winding-up order.

[22] There is no basis by which this conclusion can be justified upon an analysis of the structure of this agreement. Clause 19 might proclaim that the business was to be sold as a going concern in terms of s 197A. But this only confirms that this proclaimed characterisation of this agreement sought to obscure its true purpose. That purpose was not to nurse Atlas Carton back to commercial health so that it could avoid an order of winding-up. The purpose appears to be an attempt to circumvent the provisions of s 197 of the LRA at worst for appellant and, at best, an asset stripping exercise, but not a compromise or arrangement even within the meaning of the common law.

[23] Viewed accordingly, the transaction was a sham. It cannot, in any way, be characterised as one which falls within the scope of s 197A of the LRA.

[24] For these reasons, therefore, the appeal is dismissed with costs.

Coppin JA and Savage AJA concurred.

Appellant's Attorneys: *Biccari Bollo Matiano Inc.*

First Respondent's Attorneys: *Goldberg Attorneys.*

CAMPBELL SCIENTIFIC AFRICA (PTY) LTD v SIMMERS & OTHERS

LABOUR APPEAL COURT (CA14/2014)

3 September; 23 October 2015

Before WAGLAY JP, COPPIN JA and SAVAGE AJA

Sexual harassment—Constitutional protection against harassment—Female employees entitled to engage constructively and on equal basis in workplace without unwarranted interference with dignity and integrity.

Sexual harassment—What constitutes—Codes of Good Practice on the Handling of Sexual Offences in Workplace 1998 and 2005—Both codes in operation—Are relevant codes to guide commissioners when determining what constitutes sexual harassment.

Sexual harassment—What constitutes—Unwelcome and inappropriate conduct of sexual nature—Employee making inappropriate sexual advance to younger female contractor outside work—Underlying such advances lay power differential that favoured employee due to age and gender—Merely because advance not physical and only single incident not negating fact that it constituted sexual harassment.

The respondent, a senior employee of the appellant company, accompanied a colleague and a contractor to the company, Ms M, on a survey in Botswana. While staying overnight at a lodge, the employee asked Ms M, 'Do you want a lover tonight?' She declined, and the employee did not pursue the issue. After returning to South Africa, Ms M left for Australia. She wrote to the company to complain about the employee's unprofessional conduct in criticising his colleague behind his back and his inappropriate sexual advance. The company disciplined the employee for sexual harassment, unprofessional conduct and bringing the name and image of the company into disrepute. He was dismissed and was unsuccessful in his referral of an unfair dismissal dispute to the CCMA. On review, the Labour Court found that, while the employee's conduct had been inappropriate, it did not constitute sexual harassment and that dismissal was not justified. It ordered the employer to reinstate the employee on a final warning (see *Simmers v Campbell Scientific Africa (Pty) Ltd & others* (2014) 35 *ILJ* 2866 (LC)).

In an appeal by the company, the Labour Appeal Court noted that, by its nature sexual harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that the LAC has characterised it as 'the most heinous misconduct that plagues a workplace'. Both the Code of Good Practice on the Handling of Sexual Harassment Cases 1998, issued in terms of the LRA 1995, and the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace 2005, issued in terms of the Employment Equity Act 55 of 1998, provide that victims of sexual harassment may include not only employees, but also clients, suppliers, contractors and others who have dealings with a business. In addition both codes record that a single act may constitute sexual harassment. Although there are distinctions between the codes, both are still in operation and are relevant codes to guide commissioners.

The court found that there was no dispute that the employee made advances to Ms M that took the form of unwelcome and unwanted conduct of a sexual nature. The court below erred in finding that the advances constituted inappropriate sexual attention and not harassment, were not serious and did not impair the dignity of Ms M, who was not a co-employee, with whom there existed no disparity of power and where the two were unlikely to work together in the future. In the court's view the unwelcome and inappropriate advances were directed by the employee at a young woman close to 25 years his junior whose employment had placed her alone in the company of the employee and his colleague in rural Botswana. Underlying such advances lay a power differential that favoured the employee, due both to his age and gender. Ms M's dignity was impaired by the insecurity caused to her by the unwelcome advances and by her clearly expressed feelings of insult. The mere fact that the employee's conduct was not physical, that it occurred during a single incident and was not persisted in thereafter, did not negate the fact that it constituted sexual harassment. The court below erred in treating the conduct simply as an unreciprocated sexual advance in which the employee was only 'trying his luck'. The court below overlooked that in making the unwelcome sexual advance, the employee's conduct violated Ms M's right to enjoy substantive equality in the workplace; it caused her to be singled out opportunistically in circumstances where she was entitled to expect that this would not occur. In treating the employee's conduct as sexual harassment, Ms M and other women such as her are assured of their entitlement to engage constructively and on an equal basis in the workplace without unwarranted interference upon their dignity and integrity — this is the protection that the Constitution affords.

The court was therefore satisfied that the commissioner had correctly found on the material before him that the employee's conduct constituted sexual harassment as defined in both codes: it was unwelcome and unwanted; it was offensive; it intruded upon Ms M's dignity and integrity; and it caused her to feel both insulted and concerned for her personal safety.

Turning to the issue of sanction, the court found that the commissioner had taken all relevant circumstances into account in arriving at the conclusion that the dismissal of the employee was fair. The sanction imposed served to send out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty.

The court accordingly found that the arbitration award was justifiable in relation to the reasons given for it and did not fall outside the range of decisions which a reasonable decision maker could have made on the material before him.

The appeal was upheld with costs.

Appeal to the Labour Appeal Court from a decision of the Labour Court. The facts and further findings appear from the reasons for judgment. The judgment of the court below is reported at (2014) 35 *ILJ* 2866 (LC).

Annotations

Cases

Department of Labour v General Public Service Sectoral Bargaining Council & others (2010) 31 *ILJ* 1313 (LAC) (referred to)

Gaga v Anglo Platinum Ltd & others (2012) 33 *ILJ* 329 (LAC) (referred to)

Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 *ILJ* 943 (LAC) (referred to)

Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) 2013 (6) SA 224 (SCA); (2013) 34 *ILJ* 2795 (SCA) (referred to)

Hoechst (Pty) Ltd v Chemical Workers Industrial Union & another (1993) 14 *ILJ* 1449 (LAC) (referred to)

J v M Ltd (1989) 10 *ILJ* 755 (IC) (referred to)
Motsamai v Everite Building Products (Pty) Ltd [2011] 2 BLLR 144 (LAC) (referred to)
SA Broadcasting Corporation Ltd v Grogan NO & another (2006) 27 *ILJ* 1519 (LC) (referred to)
A SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae) 2014 (6) SA 123 (CC); (2014) 35 *ILJ* 2981 (CC) (referred to)
Saaiman & another v De Beers Consolidated Mines (Finsch Mine) (1995) 16 *ILJ* 1551 (IC) (referred to)
B Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC) (referred to)
Simmers v Campbell Scientific Africa (Pty) Ltd & others (2014) 35 *ILJ* 2866 (LC) (overruled on appeal)

Statutes

C Constitution of the Republic of SA 1996 s 1*(a)-(c)*, s 9(3)
Employment Equity Act 55 of 1998 s 6(1), s 6(3), Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace item 2.1, item 4
Labour Relations Act 66 of 1995 s 203(3), Code of Good Practice on the Handling of Sexual Harassment Cases item 1, item 3(1)-(2)

D *Adv A Freund SC* for the appellant.

Adv L Ackermann for the first respondent.

Judgment reserved.

E SAVAGE AJA:

Introduction

[1] This is an appeal, with the leave of the court a quo, against the judgment of the Labour Court (Steenkamp J) in which the dismissal of the first respondent, Mr Adrian Simmers, for sexual harassment and unprofessional conduct was found substantively unfair and his retrospective reinstatement ordered subject to a final written warning valid for 12 months.*

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[2] Mr Simmers, a 48 year old installation manager employed by the appellant, Campbell Scientific Africa (Pty) Ltd, was dismissed following a disciplinary hearing for unprofessional conduct and the sexual harassment of 23 year old Ms Catherine Markides, who was employed by Loci Environmental (Pty) Ltd, through which company the appellant was contracted as part of a consortium to work on a joint project in Botswana. Aggrieved with his dismissal, he referred a dispute to the Commission for Conciliation, Mediation & Arbitration (CCMA). A first arbitration award was set aside by the Labour Court (Rabkin-Naicker J) on the basis of certain procedural irregularities and the matter was remitted to the CCMA for a hearing de novo before a different commissioner.

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Arbitration

[3] The evidence before the commissioner in the de novo hearing was that

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*Reported as *Simmers v Campbell Scientific Africa (Pty) Ltd & others* (2014) 35 *ILJ* 2866 (LC) — Eds.

Mr Simmers, his colleague Mr Frederick le Roux, also an employee of the appellant, and Ms Markides were staying at a lodge near Serowe in Botswana where they were contracted to survey a site for the installation of equipment for the Botswana Power Corporation. On their last night at the lodge, the three had dinner together. While Mr Le Roux settled the bill, Mr Simmers and Ms Markides walked to the parking area to wait for him. Ms Markides in her evidence, tendered via telephone from Australia, said that while waiting for Mr Le Roux, Mr Simmers told her he felt lonely, made advances towards her and asked her to come to his room, an invitation which she said he 'reiterated a number of times' to the point that she felt 'quite uncomfortable'. He also asked her if she had a boyfriend, causing her to respond that she did, that she was in contact with him and that it was a serious relationship. Mr Simmers then invited her to phone him in the middle of the night if she changed her mind.

[4] Ms Markides said she felt threatened, that his advances to her were 'not welcome at all' and she programmed Mr Le Roux's number into her cellphone so that he was 'one button away from a call just in case anything happened'. She stated in evidence that:

> 'It made me feel incredibly nervous that he had treated me this way, I felt — it was uncomfortable for me, I was not open to suggestions, the offers that he was making at all — at all. I just felt that it was a very inappropriate way for him to behave towards me.'

[5] Ms Markides continued that she felt 'quite insulted', 'quite shocked' and upset given that it was 'just before we went to bed and the sleeping arrangements were that Mr Simmers' room was quite close to mine'.

[6] Following the incident, she said that she would not agree to work with Mr Simmers again. Ms Markides also took issue with Mr Simmers' conduct, which she considered inappropriate and unprofessional, in telling her that Mr Le Roux was difficult to work with, that he was a stubborn perfectionist who took too much time to do his job and did not listen.

[7] Mr Simmers' version differed in certain material respects from that of Ms Markides. He said that he asked Ms Markides only once and half-jokingly 'Do you need a lover tonight?' and that when she refused he told her that if she changed her mind, she should come to his room and knock and that they could then go to town and take a few photographs. Ms Markides did not recall this being said. She also denied that what had occurred was no more than a sexual invitation between consenting adults which had been meant lightly.

[8] Although made after-hours, the commissioner found Mr Simmers' conduct to constitute sexual harassment with the verbal sexual advances made to Ms Markides unwelcome and related to the workplace. The commissioner also found that Mr Simmers had acted in an unprofessional manner in making remarks to Ms Markides about Mr Le Roux behind his back which 'could have had the effect of bringing the company's name into disrepute'.

[9] The commissioner concluded that:

> 'In my opinion the entire conversation pertaining to the incident was inappropriate considering that they hardly knew each other. I find it inappropriate that a stranger would approach another person and ask whether she has a boyfriend. The complainant testified that even though she did not tell the applicant to stop, she made it clear in no uncertain terms that it was not acceptable and that she had blatantly refused the invitation. I therefore find that the applicant's proposals to Ms Markides constituted sexual harassment in the form of unwanted sexual advances.'

[10] The sanction of dismissal was found to be fair given that the misconduct was serious, with the mitigating factors not negating the aggravating circumstances and when Mr Simmers had shown no remorse and remained adamant throughout the proceedings that his behaviour was not serious. It was found that his 'behaviour cannot be rehabilitated' and that any future employment relationship between the parties was not possible. With no procedural defect, the dismissal of Mr Simmers was found both procedurally and substantively fair.

Labour Court

[11] Dissatisfied with the commissioner's award, Mr Simmers sought its review by the Labour Court. Steenkamp J considered the issues for determination to be whether the words 'do you want a lover tonight' and 'come to my room if you change your mind', which Mr Simmers admitted saying, constitute sexual harassment or 'mere sexual attention'. And if the words 'do you want a lover for tonight' do constitute sexual harassment, whether these words are sufficiently serious to justify a dismissal. Regarding the charge of unprofessional conduct, the issue for determination was stated as whether Mr Simmers' discussions with Ms Markides regarding Mr Le Roux justified a dismissal or other punishment.

[12] The court found it relevant that Mr Simmers and Ms Markides were not co-employees, that they would probably never work together again since Ms Markides had gone to Australia and that 'there was no disparity of power' between them. In addition, the conduct was 'once-off' and was found to have occurred outside of the workplace and outside working hours.

[13] The commissioner's statement was found illogical that 'the fact that the applicant had not denied that he had made the remarks to the complainant certainly would suggest that he was aware or should have been aware that his remarks on the day of the incident would not be welcome and therefore constitute sexual harassment'. Mr Simmers' conduct, it was stated (at para 29), 'did not cross the line from a single incident of an unreciprocated sexual advance to sexual harassment':

> 'It is true that a single incident of unwelcome sexual conduct can constitute sexual harassment. But it is trite that such an incident must be serious. It should constitute an impairment of the complainant's dignity, taking into account her circumstances and the respective positions of the parties in the workplace. This nearly always involves an infringement of bodily integrity such as touching, groping, or some other form of sexual assault; or quid pro quo harassment. In this case, it is common cause that the commissioner dealt

with a single incident. He found so. Once Markides made it plain to Simmers that it was not welcome, he backed off.'

[14] The court continued (at para 31):

'Misunderstandings are frequent in human interaction. An inappropriate comment is not automatically sexual harassment. This was a fundamental error made by the commissioner, one that led directly to his conclusion that dismissal was a fair sanction. Simmers's comment was sexual attention, crude and inappropriate as it may have been. It was a single incident. It was not serious. It could only have become sexual harassment if he had persisted in it or if it was a serious single transgression. Add to this the fact that there was no workplace power differential, the parties were not co-employees, and the incident took place after work. The advance was an inappropriate sexual one, but it did not cross the line to constitute sexual harassment. It certainly did not lead to a hostile work environment; in fact, Markides left for Australia shortly after the incident, and it is unlikely that the parties will ever work together again — they do not even work for the same employer.'

[15] The court (at para 33) took issue with the commissioner's failure to consider the relevance of Ms Markides' emails in which —

'[s]he did not say that she was afraid, nor nervous, nor threatened, nor apprehensive. In her evidence at arbitration she could not provide a plausible explanation why she did not include the following allegations, raised for the first time at arbitration, in her email: …that she was "incredibly nervous"; … that she felt insulted; … [and] that she had put Le Roux's cellphone number into her cellphone in case Simmers approached her during the night.'

[16] The high-water mark of her complaint was found to be that contained in her email of 11 June 2012 in which she stated that to her Mr Simmers' conduct in relation to Mr Le Roux was inappropriate and disrespectful; that she was surprised by his advances; and that she felt uncomfortable with his conduct 'overall'. By failing to take this evidence into account, the arbitrator was found to have reached a decision that no reasonable decision maker could have reached on the facts before him. Mr Simmers' conduct was found (at para 36) not to have amounted to sexual harassment and even if it did, it could not justify dismissal:

'It is common cause that Simmers did not touch Markides. His verbal conduct was crude and inappropriate, but it was not a demand for sex. It was an unreciprocated advance. In blunt terms, he was "trying his luck". It was inappropriate but it did not justify dismissal. The commissioner concludes, correctly and reasonably, that this was a once-off incident. There was no power differential and the parties were together for only a brief sojourn. It did not create a hostile work environment for Markides. No reasonable commissioner, in my view, could have found that this incident justified dismissal as a fair sanction.'

[17] A fair sanction, the court concluded, would have been some form of corrective discipline including a written or final written warning for inappropriate conduct. Similarly, it was found that while Mr Simmers did behave unprofessionally in discussing Mr Le Roux's perceived shortcomings with Ms Markides, creating a bad impression and leading her to consider his conduct inappropriate and

surprising, dismissal was not a fair sanction for a first offence when a form of progressive discipline was appropriate. The decision of the commissioner was found to fall outside of the realm of reasonableness required with the sanction imposed unfair. Consequently, Mr Simmers' dismissal was held to be substantively unfair and he was retrospectively reinstated into his employment with a final written warning valid for 12 months.

Evaluation

[18] Our constitutional democracy is founded on the explicit values of human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law.[1] Central to the transformative mission of our Constitution is the hope that it will have us re-imagine power relations within society so as to achieve substantive equality, more so for those who were disadvantaged by past unfair discrimination.[2]

[19] The treatment of harassment as a form of unfair discrimination in s 6(3) of the Employment Equity Act 55 of 1998 (EEA) recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace.[3] This is echoed in the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases (the 1998 code), issued by NEDLAC under s 203(1) of the Labour Relations Act 66 of 1995 (LRA), and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace (the amended code), issued by the Minister of Labour in terms of s 54(1)*(b)* of the EEA.[4]

[20] At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often 'less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor'.[5]

[21] By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality

[1] s 1*(a)-(c)* of the Constitution of the Republic of SA 1996.

[2] *SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)* 2014 (6) SA 123 (CC); (2014) 35 *ILJ* 2981 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC) at para 29.

[3] Section 6(3) reads: 'Harassment of an employee is a form of unfair discrimination which is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).' Section 6(1) has expanded upon the grounds of unfair discrimination provided in s 9(3) of the Constitution to include family responsibility, HIV status and political opinion.

[4] GN 1367 of 1998 issued by NEDLAC in terms of s 203 of the LRA; and GN 1357 of 2005 issued by the Minister of Labour in terms of s 54(1)*(b)* of the EEA (4 August 2005). See item 1 of the 1998 code; item 4 of the amended code.

[5] Basson A 'Sexual Harassment in the Workplace: An Overview of Developments' 2007 (3) *Stell LR* 425-50 at 425, quoting Garbers 2002 *SA Merc LJ* 37 n 5.

in the workplace. It is for this reason that this court has characterised it as 'the most heinous misconduct that plagues a workplace'.[6]

[22] Both the 1998 and the amended codes of good practice provide that victims of sexual harassment may include not only employees, but also clients, suppliers, contractors and others having dealings with a business.[7] In addition, both codes record that a single act may constitute sexual harassment.[8] Distinctions exist between the codes in the definition of sexual harassment, with the 1998 code defining it as —

> '(1) … unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.
> (2) Sexual attention becomes sexual harassment if —
> *(a)* the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
> *(b)* the recipient has made it clear that the behaviour is considered offensive; and/or
> *(c)* the perpetrator should have known that the behaviour is regarded as unacceptable'.[9]

[23] The definition contained in the 2005 amended code of sexual harassment is that of —

> 'unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:
> 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
> 4.2 whether the sexual conduct was unwelcome;
> 4.3 the nature and extent of the sexual conduct; and
> 4.4 the impact of the sexual conduct on the employee'.[10]

[24] In spite of it being termed the 'Amended' code, this code does not replace or supersede the 1998 code, which to date has not been withdrawn. The result is that in terms of s 203(3), both codes are 'relevant codes of good practice' to guide commissioners in the interpretation and application of the LRA.

[25] The commissioner, while correctly recording that in addition to the Code of Good Practice: Dismissal, any other relevant code of good practice was to be taken into account in his determination of the matter, relied only on the provisions of the 1998 code and not the amended code. Although the Labour Court found that the commissioner had relied on the amended code (when in fact it was the 1998 code to which the commissioner had referred), the court then considered the provisions of the amended code and not the 1998 code. For current purposes little turns on this discrepancy.

[6] *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) at para 20. See too *Department of Labour v General Public Service Sectoral Bargaining Council & others* (2010) 31 *ILJ* 1313 (LAC) at para 37.

[7] item 2.1 of amended code.

[8] item 3(2)*(a)* of 1998 code; see too *J v M Ltd* (1989) 10 *ILJ* 755 (IC).

[9] at item 3.

[10] at item 4.

[26] The appellant was entitled to discipline Mr Simmers for misconduct which was both related to and impacted on his employment relationship with the appellant.[11] This was so given that the misconduct occurred within the context of a work related social event when Mr Simmers would not have been at the lodge in Botswana and in the company of Ms Markides had it not been for his employment with the appellant and it was to the appellant that Ms Markides complained regarding Mr Simmers' conduct.

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

[28] The commissioner did not, in my mind, fail to appreciate the distinction between the content of the emails sent by Ms Markides to the appellant and her oral testimony in which she indicated that she was afraid, nervous and threatened by Mr Simmers' conduct. From her emails, it is apparent that she was circumspect in her initial report to the appellant when she stated in general terms that she considered Mr Simmers' conduct unprofessional, inappropriate and 'felt it would reflect badly on the company if … he … continued to behave in that manner'. Thereafter on the request of the appellant, she provided further details of the incident and on 11 June 2012, while accepting the appellant's apology for the behaviour, accepted that it was not behaviour 'appropriately representative of CS Africa' but Mr Simmers' 'personal misconduct'. In this email, she provided some detail of the advances made to her and also reported that Mr Simmers had been unprofessional in speaking to her about Mr Le Roux in an 'undermining and unnecessary' manner.

[29] When on 21 June 2012 Ms Markides was informed that a formal disciplinary process was to be instituted against Mr Simmers, she was asked to supply a 'short declaration'. She replied in writing:

[11] See *Hoechst (Pty) Ltd v Chemical Workers Industrial Union & another* (1993) 14 *ILJ* 1449 (LAC); *Saaiman & another v De Beers Consolidated Mines (Finsch Mine)* (1995) 16 *ILJ* 1551 (IC).

'I found Adrian's conduct inappropriate. He constantly attempted to influence my opinion of Frederick into condescension, saying that he was a perfectionist, that he was stubborn, that he took too much time to do his job, that he didn't listen, that he was an impossible person to work with. It was uncomfortable for me that he (Adrian) would try to talk about Frederick behind his back to me.

One night, after we had dinner, Frederick was finalising the bill, and Adrian and I were standing in the parking area. I said that I was not tired, Adrian suggested that we do something, to which I said (reluctantly) that we should speak to Frederick. He refused saying that he did not want Frederick to know or be involved. I then said that I was just going to go to bed. He said that it was difficult to be alone, that he was lonely and asked if I wanted to go for a walk (alone with him) or go to his room with him. I refused, he then asked about my boyfriend (whom I had mentioned …) and asked if I was in contact with him, if it was a serious relationship. I said yes, I speak to him every day. … Adrian then asked again if I was sure I didn't want to spend some time with him, to which I refused again, and said I was just going to go to bed. He then reiterated his offer, saying that if I changed my mind I could just go to his room during the night. I again said that I was going to bed. … Overall I felt uncomfortable with Adrian's conduct, and was surprised by his advances to me, and his disrespectful behaviour towards Frederick.'

[30] In her oral evidence, Ms Markides explained that her email —

'was quite brief because that's what I was asked for, it was just a brief statement of what had happened, I wasn't asked to explain exactly how I felt that evening. … I didn't go into detail of emotional wellbeing or anything'.

When pressed further as to why she had not done so, she answered: 'Because as far as I took it, I wasn't asked to do that.'

[31] By the nature of oral evidence, it was reasonable to accept that Ms Markides would provide further details, including of her emotional response to the incident, when testifying about it and that her evidence would flesh out the content of her emailed statement. It is relevant that no challenge was put to Ms Markides in cross-examination that her evidence as to her reaction to the advances made was untrue, nor that either her credibility or the reliability of her evidence was tainted by her failure to record the detail of such reaction in her emails. In not rejecting Ms Markides' evidence and in placing reliance on her oral evidence concerning the impact of Mr Simmers' conduct, the commissioner did not commit a reviewable irregularity. It follows that the court a quo's conclusion that the commissioner, in failing to take the content of the email evidence into account, reached a decision that no reasonable decision maker could have reached on the facts before him is consequently, in my mind, strained.

[32] It is trite that an arbitration award will be set aside on review where the result is unreasonable insofar as it is not one that a reasonable arbitrator could reach on all the material that was before the arbitrator.[12] From the record, it is apparent that distinctions existed in

[12] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 (6) SA 224 (SCA); (2013) 34 *ILJ* 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25. See too *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 943 (LAC).

the versions of Ms Markides and Mr Simmers regarding the incident which the commissioner in his award did not resolve. While there may have been benefit in finding on these distinctions, I agree with Mr *Freund* SC, for the appellant, that these were not sufficiently stark to place mutually exclusive versions before the commissioner and that the decision reached by the commissioner was one that a reasonable decision maker could have reached on the material before him. Mr Simmers' conduct constituted sexual harassment, as defined in both codes: it was unwelcome and unwanted; it was offensive; it intruded upon Ms Markides' dignity and integrity; and it caused her to feel both insulted and concerned for her personal safety.

[33] In *SA Broadcasting Corporation Ltd v Grogan NO & another*,[13] Steenkamp AJ (as he then was) observed that sexual harassment by older men in positions of power has become a scourge in the workplace. In *Gaga v Anglo Platinum Ltd & others*,[14] this court noted similarly that the rule against sexual harassment targets, amongst other things, reprehensible expressions of misplaced authority by superiors towards their subordinates.[15] The fact that Mr Simmers did not hold an employment position senior to that of Ms Markides or that they were not co-employees did not have the result that no disparity in power existed between the two. His conduct was as reprehensible as it would have been had it been metered out by a senior employee towards his junior in that it was founded on the pervasive power differential that exists in our society between men and women and, in the circumstances of this case, between older men and younger women. Far from not being serious Mr Simmers capitalised on Ms Markides' isolation in Botswana to make the unwelcome advances that he did. The fact that his conduct was not physical, that it occurred during the course of one incident and was not persisted with thereafter, did not negate the fact that it constituted sexual harassment and in this regard the Labour Court erred in treating the conduct as simply an unreciprocated sexual advance in which Mr Simmers was only 'trying his luck'. In its approach the court overlooked that in electing to make the unwelcome sexual advances that he did, Mr Simmers' conduct violated Ms Markides' right to enjoy substantive equality in the workplace. It caused her to be singled out opportunistically by Mr Simmers to face his unwelcome sexual advances in circumstances in which she was entitled to expect and rely on the fact that within the context of her work this would not occur. In treating the conduct as sexual harassment, Ms Markides, and other women such as her, are assured of their entitlement to engage constructively and on an equal basis in the workplace without unwarranted interference upon their dignity and integrity. This is the protection which our Constitution affords.

[34] Turning to the issue of sanction, the commissioner found the dismissal of Mr Simmers to be fair on the basis of the seriousness

[13] (2006) 27 *ILJ* 1519 (LC) at 1532A.
[14] (2012) 33 *ILJ* 329 (LAC); [2012] 3 BLLR 285 (LAC).
[15] at para 41.

of the misconduct, the lack of remorse shown by Mr Simmers, the conclusion that there was little room for rehabilitation and that a future employment relationship was not possible. In doing so he had regard to whether there existed factors in favour of the application of progressive discipline rather than dismissal. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (*Sidumo*),[16] it was emphasised that:

> 'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'[17]

[35] The commissioner had regard to all relevant circumstances in arriving at a conclusion that the dismissal of Mr Simmers was fair. It follows that in the manner of his approach to the issue of sanction, the commissioner properly applied his mind to the appropriateness of the sanction in the manner required in *Sidumo* and committed no reviewable irregularity in doing so.[18] The result was neither inappropriate nor unfair. Rather, the sanction imposed serves to send out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty.[19]

[36] It follows that the arbitration award was justifiable in relation to the reasons given for it and did not fall outside of the range of decisions which a reasonable decision maker could have made on the material before him. For these reasons, the appeal must be upheld. There is no reason in law or fairness as to why costs should not follow the result and I did not understand counsel for either party to contend differently.

Order

[37] In the result, the following order is made:

1 The appeal is upheld.
2 The order of the court a quo is set aside and replaced with the following order:

> '(1) The review application is dismissed.
> (2) There is no order as to costs.'

3 The first respondent is to pay the costs of the appeal.

Waglay JP and Coppin JA concurred.

Appellant's Attorneys: *Willem Jacobs & Associates.*
First Respondent's Attorneys: *Legal Aid Clinic, University of Stellenbosch.*

[16] [2007] ZACC 22; 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC); 2008 (2) BCLR 158 (CC).
[17] at para 79.
[18] See too para 117.
[19] *Gaga v Anglo Platinum Ltd* at para 47.

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY v RURAL MAINTENANCE (PTY) LTD & ANOTHER

A LABOUR APPEAL COURT (JA79/14)

10 September; 21 October 2015

Before DAVIS JA, COPPIN JA and SAVAGE AJA

B *Transfer of business as going concern—Going concern—What constitutes going concern—Overall assessment depends on examination of totality of business—No transfer as going concern where transferee cannot operate business without significant additional investment.*

Transfer of business as going concern—Going concern—What constitutes going C *concern—Where business consists of infrastructure to provide service and mechanism to generate revenue both must be transferred.*

Transfer of business as going concern—Transfer of business—What constitutes transfer of business as going concern—Section 197 of LRA 1995—Where transfer takes place as result of official conduct that may be ultra vires D *consequences of transfer remain until impugned conduct properly set aside.*

The appellant municipality had entered into an agreement to outsource the management, operation, administration, maintenance and expansion of its electricity supply to the respondents, Rural, for a period of 25 years. As a result of the agreement, 16 employees were transferred to Rural by way of E the provisions of s 197 of the LRA 1995. Almost two years later, and after Rural had incurred significant expenditure in expanding the business and had enlarged the workforce to 127 employees, the municipality advised it that, because the previous municipal manager had not had the authority to enter into the agreement on its behalf, it did not consider itself bound by its terms. F At the time that this matter was heard, a contractual dispute between the parties was pending in the High Court.

In the meantime, Rural returned to the municipality the electricity distribution infrastructure which consisted largely of the properties, tools, equipment and vehicles that had been transferred by it to Rural in the first place. Rural also G delivered a proposed agreement in terms of s 197 along with information concerning the 127 employees who it sought to transfer to the municipality. It did not deliver all of the components of its business but averred that it had transferred sufficient of its infrastructure to trigger the provisions of s 197.

The Labour Court held that the business of providing an electricity service that had been in the hands of Rural had been transferred to the municipality as a going H concern as contemplated in s 197 and ordered that the employment contracts of all 127 affected employees were to be transferred to it.

On appeal, the Labour Appeal Court considered the municipality's argument that the wording of s 197 required a positive act by the transferor for the section to be triggered and that, because the transaction was void ab initio because it was I ultra vires, there had been no such positive act. It concluded that this argument overlooked the approach set out in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) and developed in later judgments to the effect that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside.

J The court then examined the issue of whether the transaction had resulted in a transfer as a going concern. The municipality argued that, because what had

been transferred to it did not allow it seamlessly to continue to do business in substantially the same way as before, this had not constituted the transfer of the same business in different hands, which is what is required for a transfer as a going concern. A service had been transferred but not the actual business that provided the comprehensive service. A substantial additional financial investment was necessary in order to replicate the business that Rural had run prior to the handover. On the other hand, Rural argued that there had been a transfer of the infrastructure and capital infrastructural assets which was sufficient to conclude that the business which was now conducted by the municipality was the same business as had been conducted by Rural.

Having considered the position in European law, the court concluded that the overall assessment depends on an examination of the totality of the business; in this case, the business operated by Rural prior to the transfer. That business operated on two legs: the provision of adequate infrastructure in order for residents to be supplied with electricity and the mechanism by which to generate sufficient revenue for the supply of electricity by way of an adequate billing of consumers and the collection of what was owed for the supply of electricity. Since many of Rural's assets were not transferred, it was not possible for the municipality, without significant investment, to conduct the same business.

Rural had therefore failed to discharge the onus of showing that the transfer of a business as a going concern had taken place. The appeal was consequently upheld.

Appeal to the Labour Appeal Court from a decision of the Labour Court. The facts and further findings appear from the reasons for judgment.

Annotations

Cases

Southern Africa

Aviation Union of SA & another v SA Airways (Pty) Ltd & others 2012 (1) SA 321 (CC); (2011) 32 *ILJ* 2861 (CC) (considered)

Harsco Metals SA (Pty) Ltd & another v Arcelormittal SA Ltd & others (2012) 33 *ILJ* 901 (LC) (referred to)

MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) (applied)

Nature's Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Metropolitan Municipality 2010 (3) SA 581 (SCA) (referred to)

Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004 (6) SA 222 (SCA) (applied)

Europe

Oy Liikenne Ab v Pekka Liskojärvi & another [2001] IRLR 171 (ECJ) (considered)

P & O Trans-European Ltd v Initial Transport Services Ltd [2003] IRLR 128 (CA) (considered)

Spijkers v Gebroeders Benedik Abattoir CV [1986] 2 CMLR 296 (ECJ); [1986] ECR 1119 (ECJ) (considered)

Statutes

Labour Relations Act 66 of 1995 s 197, s 197(1)-(2)

Adv A I S Redding SC (with *Adv K Hopkins* and *Adv S Freese*) for the appellant.

Adv P J Pretorius SC (with *Adv L Hollander*) for the respondents.

Judgment reserved.

Davis JA:

Introduction

A [1] Appellant is a local municipality responsible for exercising legislative and governmental functions in the Eastern Free State area, which includes Harrismith, Kestell and Phutaditjhaba. Amongst its functions is the supply of electricity to residents.

[2] It is common cause that in 2011, the then municipal manager of
B appellant decided to outsource this function to first and second respondents (Rural). Rural specialises in assisting municipalities to provide electricity to consumers. It appears that appellant had allowed its electricity infrastructure to fall into a state of disrepair. Major transformers had suffered oil leaks which caused them to
C malfunction and circuit breakers were damaged beyond repair. There were frequent electricity outages. There were cases of live electricity distribution points which had not been properly secured and which, if accessed by members of the public, would result in electrocution and potential death. The switch gear was malfunctioning and, at least in one case, a substation exploded killing a person.
D [3] It also appeared that appellant could not pay Eskom for the electricity which was supplied. In significant part, this problem was caused by an inability to effectively collect revenue from consumers, because appellant did not have the necessary metering, invoicing and collecting systems in place.
E [4] For these reasons, on 3 April 2011, the municipal manager of appellant and Rural concluded the electricity management contract (EMC), in terms of which Rural was appointed by appellant to manage, operate, administer, maintain and expand the municipal
F electricity distribution network for a period of 25 years, after which the obligation to supply electricity to residents would revert to appellant. The EMC was signed on behalf of the appellant by the former municipal manager, Mr L M Mtombela, and by Mr Ilze Bosch on behalf of Rural.
G [5] It is also common cause that, in terms this agreement, Rural accepted 16 employees from appellant by way of a transfer agreed to by the parties which transfer was governed by s 197 of the Labour Relations Act 66 of 1995 (LRA).

[6] Rural commenced the performance of its obligations under the
H EMC from 1 September 2011. It incurred significant expenditure in expanding the business and it enlarged the workforce to 127 employees. It invested money in this expansion process which it explained in its founding affidavit as follows:

'Rural has incurred considerable expenditure in respect of:
I 1 the purchase of network materials being switch gear, polls, transformers, mini-substations and prepaid meters and the purchase of 17 new light commercial vehicles, totalling R13,523,766.51;
2 the purchase of two specialised trucks being an Iveco 4x4 Live Line truck and an Iveco 6x6 drill rig totalling R7,500,000;
J 3 electrical infrastructure mapping (ie the compiling and recordal of the details of the municipality's electrical distributions infrastructure), the

mapping of townships within the geographical area of the municipality, the purchase of software systems in regard to the electricity metering, billing, collection, customer care, fault desk, call centre, technical services and the like … salaries, legal costs, travel costs, technical investigations, financial investigations and feasibility study costs totalling R69,987,804; and

4 the purchase of an immovable property in Harrismith to be used to construct offices for Rural's employees and staff accommodation. The total costs of the immovable property including construction will be approximately R5,000,000.'

[7] On 5 August 2013, appellant advised Rural that it considered that it was not bound by the terms of the EMC, because its former municipal manager, Mr Mtombela, had not obtained the requisite authority from appellant to enter into the contract on behalf of the appellant. Therefore, his action was ultra vires and, accordingly, the contract was null and void. A further reason emerged as a basis for this contention, namely that Rural had not procured the necessary licence from the relevant regulator NERSA, which is a mandatory requirement in terms of the Electricity Regulation Act 4 of 2006.

[8] Rural contends that appellant had no right to resile from the EMC and that its actions amounted to a breach of contract. Accordingly, it has sought to cancel the contract. This contractual dispute is the subject of a pending action in the Free State High Court. It appears that the action was set down for hearing in October 2014 but the matter was postponed and will be heard later this year.

[9] Notwithstanding this pending action, Rural delivered an information pack to appellant on 3 October 2014 containing a list of the names of the 127 affected employees, their employment contracts, an organogram of Rural's organisational structure together with a proposed agreement in terms of s 197 of the LRA. Rural then sought to transfer the 127 employees onto appellant's payroll. It returned to appellant what it termed 'possession of the network and the capital assets'; in other words the electricity distribution infrastructure which consisted largely of the properties, tools, equipment and vehicles that had been transferred by appellant to Rural in the first place.

[10] In its replying affidavit, Rural said, 'the retention by Rural of peripheral assets such as vehicles, computer stations and the like does not affect this conclusion'; that is it had transferred sufficient of the infrastructure to trigger the operation s 197 of the LRA.

[11] The relevant portion of s 197 reads as follows:

'(1) In this section … —
(a) "business" includes the whole or a part of any business, trade, undertaking or service; and
(b) "transfer" means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.
(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) —
(a) 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;

(b) all the rights and obligations between the old employer and an employee at the time of transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and the employee's contract of employment continues with the new employer as if with the old employer.'

[12] The court a quo found that it was satisfied that the business of providing a service to the local inhabitants had previously been in the hands of Rural but had now been transferred to appellant. It thus concluded that there has been a transfer of a business as a going concern as contemplated in s 197. Accordingly, Tlhotlhalemaje AJ ordered that, with effect from 1 April 2014, the employment contracts of all 127 affected employees were to be transferred to appellant in terms of s 197(2) of the LRA.

[13] On petition, this issue has now come on appeal to this court.

The key issues

[14] Mr *Redding*, who appeared together with Mr *Hopkins* and Ms *Freese* on behalf of the appellant, raised an initial point to the effect that, even if factually there had been a transfer of business 'as a going concern', the court a quo had erred in finding that, as a matter of law, a transfer had taken place. In his view, there could be no transfer unless there was some positive action on the part of the transferor. The transferor would have to engage in a deliberate and intentional 'handing over' of the business. Section 197 employs the words of a business being transferred 'by one employer ("the old employer") to another employer ("the new employer") as a going concern'. In Mr *Redding's* view, this connotes a positive act to effect the necessary transfer.

[15] The wording of this section has been the subject of a great deal of debate, both among academic commentators and in case law. See, in particular, Malcolm Wallis 'It's Not Bye-Bye to "By": Some Reflections on Section 197 of the LRA' (2013) 34 *ILJ* 779-807 and the authorities cited therein together with the decision of the Constitutional Court in *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* 2012 (1) SA 321 (CC); (2011) 32 *ILJ* 2861 (CC). In reviewing the judgment of the Constitutional Court, Wallis, writing in his academic capacity, concludes as follows:

> 'Whilst the principal is the agency by which that occurs, the principal is not the employer of the affected workers and that employer (the old employer for the purposes of s 197) has not effected any transfer. All that they can do is withdraw from the scene. In those circumstances the position remains that the transfer has not been a transfer by the old employer. The principal is the party that causes the transfer of the business not the old employer. The judgment of the CC not only does not alter that, it reinforces it. That conclusion should

not be obscured by the outcome of the litigation, which was driven by the peculiar facts of that case.'[1]

[16] Following upon this approach, Mr *Redding* submitted that, unless Rural took positive steps to cause its business to be transferred back to appellant, s 197 of the LRA could not have been triggered in this case. In particular, Mr *Redding* submitted that the appellant had taken the view that the EMC had been concluded ultra vires and, accordingly, the contract was void ab initio. It therefore followed that no positive act as envisaged in s 197 had taken place to cause the business to be transferred back to the appellant.

[17] Regrettably, this argument does not take sufficient cognisance of the implications of the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*[2] where the following was said:

> 'For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. … But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question.'[3]

[18] This approach has been further developed in *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* (*Kirland*)[4] where Cameron J said:

> 'The fundamental notion — that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside — springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality.'[5] (Footnote omitted.)

[19] In *Kirland* an acting superintendent-general in the Department of Health Eastern Cape granted approval for the establishment of private hospitals, which permission had initially been refused by the superintendent-general before he took an extended period of sick leave. When he resumed duty, the superintendent-general withdrew the approvals on the grounds that the acting superintendent-general had acted improperly and hence the former could withdraw the decision.

[1] at 797.
[2] 2004 (6) SA 222 (SCA).
[3] at para 26.
[4] 2014 (3) SA 481 (CC).
[5] at para 103.

[20] The respondent approached the High Court seeking an order overturning the decision to withdraw the purported approval and thus reinstating the initial approval that had been granted by the acting superintendent-general.

[21] Of relevance to the present dispute, the High Court held that the withdrawal of the approval should be overturned on the basis that when the decision to withdraw the approvals was taken, the superintendent-general had not complied with the requirements of procedural fairness. On appeal to the Constitutional Court, the wider question of the implications of the *Oudekraal* decision was examined.

[22] For the majority, Cameron J found that the appeal had to fail because:

> 'The approval communicated to Kirland was therefore, despite its vulnerability to challenge, a decision taken by the incumbent of the office empowered to take it, and remained effectual until properly set aside. It could not be ignored or withdrawn by internal administrative fiat. This approach does not insulate unconstitutional administrative action from scrutiny. It merely requires government to set about undoing it in the proper way. That is still open to government.'[6]

[23] This finding is clearly applicable to the present set of facts. It is not sufficient, as Mr *Redding* argued, that, as the appellant has taken steps in another court to declare the contract ultra vires and consequently void, the *Oudekraal* principle does not apply thereto. See also *Nature's Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2010 (3) SA 581 (SCA); Hoexter *Administrative Law in SA* 2 ed (Juta 2012) at 546–50. Accordingly, in the absence of a finding by the Free State High Court, it cannot be said that the EMC can be ignored legally and there could be no transfer of the business 'by' Rural to the appellant because the return of the infrastructure happened in consequence of a restituo in integrum, and not as a result of some positive conduct on the part of the relevant parties.

Has there been a transfer as a going concern?

[24] Mr *Redding* submitted that to classify the transaction as a going concern, what must be transferred is 'the same business in different hands'. The business that was operated before the transfer must be substantially the same as the business that is capable of being operated after the transfer. Accordingly, a business cannot be sold as a going concern if it cannot seamlessly commence trading in substantially the same way as the business was traded previously. Mr *Redding* submitted that the business that was operated by Rural immediately before the handover used specialised tools and assets in a manner that the appellant could not employ after 'the hand over', because these same tools and assets had not been handed over by Rural. Significant assets were not transferred to the appellant, including:

[6] *Kirland* at para 105.

1 a host vending system, software and intellectual property relating to pre-paid metering;
2 an immovable property in Harrismith which provided offices and accommodation for at least 18 of the 127 employees;
3 computer software systems for electricity metering, billing, collection, customer care, fault desk, call centre, technical services;
4 computer hardware and stationery;
5 two specialised trucks (Iveco 4x4 Live Line truck and Iveco 6x6 drill rig) and 17 new light commercial vehicles; and
6 electrical infrastructure mapping.

[25] Mr *Redding* submitted that what Rural had handed over was the basic infrastructure needed to supply electricity. It had transferred a service to the appellant but had not transferred the actual business that provided the comprehensive service which it had conducted prior thereto. When appellant decided to outsource the business to Rural, it had done so on the basis of two important considerations; that is the inadequate maintenance of the infrastructure and the appellant's inability properly to bill consumers and collect revenue.

[26] While accepting that the basic infrastructure has been handed back to appellant, this was insufficient to operate the trading business. More was required to convert the mere supply of electricity into a viable trading business. The additional components, which were required to perform this additional set of activities, were never transferred to appellant and accordingly the same business was not transferred. Thus, it could not be concluded that appellant had received 'a going concern' from Rural, without a substantial additional financial investment which had to be made in order to replicate the business that Rural had run prior to the handover.

[27] Mr *Pretorius*, who appeared together with Mr *Hollander* on behalf of the respondent, submitted that an extensive electricity transmission and distribution network comprising all the equipment, wires and hardware installed in order to receive the bulk electricity from the Eskom metering point and to distribute electricity to the end-users through the end-user metering point, had been transferred back to the appellant. This included substations, switchgear protection and isolators, transformers, power lines, dropout fuses and links and metering equipment together with the appellant's prepaid vending system, comprising approximately 30 prepaid stations.

[28] In support of his submission that it was sufficient for the entire operating infrastructure and capital assets to be transferred to appellant in order to trigger the application of s 197 of the LRA, Mr *Pretorius* referred to the test as formulated in *Spijkers v Gebroeders Benedik Abattoir CV*:[7]

> 'The decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity.

[7] [1986] 2 CMLR 296 (ECJ); [1986] ECR 1119 (ECJ).

Consequently a transfer of an undertaking, business or part of business does not occur merely because its assets are disposed of. Instead it is necessary to consider … whether the business was disposed of as a going concern, as would be indicated, inter alia by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities. In order to determine whether those conditions are met, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.'[8]

[29] On the basis of this dictum, Mr *Pretorius* submitted that it was clear that the same business was conducted in the same location for the benefit of the same constituency, albeit in different hands. There had been a transfer of the infrastructure and capital infrastructural assets which was sufficient to conclude that the business which was now conducted by the appellant was the same business as had been conducted by the respondents. See also *Harsco Metals SA (Pty) Ltd & another v Arcelormittal SA Ltd & others* (2012) 33 *ILJ* 901 (LC); [2012] 4 BLLR 385 (LC) at paras 34-36.

[30] In the debate about the appropriate test, Mr *Redding* sought to rely on a decision of the European Court of Justice in *Oy Liikenne Ab v Pekka Liskojärvi & another* (*Oy Liikenne*).[9] In this case the court noted that when a transfer is of a going concern, the transfer must relate —

'to a stable economic entity whose activity is not limited to performing one specific work's contract … the term "entity" thus refers to an organised grouping of persons and assets facilitating the exercise or an economic activity which pursues a specific objective'.[10]

The court went on to say:

'So the mere fact that the service provided by the old and new contractors are similar does not justify the conclusion that there has been a transfer of an economic activity between the two undertakings. Such an entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors such as its workforce, its management staff, the way in which its work is organised, its operating methods, or indeed, where appropriate, the operational resources available to it.'[11]

[31] In this case, the court dealt with the transfer of seven local bus routes from the respondent to the appellant. It noted:

'In a sector such as scheduled public transport by bus, where the tangible assets contribute significantly to the performance of the activity, the absence

[8] at paras 11-13.
[9] [2001] IRLR 171 (ECJ).
[10] at para 31.
[11] at para 34.

of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity.'[12]

Evaluation

[32] To the argument that the case of *Oy Liikenne* is authority for the proposition that in an asset intensive industry such as the delivery of petroleum products by a tanker, the absence of a transfer of such assets or a significant part of them is decisive, in that in these circumstances the entity does not retain its identity, the Court of Appeal in *P & O Trans-European Ltd v Initial Transport Services Ltd*[13] said:

'[T]o determine whether the conditions for the transfer of an economic entity are satisfied, it is also necessary to consider all the factual circumstances characterising the transaction in question, including in particular the type of undertaking or business involved, whether or not its tangible assets such as buildings and movable property are transferred, the value of its intangible assets at the time of the transfer, whether or not the core of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. These are, however, merely single factors in the overall assessment which must be made, and cannot therefore be considered in isolation (see in particular *Spijkers* paragraph 13 and *Süzen* paragraph 14).'[14]

See also Wynn-Evans *The Law of TUPE Transfers* (Oxford University Press 2013) at 41-4.

[33] It is clear therefore that the overall assessment depends on an examination of the totality of the business; in this case, the business operated by Rural prior to the transfer.

[34] The court a quo held that the vehicles, drill rigs, tools, computers, software, metering and billing systems, intellectual property, debtors' information and debtors' books were peripheral assets used in the conduct of the business. The contrary argument was that this focused the attention of the enquiry solely on a service that supplies electricity, rather than upon the totality of the service which had been performed by Rural and which could be described as its business. Following this description, the business conducted by Rural operated on two legs, namely the provision of adequate infrastructure in order for residents to be supplied with electricity and the mechanism by which to generate sufficient revenue for the supply of electricity by way of an adequate billing of consumers and the collection of what was owed for the supply of electricity.

[35] In its founding affidavit, deposed to by Mr Bester, Rural states as follows:

'The entire network business relating to all aspects of the project, ie the provision of all electricity related services to inhabitant of the municipality's

[12] at para 42.
[13] [2003] IRLR 128 (CA).
[14] at para 12 quoted in *Oy Liikenne* at para 33.

jurisdictional area, has reverted to and has been taken over by the municipality and is already under the control of the municipality and possession of the network and the capital assets has already been returned to the municipality.

The entire electricity distribution infrastructure of the municipality that Rural and Rural Free State were in control of and utilised (and maintained and upgraded) for the provision of all electricity related services to inhabitants of the municipality's jurisdictional area, as the municipality had previously done, is no longer under the control of Rural and Rural Free State and has been handed back, together with the additions and improvements thereto effected by Rural and Rural Free State, to the municipality.'

[36] Significantly, earlier in his affidavit Mr Bester sets out 'the considerable expenditure' incurred by Rural, when it began to fulfil its obligations under the EMC, including two specialised trucks, electrical infrastructure mapping and the purchase of an immovable property as well as software systems 'in regard to the electricity metering, billing, collection, customer care, fault desk, call centre, technical services and the like'. All of these were considered to be necessary for the operation of the business conducted by Rural. As indicated earlier, many of these assets were not transferred to the appellant and accordingly, without significant investment by the latter, it would be impossible for the appellant without more, to seamlessly conduct the same business as that which had been conducted by Rural.

[37] In my view, given that the onus rests upon the respondent to show, on the probabilities, that a transfer of a business as a going concern had taken place, it cannot be said that the same business conducted by Rural had been transferred so that it was now conducted by a different entity, namely appellant. Take but one critical issue, debt collection. For debt collection to be continued seamlessly by appellant, as this component of the business had been conducted by Rural, it was necessary to meter the use of electricity, invoice the consumer and collect payments therefrom. Essential to this process would have been the use of software and information stored and used in digital form as had been employed by Rural. In short, the means to perform this debt collection activity had not been transferred. On its own, this was a significant component of the overall business. It supports the overall assessment that it cannot be said, on these papers, that the very business conducted by Rural had been transferred to appellant. Expressed differently, appellant would not have been able to continue business seamlessly after the 'transfer'. For these reasons, the appeal must be upheld.

Order

[38] The appeal succeeds with costs, including the costs of two counsel. The order of the of the court a quo is set aside and replaced with the following: The application is dismissed with costs.

Coppin JA and Savage AJA concurred.

Appellant's Attorneys: *Majavu Inc.*

Respondents' Attorneys: *Webber Wentzel.*

CHAUKE v SAFETY & SECURITY SECTORAL BARGAINING COUNCIL & OTHERS

LABOUR COURT (JR1944/12)

13 August; 10 September 2015

Before VOYI AJ

Practice and procedure—Condonation—Bargaining council proceedings—Late referral of dismissal dispute—Excessive delay—Employee not giving coherent explanation for delay of over four years—Diligent litigant would have done more to pursue claim—Ruling refusing condonation upheld on review.

Practice and procedure—Motion proceedings—Labour Court—Exception—Not permissible to raise exception in motion proceedings—Affidavit in such proceedings not 'pleading' referred to in rule 23 of High Court Rules—Correct procedure for respondent to raise preliminary point in answering affidavit.

The applicant, a member of the SA Police Service, was dismissed in April 2008. He referred an unfair dismissal dispute to the SSSBC in 2012, accompanied by an application for condonation. An arbitrator found that the delay of just over four years was excessive, that it was difficult to discern a coherent explanation for the delay, and that the employer would be severely prejudiced if condonation were granted. He therefore ruled against granting condonation for the late referral of the dispute. The applicant approached the Labour Court to review the condonation ruling. The second respondent, the Minister of Police, filed an exception on the grounds that the review application lacked the averments necessary to sustain a cause of action and contained averments that were vague and embarrassing.

The court found that, although it is accepted that an exception can be raised in proceedings before the Labour Court by reliance on rule 11 of the Labour Court Rules read with rule 23 of the High Court Rules, it is not permissible to raise an exception in motion proceedings before the court. Rule 23 specifically refers to 'a pleading' and an affidavit in support of a review application is not a pleading. The proper procedure to follow was for the minister to raise a preliminary point that a case had not been made out in the founding papers in an answering affidavit. The minister had elected not to deliver an answering affidavit. His exception was dismissed, and the matter proceeded without any answering affidavit by the minister.

The court then considered the applicant's review application. It found that nothing that the applicant stated in his founding affidavit as grounds for review laid any justifiable basis for setting aside the arbitrator's condonation ruling. It agreed with the arbitrator that the delay of over four years was excessive, that the applicant had failed to give a coherent explanation for the delay, and that a diligent litigant would have done more to pursue his complaint of unfair dismissal. The court accordingly found that the arbitrator's ruling could not be faulted.

The minister's exception and the applicant's review application were dismissed.

Application to the Labour Court to review a ruling handed down under the auspices of a bargaining council. The facts and further findings appear from the reasons for judgment.

Annotations

Cases

AB Civils (Pty) Ltd t/a Planthire v Barnard (2000) 21 *ILJ* 319 (LAC) (referred to)
Bader & another v Weston & another 1967 (1) SA 134 (C) (considered)
Charlton v Parliament of the Republic of SA (2011) 32 *ILJ* 2419 (SCA) (referred to)
De Klerk v Cape Union Mart International (Pty) Ltd (2012) 33 *ILJ* 2887 (LC) (referred to)
Eagleton & others v You Asked Services (Pty) Ltd (2009) 30 *ILJ* 320 (LC) (referred to)
Van Rooy v Nedcor Bank Ltd (1998) 19 *ILJ* 1258 (LC) (referred to)

Statutes

Labour Relations Act 66 of 1995 s 158(1)*(g)*

Rules

Rules for the Conduct of Proceedings in the Labour Court rule 11(3), rule 11(4)
Rules Regulating the Conduct of the Proceedings of the High Court of SA rule 23(1)

Adv S Tilly for the second respondent.

Judgment reserved.

VOYI AJ:

Introduction

[1] This is an application to review and set aside a condonation ruling issued by the third respondent (hereinafter the commissioner) on 26 July 2012 under case no PSSS446-07/08. In so issuing the ruling under review, the commissioner was acting under the auspices of the first respondent, the Safety & Security Sectoral Bargaining Council (hereinafter the SSSBC).

[2] The application for review is brought in terms of s 158(1)*(g)* of the Labour Relations Act,[1] read together with s 145 of the same Act. It was filed with this court on 21 August 2012. The application is opposed only by the second respondent.

Preliminary observations

[3] After the review application was delivered and on 28 August 2012, the second and fourth respondents delivered a notice of their intention to oppose.[2] In further resisting the review, the second respondent took exception to the manner in which the application was framed and to what was contained in the affidavit in support thereof. In regard to the latter and on 8 October 2012, the second respondent delivered what it labelled as its 'Notice to the applicant in terms of rule 11 of the Labour Court Rules read with rule 23 of the High Court Rules'.

[4] The aforementioned notice raised a few complaints against the applicant's application for review. In essence, the second respondent complained that the applicant's application for review (i) constituted

[1] Act 66 of 1995 as amended (the LRA).
[2] In the end however, it was only the second respondent that persisted with opposing the matter.

'an irregular proceeding' and (ii) 'was excipiable' on the basis that it lacked averments necessary to sustain a cause of action and that it contained averments that are vague and embarrassing.

[5] It was mentioned in the aforesaid notice that 'if the applicant does not remedy the defects within 15 days of receipt of [the] notice the second respondent will apply to this honourable court to set aside the application on the grounds that it constitutes an irregular proceeding and/or is vague and embarrassing and fails to disclose a cause of action'.[3]

[6] The applicant did not remedy the alleged defects. Instead, he delivered what he termed a 'Replication to second respondent's notice to the applicant in terms of rule 11 of the Labour Court Rules read with rule 23 of the High Court Rules'.

[7] In his purported 'replication', the applicant rejected the second respondent's assertions that his application for review constituted an irregular proceeding and/or that same was excipiable. The applicant tabulated his reasons for disagreeing with the second respondent. These somehow went into the merits of his overall case against the second respondent.

[8] With the applicant having failed to remedy the identified defects, the second respondent delivered what it labelled as an 'Exception'. The 'exception' was grounded on the applicant's application for review (i) lacking averments necessary to sustain a cause of action and (ii) containing averments that are vague and embarrassing.

[9] I need to say something about the second respondent's approach in resisting the application for review. I do so before delving into the merits of the review.

The 'exception' to the application for review

[10] The approach adopted by the second respondent in resisting the review application involves the importation of the provisions of rule 23 of the Uniform Rules of Court into proceedings before this court. Such an approach is permissible under rule 11(3) of the Rules of the Labour Court, the provisions of which read as follows:

> 'If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any approach that it deems appropriate in the circumstances.'

[11] There is no provision in the Rules of the Labour Court that deals with exceptions and/or irregular proceedings. It is, by now, accepted that an exception can be raised in proceedings before this court through reliance on rule 11, read together with rule 23 of the Uniform Rules of Court.[4]

[3] In the second respondent's notice under discussion, no distinction seems to be drawn between the provisions of rule 23 and rule 30 of the Uniform Rules of Court. Rule 23 deals with exceptions and applications to strike out whereas rule 30 deals with irregular proceedings.

[4] *Van Rooy v Nedcor Bank Ltd* (1998) 19 *ILJ* 1258 (LC); *Eagleton & others v You Asked Services (Pty) Ltd* (2009) 30 *ILJ* 320 (LC) at para 15; *Charlton v Parliament of the Republic of SA* (2011) 32 *ILJ* 2419 (SCA) at para 16; *De Klerk v Cape Union Mart International (Pty) Ltd* (2012) 33 *ILJ* 2887 (LC) at para 18.

[12] There is, accordingly, no controversy in raising an exception to a claim brought under rule 6 of the Rules of the Labour Court.[5] What I, however, need to deal with in this matter is the permissibility of an exception in motion proceedings before this court. This necessitates an analytical look at the provisions of rule 23 of the Uniform Rules of Court. Rule 23(1) reads as follows:

> 'Where any *pleading* is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filling any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph *(f)* of subrule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.' (Emphasis added.)

[13] It is evident from the above that the exception contemplated by rule 23 is directed at a 'pleading'. In this matter, we are dealing with a notice of motion accompanied by an affidavit.

[14] In my considered view, there is a material distinction between a 'pleading' and an 'affidavit'. In Herbstein & Van Winsen *The Civil Practice of the High Courts of SA*,[6] the following is stated:

> 'In South Africa the term "pleading" is used in a more restricted sense and does not include documents such as petitions, notices of motion, affidavits, simple summons, provisional sentence summons or writs of arrest.'

[15] In *AB Civils (Pty) Ltd t/a Planthire v Barnard*,[7] the LAC held thus:

> 'An affidavit is not a pleading. It is a means of putting evidence before the court. It takes the place of viva voce testimony.'[8]

[16] In this matter, the second respondent's 'exception' is, therefore, not directed at a 'pleading' but at the 'affidavit' in support of the review application. In my opinion, that is incompetent. The provisions of rule 23(1) specifically make reference to instances where 'any *pleading* is vague and embarrassing or lacks averments which are necessary to sustain an action or defence'.

[17] The Uniform Rules of Court do not permit rule 23 to be applicable in motion proceedings. In affirming this, I refer to the decision of Schippers J in *WP Fresh Distributors (Pty) Ltd v Klaaste NO & others*,[9] where the following was held:

> 'Rule 23(1) provides inter alia that where any pleading is vague and embarrassing or lacks averments necessary to sustain an action, the opposing party may deliver an exception thereto and may set it down for hearing; provided that

[5] ibid.
[6] vol 1 (5 ed Juta & Co) at 558.
[7] (2000) 21 *ILJ* 319 (LAC).
[8] at para 7.
[9] (16473/12) [2013] ZAWCHC 95 (23 April 2013); 2013 JDR 1616 (WCC).

where a party intends to take an exception that a pleading is vague and embarrassing, the opponent must be given an opportunity of removing the cause of complaint. However, in applications there is no recognized procedure for raising an exception before the case comes to trial. Instead, rule 6(5)*(d)* requires any person opposing an order sought in the notice of motion to notify the applicant in writing that he or she intends to oppose the application; and to deliver an answering affidavit within 15 days of the notice of intention to oppose. If a respondent intends to raise only a question of law, he or she is required to deliver a notice of this intention, setting forth the question of law. Thus a respondent who wishes to raise a preliminary point that a case is not made out in the founding papers, must do so in the answering affidavit. This construction is buttressed by rule 6(14) which expressly states that rules 10, 11, 12, 13 and 14 apply *mutatis mutandis* to all applications. Rule 23 is not one of them.'[10]

[18] In the present matter, I come to the considered view that the second respondent's 'exception' to the application for review is bad in law and can, therefore, not stand.

[19] The second respondent had an opportunity to deliver an answering affidavit and, instead, elected to follow an approach not envisaged in motion proceedings. In *Bader & another v Weston & another*,[11] it was held as follows:

'[W]here a respondent has had adequate time to prepare his affidavits, he should not omit to prepare and file his opposing affidavits and merely take the preliminary objection. The reason for this is fairly obvious. If his objection fails, then the Court is faced with two unsatisfactory alternatives. The first is to hear the case without giving the respondent an opportunity to file opposing affidavits: this the Court would be most reluctant to do. The second is to grant a postponement to enable the respondent to prepare and file his affidavits. This gives rise to an undue protraction of the proceedings, which cannot always be compensated for by an appropriate order as to costs and results in a piecemeal handling of the matter which is contrary to the very concept of the application procedure.'[12]

[20] In my view, it would not serve the object of a speedy and expeditious resolution of labour disputes to afford the second respondent a further opportunity to deliver an answering affidavit now that I have disallowed the 'exception'.[13] I will, accordingly, deal with the matter in the absence of an answering affidavit from the second respondent.

[21] The matter was, in any event, not enrolled solely for the purposes of deciding on the second respondent's 'exception'. The notice of set down issued by the registrar on 27 January 2015 informed the parties that '[t]he review application has been set down for hearing on the opposed motion roll … on 13 August 2015 at 10:00'.

[22] At the hearing of the matter, the parties were nevertheless allowed to canvass all the issues arising without being confined to arguments

[10] at para 5.
[11] 1967 (1) SA 134 (C).
[12] at 136H-137B.
[13] The provisions of rule 11(4) of the Rules of the Labour Court provide that this court may, in the exercise of its powers and in the performance of its functions or in any incidental matter, act in a manner that it considers expedient in the circumstances to achieve the objects of the LRA.

only on the second respondent's 'exception'. I, therefore, have to deal with the merits of matter on the basis of application for review as it stands.

A *Evaluation*

[23] The disposal of the second respondent's 'exception' does not mean that the applicant's application for review ought automatically to succeed.

[24] It must still be determined if, indeed, the commissioner's condonation B ruling should be reviewed and set aside on the basis of what the applicant alleges in his founding affidavit.

[25] In view of the findings reached above in relation to the second respondent's 'exception', it seems to me that the matter must be considered on the basis of whether indeed a case has been made out C in the applicant's review application for the primary relief he seeks, namely the setting aside of the commissioner's condonation ruling.

[26] Inasmuch as the applicant's application for review contains a convoluted catalogue of peculiar claims,[14] the review and setting aside of the condonation ruling is the only relief the applicant is D entitled to seek in the matter before me. This in view of the fact that the referral of inter alia his unfair dismissal dispute was refused by the commissioner on account of its being exceedingly out of time.

[27] The other claims the applicant articulated in his papers are simply not properly before me and they, therefore, stand to be disregarded. E I now turn to the condonation ruling and the grounds advanced for its setting aside.

[28] Having been dismissed in or about April 2008, the applicant referred his alleged unfair dismissal dispute to the SSSBC. This he did only in June 2012. As the referral was late, an application for condonation F was necessary and same was delivered by the applicant. The said application came before the commissioner for a ruling.

[29] In his condonation ruling, the commissioner reasoned as follows:

> '11 It is trite that in applications of this nature the following factors are relevant: Extent of the delay; the explanation for the delay; the prospects of G success in the main dispute/complaint; prejudice to both sides (also called the balance of convenience); and some authorities add the importance of the matter. These factors are interrelated, although it is generally accepted that if there is an inadequate explanation or if there are little prospects of success, condonation need not be granted.
>
> H 12 In this particular case the delay is very excessive. Assuming that there was a dismissal during or about March or April 2008, the referral now is just over four years late.
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> 13 I have found it very difficult to discern a coherent explanation for this long delay. The fact that the applicant was embroiled in various court

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[14] These claims are for inter alia (i) losses incurred due to alleged unfair labour practices with regard to certain project software estimated between prices ranging from R480 million to R1.3 billion, (ii) compensation for lost property at the value of R46 million, (iii) compensation for missing property confiscated with net value of R250 million; (iv) lapsed investments and insurance business J covers worth R1.5 million. The founding affidavit deals at length with the alleged basis for these claims.

cases in my view does not provide a reasonable explanation for the delay. A diligent litigant would have done much more much sooner to pursue his complaint of unfair dismissal.

14 Even if arguably the applicant may have some prospects of success in the matter of the original complaint of misconduct against him, it would be severely prejudicial to expect of the respondent to deal with that dispute at this time. It is well known that SAPS often has problems in finding and obtaining the cooperation of members of the public in complaints against employees, more so after such a long period. It is also quite probable that the applicant as a reservist is not an employee as contemplated in the LRA.

15 Bearing in mind the long delay, inadequate explanation, and the balance of convenience favouring the employer, I conclude that the applicant has not shown good cause for condonation.'

[30] Having deliberated on the applicant's application for condonation as per the preceding paragraphs, the commissioner ultimately ruled that '[c]ondonation for the late referral of the unfair dismissal is not granted'.

[31] As indicated hereinbefore, I have to consider whether a case is made out for the setting aside of the commissioner's ruling. As correctly pointed out by the second respondent's counsel, *Adv S Tilly*, during the hearing of the matter, the only discernable grounds for review that can be ascertained from the entire hodgepodge in the founding affidavit are those contained at para 5.1 to 5.3 thereof. It would be useful to quote these in their entirety. They read as follows:

'5.1 There was a defect on the condonation ruling award in that the matter was reported around 2007 for unfair labour practices. It was given the same case number of PSSS446-07/08 and processes underway were abandoned no award was ever served. Recently when I referred the matter for condonation of unfair dismissal the matter as given the same case number of PSSS446-07/08 in 2012.

5.2 The commissioner exceeded his powers in that there was gross irregularity in the conduct of the arbitration proceedings.

The award has been improperly obtained in that the same case number of matter reported in 2007 is still subject to debates in the council in 2012. There is no proper explanation as to why this matter was not conciliated during the processes of 2007 when it was referred. From December that is enough period that is approximately three months until 11 March 2008 before sentence and conviction also when I was still available for this matter to be heard. This is within the ambit of the prescribed period on which the bargaining council should have adjudicated this matter on their roll a failure which is also a gross irregularity.

5.3 This matter was declined condonation in 2012. That delay is also too excessive, but who bares the blame if not the bargaining council. There is nowhere in between this processes of four years that the council decided to address the matter or refer it to court to make a decision. It is only when I made an enquiry into the outstanding dispute and redoing the referral in 2012 as advised to do so by senior commissioner in the CCMA that this ruling is made. The commissioner committed a gross irregularity in that he has adjudicated two referrals in a single interval that have been referred at different time frames, by so doing he exceeded his powers as the commissioner.'

[32] It is my considered view that these allegations are simply inadequate to upset the commissioner's ruling. None of what the applicant states

in his founding affidavit, as grounds for review, lays any justifiable and valid basis for the setting aside the condonation ruling.

[33] In my judgment, the commissioner's condonation ruling falls within the realm of what is a reasonable decision under the circumstances.

A [34] The commissioner was dealing with a dispute that was late by over four years. Such delay is beyond excessive. It is quite remarkable. It was the commissioner's viewpoint that 'it [was] very difficult to discern a coherent explanation for [the] long delay'.[15]

[35] The commissioner went on to reason that a 'diligent litigant would B have done much more much sooner to pursue his complaint of unfair dismissal'.[16] I cannot agree more.

[36] To take over four years in lodging an unfair dismissal claim is simply inexcusable. To the extent that the incarceration of the applicant may justify the delay, it only lasted for no more than 12 months. C Such incarceration can, therefore, not serve as an excuse for such an extraordinary delay. All things considered, the commissioner's ruling can, therefore, not be faulted.

[37] It is, accordingly, my conclusion that the applicant's application for review fails to make out a case for the primary relief he seeks, which D is to review and set aside the commissioner's condonation ruling. Consequently, the application for review stands to be dismissed.

[38] In this matter, there is no necessity for awarding any costs order as neither party is successful in their respective cases as advanced in the papers before me. The second respondent's 'exception' is declined E and the applicant's application for review is refused.

Order

[39] I, accordingly, make the following order:

F (i) The second respondent's 'exception' is dismissed.
(ii) The applicant's application for review is dismissed.
(iii) There is no order as to costs.

Second Respondent's Attorney: *State Attorney.*

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J [15] at para 13 of the condonation ruling.
[16] ibid.

CITY OF CAPE TOWN v INDEPENDENT MUNICIPAL & ALLIED TRADE UNION & OTHERS

LABOUR COURT (C884/2014)

16 April; 17 September 2015

Before RABKIN-NAICKER J

Bargaining council agreement—Collective agreement—Not valid agreement in terms of bargaining council constitution—Agreement not binding on parties to council.

Bargaining council agreement—Collective agreement—Sections 31 and 32 of LRA 1995—Special type of collective agreement—Distinction between such agreement and collective agreement governed by s 23—Bargaining council agreement cannot morph into agreement in terms of s 23 where it is found to be non-compliant with bargaining council constitution.

Collective agreement—Bargaining council agreement—Sections 31 and 32 of LRA 1995—Special type of collective agreement—Distinction between such agreement and collective agreement governed by s 23—Bargaining council agreement cannot morph into agreement in terms of s 23 where it is found to be non-compliant with bargaining council constitution.

Following protracted litigation relating to the validity of a collective agreement concluded by the parties to the SALGBC, the Labour Court endorsed an earlier finding by the Labour Appeal Court (see *SA Local Government Association v Independent Municipal & Allied Trade Union & others* (2014) 36 *ILJ* 2811 (LAC)) that the collective agreement was not a valid agreement in terms of the bargaining council constitution and was, therefore, not binding on the applicant city. The court then considered a counter-application by the respondent unions, IMATU and SAMWU, for an order declaring the impugned agreement to be a valid collective agreement within the contemplation of s 23 of the LRA 1995.

The court noted that it had to determine whether a collective agreement entered into by parties to a bargaining council could be governed by both ss 31-32 and s 23 of the LRA. It found that ss 31 and 32 deal specifically with the binding nature of collective agreements concluded in a bargaining council. There is a clear distinction between such bargaining council collective agreements and collective agreements governed by s 23: A bargaining council agreement is entered into for a specified period, whereas a collective agreement governed by s 23 may bind the parties for an indefinite period. Furthermore, a bargaining council agreement is clothed with statutory enforcement mechanisms as provided for in s 33A.

The court was therefore of the view that a bargaining council collective agreement is a collective agreement of a special type, which cannot 'morph' into a s 23 collective agreement when it is found to be non-compliant with the bargaining council's constitution.

The court accordingly found that the collective agreement in this matter had not been validly concluded in terms of the SALGBC constitution and was not binding on the city.

Application to the Labour Court for various declaratory orders. The facts and further findings appear from the reasons for judgment.

Annotations

Cases

Competition Commission of SA v Pioneer Hi-Bred International Inc & others 2014 (2) SA 480 (CC) (referred to)

SA Local Government Association v Independent Municipal & Allied Trade Union & others (2014) 36 *ILJ* 2811 (LAC) (considered)

Statutes

Labour Relations Act 66 of 1995 s 23(1)-(4), s 31, s 32, s 33A

Adv A J Freund SC (with *Adv G A Leslie*) for the applicant.

Adv J G van der Riet SC (with *Adv U Dayan* and *Adv Jugroop*) for the first and second respondents.

Judgment reserved.

Rabkin-Naicker J:

[1] The applicant seeks the following relief from this court:

'*(a)* Declaring that the disciplinary procedure and code collective agreement (the DPCCA) purportedly entered into between the first, second and third respondents on 21 April 2010, under the auspices of the fourth respondent on 21 April 2010 was not validly concluded in terms of the fourth respondent's constitution and accordingly did not become binding on the applicant.

(b) In the alternative, declaring that the DPCCA lapsed on 30 June 2012 and no longer binds the applicant.

(c) Further in the alternative, declaring that the DPCCA lapsed on 31 December 2012 and no longer binds the applicant.'

[2] The first and second respondents have brought a conditional counter-application. They seek that:

'*(a)* In the event that it is found that the DPCCA was never validly concluded as required by the fourth respondent's constitution, an order declaring that the DPCCA is a valid collective agreement within the contemplation of s 23 of the LRA and binds all the parties to the DPCCA and all their respective members as contemplated in s 23(1) and (2) of the LRA.

(b) In the event that it is found that the DPCCA lapsed on 30 June 2012, alternatively 31 December 2012, an order declaring that the DPCCA remains part of the individual contracts of employment of all employees in the local government sector who had been employed at the time when the DPCCA had been in operation, until it is varied by agreement.'

[3] Both applications were opposed. Certain in limine issues were pleaded by the respondents. First, that this court does not have jurisdiction to grant the declaratory relief sought, because there is no specific provision in the LRA giving the court such power, ie to declare a collective agreement invalid. It was submitted on behalf of the applicant that save in respect of matters which, in terms of the specific provisions of the LRA are to be determined by other institutions like the CCMA or a bargaining council, the whole scheme of the LRA is that the Labour Court is empowered to deal with matters arising from the LRA. The fundamental issue raised

by this application is whether the applicant is bound by a collective agreement ostensibly concluded by an employers' organisation to which it belongs, under the auspices of a bargaining council. The application is in my view quintessentially a matter that the specialist labour courts must deal with.

[4] The second point in limine raised by the respondents is that of estoppel, ie that the applicant has made a factual representation through its conduct since 2010 (by initiating disciplinary hearings in terms of the DPCCA) that in the view of the city the agreement is valid. I must agree with the applicant's submissions on this point that the very fact that the alleged representation is a representation as to the opinion of the city, is a sufficient basis to dismiss this defence. Further, that the representation is a representation as to the law, namely that the DPCCA is valid and binding.[1] The respondents have also failed to establish that, as a result of the alleged representation, they have altered their position to their prejudice.[2]

[5] The background facts pertaining to the conclusion of the DPCCA are recorded in the LAC judgment of *SA Local Government Association v Independent Municipal & Allied Trade Union & others*[3] which dealt with the wage curve agreement purportedly concluded together with the DPCCA, are as follows:

> 5.1 On 26 March 2010, SAMWU issued a strike notice. On 12 April 2010, its members embarked on a strike in furtherance of its demand for a wage curve agreement and the conclusion of a new disciplinary code agreement, ie the DPCCA.
> 5.2 During the strike the parties resumed negotiations. Draft collective agreements relating to the above were written.
> 5.3 The parties met formally under the auspices of the council, on 19 and 20 April 2010, in order to conclude collective agreements relating to the wage curves and disciplinary code. They met as a bargaining committee of the council.
> 5.4 After members of the bargaining committee and others had considered the draft agreements and sufficient consensus had been achieved, the parties decided that a team would refine the agreements reached in the bargaining committee and draft the final agreements, for consideration by the principal decision makers of the parties.
> 5.5 The bargaining committee adjourned when the drafting team consisting of Messrs Koen (IMATU), Forbes (SAMWU), Lebello (SALGA), Yawa (SALGA) and Van Zyl (SALGA) started its work.
> 5.6 The drafting committee concluded its deliberations, whereafter Adams (the deputy general secretary for legal matters of IMATU) was requested to print hardcopies of the 'agreements'. Adams

[1] *LAWSA* (2 ed) vol 9 para 657.
[2] *LAWSA* para 663.
[3] (2014) 36 *ILJ* 2811 (LAC); [2014] 6 BLLR 569 (LAC).

gave Yawa a copy of the two agreements. The unions indicated that they and SALGA discussed the contents of the agreements with their principals who were satisfied therewith and prepared to sign their agreements.

5.7 The DPCCA was signed by the parties' principals at a signing ceremony on 21 April 2010.

[6] Clause 7.2 of the constitution of the council is headed 'Bargaining Committee' and provides as follows:

'7.2.1 The bargaining committee shall consist of 20 seats divided equally between the employer parties and the trade union parties.

7.2.2 The allocation of representatives among the employer parties shall be determined mutatis mutandis by the formula in subclause 5.4.

7.2.3 The allocation of representatives amongst the trade union parties shall be determined by the formula in subclause 5.4.

7.2.4 The delegates shall, at the first meeting of the year, appoint a chairperson from amongst the delegates to the bargaining committee. The bargaining committee may appoint a chairperson from outside the delegates of the parties' representatives.

7.2.5 The bargaining committee shall meet as such place, date and time it or the executive committee may determine.

7.2.6 The bargaining committee shall have the power to conclude any collective agreement relating to terms and conditions of service or any other matter referred to it by the executive committee.

7.2.7 A dispute that arises in the bargaining committee shall be resolved in terms of clause 11.'

[7] Clause 16 of the constitution is headed 'Decisions' and reads as follows:

'16.1 All decisions of the central council, division or any committee concerning substantive matters shall require a two-thirds concurrent majority of the employer representatives on the one hand and a two-thirds concurrent majority of the trade union representatives to the council on the other hand.

16.2 No decision of the central council, division or any committee concerning substantive matters shall be binding on the parties unless —

16.2.1 the subject-matter of the decision has been reduced to writing before the decision is taken; or

16.2.2 if not reduced to writing before the decision is taken, the subject-matter of the decision is reduced to writing and adopted by a subsequent decision of the council.

16.3 Decisions of the central council, division or any committee concerning administrative matters shall require a simple majority of those representatives present.

16.4 The central council shall determine from time to time which matters are substantive and which are administrative in terms of the process as is set out in clause 16.1 above.'

[8] A further clause of the constitution is cited by the applicant as relevant to the issue of whether the DPCCA was validly concluded, and that is clause 17, which is headed 'Procedure for the negotiation of collective agreements'. It reads as follows:

'17.1 A procedure, forum and level for negotiations shall be determined by the parties to the central council.
17.2 Any party to the council may introduce proposals for the conclusion of a collective agreement on the appropriate subject-matter and at the appropriate level.
17.3 At least two-thirds of the employer representatives on the one hand and two-thirds of the trade union representatives on the other hand must vote in favour of a collective agreement for it to be binding on the parties.
17.4 In the event of a dispute arising from the proposals for the conclusion of a collective agreement the parties shall have the rights prescribed in the Act.'

[9] The above clauses were considered by the LAC in *SA Local Government Association v Independent Municipal & Allied Trade Union & others* above. In the judgment the court made, the court made findings (of direct relevance to this matter) as to the failure of the parties' representatives to send back the wage curve agreement to the bargaining committee in compliance with the terms of the council's constitution. The LAC found that:

'[30] In *Cape United Sick Fund Society v Forrest & others*, it was said that:
"It is of prime importance to decide in the first instance how to approach the problem raised in this appeal. The Society's constitution is in writing and to use the words of Stratford, J.A., in *Wilken v Brebner and Others*, 1935 AD 175 at p. 187,
'we have only to solve the question submitted to us by ascertaining the meaning of a written document according to the well-established rules of construction.'
This *dictum* is in consonance with a long line of cases in which emphasis is laid on the necessity of adhering to the terms of the constitution of a body like the Society."[4]
[31] In my view, the same should apply to the constitution of the third respondent. The three parties embroiled in litigation in this matter are the parties who drafted and signed the constitution of the third respondent. They decided how decisions taken under the auspices of the third respondent should be taken and what body should have the power to conclude collective agreements.
[32] The problem with the entire procedure followed in this matter is that the constitution does not make provision for a drafting team. If the parties decide to refer an administrative or substantive matter to an unrecognized subcommittee, it is incumbent on them to refer the matter back to the recognized council, division or committee so that a resolution or decision can be taken in terms of the constitution.
[33] In this matter, it is common cause that the bargaining committee did not reconvene after the drafting team was requested to refine the agreement. …
[34] The union's case was that the practice has also been that after the drafting team had settled an agreement it is then taken to the principals, for vetting and signature. The court a quo found that the practice had

[4] 1956 (4) SA 519 (A) at 527H-528A. See also *Absa Bank Ltd v SA Commercial Catering & Allied Workers Union National Provident Fund (under curatorship)* 2012 (3) SA 585 (SCA).

been established and that the wage curve agreement and the disciplinary code agreement were validly entered into in terms of the practice. I disagree.

[35] Firstly, the practice itself has not been properly established. There is no evidence as to when this practice was started; how many collective agreements have been adopted by following this practice or whether this practice was only followed in respect of administrative matters or both administrative and substantive matters. Even if one assumes that in some circumstances a practice by parties can override what they specifically agreed to in their constitution, there must be sufficient evidence establishing that the practice or custom is well entrenched. Such evidence is lacking in this matter. The existence of this practice was never put to the appellant's witnesses. Mashilo, who was the facilitator and senior member of SALGA and the third respondent, was not asked a single question relating to the existence of this practice. George, who signed agreements on behalf of SALGA, was not asked about the practice. Lebello, a member of SALGA and the bargaining committee, was also not asked about its existence.

[36] Secondly, a practice cannot trump the express and unambiguous terms of a constitution. The decisions taken by the drafting team clearly have far-reaching implications, financial and otherwise. If this degree of deviation from the express provisions of the constitution is tolerated it would effectively write the decision-making requirements set out in clause 16 out of existence. The constitution of the third respondent should not, without justification, be frittered away by practice or judicial decree. This would indeed be a dangerous path to take because the parties testified that the intention was always to request the Minister of Labour to extend the agreement to non-parties to the agreement that are within the registered scope of the third respondent.

[37] The decision of the drafting team is not a decision of the bargaining committee. The reason why two-thirds concurrent majority of the employer representatives on the one hand and two-thirds concurrent majority of the trade union representatives on the other hand is needed for a decision is very important. Trade union representatives to the council are there with a mandate but as individuals. They have individual votes. If for an example three members of SAMWU who had six votes decided to agree with IMATU in favour of a proposal that would be seven trade union representatives voting in favour of a proposal and if all the employer representatives also voted in favour, that decision would be a legal decision of the bargaining committee, irrespective of the mandate of the SAMWU delegation. The purported agreement was therefore not a binding agreement in terms of the third respondent's constitution. Considerations of equity cannot, when the provisions of the constitution of the third respondent are clear and unambiguous, affect the interpretation to be placed on it.'

[10] Given the above findings (against which the respondents were unsuccessful in seeking leave to appeal to the Constitutional Court)[5] on precisely the clauses of the council's constitution which are the focus of this application, and their trumping of the practice of

[5] The Constitutional Court has refused leave to appeal against inter alia these findings, under case no CCT44/14.

allowing a drafting committee to finalise collective agreements for signature, I grant prayer 1 of the applicant's notice of motion. This means that the following part of the counter-application before me is now at issue, ie: A

'*(a)* In the event that it is found that the DPCCA was never validly concluded as required by the fourth respondent's constitution, an order declaring that the DPCCA is a valid collective agreement within the contemplation of s 23 of the LRA and binds all the parties to the DPCCA and all their respective members as contemplated in s 23(1) and (2) of the LRA.' B

[11] The question that must be posed is whether a 'collective agreement' which is not binding in terms of the bargaining council's constitution, can nevertheless be considered binding on the parties to it in terms of the provisions of s 23 of the LRA which reads as follows: C

'23 Legal effect of collective agreement
(1) A collective agreement binds —
(a) the parties to the collective agreement;
(b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them; D
(c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates —
(i) terms and conditions of employment; or
(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers; E
(d) employees who are not members of the registered trade union or trade unions party to the agreement if —
(i) the employees are identified in the agreement;
(ii) the agreement expressly binds the employees; and F
(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.
(2) A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1)*(c)* who was a G
member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement.
(3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective H
agreement.
(4) *Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.*' (Emphasis added.)

[12] Can a collective agreement entered into by parties to a bargaining I
council be governed by both ss 31-32 and s 23 of the LRA? The very purpose of the establishment of bargaining councils and the conclusion of collective agreements within them, is to regulate sectoral bargaining. For that reason, the binding nature of collective J
agreements concluded by parties to those councils is governed by

specific provisions in the LRA, set out in part C of chapter III headed 'Bargaining Councils'. Sections 31 and 32 of the LRA deal specifically with the binding nature of collective agreements concluded in a bargaining council:

A

'31 Binding nature of collective agreement concluded in bargaining council
Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds —
(a) the parties to the bargaining council who are also parties to the collective agreement;
B
(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is such a party, if the collective agreement regulates —
C
(i) terms and conditions of employment; or
(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.
D
32 Extension of collective agreement concluded in bargaining council
(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request, if at a meeting of the bargaining council —
(a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and
E
(b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.
F
(2) *Within 60 days of receiving the request, the Minister must extend the collective agreement, as requested, by publishing a notice in the* Government Gazette *declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice.*
(3) A collective agreement may not be extended in terms of subsection (2) unless the Minister is satisfied that —
G
(a) the decision by the bargaining council to request the extension of the collective agreement complies with the provisions of subsection (1);
(b) the majority of all the employees who, upon extension of the collective agreement, will fall within the scope of the agreement, are members of the trade unions that are parties to the bargaining council.'
H

[13] The use of the words 'subject to … section 32' in s 31 of the LRA is best understood as meaning: 'except as curtailed by'.[6] In particular, I note that s 32(2) of the LRA thus curtails the period of the binding

I

[6] The words 'subject to' in statutory interpretation 'has no a priori meaning. … While the phrase is often used in statutory contexts to establish what is dominant and what is subservient, its meaning in a statutory context is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning "except as curtailed by"' (see *Competition Commission of SA v Pioneer Hi-Bred International Inc & others* 2014 (2) SA 480 (CC) at para 35).
J

nature of a collective agreement entered into by the parties to a bargaining council to one 'from a specified date and for a specified period'. In contrast, collective agreements governed by s 23 may bind the parties for an indefinite period in terms of s 23(4). A

[14] A reading of the DPCCA reveals that it was drafted as a bargaining council agreement with the clear intention that it should be in conformity with ss 31 and 32 of the LRA. The DPCCA records in clause 3.4:

> 'This portion of the main collective agreement shall come into operation in respect of non-parties (which include but is not limited to, municipal entities as defined in the Municipal Systems Act 32 of 2000), on a date to be determined by the Minister of Labour and *shall remain of force and effect until 30 June 2012 and after 30 June 2012 for such further period as determined by the Minister of Labour at the request of the parties.*' (Emphasis added.) B C

[15] A further indication of the distinction between bargaining council collective agreements and those collective agreements governed by s 23 of the LRA is that the former are clothed with statutory enforcement mechanisms, as provided for in s 33A. In my judgment, therefore, a bargaining council collective agreement is a collective agreement of a special type, which cannot 'morph' into a s 23 collective agreement when the agreement in question is found to be non-compliant with the bargaining council's constitution. In that scenario the parties to such an agreement would have no powers to enforce it across a sector invalidating the inherent purpose of the conclusion of a collective agreement in a bargaining council. D E

[16] In view of the above evaluation, I dismiss the first conditional counter-claim. The second counter-claim therefore falls away. Given the relationship between the parties a costs order is not appropriate.

[17] In all the above circumstances, I make the following order: F

Order

The disciplinary procedure and code collective agreement (2010) was not validly concluded in terms of the SALGBC [constitution] and accordingly did not become binding upon the applicant. G

Applicant's Attorneys: *Norton Rose Fullbright South Africa.*

First and Second Respondents' Attorneys: *Cheadle Thompson & Haysom Inc.*

KWAZULU-NATAL DEPARTMENT OF TRANSPORT v HOOSEN & OTHERS

LABOUR COURT (D259/11)

3 February; 17 September 2015

Before WHITCHER J

Residual unfair labour practice—Promotion, demotion, training and benefits—Promotion—Public service employee—Employee not meeting minimum qualifications for post to which appointed—Irregularity persisting when employee promoted to higher post—Career prospects of colleagues impeded by employee's promotion—Promotion unfair—Remedy not creation of further promotional post but reduction in rank of employee.

Residual unfair labour practice—Promotion, demotion, training and benefits—Promotion—Public service employee—Employee permitted to remain in upgraded post with higher salary and rank designation when returning from deployment to another unit—This constituting act of promotion.

In 2003 the fourth respondent, Mr M, who occupied a post level 8 position as a principal provincial inspector in the applicant department, was selected to provide bodyguard services to the provincial MEC in a new task team. While deployed in his new position of senior protection officer his 'salary position' was upgraded from post level 8 to 9. In 2007 he returned to his former unit as a principal provincial inspector. Mr M complained that his position was not at the equivalent rank as that he held in the task team, and he was granted a 'translation in rank' to chief provincial inspector, a post level 9 position. The 24 respondent employees, all principal provincial inspectors, sought a similar elevation in rank to Mr M. They referred an unfair labour practice dispute relating to promotion to the relevant bargaining council, the GPSSBC. They sought either to be similarly upgraded, compensation or the setting aside of Mr M's promotion. It came to light at arbitration that Mr M did not possess the minimum educational qualifications even for the post of principal provincial inspector. The arbitrator found that Mr M, who should never have been appointed to a post in the first place, could not have used that post to ascend to a more senior position. He found further that Mr M's assumption of the post of chief provincial inspector constituted a promotion, and that the promotion had not complied with the process provided for in the Public Service Regulations. He concluded that the arbitrary and irregular manner in which Mr M became a chief provincial inspector amounted to an unfair labour practice relating to promotion, as the other principal provincial inspectors were wrongly blocked from applying for promotion to the post which Mr M now occupied. The arbitrator did not set aside Mr M's promotion, but instead ordered the department to remedy the unfair labour practice by initiating a recruitment process for the appointment of another chief provincial inspector.

On review, the Labour Court rejected the department's submission that Mr M had not been promoted but had simply benefited from the upgrading of his post as senior protection officer in the task team from level 8 to level 9. The court found that the department promoted Mr M when it permitted him to remain in the upgraded post and afforded him the appropriate higher salary, and it mattered not when precisely the promotion occurred and what the department purported to call it. The court also rejected the department's

submission that the decision to change Mr M's designation from principal provincial inspector to chief provincial inspector was not a promotion. By definition an act of promotion included an advance to a higher office or rank, even if the department thought it was merely correcting an error in assigning Mr M the rank commensurate with that he had held in the task team. The court was, therefore, satisfied that the arbitrator was objectively justified on the evidence in finding that a promotion had occurred.

The court agreed with the arbitrator that Mr M's promotion was unfair. On the unchallenged evidence before the arbitrator it was clear that he did not possess the minimum educational qualifications even for the post of a principal provincial inspector. As a result the employees were wrongly blocked in future from ascending to a chief provincial inspector position because Mr M occupied it — their career prospects suffered and they had to treat someone who had no right to command them as their superior officer.

Regarding the remedy ordered by the arbitrator, the court was of the view that the creation of a post that in the ordinary course would not have existed was an overreach by the arbitrator. His decision was overly onerous on the department, imposed a long-term inefficiency in its operations, and was logically unconnected to the nature of the unfairness suffered by the employees. The unfairness experienced by the employees was of a negative nature — their issue was not that any of them ought to have been promoted to the post of chief provincial inspector, but that Mr M ought not to have been so promoted thus rising above them and impeding their future career prospects.

The court accordingly found that the arbitrator's decision on remedy was not a reasonable one. It replaced the award with one directing the department to reduce the rank of Mr M to that of principal provincial inspector, but for his salary to remain the same.

Application to the Labour Court to review an arbitration award handed down under the auspices of a bargaining council. The facts and further findings appear from the reasons for judgment.

Annotations

Cases

Commercial Workers Union of SA v Tao Ying Metal Industries & others 2009 (2) SA 204 (CC); (2008) 29 *ILJ* 2461 (CC) (referred to)

De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others (2013) 34 *ILJ* 1427 (LAC) (referred to)

Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 *ILJ* 943 (LAC) (referred to)

Mathibeli v Minister of Labour (2015) 36 *ILJ* 1215 (LAC) (referred to)

Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC) (referred to)

Statutes

Labour Relations Act 66 of 1995 s 186(2)*(a)*

Adv P Schumann for the applicant.

Attorney P Hobden for the first respondent.

Judgment reserved.

WHITCHER J:

Introduction

[1] This is an application to review and set aside an arbitration award

handed down by the third respondent (the commissioner) on 30 November 2010 in the GPSSBC, under case no PSGA444-08/09. The late filing of the review application, filed four days late, is condoned. The first respondents, A M Hoosen and 23 others, oppose the review.

[2] The commissioner found that the promotion of the fourth respondent, Mr Makabela, to the rank of chief provincial inspector was unfair towards the first respondents. First, he found that Mr Makabela did not meet the minimum requirement even for the lower post used as a 'launching platform' for his promotion. Second, Mr Makabela's rise in rank was not in accordance with prescripts regulating promotions in the public service. His promotion above the first respondents appeared arbitrary, irregular, unfair and the product of a quirk of fate.

[3] The commissioner did not set aside Mr Makabela's appointment but instead ordered that the department remedy the unfair labour practice towards the first respondents 'by initiating a recruitment process' for the appointment of another chief provincial inspector. The commissioner ordered costs against the applicant for the day of 7 July 2010.

Background

[4] In January 2003, Mr Makabela, then occupying a post level 8 position as a principal provincial inspector (PPI) within the department's public transport enforcement unit, was selected to provide bodyguard services to the provincial MEC for Transport in a new special operations task team. This career move was characterised by the department at the time as a transfer. Mr Makabela kept the same salary and job grade although he acquired the new designation of senior protection officer.

[5] In November 2003, while deployed as a senior protection officer, Mr Makabela was informed that his 'salary position' was upgraded from post level 8 to 9.

[6] In 2007, the MEC became Premier of KwaZulu-Natal. Mr Makabela wrote to a senior manager asking to formally return to his erstwhile unit, the PTEU, as a uniformed officer, with a 'translation' in rank. He added that his former colleagues in the PTEU made him feel unwelcome. This had something to do with their not saluting him for, in uniform, Mr Makabela still had the same number of bars upon his shoulders as they did.

[7] In August 2007, with his current salary unaffected, Mr Makabela returned to the PTEU he had left as a principal provincial inspector (PPI) in 2003. Although his designation in the special operations team was special protection officer at post level 9, he initially took up the rank once again of a PPI in the PTEU.

[8] His trade union complained that Mr Makabela should in fact hold an equivalent rank in the PTEU of chief provincial inspector (CPI) and not PPI as the former was the equivalent grade within the PTEU commensurate with grade of the post Mr Makabela occupied in the special operations team. The department complied with this request

on the authority of Ms Cunliffe, senior general manager, corporate services. Cunliffe referred to the process as a 'translation in rank'.

[9] The first respondents initially pursued a grievance against the department, seeking similar elevation in rank to Mr Makabela. They claimed that they too had provided bodyguarding services for extended periods but had, inconsistently, not been upgraded. Their dispute ended up as an unfair labour practice dispute relating to promotion. The relief they sought was either being upgraded themselves, compensation or the setting aside of Mr Makabela's promotion.

The arbitration award

[10] On the evidence before him, the commissioner accepted that Mr Makabela did not have a senior certificate, a minimum requirement for the post of PPI and CPI. He found that 'it offends one's sense of logic and fairness that a person who should never have been appointed to a post in the first place could have used that post to ascend to an even more senior position'.

[11] The commissioner also found that Mr Makabela's assumption of the post of CPI in the PTEU constituted a promotion. He accepted the first respondents' argument that promotions in the public service could only occur by means of a specific process, involving advertisements and open competition, which did not occur in Mr Makabela's case. The arbitrary and irregular manner in which he became a CPI amounted to an unfair labour practice relating to promotion in that the individual complainant PPIs were wrongly blocked and prevented from applying for promotion to the CPI post Mr Makabela now occupied.

Grounds of review

Jurisdiction

[12] In the first instance, the applicant challenges the jurisdiction of the GPSSBC to have heard the matter. It points out that the first respondents' initial complaint took the form of grievance in which they sought elevation to Makabela's grade. Consequently, the real dispute was one of mutual interest. The failure by the commissioner to appreciate his lack of jurisdiction is a reviewable irregularity.

[13] The applicant correctly points out that jurisdictional rulings are made by the reviewing court on objectively justifiable grounds, not on the reasonableness test set out in *Sidumo*.[1] They incorrectly, though, try to confine the first respondents to the name they gave their dispute at its genesis. Neither the original grievance form, nor the certificate of outcome issued by a commissioner is wholly determinative of the nature of the dispute. Instead, as the Constitutional Court held in *CUSA v Tao Ying Metal Industries & others*, 'a commissioner is required

[1] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC); see *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 *ILJ* 1427 (LAC) at para 24.

to take all facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration'.[2]

[14] The first respondents contend that the surrounding facts, the way the dispute was articulated at the GPSSBC and the relief sought in closing argument all placed their dispute within the ambit of s 186(2)*(a)* of the Labour Relations Act 66 of 1995 (LRA). They argue that an original and separate grievance seeking their own upgrading, while permeating aspects of the promotion dispute, did not destroy or exclude their claim that they had suffered an unfair labour practice when Mr Makabela was promoted above them. This submission is, in my view, objectively right. Consequently, the commissioner committed no irregularity in not stopping the case at the outset for lack of jurisdiction.

Was there a promotion?

[15] The centrepiece of the first respondents' case before the GPSSBC was that Mr Makabela's promotion by the department was unfair to them. The applicant disputes that any promotion occurred. This too is a jurisdictional issue. If there was no promotion but simply a 'translation in rank' as the applicant contends, then the GPSSBC lacked the power to determine the fairness of such an event.

[16] I sympathise with the commissioner who remarked that the evidence before him about how Mr Makabela came to attain the rank of CPI was not very clear. Despite the department's stout semantic efforts to characterise Mr Makabela's increase in salary and rank between the time he left the PTEU in 2003 and rejoined it in 2007 as anything but a promotion, this position is ultimately untenable. It does not matter precisely when the promotion occurred, or what the employer purported to call it; a promotion plainly happened. It may have been in 2003 when Mr Makabela's 'salary position' was upgraded. It may have been in 2007, when a senior manager authorised another bar upon his shoulder as a CPI. It is quite possible that both of these career events qualify as a promotion, the one enabling the other.

[17] The applicant's argument that Mr Makabela was not promoted in 2003 but simply benefited from his special protection officer post being upgraded from level 8 to 9 cannot be sustained. The department promoted Mr Makabela the moment they permitted him to remain in the upgraded post and afforded him the appropriate higher salary.[3]

[18] The argument that, after Mr Makabela's transfer back to the PTEU, the decision to change his designation from a PPI to CPI was not a promotion is also unsustainable. *The Concise Oxford Dictionary* (9 ed), defines 'promote' as to advance or raise (a person) to a higher office, rank. When Makabela was transferred back to the PTEU, it was initially at the rank of PPI, albeit with his grade 9 salary level intact.

[2] *Commercial Workers Union of SA v Tao Ying Metal Industries & others* 2009 (2) SA 204 (CC); (2008) 29 *ILJ* 2461 (CC); [2009] 1 BLLR 1 (CC).

[3] See *Mathibeli v Minister of Labour* (2015) 36 *ILJ* 1215 (LAC); [2015] 3 BLLR 267 (LAC) at para 16.

The department may well have thought they were merely correcting an error in assigning (or 'translating') him the rank commensurate with the grade he held in the special operations unit. However, by definition, this act was a promotion. The other processes the applicant mentions to describe this career event, such as 'translation with post', find no expression in the regulations prescribing how employees in the public service move from one rank to another.

[19] As a result the commissioner was objectively justified, on the evidence before him, in finding that a promotion occurred.

Was the promotion unfair?

[20] The first respondents bore the onus in this matter. After a discovery application, documents recording the educational qualifications of Mr Makabela were entered into evidence. The commissioner found that these tended, prima facie, to show that Mr Makabela, who was joined in the proceedings, did not possess the minimum educational qualifications even for the post of a PPI. As expected, evidence also showed that a senior certificate was a requirement for the position of CPI. Notwithstanding the absence of any evidence of such a qualification in Mr Makabela's personnel file, a memorandum from Mr P Govender, of management advisory services on 15 October 2007, contains the probably erroneous assurance that Mr Makabela met the minimum requirements for elevation in rank to a CPI. Ms Cunliffe relied on this information in purporting to 'translate' Mr Makabela's rank. Mr Makabela did not avail himself of the opportunity to rebut any of the documentary proof that he lacked a senior certificate qualification, nor did the department manage to do so.

[21] The commissioner's finding, not particularly strongly challenged in argument by the department, was that this alone was sufficient to render Mr Makabela's promotion unfair. The first respondents were wrongly blocked in future from ascending to a CPI position because Mr Makabela now occupied it. This finding is not unreasonable whether or not, at the time Mr Makabela was promoted, a vacant post existed. It seems logical that with Mr Makabela's occupying a senior rank in PTEU, the career prospects of his juniors will suffer some limitation. In addition, Mr Makabela's colleagues will, on a day-to-day basis, have to treat someone who has no right to command them, as their superior officer. This is not a trivial issue in a uniformed and rank-conscious environment such as law enforcement. This problem is confirmed by Mr Makabela's original motivation to have his special operations unit rank 'transferred' to him, which was that his colleagues considered him their equal and declined to salute him.

[22] The commissioner also accepted the first respondents' argument that Mr Makabela's promotion did not occur within the framework set out in part VII of the Public Service Regulations. The department found it difficult to contest this aspect of the case. They had placed all their eggs in the basket of denying any promotion took place. The best they could do to deny unfairness was to contend that Mr

Makabela was not promoted to any *vacant* CPI post. He was simply assigned his proper rank.

[23] Having considered the regulations setting out the process by which posts in the public service are supposed to be created and filled and how promotions are supposed to take place, I am not sure that the fact that Mr Makabela was promoted against a non-vacant, non-existent, or specially created post assists the applicant. It is, though, unnecessary for me to decide this point. Even if the commissioner's decision making was unreasonable in finding that the promotion of Mr Makabela was irregular by want of compliance with the Public Service Regulations, I have already endorsed his finding that Mr Makabela's promotion was irregular by want of his meeting the minimum criterion for the position. This irregularity persists whether Mr Makabela assumed a vacant CPI post or was simply assigned a higher rank.

Remedy

[24] The remedy the commissioner ordered would, in the highly regulated world of the public service, cause a post to have to be created when there was no evidence that there was objectively a need for another CPI position in the PTEU. A remedy that places an unfairly treated employee in an available post he or she would certainly have been promoted to but for the unfair action of the employer is perfectly reasonable. Imposing, as a remedy for the unfairness experienced by the individual respondents, the creation and filling of a post that in the ordinary course would not have existed seems to me, however, to be an overreach on the part of the commissioner. His decision on remedy is one that another decision maker could not reasonably have arrived at based on the totality of the evidence.[4] It is overly onerous to the employer, imposes a long-term inefficiency in its operations and is logically unconnected to the nature of the unfairness the evidence revealed the individual respondents underwent. The unfairness experienced by them was of a negative nature. In other words, they did not establish a case that any of them ought to have been promoted to a CPI. Their issue was that Mr Makabela ought not to have been appointed as a CPI, thus rising above them and also impeding their future career prospects. It strikes me that there is a remedy available that properly and more justly remedies the true unfairness in this case. The commissioner ought to have grasped this nettle instead of ordering the recruitment of another CPI.

Conclusion

[25] Ordinarily I would have remitted this matter to the commissioner to decide relief anew. However, I note that sufficient evidence exists on the record before me to fairly and properly replace the commissioner's order with my own. The only person who might benefit from the leading of further evidence or argument on the remedy to be offered

[4] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 943 (LAC) at para 20.

to the respondents is Mr Makabela. He was however joined in the proceedings and elected not to place any evidence or argument before the bargaining council or this court. He has had his chance to influence the outcome of the case insofar as it affects him. I also note with some alarm how long ago the actions that form the basis of this matter happened. I think it is in the interests of all parties that finality is achieved.

Order

[26] The order I make therefore is the following:

(i) The portion of the award relating to remedy of the third respondent, dated 30 November 2010, under case no PSGA444-08/09, issued by the second respondent, is reviewed and set aside. It is replaced with an award directing the applicant to reduce the rank of Mr Makabela to that of a principal provincial inspector on or before 30 September 2015. Mr Makabela's salary is to remain the same.

(ii) There is no order as to costs.

Applicant's Attorneys: *Lambert & Associates.*

First Respondent's Attorneys: *Tomlinson Mnguni James Attorneys.*

MAKUSE v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS

LABOUR COURT (JR2795/11)

17 August; 18 August 2015

Before MYBURGH AJ

Costs—Labour Court—Application for condonation of late filing of review application—Unacceptable for applicant to bring late review application and put respondent to expense of defending hopeless condonation application—Applicant cannot reasonably expect to escape paying costs.

Practice and procedure—Condonation—Labour Court proceedings—Late referral of dispute—Corrective steps by labour courts and legislature to ensure expeditious prosecution of review applications—Strict scrutiny of condonation applications part of overall scheme to ensure effective and expeditious resolution of labour disputes.

Practice and procedure—Condonation—Labour Court proceedings—Late referral of dispute—Unreasonable delay—Flagrant or gross failure to comply with prescribed time periods—No compelling explanation for egregious delay—Condonation may be refused without considering prospects of success.

After a CCMA commissioner found that the applicant employee had not been dismissed in terms of s 186(1)*(b)* of the LRA 1995, she launched an application to review the award. The application was referred almost eight months outside the six-week period prescribed by s 145(1)*(a)*, and the employee sought condonation.

A The Labour Court noted that labour law litigation is unique in that it takes place within a system designed to ensure the effective and expeditious resolution of labour disputes. Because labour disputes require speedy resolution, the courts have consistently held that condonation for delays is not simply there for the taking. This is particularly so when it comes to delays in the launching of s 145
B review applications, especially in the context of individual dismissals, where the courts have made it clear that condonation applications will be subject to strict scrutiny and that the principles of condonation should be applied on a much stricter basis.

The court referred to the earlier criticism by both the Constitutional Court and the
C Supreme Court of Appeal of the systemic delays in the finalisation of review applications, and noted that the corrective steps taken by the labour courts as an institution and the legislature to ensure the expeditious prosecution and determination of review applications underscore the statutory imperative that labour disputes must be effectively, and thus expeditiously, resolved. The strict scrutiny of condonation applications relating to the late launching of s 145
D review application is very much part of this overall scheme of things.

Applying the above principles to the matter before it, the court found that the employee had not demonstrated a reasonable or acceptable explanation for the egregious delay of eight months, let alone a compelling one, as was required in the circumstances.

E Relying on recent Labour Appeal Court authority that, where there has been a flagrant or gross failure to comply with the rules of court, condonation may be refused without considering the prospects of success, the court found that the employee's prospects of success in this matter were immaterial and did not need to be considered.

F Turning to the issue of costs, the court found that it was unacceptable for the employee to bring the review application eight months late and then put the respondent to the expense of defending a hopeless application for condonation. The court commented that it was high time that applicants on review learn that when they bring a review application way out of time and condonation is refused, they cannot reasonably expect to escape paying the costs.

G The court accordingly dismissed the applications for condonation and review and ordered the employee to pay the costs.

Application to the Labour Court for condonation of the late referral of a review application. The facts and further findings appear from the reasons for judgment.

H **Annotations**

Cases

A Hardrodt (SA) (Pty) Ltd v Behardien & others (2002) 23 *ILJ* 1229 (LAC) (referred to)

I Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others (2010) 31 *ILJ* 273 (CC) (considered)

Colett v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 *ILJ* 1948 (LAC) (followed)

Commercial Workers Union of SA v Tao Ying Metal Industries & others 2009 (2) SA 204 (CC); (2008) 29 *ILJ* 2461 (CC) (considered)

J Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation &

Arbitration & others 2009 (1) SA 390 (CC); (2008) 29 *ILJ* 2507 (CC) (referred to)

Lentsane & others v Human Sciences Research Council (2002) 23 *ILJ* 1433 (LC) (considered)

Mbatha v Lyster & others (2001) 22 *ILJ* 405 (LAC) (referred to)

National Education Health & Allied Workers Union on behalf of Mofokeng & others v Charlotte Theron Children's Home (2004) 25 *ILJ* 2195 (LAC) (referred to)

Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others 2010 (2) SA 269 (CC); (2009) 30 *ILJ* 1521 (CC) (referred to)

NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC) (referred to)

Queenstown Fuel Distributors CC v Labuschagne NO & others (2000) 21 *ILJ* 166 (LAC) (considered)

Republican Press (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union & others 2008 (1) SA 404 (SCA); (2007) 28 *ILJ* 2503 (SCA) (referred to)

Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others 2009 (3) SA 493 (SCA); (2009) 30 *ILJ* 829 (SCA) (considered)

Strategic Liquor Services v Mvumbi NO & others 2010 (2) SA 92 (CC); (2009) 30 *ILJ* 1526 (CC) (referred to)

Van Wyk v Unitas Hospital & another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) (considered)

Visser v Mopani District Municipality & others (2012) 33 *ILJ* 321 (SCA) (referred to)

Statutes

Labour Relations Act 66 of 1995 s 1*(d)*(iv), s 145(1)*(a)*, s 145(5)-(7)

Attorney N Mahomed for the applicant.

Adv R Venter for the third respondent.

Judgment reserved.

MYBURGH AJ:

Introduction

[1] In an arbitration award issued by him, the second respondent found that the applicant had not been dismissed in terms of s 186(1)*(b)* of the LRA,[1] in that she did not have a reasonable expectation of the extension of her fixed-term contract.

[2] Dissatisfied with the award, the applicant launched a review in terms of s 145. But she did so some eight months outside of the six-week period prescribed in s 145(1)*(a)*.[2] She now seeks condonation.

[3] Before evaluating the application for condonation, it is useful to consider first what the test for the grant of condonation is in the present circumstances.

The test for the grant of condonation

[4] Labour law litigation is unique in that it takes place within a system designed to ensure the effective (and thus expeditious) resolution of

[1] Labour Relations Act 66 of 1995.

[2] The award was issued on 2 March 2011, and the review application delivered on 9 December 2011. It ought to have been brought by mid-April 2011, and was thus brought a week short of eight months late.

labour disputes — this being one of the primary objects of the LRA.[3] The need for this, and the implications of delays, were explained as follows by Ngcobo J in *Commercial Workers Union of SA v Tao Ying Metal Industries & others* 2009 (2) SA 204 (CC); (2008) 29 *ILJ* 2461 (CC); [2009] 1 BLLR 1 (CC):

A

'The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. *These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be*
B *detrimental not only to the workers* who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have *a detrimental effect on an employer* who may have to reinstate workers after a number of years.'[4] (Emphasis added.)

[5] It follows from this that condonation for delays in all labour law
C litigation is not simply there for the taking. But this is particularly so when it comes to delays in the launching of s 145 review applications, especially in the context of individual dismissals. Here the courts have made it clear that applications for condonation will be subject to 'strict scrutiny', and that the principles of condonation should be
D applied on a 'much stricter' basis. This can be traced back to this important dictum of the LAC (per Conradie JA) in *Queenstown Fuel Distributors CC v Labuschagne NO & others* (2000) 21 *ILJ* 166 (LAC); [2000] 1 BLLR 45 (LAC), which was decided in 1999:

E '[24] … In principle, therefore, it is possible to condone non-compliance with the time-limit. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals *will not readily be granted*. The excuse for non-compliance would *have to be compelling*, the case for attacking a defect in the proceedings would *have to be cogent* and the defect would have to be of a kind which would result
F in a *miscarriage of justice if it were allowed to stand*.

[25] By adopting a policy of *strict scrutiny* of condonation applications in individual dismissal cases I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in
G his award.'[5] (Emphasis added.)

[6] This dictum, which has been followed by the LAC in other judgments,[6] was explained as follows by Sutherland AJ (as he then was) in *Lentsane & others v Human Sciences Research Council* (2002) 23
H *ILJ* 1433 (LC):

'In that decision Conradie JA pointed out that the principles of condonation should be *much stricter* than those which were applied "in normal circumstances".

I

[3] See s 1*(d)*(iv). The delay in the resolution of labour disputes is 'one of the underlying problems that the LRA seeks to remedy': *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* (2010) 31 *ILJ* 273 (CC); [2010] 5 BLLR 465 (CC) at para 45.

[4] at para 63.

[5] at paras 24-25.

J [6] *Mbatha v Lyster & others* (2001) 22 *ILJ* 405 (LAC); [2001] 4 BLLR 409 (LAC) at para 18; *A Hardrodt (SA) (Pty) Ltd v Behardien & others* (2002) 23 *ILJ* 1229 (LAC) at paras 3-4.

This remark I understand to be an endeavour to distinguish the considerations pertinent to challenging an award granted by a commissioner of the CCMA, in relation to other litigious issues, such as for example an application for condonation of the late referral of a statement of case or of defence. The policy reasons for that distinction are clear. Once a party has an award in his or her favour, the failure to respond within the six-week period to challenge that award gives rise to considerations which are absent at the outset of litigation, where the table is being set for debate.'[7] (Emphasis added.)

[7] Consistent with these judgments, the Constitutional Court has also recognised that there comes a point at which a successful party can feel secure in the decision in question and arrange its affairs accordingly, and that it is difficult to obtain condonation for the late launching of an application for leave to appeal (and the same would apply to a review) after this point in time. As the court put it in *Van Wyk v Unitas Hospital & another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC):

'There is an important principle involved here. An inordinate delay induces a reasonable belief that the order had become unassailable. This is a belief that the hospital entertained and it was reasonable for it to do so. It waited for some time before it took steps to recover its costs. A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives. *After an inordinate delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further.* To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice.'[8] (Emphasis added.)

[8] From about 2007 onwards, this court and the LAC were taken to task by both the SCA and Constitutional Court for 'systemic delays'[9] in the resolution of labour law disputes, particularly in the context of the final determination of review applications.[10] In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* 2009 (3) SA 493 (SCA); (2009) 30 *ILJ* 829 (SCA); [2009] 7 BLLR 619 (SCA), the SCA held that such delays are untenable:

'The entire scheme of the LRA and its motivating philosophy are directed at cheap and easy access to dispute resolution procedures and courts. Speed of result

[7] at para 14.

[8] at para 31.

[9] A phrase coined by the SCA in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* 2009 (3) SA 493 (SCA); (2009) 30 *ILJ* 829 (SCA); [2009] 7 BLLR 619 (SCA) at para 33.

[10] See this string of high-ranking judgments: *Republican Press (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union & others* 2008 (1) SA 404 (SCA); (2007) 28 *ILJ* 2503 (SCA); [2007] 11 BLLR 1001 (SCA) at paras 20-22; *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* 2009 (1) SA 390 (CC); (2008) 29 *ILJ* 2507 (CC); [2008] 12 BLLR 1129 (CC) at para 52; *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others* 2010 (2) SA 269 (CC); (2009) 30 *ILJ* 1521 (CC); [2009] 6 BLLR 517 (CC) at paras 1 and 12; *Shoprite Checkers (Pty) Ltd v CCMA & others* n 9 above at paras 33-34; *Strategic Liquor Services v Mvumbi NO & others* 2010 (2) SA 92 (CC); (2009) 30 *ILJ* 1526 (CC); [2009] 9 BLLR 847 (CC) at para 12; *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* n 3 above at para 47; *Visser v Mopani District Municipality & others* (2012) 33 *ILJ* 321 (SCA); [2012] 3 BLLR 266 (SCA) at paras 13-14.

was its clear intention. Labour matters invariably have serious implications for both employers and employees. Dismissals affect the very survival of workers. *It is untenable* that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure.'[11] (Emphasis added.)

[9] In *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others*, the Constitutional Court held that whatever the cause of the problem is, it had to be addressed:

'[46] … It is unfortunately necessary to make some forthright comments about this unsatisfactory state of affairs again. There is nothing inevitable that causes delays in the dispute-resolution process under the provisions of the LRA. *If there is an underlying cause it may be because problems in the process are not addressed timeously and are then acknowledged as being the acceptable norm*.

[47] … The Labour Court and Labour Appeal Court rules provide for a court-managed process to ensure that matters are heard in proper form, and expeditiously so. If practitioners cause delays, the rules provide the means for the labour courts' judiciary to exercise discipline and control over them. As judges we also need to produce our judgments expeditiously. *Accountability and responsibility affect and concern us all*.'[12] (Emphasis added.)

[10] As an institution, the labour courts took heed of this criticism and responded to it through a range of remedial measures. Amongst them was the introduction of a pro bono judge system in 2011, in terms of which practitioners act as judges on a pro bono basis for a week during recesses, with the specific objective being to address the back-log in review applications. Allied to this, in April 2013, a Practice Manual was introduced, which contains a number of provisions (in para 11.2) aimed at speeding up the determination of reviews. It records that a review application 'is by its very nature an urgent application', and requires review records to be delivered within 60 days of their being made available by the CCMA (or bargaining council) and for all the necessary papers in the application to be filed within 12 months of the date of the launch of the application.

[11] In addition to this, the legislature found it necessary in the 2014 amendments to the LRA (which took effect on 1 January 2015) to pass three amendments to s 145, which are specifically aimed at expediting the prosecution of review applications. The first is that an applicant on review must apply for a hearing date within six months of launching the review (subsection (5)); the second is that judgments in review applications must be delivered as soon as reasonably possible (subsection (6)); and the third is that the institution of a review does not suspend the operation of the award, unless the applicant furnishes security to the satisfaction of the court (subsection (7)).

[12] For present purposes, the amendment requiring the applicant to apply for a hearing date within six months of launching the review

[11] at para 33.
[12] at paras 46–47.

stands to be emphasised. In practical terms, it halves the time for the completion of the filing of all papers set in the Practice Manual. In effect, the legislature wants reviews determined twice as fast as the target set by the court itself in its Practice Manual.

[13] The corrective steps taken by the labour courts as an institution and the legislature to ensure the expeditious prosecution and determination of review applications outlined above underscore the statutory imperative that labour disputes must be effectively (and thus expeditiously) resolved. And the strict scrutiny of condonation applications relating to the late launching of s 145 review applications is very much part of this overall scheme of things.

[14] Although the review application in this matter dates back to 2011, and was thus brought before the introduction of the Practice Manual and the 2014 amendments to the LRA, I do not believe that this means that a less stringent test for the grant of condonation should apply. As far back as 1999, the LAC's dictum in *Queenstown Fuel Distributors* quoted above has been the law (and remains the law).

Evaluation

[15] It is in this overall context that the application for condonation herein stands to be determined. As a point of departure, the delay of some eight months is egregious. Instead of taking six weeks to bring the review, the applicant took more than nine months to do so, which equates to more than six times longer than the statutory standard. (Judged in terms of the current six-month standard in s 145(5), the applicant took three months longer just to launch her review than applicants have to apply for a hearing date.)

[16] The question then is whether the applicant (in the words of the LAC in *Queenstown Fuel Distributors*) has tendered a 'compelling' excuse for non-compliance. The sum total of the explanation (such as it is) is this: once the award was received by Clientele Legal (the applicant's legal insurers) on 2 March 2011, the matter was assessed internally, with the legal adviser assigned to the matter having changed on three occasions, which caused delays; and it ultimately took much time for Clientele Legal to give the go ahead for the review and the appointment of attorneys — this in circumstances where, so it is alleged, their internal legal advisers are not familiar with the time periods for the launching of a review (a scarcely credible allegation).

[17] Self-evidentially, this explanation is entirely bereft of substance and detail. Critically important facts are missing, like, for example, the date upon which the applicant's current attorneys were appointed, thus making it impossible to assess the diligence or otherwise with which they conducted themselves after being appointed. The applicant also makes no attempt at all to take the court into her confidence about what, if any, steps she took to follow up with Clientele Legal, or to seek alternative legal advice. There is also no confirmatory affidavit from anyone at Clientele Legal (attesting to their alleged lack of knowledge of time periods). In these circumstances, the applicant has come nowhere near establishing that she was free from blame for the delay.

[18] In addition, although the applicant does not deal with this at all in her application for condonation, it appears that the notice of motion and founding affidavit were signed on 8 November 2011 and 28 November 2011, respectively, and that the review application was delivered by fax on 9 December 2011. There is no explanation for the apparent delay in the signature of the founding affidavit (by some three weeks) and the subsequent delay in the delivery of the application (of 11 days). In effect, a delay of an entire month again goes entirely unexplained — and this in circumstances where the review application was already hopelessly out of time by that stage.

[19] In short, the applicant has not demonstrated a reasonable and acceptable explanation for the egregious delay — let alone a compelling one, as is required in the circumstances of this matter.

[20] This leaves the issue of prospects of success. While an analysis of judgments of the LAC over the years reveals that it has not always consistently adopted the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial,[13] it endorsed such a position in its recent judgment in *Colett v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 1948 (LAC); [2014] 6 BLLR 523 (LAC). Significantly, this was in the context of an application to dismiss a review application for want of diligent prosecution. In a unanimous judgment, Musi AJA held as follows:

> '[38] There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that *where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success*. In *NUM v Council for Mineral Technology* [[1999] 3 BLLR 209 (LAC) at para 10], it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C–D should be followed, but —
>
> > "[t]here is a further principle which is applied and that is that *without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial*, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused".
>
> [39] The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.'[14] (Emphasis added.)

[21] In the light of this dictum, given that the applicant has not provided a reasonable and acceptable explanation for the delay and is guilty of a flagrant and gross failure to comply with the prescribed time-period (the application being eight months late), her prospects of success are immaterial, and thus need not be considered.

[13] Compare, for example, *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10 with *National Education Health & Allied Workers Union on behalf of Mofokeng & others v Charlotte Theron Children's Home* (2004) 25 *ILJ* 2195 (LAC); [2004] 10 BLLR 979 (LAC) at para 23.

[14] at paras 38–39.

[22] In the result, when subjected to the 'strict scrutiny' required by the LAC in *Queenstown Fuel Distributors*, the application for condonation falls hopelessly short of the mark, and must fail. In the absence of the applicant having succeeded in obtaining condonation, the review application also stands to be dismissed.

[23] Turning to the issue of costs, in the light of the jurisprudence outlined above, it is unacceptable for a party to bring a review application eight months late, and then put the respondent to the expense of defending a hopeless application for condonation. To my mind, it is high time that applicants on review come to learn that where they bring a review application way out of time and condonation is refused, they cannot reasonably expect to escape paying the costs.

Order

[24] In the circumstances, the following order is made:

1 application for condonation is dismissed;
2 the review application is accordingly dismissed;
3 the applicant shall pay the costs.

Applicant's Attorneys: *Nadeem Mahomed Attorneys.*

Third Respondent's Attorneys: *Maenetja Attorneys.*

NATIONAL UNION OF METALWORKERS OF SA on behalf of MEMBERS v VIDEX WIRE PRODUCTS (PTY) LTD & OTHERS

LABOUR COURT (JR1298/12)

8 October; 28 October 2015

Before STEENKAMP J

Strike—Demand—Demand relating to productivity bargaining—Demand amounting to demand for higher wages and forming subject-matter for collective bargaining under auspices of bargaining council—Demand standing outside confines of area of protected strike.

Strike—Unprotected strike—Demand—Demand relating to productivity bargaining—Demand amounting to demand for higher wages and forming

subject-matter for collective bargaining under auspices of bargaining council—Demand standing outside confines of area of protected strike—Strike unprotected.

A The applicant trade union sent a letter to the first respondent company setting out its demands regarding the 'standard for production targets'. The parties could not reach an agreement. The union referred a dispute for conciliation to the bargaining council, the MEIBC, characterising it as a matter of mutual interest in terms of s 64 of the LRA 1995. Conciliation failed and the arbitrator issued B a certificate to that effect. The company responded to the demands set out in the union's letter, but the parties still could not agree. The union issued a notice that it would embark on a protected strike within 48 hours in terms of s 64. The union refused a request by the company to give an undertaking to stop the strike as it was in support of productivity bargaining, which was C an issue covered by the main agreement. The company launched an urgent application and the Labour Court granted an interdict pending a referral to arbitration to determine whether the union could strike over the issue. At arbitration the arbitrator found that the union could not strike over the issue. The union referred the decision to the Labour Court for review.

D The court noted that the union's demands would mean extra money in the employees' pockets. The arbitrator after applying the facts on the evidence before her to the provisions of the main agreement, had concluded that the demands amounted to a demand for higher wages; that these could only be negotiated nationally under the auspices of the council; and that, therefore, the union and its members could not strike over those demands. The court agreed E with the judgment of the Labour Appeal Court, in *Transport & Allied Workers Union of SA & others v Unitrans Fuel & Chemical (Pty) Ltd* (2015) 36 *ILJ* 2822 (LAC), that the demand was one that would lead to increased costs for the company; that it was subject to collective bargaining; and thus that it stood outside the confines of the area of a protected strike.

F The court was satisfied that the arbitrator's finding that the union's demands were essentially for more money, and that they formed the subject-matter for collective bargaining under the auspices of the council, was not so unreasonable that no other arbitrator could have come to the same conclusion.

The application was, accordingly, dismissed.

Application to the Labour Court to review an arbitration award handed down by G a bargaining council. The facts and further findings appear from the reasons for judgment.

Annotations

Cases

H North East Cape Forests v SA Agricultural Plantation & Allied Workers Union & others (1997) 18 *ILJ* 971 (LAC) (referred to)

Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC) (referred to)

Transport & Allied Workers Union of SA & others v Unitrans Fuel & Chemical (Pty) Ltd (2015) 36 *ILJ* 2822 (LAC) (applied)

I Unitrans Fuel & Chemical (Pty) Ltd v Transport & Allied Workers Union of SA & another (2010) 31 *ILJ* 2854 (LAC) (considered)

Attorney X Ngako for the applicant.

Adv G Fourie for the first respondent.

J Judgment reserved.

STEENKAMP J:

Introduction

[1] The applicant, NUMSA,[1] seeks to have an arbitration award reviewed and set aside in terms of s 158(1)*(g)* of the LRA.[2] The commissioner[3] held that the union members' demands in terms of the main agreement governing them constitute demands for remuneration and/or productivity bargaining which may not be negotiated outside the bargaining council.[4] Therefore NUMSA may not strike over those issues.

Background facts

[2] The union and the employer are bound by the consolidated main agreement for the Metal & Engineering Industries Bargaining Council. More specifically, they are bound by the agreement reached at national level over remuneration and productivity bargaining. The company argues that the union's members may not strike over those issues at plant level during the period of the agreement; the union contends otherwise. Clause 37 of the main agreement reads as follows:

> '37 Levels of bargaining in the industry
> (1) Subject to subclause (2) —
> *(a)* the bargaining council shall be the sole forum for negotiating matters contained in the main agreement;
> *(b)* during the currency of the agreement, no matter contained in the agreement may be an issue in dispute for the purposes of a strike or lock-out or any conduct in contemplation of a strike or lock-out;
> *(c)* any provision in a collective agreement binding an employer and employees covered by the council, other than a collective agreement concluded by the council, that requires an employer or a trade union to bargain collectively in respect of any matter contained in the main agreement, is of no force and effect.
> (2) Where bargaining arrangements at plant and company level, excluding agreements entered into under the auspices of the bargaining council, are in existence, the parties to such arrangements may, by mutual agreement, modify or suspend or terminate such bargaining arrangements in order to comply with subclause (1). In the event of the parties to such arrangements failing to agree to modify or suspend or terminate such arrangements by the date of implementation of the main agreement, the wage increases on scheduled rates and not on the actual rates shall be applicable to such employers and employees until the parties to such arrangement agree otherwise.'

[3] Annexure D to the main agreement provides:

> 'Subject to the provisions of clause 37 of the main agreement, an employer, his employees, any employee representative body and any trade unions representing the affected employees may, by mutual agreement, enter into

[1] The National Union of Metalworkers of SA.
[2] Labour Relations Act 66 of 1995.
[3] The second respondent, Ms K Driscoll.
[4] The Metal & Engineering Industries Bargaining Council (MEIBC), the third respondent.

voluntary negotiations to conclude a productivity agreement with the objective of achieving measurable improvements in productivity performance and work life at company level in terms of the principles and guidelines contained in this Annexure.'

[4] The issue of production targets has been a contentious one for a number of years. NUMSA sent a letter to the company setting out its demands (or proposals). For the sake of understanding those demands, and whether or not they are covered by the main agreement, they are worth quoting in full:

'*Re: Standard for production targets*
Further to our previous discussions pertaining the above, please find herewith our proposals in respect of production targets:

1 We submit that all members are paid per hour, and not per the targets.
2 We submit that production targets must not be linked to the hourly rate.
3 We submit that failure by employees to reach the production targets should not result in disciplinary action.
4 We submit that production targets should be based and/or calculated on the sliding scale.
5 We propose that there should be a daily amount which employees will receive for reaching the production targets.
6 We propose that in case the employee did not reach targets he/she will forfeit certain amount of money percentage of daily targets money based on the sliding scale (sic).
7 We propose that in case the employee reached daily targets prior to knock off time, such employee should have option to knock off [or] continue to work as overtime.
8 We propose that any increase to production targets must be subject to negotiations between the union and company.
9 We propose that production targets be dealt with by the accredited professionals with good reputation in general and SABS in particular.
10 We put on record that the production targets must not violate basic human rights and health and safety rules and regulations.
11 We propose to meet with yourselves (sic) on either 13 April 2011 at 12h00 or on 20 April 2011 at 10h00 to discuss about this matter including procedural and recognition agreement.'

[5] The parties could not reach an agreement. The union referred a dispute for conciliation at the bargaining council. It characterised it as a matter of mutual interest in terms of s 64 of the LRA. Conciliation failed and the council commissioner issued a certificate to that effect. He ticked the box that indicated that, if the dispute remained unresolved, the union could call its members out on strike.

[6] The company responded to the demands set out in the union's letter, but still the parties could not agree. The union issued a notice that it would embark on a protected strike within 48 hours in terms of s 64 of the LRA. The union reiterated the ten demands set out in its earlier letter. It added a new demand that 'five grade structure must be benchmarked by the highly paid artisans', but subsequently withdrew it.

[7] The company's attorneys sent a letter to NUMSA advising it that the strike would be in support of productivity bargaining; that that

was an issue covered by the main agreement; and that, hence, the strike would be unprotected. They further pointed out that the company had not agreed to negotiations on productivity bargaining in accordance with annexure D to the main agreement. They asked NUMSA to give an undertaking to stop the strike.

[8] NUMSA refused. The company launched an urgent application in this court. The court granted an interdict stopping the strike pending a referral to arbitration of the following question:

> 'Whether the union demands in terms of the main agreement constitute demands for remuneration and productivity bargaining which may not be negotiated outside the bargaining council and if so whether the union may strike over the issue.'

[9] The arbitrator answered the question in the affirmative and ruled that the union and its members 'may not strike over the issues'.

The award

[10] The commissioner was guided by the remarks of the LAC in *North East Cape Forests*[5] that the interpreter of a collective agreement should, in addition to applying the ordinary rules of interpretation, also ask the question whether the interpretation accords with the objectives of the LRA. Those objectives include providing a framework for collective bargaining; and to encourage collective bargaining at sectoral rather than plant level: 'The negotiating and setting of wage increases, the minimum wages assigned to each job category and the terms and conditions of employment are thus at the heart of collective bargaining and a bargaining council.'

[11] The company had argued that the union's demands were essentially in support of more money. In particular, NUMSA demanded an additional payment of R150 per day for meeting production targets; but their other demands did not fall away. The arbitrator considered those demands. She concluded that the demands did indeed pertain to issues which were governed by the main agreement. The real demand was for an increase of workers' wages and this may only be negotiated nationally under the auspices of the bargaining council.

Review grounds

[12] The applicant submits that the award is reviewable because the arbitrator 'committed misconduct in that she rendered an award which no reasonable decision maker could render'. Both parties argued the review application on the basis of the reasonableness test set out in *Sidumo*,[6] even though the application was launched under s 158(1)*(g)* rather than s 145 of the LRA.

[13] Mr *Ngako* submitted that the real dispute between the parties

[5] *North East Cape Forests v SA Agricultural Plantation & Allied Workers Union & others* (1997) 18 *ILJ* 971 (LAC).

[6] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC).

pertained to production targets and target incentives, and that those issues were not governed by the main agreement. NUMSA's main demand was that 'there should be a daily amount of money which employees will receive for reaching the daily targets', being R150 per day. That, he argued, is not covered by the main agreement.

Evaluation/Analysis

[14] On the evidence before the arbitrator, she correctly found that the company had assigned a daily production target to the workers. It paid them the hourly wage whether they reached the target or not. The union's demands, including the demand for R150 per day if they reached the target, would mean extra money in their pockets. The arbitrator's finding that their demands were for 'an amount of money in addition to the normal hourly rate, for no additional work', is not unreasonable. Neither is the following conclusion:

> '[T]he additional amount is related to a particular aspect of … employment and has the single effect of increasing the [workers'] wages. This in my view places the demands within the ambit of the main agreement.'

[15] The arbitrator applied the facts on the evidence before her to the provisions of the main agreement. She concluded that the demands amounted to a demand for higher wages; that this could only be negotiated nationally under the auspices of the council; and that, therefore, the union and its members could not strike over those demands. That conclusion is not so unreasonable that no other commissioner could have come to the same conclusion on the facts before her.

[16] In support of his argument, Mr *Ngako* referred to a judgment of the Labour Appeal Court in *Unitrans*[7] in which the LAC held that the fact that the union could not strike over one issue governed by a collective agreement, did not prevent it from striking over another discrete issue. That proposition is certainly correct. But that judgment was followed by a more recent one.[8] In *Unitrans (2)*, the LAC held on the facts of that case that a demand relating to wage disparities was one that would lead to increased costs for the company; that it was subject to collective bargaining; and thus that it 'stood outside the confines of the area of a protected strike as defined by the Labour Appeal Court'.[9]

[17] The same considerations apply to this case. The arbitrator's finding that the union's demands were essentially for more money, and that they formed the subject-matter for collective bargaining under the auspices of the council, is not so unreasonable that no other arbitrator could have come to the same conclusion.

[7] *Unitrans Fuel & Chemical (Pty) Ltd v Transport & Allied Workers Union of SA & another* (2010) 31 *ILJ* 2854 (LAC); [2011] 2 BLLR 153 (LAC) (*Unitrans (1)*).

[8] *Transport & Allied Workers Union of SA & others v Unitrans Fuel & Chemical (Pty) Ltd* (2015) 36 *ILJ* 2822 (LAC) (*Unitrans (2)*).

[9] *Unitrans (2)* para 33 per Davis JA.

Conclusion

[18] The arbitrator's conclusion is not so unreasonable that no other commissioner could have come to the same conclusion on the facts before her. The award is not open to review.

[19] Concerning costs, I take into account that there is an ongoing relationship between the parties and that the issues in dispute may well form the subject of collective bargaining in months to come. In law and fairness, I do not consider a costs order to be appropriate.

Order

The application for review is dismissed.

Applicant's Attorneys: *Ruth Edmonds Attorneys*.

First Respondent's Attorneys: *Cliffe Dekker Hofmeyr.*

NXUMALO v MINISTER OF CORRECTIONAL SERVICES & OTHERS

LABOUR COURT (D1092/13)

19 March; 30 September 2015

Before CELE J

Protected Disclosure Act 26 of 2000—Disclosure—Protected disclosure—Only disclosure, made in good faith, of information either disclosing or tending to disclose forms of criminal or other misconduct subject of protection under Act—Employee bearing onus to prove entitlement to protection—No compelling circumstantial evidence proving that employee's transfer motivated by illegitimate purpose.

Protected Disclosure Act 26 of 2000—Interdict—Interdict to prevent employer from proceeding with disciplinary hearing—Only disclosure, made in good faith, of information either disclosing or tending to disclose forms of criminal or other misconduct subject of protection under Act—Employee bearing onus to prove entitlement to protection—No compelling circumstantial evidence proving that employee's transfer motivated by illegitimate purpose—Interdict refused.

The applicant employee, the head of medium B at Westville Prison, came into conflict with a prisoner, Mr N, a veteran of the struggle against apartheid and former head of the Pietermaritzburg Prison who was incarcerated for murder, because he refused to grant Mr N preferential treatment and acknowledge his control over the wardens at the prison. Mr N claimed that he had influential friends in the government, and informed the employee that he would arrange for him to be transferred. Mr N later taunted the employee claiming that his transfer had been arranged and it was only a question of where he would be transferred to. The following month senior management of the department

held a meeting after which the Minister of Correctional Services announced that heads of prisons were to be transferred. Shortly thereafter, the employee was called to a meeting and he was told by the minister that he was to be transferred to another prison. The employee took the position that his transfer was motivated by an illegitimate purpose as orchestrated by a prisoner whose interests were in conflict with the legitimate interests of the department. He was of the view that his employer was about to commit an unfair labour practice relating to a transfer, at the behest of a convicted criminal. In order to obtain evidence of that unlawful state of affairs the employee had recorded the meeting with the minister with his official cellphone. He later handed the recording to his attorneys, who arranged for a transcript of the recording. When the minister came to know about the transcribed recording made by the employee, a decision was taken to charge him with acts of misconduct. He was charged with secretly recording, transcribing and distributing a discussion involving senior officials of the department thereby prejudicing the administration of the department and dishonouring the confidentiality of discussions that were impliedly confidential or secret. The employee was then suspended. He brought an application to interdict the minister and the department from proceeding with disciplinary proceedings, contending that insofar as he distributed the recording to his legal advisers for the purposes of obtaining legal advice, the recording was a 'protected disclosure' as defined in the Protected Disclosures Act 26 of 2000.

The Labour Court noted that the court may intervene to stop disciplinary proceedings where the continuation of such proceedings contravenes an established right. Section 3 of the PDA provides that no employee may be subjected to any occupation detriment by his or her employer on account, or partly on account, of his or her having made a protected disclosure. After considering the provisions of the PDA and case law, the court said it is only the disclosure of information that either discloses or tends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA. The disclosure must also be made in good faith. The employee bears the onus to prove his or her entitlement to the protection he or she avers flows from the PDA.

Turning to the authenticity of the transcript of the meeting, the court noted that, at a disciplinary hearing, it is the employer who has to prove every element of the misconduct complained of. Therefore, in this matter the employer would have to prove the authenticity of the transcript it relied on. All that the employee had to do was to make reference to the transcript of the discussion referred by the employer in the charge-sheet to enable him to interdict the disciplinary hearing. The employer was therefore being opportunistic in demanding the employee to authenticate a transcript which it intended to use against the employee. Moreover, the court found that, as the employee had been a participant in the monitoring and recording, the recording of the discussion with the minister was not unlawful.

Regarding the disclosure contained in the recording, the court said that there was no compelling circumstantial evidence in the transcript which proved that the employee's transfer was motivated by an illegitimate purpose and was orchestrated by a prisoner, Mr N. In the absence of a disclosure of information that either disclosed or tended to disclose forms of criminal or other misconduct, there could not be talk of there being a protected disclosure. Neither could it be said that the employee had suffered any occupational detriment.

The court accordingly discharged the rule nisi.

Application to the Labour Court for a final interdict. The facts and further findings appear from the reasons for judgment.

Annotations

Cases

Communication Workers Union v Mobile Telephone Networks (Pty) Ltd (2003) 24 *ILJ* 1670 (LC) (referred to)
Lenco Holdings Ltd & others v Eckstein & others 1996 (2) SA 693 (N) (referred to)
Radebe & another v Premier, Free State Province & others 2012 (5) SA 100 (LAC); (2012) 33 *ILJ* 2353 (LAC) (referred to)
SA Municipal Workers Union on behalf of Matola v Mbombela Municipality (2011) 32 *ILJ* 2748 (LC) (referred to)
Tap Wine Trading CC & another v Cape Classic Wines (Western Cape) CC & another 1999 (4) SA 194 (C) (referred to)

Statutes

Labour Relations Act 66 of 1995 s 158(1)*(a)*(iii)
Protected Disclosures Act 26 of 2000 s 3, s 5

Adv D Crompton for the applicant.

Adv K T M Moerane (with *Adv Z Rassool*) for the respondents.

Judgment reserved.

Cele J:

Introduction

[1] This application is brought in terms of s 158(1)*(a)*(iii) of the Labour Relations Act[1] to interdict and restrain all the respondents from subjecting the applicant to any disciplinary proceedings or any occupational detriment as defined in the Protected Disclosures Act[2] and to interdict and restrain them from commencing or continuing with disciplinary proceedings against the applicant. The application was opposed by the respondents. It was initially brought as an urgent application on 17 October 2013 and was enrolled for 21 October 2013. In court the respondents delivered what they called an 'interim affidavit'. An interim order was granted by consent of the parties in terms of which:

(a) a procedure was put in place for the respondents to satisfy themselves as to the authenticity of the transcript annexed to the founding affidavit;
(b) time periods were prescribed for the filing of further affidavits, if any;
(c) parties were to meet by 24 October 2013 to listen to the original recordings on the cellular telephone of the applicant;
(d) the matter set down at the General Public Service Sectoral Bargaining Council, the GPSSBC, emanating from this case, was to be adjourned sine die by consent; and
(e) the respondents undertook not to proceed with the disciplinary enquiry set down for 22 October 2013 until the finalisation of the application.

[1] 66 of 1995 (the Act).
[2] 26 of 2000 (the PDA).

[2] The set time frames notwithstanding the answering affidavit and therefore the replying affidavit were not filed by the parties on time. On 31 October 2013 the respondents sought condonation for their failure to file the answering affidavit, contending that the delay was mainly due to the delays in the process of authenticating the transcript. According to the applicant that process was completed by September 2013. The opposition to this application was therefore based on the interim affidavit and on the applicant's papers.

Factual background

[3] The applicant is in the employment of the second respondent Department of Correctional Services (the department) stationed as the head at medium B, Westville Prison, KwaZulu-Natal, where he holds the rank of a deputy director. One of Westville Prison's inmates was a Mr Russell Ngubo. He was serving a sentence for murder and other related charges. Before being prosecuted for the criminal charges, Mr Ngubo was the head of Pietermaritzburg Prison and therefore an employee of the department. As previous head of a prison he was well known in the department. The applicant believed that Mr Ngubo was involved in the struggle against apartheid and was imprisoned for activities as a Police & Prisons Civil Rights Union (POPCRU) official and therefore that Mr Ngubo was held in high esteem for his contribution towards the struggle. The applicant said that Mr Ngubo is a friend with and has lines of communication to people who were similarly involved in the struggle and who are now in positions of power in the present democratic government.

[4] The applicant said that as head of medium B Westville Prison he came into conflict with Mr Ngubo. He contended that Mr Ngubo adopted an attitude that he was in charge of applicant's prison and that wardens and official there such as applicant were Mr Ngubo's subordinates. The applicant would not tolerate that attitude and refused to give Mr Ngubo the preferential treatment that Mr Ngubo, according to the applicant, considered himself entitled to. The applicant said that Mr Ngubo reacted by threatening to exert the influence that he claimed to wield with persons in positions of power by taunting him, saying that he would arrange for the applicant to be transferred away from Westville Prison. The applicant said that in September 2012 Mr Ngubo told him that applicant's transfer had already been arranged and it was a question of where he would be transferred to.

[5] In October 2012 senior management of the second respondent in KwaZulu-Natal held a meeting. The first respondent announced that heads of prisons were to be transferred. During November 2012 the applicant had an encounter with Mr Ngubo in which, according to the applicant, Mr Ngubo was talking on a public phone in prison asking the other person on the line why the applicant was still at Westville Prison. Shortly after that encounter, the applicant was called to a meeting with the first respondent where he was told by the first respondent that he was to be transferred to Pietermaritzburg Prison.

[6] The applicant then said that in January 2013 he had an altercation with Mr Ngubo at which Mr Ngubo said that he was tired of the applicant's behaviour and that the applicant was soon to be called to a meeting by the first respondent. On 15 January 2013 the applicant was called to a meeting by the first respondent to discuss his transfer. Mr David, the area commissioner, Durban was also in attendance at that meeting. He took the position that his transfer was motivated by an illegitimate purpose as orchestrated by a prisoner whose interests were in conflict with the legitimate interests of the department. He was of the view that his employer was about to commit an unfair labour practice relating to a transfer, at the behest of a convicted criminal. In order to obtain evidence of that unlawful state of affairs the applicant decided to record the meeting with his officially allocated cellular telephone. He later handed the recordings to a firm of attorneys he had instructed. The attorneys arranged for a transcript of the recordings.

[7] When the first respondent came to know about the transcribed recordings of the applicant, a decision was made to charge him with acts of misconduct in that he was alleged to have secretly recorded, transcribed and distributed a discussion involving the first respondent and the acting regional head corporate services and thus —

(a) prejudiced the administration, discipline or efficiency of the department or office, or an institution of the state; and
(b) dishonoured the confidentiality of matters, documents and discussions implied as being confidential or secret.

[8] The applicant was then suspended from employment by a letter dated 8 April 2013 and the third respondent was appointed as the initiator to the disciplinary proceedings. He challenged the lawfulness of his suspension by referring a dispute relating thereto to the GPSSBC. He placed his reliance on the provisions of the PDA, with particular reference to s 3 thereof.

[9] In a separate court action, the applicant initiated review proceedings to challenge his transfer to Pietermaritzburg under case no D143/2013. An interim court order was granted in his favour staying the transfer pending the outcome of the review application.

[10] In their interim affidavit the respondents opposed this application basically on the following grounds, namely that:

(a) the transcript of the applicant has never been authenticated. No valid authentication certificate has been filed and the attached certificate is not signed;
(b) the transcriber has not deposed to an affidavit verifying the correctness of the undated transcript. The reading of the transcript demonstrated clearly that the transcriber left out conversations which were in IsiZulu;
(c) most of the conversation has been excised; and
(d) the transcript does not show any alleged criminal or irregular conduct on the part of the first respondent or any of the employees of the second respondent.

[11] The applicant contended that, insofar as he distributed the recording to his legal advisers for the purposes of obtaining legal advice, the recording is a 'protected disclosure' as defined in the PDA. It is the applicant's case that the proposed disciplinary proceedings are illegal in that they contravene s 3 of the PDA. The applicant sought to interdict the disciplinary action because he believed that the disciplinary action against him was illegal by virtue of s 3 of the PDA. Put differently, s 3 confers on applicant the right not to be subjected to an occupational detriment if that was on account, or partly on account, of his having made a protected disclosure. The court may intervene to stop disciplinary proceedings where the continuation of such proceedings contravenes an established right.[3]

[12] As foreshadowed in the interim affidavit the respondents objected to the admissibility of the recordings or transcript on the basis that the authenticity of the recordings and of the transcription had not been established and the recordings were obtained unlawfully during confidential discussions between an employer and employee relating to a grievance in the workplace, where such discussions ought never to be used to discredit the employer.

Evaluation

[13] Section 3 of the PDA basically provides that no employee may be subjected to any occupation detriment by his or her employer on account, or partly on account, of his or her having made a protected disclosure. As correctly submitted by *Mr Crompton*, for the applicant, the term 'disclosure' is defined in the PDA to include 'any disclosure of information regarding any conduct of an employer or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of' various types of impropriety that are set out in paras *(a)* to *(g)* of the definition. It is not required that the disclosure must, in and of itself, prove the impropriety. It is sufficient if it 'tends to show' the impropriety.[4]

[14] The PDA is a four-stage process entailing firstly, an analysis of the information to determine whether there is a disclosure. Secondly, where there is a disclosure it has to be determined if it is protected. Thirdly, a determination is to be made whether the employee was subjected to any occupational detriment. Fourthly, an assessment of the appropriate remedy is then to be finally made. In terms of s 5 of the PDA a disclosure may be made to a legal adviser, such as an attorney.

[15] In *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* court held that:[5]

[3] See *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* (2003) 24 *ILJ* 1670 (LC) and *SA Municipal Workers Union on behalf of Matola v Mbombela Municipality* (2011) 32 *ILJ* 2748 (LC).

[4] See *Radebe & another v Premier, Free State Province & others* 2012 (5) SA 100 (LAC); (2012) 33 *ILJ* 2353 (LAC).

[5] (2003) 24 *ILJ* 1670 (LC) at para 21.

'However as I have noted the protection extended to employees by the PDA is not unconditional. The PDA sets parameters of what constitutes a protected disclosure as well as the manner of permissible disclosure by workers. The definition of disclosure clearly contemplates that it is only the disclosure of information that either discloses or intends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA. Disclosure must also be made in good faith. An employee who deliberately sets out to embarrass or harass an employer is not likely to satisfy the requirements of good faith. It does not necessarily follow though that good faith requires proof of the validity of any concerns or suspicions that an employee may have, or even a belief that any wrongdoing has actually occurred. The purpose of the PDA would be undermined if genuine concerns or suspicions were not protected in an employment context even if they later proved to be unfounded. There is no doubt why disclosures made in general circumstances require in addition to good faith a reasonable belief in the substantial truth of the allegation. However more extensive the rights established by the PDA might be in the employment context, I do not consider that it was intended to protect what amounts to mere rumours or conjecture.'

[16] Accordingly, it is only the disclosure of information that either discloses or tends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA. Secondly, the disclosure must also be made in good faith. The applicant bears the onus to prove his entitlement to the protection he avers flows from the PDA.

Authenticity

[17] The applicant is before court today because he has been charged by the first and the second respondents with misconduct. While the respondents have not said so in so many words, it is probable that the two charges are dependent on the transcript of the discussion the applicant had with the first respondent and Mr David. If that is the case, at the disciplinary hearing, it is the respondents who have to prove every element of the misconduct complained of. The respondents have to prove that the applicant secretly recorded, transcribed and distributed a discussion involving the first respondent and Mr David thus prejudicing 'the administration, discipline or efficiency of the department or office, or an institution of the state and that he dishonoured the confidentiality of matters, documents and discussions implied as being confidential or secret'. It is the respondents who would have to prove the authenticity of the transcript they will rely on. All that the applicant has to do in this case is to make reference to the transcript of the discussion as is referred by the respondents in the charge-sheet for the hearing he seeks to interdict.

[18] While the applicant is the one who filed a transcript on record, he must be understood to have filed what he believed is the material to be used by the respondents at his disciplinary hearing which the applicant seeks to interdict and restrain from taking effect. In my view, the respondents are being opportunistic in demanding the applicant to authenticate a transcript which the respondents intend to use against the applicant. That defence therefore stands to fail.

Unlawfulness of transcript

[19] South African law recognises two types of monitoring, being participatory and non-participatory interceptions. Non-participatory monitoring occurs when the interceptor invades or eavesdrops and/or records a communication which he or she is not privy to, such as phone tapping.[6] In the present matter the applicant was part of the deliberations being recorded and it is thus a case of participatory monitoring which was never intended to be prohibited.[7]

Disclosure

[20] The applicant contended that the transcript contained compelling circumstantial evidence which proved that his transfer was motivated by an illegitimate purpose and was orchestrated by a prisoner, Mr Ngubo. These submissions are not borne out by the transcript referred to. Even after the applicant had introduced the discussion around Mr Ngubo and his demands to the wardens, the first respondent made it abundantly clear that heads of prisons were not to succumb to the demands of prisoners. The first respondent suggested that information on what was discussed might have leaked to Mr Ngubo. He also referred to political pressure emanating from well-known prisoners in general terms, but intimated that such was not to compromise decisions of heads of prisons. While he referred to telephone calls that came from politicians, the first respondent steadfastly insisted on there being no justification to deviate from the prison rules. He intimated that Mr Ngubo had to be transferred to another prison due to difficulties he was reportedly causing. Mr Ngubo was indeed subsequently transferred by the first respondent to Sterkfontein Prison.

[21] There is thus no compelling circumstantial evidence which proves that the applicant's transfer was motivated by an illegitimate purpose and was orchestrated by a prisoner, Mr Ngubo. In the absence of a disclosure of information that either discloses or tends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA there cannot be talk of there being a protected disclosure. Neither can it be said that the applicant suffered any occupational detriment.

[22] Accordingly, the rule nisi is discharged with no order as to costs.

Applicant's Attorneys: *Brett Purdon Attorneys*.

Respondents' Attorney: *State Attorney*, *Durban*.

[6] See *Lenco Holdings Ltd & others v Eckstein & others* 1996 (2) SA 693 (N).

[7] See *Tap Wine Trading CC & another v Cape Classic Wines (Western Cape) CC & another* 1999 (4) SA 194 (C).

PUBLIC SERVANTS ASSOCIATION OF SA & ANOTHER v MINISTER OF LABOUR & ANOTHER

LABOUR COURT (J1511/15)

24 August; 5 October 2015

Before MYBURGH AJ

Administrative law—Administrative action—Promotion of Administrative Justice Act 3 of 2000—Minister of Labour revoking designation of Registrar of Labour Relations—Review—As general rule employment issues in public sector not constituting administrative action, but rule not invariable—Exception in case of high-ranking public servant who holds statutory office in public interest—Minister's decision constituting administrative action and subject to review on grounds of rationality.

Administrative law—Review—Grounds—As general rule employment issues in public sector not constituting administrative action, but rule not invariable—Exception in case of high-ranking public servant who holds statutory office in public interest.

Promotion of Administrative Justice Act 3 of 2000—Administrative action—Exercising public power—Minister of Labour revoking designation of Registrar of Labour Relations—Review—As general rule employment issues in public sector not constituting administrative action, but rule not invariable—Exception in case of high-ranking public servant who holds statutory office in public interest—Minister's decision constituting administrative action and subject to review on grounds of rationality.

Registrar of Labour Relations—Minister of Labour revoking designation—Review—Minister's decision constituting administrative action and subject to review on grounds of rationality—Decision also subject to legality review—Minister failing to consider relevant material facts in arriving at decision—Decision unreasonable and subject to review.

Review—Administrative action—Rationality—Minister of Labour revoking designation of Registrar of Labour Relations—As general rule employment issues in public sector not constituting administrative action, but rule not invariable—Exception in case of high-ranking public servant who holds statutory office in public interest—Minister's decision constituting administrative action and subject to review on grounds of rationality—Whether rational objective basis justifying connection made by administrative decision maker between material properly available and conclusion arrived at—Minister failing to consider relevant material facts in arriving at decision—Decision unreasonable and subject to review.

Review—Labour Court—Section 158(1)(h) *of LRA 1995—Minister of Labour revoking designation of Registrar of Labour Relations—Minister's decision constituting administrative action and subject to review on grounds of rationality.*

State as employer—Review—Section 158(1)(h) *of LRA 1995—Minister of Labour revoking designation of Registrar of Labour Relations—Minister's decision constituting administrative action and subject to review on grounds of rationality.*

Section 108(1) of the LRA 1995 entitles the Minister of Labour to designate an officer of the Department of Labour as the Registrar of Labour Relations, to perform various functions conferred on the registrar in terms of the LRA. The office of the registrar is central to the procedure for the registration and regulation of trade unions and employers' organisations. In line with that function, C, the second applicant and the Registrar of Labour Relations, decided to launch an application to place the Chemical Energy Paper Printing Wood & Allied Workers Union under administration. It was common cause that the majority of CEPPWAWU's 66,000 members supported the application and feared that financial maladministration would otherwise result in the union ceasing to function.

The matter came to the attention of the Minister of Labour, the first respondent, who requested in writing that C 'suspend' the application until she had been fully briefed. C responded that he would be willing to meet with the minister and would await receipt of a suitable date for such meeting from her office. C did not, however, suspend the application. On the date of the court application, CEPPWAWU applied for a postponement which was granted. C thereafter received a letter from the director-general expressing concern that he had disregarded the minister's instruction and requesting a detailed report as to the events. C responded to the letter and disputed that he had failed to brief the minister, indicating that she was fully aware of the non-compliance by CEPPWAWU, that the call on him to 'suspend' the application was difficult to understand, and that he had availed himself to attend a meeting but had received no further communication in this regard. C further indicated that he regarded himself as functus officio and could not reverse the decision to place CEPPWAWU under administration. The minister thereafter revoked C's designation as the Registrar of Labour Relations and appointed the second respondent as acting registrar.

The applicant union and its member, C, approached the Labour Court to review and set aside that decision in terms of s 158(1)*(h)* of the LRA which entitles the court to review conduct by the state in its capacity as employer on such grounds as are recognised in law. The grounds set out by C were based on s 6 of the Promotion of Administrative Justice Act 3 of 2000 with the contention being that the minister's decision to revoke his designation constituted 'administrative action'. In the alternative and should the decision not constitute administrative action, C sought to review it on the grounds of an infringement of the principle of legality.

Counsel for the minister raised a number of preliminary points. He contended firstly that the court lacked jurisdiction to deal with the matter as C's complaint fell within the ambit of s 186(2)*(b)* and thus had to be referred for conciliation and arbitration at the bargaining council. The court disagreed and noted that C had not framed his complaint as an unfair labour practice. His claim was instead based in administrative law and the court had jurisdiction to entertain such a review. The court similarly rejected the claim that C was effectively seeking reinstatement and could not obtain such relief without first following the dispute settlement mechanisms provided for in the LRA. It noted that C had not lodged an unfair dismissal or unfair labour practice claim and was not seeking reinstatement but the setting aside of the minister's decision.

The third preliminary point raised was that the minister's decision did not constitute administrative action with the result that a review under PAJA was not available to C. The court considered the definition of administrative action under PAJA as well as the leading case law in this regard and accepted that as a general rule, employment issues in the public sector do not constitute administrative action, but that rule is not invariable. One potential exception appeared to be

the dismissal of high-ranking public servants who hold statutory offices in the public interest. The court had regard to two recent cases in which the court had deviated from the general rule, and concluded that the present matter was similarly one of those exceptions. In reaching that conclusion the court took into account that the minister exercised a public power in revoking C's designation as registrar and relied on a specific statutory provision to do so (s 108(1) of the LRA); it appeared that C had no alternative remedy in terms of the LRA as his situation was neither a demotion nor would it fall under disciplinary action short of dismissal; the office of the registrar performs a critical function under the LRA and C's removal was of huge public import, particularly for the 66,000 CEPPWAWU members affected by the application for administration of the union; and lastly that there could be no doubt that the minister's decision materially and adversely affected C's rights under PAJA. The court was accordingly satisfied that the minister's decision did constitute administrative action and that a PAJA review was available to C.

The final preliminary point raised was that even if PAJA did apply, C had failed to exhaust his internal remedies with the result that in terms of s 7(2)*(a)* of PAJA, the court should refuse to entertain his review application. The court noted that counsel for the minister was unable to explain precisely what that internal remedy was and that his submissions in this regard were too vague to sustain the point.

Having dismissed all of the preliminary points, the court considered the principle of legality and legality review, noting that even if it was wrong that C could review the minister's decision in terms of PAJA, he would still have recourse to the review of legality. Such reviews stem from s 1*(c)* of the Constitution and now effectively cover most of the grounds of review in administrative law. The primary requirements of the principle of legality are that public functionaries are required to act within the powers granted to them; the exercise of public power must be rational; executive and public functionaries must exercise their power for the specific purpose for which it was granted; procedural fairness is a requirement of rationality; and reasons must be provided for any decision. Rationality is the most commonly invoked requirement in a review based on the principle of legality, and this requires a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she arrived at. The failure by a decision maker to have regard to relevant material may rob the decision of rationality.

The court then turned to the merits of C's application for review and considered each of the four main grounds in turn. The first challenge was that the minister was not authorised by s 208A to revoke C's designation as the registrar and committed a material error of law by doing so. It was common cause that s 208A did not give the minister that power and that the power was granted in s 108(1). The court accepted the explanation that the minister erred in citing the incorrect section but found that, as the decision was not a conscious act, it was not invalidated by the error. The court dismissed the first ground of review.

The second challenge was that the instruction to C was unlawful because, having brought the CEPPWAWU application, he was functus officio and could not suspend the application. The court agreed that C would have been functus officio had the minister requested him to withdraw the application but that could not extend to the request to postpone the application, which was effectively what the request to 'suspend' the application meant. There was no legal impediment to C postponing the matter and indeed that is in any event what transpired.

The court had more difficulty with the third ground of review, namely that the minister failed to consider relevant material facts in arriving at her decision. Having regard to the events, the correspondence and the content of the ministerial submissions the court was satisfied that the minister erred in concluding that C had not adequately explained why her request to 'suspend' the application was ignored. In fact C provided a detailed, cogent and sincere explanation for his actions and the minister failed properly to consider the ministerial submission before making her decision. Our courts have consistently endorsed the view that a failure to consider relevant facts will typically result in an unreasonable decision. The first enquiry is whether the facts ignored were material; and if so, the result arrived at is prima facie unreasonable. The second enquiry is whether there exists a basis in the evidence overall to displace the prima facie case of unreasonableness and if the answer to that enquiry is in the negative, then the decision stands to be set aside on review on the grounds of unreasonableness.

Applying this analysis to the facts before it, the court was satisfied that if the minister had applied her mind to the ministerial submission in a fair and objective manner, it would have caused her to come to a different decision. The facts ignored by the minister were thus material and the decision prima facie unreasonable. The court also found that there existed no basis in the evidence overall to displace the prima facie case of unreasonableness, with the result that the decision stood to be struck down as unreasonable and liable to review.

Insofar as the decision did not constitute administrative action and PAJA did not apply, the court was in any event of the view that the failure to consider the ministerial submission rendered the decision irrational and thus liable to a principle of legality review. Furthermore, the minister's failure to afford C a hearing before his designation as registrar was revoked also constituted an act of procedural unfairness that rendered the decision liable to review either under PAJA or on the ground of a breach of the principle of legality.

The court dismissed the final ground of review, namely that the minister unlawfully interfered with or frustrated C's attempts to acquit himself of his statutory function in prosecuting the CEPPWAWU application. The court noted that the minister in her opposing affidavit set out the reasons she considered it necessary to suspend the application and, as C did not file a replying affidavit, the court had to accept her submissions and reject that ground of review.

The court accordingly reviewed the decision of the minister and reinstated C as the Registrar of Labour Relations.

Application to the Labour Court to review a decision made by the Minister of Labour. The facts and further findings appear from the reasons for judgment.

Annotations

Cases

Building Industry Bargaining Council (Southern & Eastern Cape) v Commission for Conciliation, Mediation & Arbitration (2011) 32 *ILJ* 1305 (LC) (referred to)

Carephone (Pty) Ltd v Marcus NO & others 1999 (3) SA 304 (LAC); (1998) 19 *ILJ* 1425 (LAC) (referred to)

Chirwa v Transnet Ltd & others 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC) (referred to)

De Villiers v Head of Department: Education, Western Cape Province (2010) 31 *ILJ* 1377 (LC) (considered)

Democratic Alliance v President of the Republic of SA & others 2013 (1) SA 248 (CC) (considered)

Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA); (2001) 22 *ILJ* 2407 (SCA) (referred to)
Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others 1999 (1) SA 374 (CC) (referred to)
First National Bank—A Division of First Bank Ltd v Language & others (2013) 34 *ILJ* 3103 (LAC) (referred to)
Gaga v Anglo Platinum Ltd & others (2012) 33 *ILJ* 329 (LAC) (referred to)
Gauteng Gambling Board & another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) (referred to)
Gcaba v Minister for Safety & Security & others 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC) (considered)
Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 *ILJ* 943 (LAC) (referred to)
Head of Department of Education v Mofokeng & others (2015) 36 *ILJ* 2802 (LAC) (followed)
Head, Western Cape Education Department & others v Governing Body, Point High School & others 2008 (5) SA 18 (SCA) (referred to)
Hendricks v Overstrand Municipality & another (2015) 36 *ILJ* 163 (LAC) (considered)
Howick District Landowners Association v uMngeni Municipality & others 2007 (1) SA 206 (SCA) (referred to)
Joseph & others v City of Johannesburg & others 2010 (4) SA 55 (CC) (referred to)
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MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena (2014) 35 *ILJ* 2131 (LAC) (considered)
Minister of Education v Harris 2001 (4) SA 1297 (CC) (referred to)
Minister of Health & another NO v New Clicks SA (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae) 2006 (2) SA 311 (CC) (referred to)
National Director of Public Prosecutions & others v Freedom Under Law 2014 (4) SA 298 (SCA) (referred to)
Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of SA & others 2000 (2) SA 674 (CC) (referred to)
Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) (referred to)
President of the Republic of SA & others v SA Football Union & others 2000 (1) SA 1 (CC) (referred to)
Public Servants Association of SA on behalf of De Bruyn v Minister of Safety & Security & another (2012) 33 *ILJ* 1822 (LAC) (referred to)
Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC) (referred to)
Union of Refugee Women & others v Director: Private Security Industry Regulatory Authority & others 2007 (4) SA 395 (CC); (2007) 28 *ILJ* 537 (CC) (referred to)

Statutes

Constitution of Republic of SA 1996 s 1*(c)*
Labour Relations Act 66 of 1995 s 103A, s 108(1), s 109, s 111(3), s 158(1)*(h)*, s 186(2)*(b)*, s 193(1), s 208A

Promotion of Administrative Justice Act 3 of 2000 s 1, s 3, s 6, s 7(2)*(a)*
Public Finance Management Act 1 of 1999

Adv A P S Nxumalo for the applicants.
Adv D T Skosana SC (with *Adv M M Mojapelo*) for the respondents.
Judgment reserved.

MYBURGH AJ:

Introduction

[1] On 23 July 2015, the first respondent (the minister) revoked the designation of the second applicant (Mr Crouse) as the Registrar of Labour Relations (the registrar). Together with his union, Mr Crouse has brought a review application, with the principal relief sought being that the minister's decision should be reviewed and set aside, and that he be reinstated as the registrar.

[2] At the hearing of this matter on 24 August 2015, an order was granted joining the current acting registrar as the second respondent.

[3] The structure of this judgment is as follows: (i) the statutory provisions in the LRA[1] relating to the registrar are analysed; (ii) the relevant factual matrix is sketched; (iii) an analysis of the legal basis of Mr Crouse's case is undertaken; (iv) the preliminary points raised by the minister are addressed; (v) the principle of legality and legality review is discussed; (vi) the merits of the review application are evaluated; (vii) certain remaining issues are dealt with; and (viii) a summary of my main findings is provided.

The registrar under the LRA

[4] In terms of the preamble to the LRA, amongst its purposes is to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control. The office of the registrar is central to this legislative aspiration.

[5] In terms of s 108(1), the minister must designate an officer of the Department of Labour (the department) as the registrar to perform the functions conferred on the registrar by or in terms of the LRA. Section 109 sets out certain functions of the registrar, with subsection (4) providing that the registrar 'must perform' all the other functions conferred on the registrar by or in terms of the LRA. Amongst the registrar's other functions are the registration of trade unions and employers' organisations (ss 95-96), the cancellation of their registration (s 106), and the placing of them under administration (s 103A). In terms of s 111(3), any person who is aggrieved by a decision of the registrar may appeal to this court against that decision.

[6] Given its significance in this matter, the operation of s 103A warrants mention. Section 103A was introduced into the LRA by way of the

[1] Labour Relations Act 66 of 1995. Unless otherwise indicated, all references to sections herein are to the LRA.

2014 amendments, which came into operation on 1 January 2015. Subsection (1) provides that this court may order the appointment of a person to administer a trade union or employers' organisation if: the court is satisfied that it is just and equitable to do so; and either the trade union/employers' organisation has resolved to be placed under administration and applied to court to give effect to the resolution, or the registrar has applied to court to appoint an administrator. Without limiting the generality of the circumstances under which it will be just and equitable for the court to place a trade union under administration, subsection (2) provides that it may be just and equitable to grant such an order if the trade union materially fails to perform its functions or there is serious mismanagement of the finances of the trade union.

[7] In essence, the appointment of an administrator may be compared to the appointment of a business rescue practitioner in the case of an ailing company. It is a mechanism that can be resorted to before a trade union or employers' organisation is deregistered and wound up, and attempts to avoid this is in the interests of all concerned.

[8] For present purposes something should also be said about s 208A. In terms of this section, the minister may delegate to the DG[2] or other officer of the department any power, function or duty conferred or imposed upon the minister in terms of the LRA (save for a few exceptions), and may withdraw such a delegation at any time. But it is important to emphasise that the registrar's powers, functions and duties are not derived from any delegation by the minister in terms of s 208A. Instead, they are original statutory powers, functions and duties vested in him or her by the LRA.

The factual matrix

[9] CEPPWAWU,[3] an affiliate of COSATU,[4] has 66,000 members and funds of in excess of R4 billion. For some time now, the department together with the registrar has been seeking to ensure compliance by CEPPWAWU with the provisions of the LRA dealing with the regulation and administration of trade unions. The steps taken in this regard up to that point are set out in a ministerial submission made by the acting DG to the minister dated 9 May 2014.

[10] On 1 August 2014, and after CEPPWAWU had failed to comply with the agreed 'road map', Mr Crouse caused to be published in the *Government Gazette* a notice of his intention to cancel the registration of the union in terms of s 106. The reasons provided were that the union had failed to comply with the provisions of ss 98, 99 and 100, and had ceased to function in terms of its constitution. The union and interested parties were invited to make written representations as to why the registration should not be cancelled.

[2] Director-General.
[3] Chemical Energy Paper Printing Wood & Allied Workers Union.
[4] Congress of SA Trade Unions.

[11] Amongst the written representations that were received was a detailed set of representations by Mr Seatlholo, the deputy general secretary of CEPPWAWU. These submissions, which are date stamped 30 September 2014, concluded as follows:

> 'In the light of all the material factors detailed above, it is our concerted view, as representatives of the majority of members within CEPPWAWU, that the only meaningful mechanism to salvage the union and secure its future would be to seek the assistance of an administrator in respect of the union.'

[12] On 13 April 2015, Mr Crouse is said to have made the following formal decision (the decision of 13 April 2015):

> 'In the light of the aforementioned information, it is recommended that the registrar approach the Labour Court to apply to put the union under administration in terms of s 103A. However if administration fails, or the application is opposed at the Labour Court, then this office will proceed to cancel the registration of the union.'

[13] On 24 April 2015, Mr Crouse launched an urgent application in this court to place CEPPWAWU under administration in terms of s 103A, alternatively to wind it up pursuant to s 103 and place it in liquidation (the CEPPWAWU application). The application was enrolled for 18 June 2015. In bringing the application, the State Attorney (Johannesburg) acted as Mr Crouse's attorneys of record.

[14] It is not in dispute that Mr Crouse brought the CEPPWAWU application for, inter alia, the following reasons: (i) CEPPWAWU had failed to prepare and submit audited financial statements for 2010, 2011, 2012 and 2013 to the registrar; (ii) the existence of internal conflict and strife amongst elected office-bearers which has resulted in litigation amongst them; (iii) the failure to hold a meeting of office-bearers and of the national executive committee as required by the union's constitution; (iv) the failure since 2010 by the union to keep records of its income, expenditure, assets and liabilities; and (v) the fact that it is in the interests of justice that the union's funds (of some R4 billion) are safeguarded.

[15] In his founding affidavit, Mr Crouse goes on to state that he seeks to place CEPPWAWU under administration on the basis that it has materially failed to perform its functions and 'my suspicions that there might be serious mismanagement of its finances underway to the prejudice of its members'. In corroboration of this, Mr Crouse attached a letter from the attorneys of CEPPWAWU Investments (Pty) Ltd, an investment company established for the benefit of CEPPWAWU members. If this letter is anything to go by, Mr Crouse's concerns about serious financial mismanagement are well founded.

[16] Although the date thereof is not clear from the papers, it is common cause that six office-bearers or officials of CEPPWAWU applied to intervene in the CEPPWAWU application and were ultimately joined as respondents (the intervening parties). The intervening parties, who include Mr Seatlholo, support the union being placed

under administration. (The joinder was effected before 18 June 2015.)

[17] In a letter from the minister to Mr Crouse dated 5 June 2015 (which was received on 8 June 2015), the minister recorded the following:

> 'It has come to my attention that you have filed papers in the Labour Court of South Africa wherein you seek an order to place … CEPPWAWU under administration. I am deeply concerned that you have not had the courtesy as my designated official in terms of s 108 of the LRA, to brief me on this matter prior to invoking this new provision of the Act. Accordingly, I call on you to suspend the Labour Court application in question until such time that you have briefed me fully on this matter. My PA will liaise with you on the suitable date when you can brief me in this regard.'

[18] On Mr Crouse's version (which appears from the annexures to the founding affidavit), in response to this letter from the minister, he sent an email to the office of the minister on 9 June 2015, in which he stated that he was willing to meet with the minister and that he would wait to be advised of the date of the meeting. But no further communication was received from the minister's office. (See further below.)

[19] Save as aforesaid, it is common cause that Mr Crouse did not formally respond to the minister's letter of 5 June 2015, and that he did not 'suspend' the CEPPWAWU application, which was due to be heard on 18 June 2015.

[20] On 17 June 2015, CEPPWAWU brought an application to postpone the hearing of the CEPPWAWU application — this in circumstances where it had yet to deliver an answering affidavit.

[21] On 18 June 2015, this court (per Lagrange J) granted an order postponing the CEPPWAWU application to 6 August 2015, and setting out a timetable for the filing of affidavits and heads of argument. In terms of the order, CEPPWAWU was required to file its answering affidavit by 9 July 2015, Mr Crouse was required to file his replying affidavit by 23 July 2015, and all the parties (including the intervening parties) were required to file their heads of argument by 30 July 2015.

[22] On 10 July 2015, the DG addressed a letter to the DDG[5] and Mr Crouse relating to the CEPPWAWU application.

(a) With reference to the minister's letter of 5 June 2015, the DG recorded:

> 'I am advised that the office of the minister attempted to schedule a date as indicated by the minister; however the registrar failed to avail himself to brief the minister. It has come to my attention that the registrar did not suspend the Labour Court application as instructed by the minister, instead he ignored the minister's instruction and went ahead with the application on 18 June 2015. I am advised that the matter was postponed to be heard on 6 August 2015.'

[5] Deputy Director-General: Labour Policy & Industrial Relations.

(b) The DG went on to issue these 'further instructions':

> 'I am deeply concern[ed] with the manner in which [the] Labour Policy and Industrial Relations Unit, specifically the registrar handled this matter and ignored the minister's clear instructions. Therefore your office and the registrar are instructed to do the following:
> • suspend the Labour Court application … immediately; thereafter advise my office accordingly;
> • avail yourselves to fully brief the minister and myself on a date, which will be forwarded to you by the personal assistant of the minister;
> • provide a detailed report in a ministerial submission stipulating reasons why the minister's instructions were ignored by the registrar. The submission should reach my office before the close of business on 15 July 2015.'

(c) Under the heading 'Important notice', the DG further recorded:

> 'Please take note further and be advised that:
> • Any legal costs and/or any other costs already incurred as the result of this application will be regarded as irregular expenditure and will be recovered from all officials of the Department of Labour involved in this matter.
> • Any further costs and/or any other costs related to this matter will not be for the account of the Department of Labour. Our Legal Services Unit has been instructed to advise the State Attorney's office accordingly.
> • The chief financial officer [CFO] has also been instructed not to pay any legal costs and/or any other costs related to this application.'

[23] Also on 10 July 2015, the DG directed a letter to the CFO reiterating and instructing his office not to pay any legal costs or any other costs related to the CEPPWAWU application, pending further instructions.

[24] On 14 July 2015, Mr Crouse responded in detail to the DG's letter quoted above. For present purposes, the following aspects of Mr Crouse's letter are material:

(a) In relation to the statement by the minister in her letter of 5 June 2015 that he had not had the courtesy to brief her on the matter before launching the CEPPWAWU application, Mr Crouse recorded that this was incorrect. Amongst the reasons given by him were that in the ministerial submission of 9 May 2014 (see above), the minister had been fully briefed on the non-compliance of CEPPWAWU and the possible outcome thereof, including that this could result in the union being placed under administration.[6] Further reasons provided by Mr Crouse were that the minister had herself facilitated a meeting with, inter alia,

[6] Paragraph 4.3 of the ministerial submission recorded in part as follows: 'The letter stressed that if the road map is not implemented in its entirety by not later than end of May 2014, the department could approach the Labour Court to request that the union be put under administration, or the registrar will proceed to publish a notice of intention to cancel the registration of the union.'

COSATU in an attempt to resolve the impasse,[7] and that she had received written representations on behalf of the majority of the regions of CEPPWAWU, which reflected the conclusion that 'the only meaningful mechanism to salvage the union and to secure its future was to appoint an administrator'. (It would appear that these representations included those of Mr Seatlholo dealt with above.)

(b) In relation to the call by the minister in her letter of 5 June 2015 for him 'to suspend' the CEPPWAWU application, Mr Crouse recorded that: (i) the instruction was ambiguous and difficult to understand; (ii) if 'to suspend the application' meant that the application would have had to be withdrawn from the urgent roll and placed on the ordinary court roll, this would be to the detriment of the 66,000 workers, could potentially be regarded as fruitless expenditure, and would cause embarrassment to the department and the registrar; (iii) there was no direct instruction by the minister to withdraw the CEPPWAWU application, nor was any reason provided as to why it should be suspended; and (iv) he had responded to the minister's letter in an email on 9 June 2015 to the effect that he was willing to meet with the minister and that he would wait to be advised of the date of the meeting, but no further communication was received from the minister's office.

(c) In relation to the DG's instruction to immediately suspend the CEPPWAWU application, Mr Crouse recorded that this was 'with respect a repetition of an unclear instruction', and that 'the legal service programme and the state attorney's office are not entirely clear on what this instruction means'. He went on to record that it 'would in any case be to the detriment of the workers and could encourage ongoing mismanagement of the union by its officials'. Furthermore, both the minister's letter and the DG's letter 'do not contain clear legal instructions that can be executed and do not provide reasons for the sudden change of course', and 'no valid reason has been provided to this office'.

(d) With reference to the 13 April 2015 decision, Mr Crouse went on to state that he was 'functus officio and cannot reverse his decision'. As far as he was concerned, the remedy for an aggrieved person was to appeal the decision in terms of s 111.

(e) Mr Crouse then set out a detailed explanation as to why he had decided to seek to place CEPPWAWU under administration instead of proceeding with the cancellation of its registration. He went on to state that a withdrawal of the CEPPWAWU application would result in the status quo within the union applying, 'which is untenable and chaotic'. As he put it, this would be tantamount to the department 'granting officials of

[7] In this regard, the minister annotated the following comment on the ministerial submission of 9 May 2014:'I have requested a meeting with NOBs [national office-bearers] of CEPPWAWU and COSATU president and my office together with acting DDG.'

the union a license to continue mismanaging the union', and 'condoning the union's non-compliance with the law'. In the same vein, Mr Crouse stated that to stop him from proceeding with the application 'without a single valid reason' would result in irregular expenditure having been incurred, would 'be inexplicable to the public at large and illogical', and 'may be interpreted as political interference'.

(f) Reflecting on the history of the matter, Mr Crouse recorded that he had wanted to cancel the registration of CEPPWAWU in October 2014 already (which would have had more severe implications for the union), and that this could have been done without any intervention by the minister's office. According to Mr Crouse, it was at the request of the then acting DDG that he delayed the decision to cancel, and considered the administration option (which was to be signed into law).

(g) Having expressed surprise at having been called upon by the DG to brief him on the matter, Mr Crouse recorded the following:

> 'In the 20 years of being registrar he has never been called upon by a [DG] or higher official to brief him/her on any matters of this nature. It is not clear what makes the CEPPWAWU matter different from the other cases that have been dealt with. (Over the past five years the registrar has cancelled the registration of 81 trade unions without involvement from senior management.)'

(h) Mr Crouse also took issue with the DG's instructions regarding the issue of costs, stating that they were 'unreasonable and contrary to the PFMA'.[8]

(i) Mr Crouse also reaffirmed that he 'will avail himself to further elaborate on any aspect relating to this matter as already indicated in the email to the PA of the minister of 9 June 2015'.

[25] On 15 or 16 July 2015, and as he had been instructed to do, the DDG submitted a ministerial submission to the DG, which was co-signed (and apparently drafted) by Mr Crouse. The purpose of the submission is recorded as being as follows: (i) 'to explain to the minister, in the registrar's view, the reasons why the minister's call to suspend the Labour Court application could not be adhered to'; (ii) 'to indicate to the minister that the registrar by no means ignored the minister's instructions, but that there was no clear instruction on which the registrar could act'; and (iii) 'to explain to the minister the implications of not placing CEPPWAWU under administration'.

[26] To a large extent this ministerial submission repeats the contents of Mr Crouse's letter to the DG of 14 July 2015 (with those submissions not being repeated below in the present context). Amongst the additional points made (or materials referred to) in the ministerial submission (which runs to a total of some six pages, excluding annexures) that warrant highlighting are the following:

[8] Public Finance Management Act 1 of 1999.

(a) In relation to the contention that Mr Crouse had failed to brief the minister before launching the CEPPWAWU application, issue is taken with it on the basis that 'this statement implies that the registrar must obtain prior approval from the minister to execute any of his duties outlined in terms of the LRA'.

(b) In relation to the contention that the minister attempted to schedule a date for the briefing after her letter of 5 June 2015 but that Mr Crouse failed to avail himself to brief the minister, the following is recorded:

> 'It should be brought to the attention of the minister that the registrar is not aware of any formal request to avail himself for a meeting. The registrar did however avail himself by email on 9 June 2015 (annexure DD) in response to a request by the chief of staff in the minister's office.'

(c) The submission also records the following:

> 'What makes "suspension" impossible to execute is the fact that the registrar had already made the following decision on 13 April 2015 [see above]. The registrar's decision is functus officio and he cannot reverse his decision. The Act prescribes a specific procedure that must be followed once the registrar has made a decision. Section 111 of the LRA stipulates that any person who is aggrieved by a decision of the registrar may appeal to the Labour Court against that decision.'

(d) Having provided an explication of the implications of appointing an administrator to rescue CEPPWAWU, the negative results that the cancellation of the registration of the union would produce, and the implications of not appointing an administrator or withdrawing the CEPPWAWU application, this additional point is made:

> 'The majority of the regions have successfully applied to court to join the application by the registrar to appoint an administrator … . In the event of the withdrawal it appears that the matter will in any case be heard as the regions have indicated that they are in support of the appointment of an administrator and would be able to proceed with the matter.'[9]

(e) Importantly, amongst the eight annexures that appear to have been attached to the ministerial submission were Mr Crouse's letter to the DG of 14 July 2015, and a copy of the entire CEPPWAWU application.

[27] Although I deal with the issue in more detail below (there being a dispute of fact here), for present purposes it warrants mention that the ministerial submission contains the following handwritten annotation made (presumably by the DG) in the section reserved for 'comments':

[9] As stated above, in terms of s 103A, a trade union can itself resolve to be placed under administration and apply to court to give effect to the resolution. In such an event, the registrar need not play any role.

'DG's letter only requires a response as to why the registrar ignored the minister's request for a briefing before proceeding.'

[28] On 17 July 2015, an email was sent by an official of the department to the state attorney reading (in part) as follows:

'We confirm our instruction … that the application must be withdrawn/suspended with immediate effect. We confirm that such an instruction was given due to the fact that a letter from the [DG] to legal services mentioned interchangeably both suspension and withdrawal of the application. We further confirm that your office has indicated that the instruction is not clear in that there is no provision in the court rules to the effect of a suspension of an application, and if then the instruction is to withdraw the application, that must be spelt out. You indicated that a letter will be addressed to the [DG] setting this out.'

[29] The letter from the DG to legal services mentioned in this email is not part of the papers. The minister and DG had required Mr Crouse to 'suspend' the application in their letters of 5 June 2015 and 10 July 2015 respectively On the face of this email, the DG had sent a letter to legal services requiring the withdrawal/suspension of the application, with the state attorney having indicated that the meaning of this was unclear, and that one cannot suspend a court application.

[30] On 20 July 2015, the state attorney responded to the email quoted above in the following terms (in part):

'I still do not understand the instruction in this matter as you still [say] we must withdraw/suspend the application. We pointed out to you that we cannot suspend an urgent application. We can only withdraw the application. If the instruction to suspend was given prior to the arrangement[s] that were made before the judge, we could perhaps have requested that the matter should be removed from the urgent roll and be placed in (sic) the normal motion court roll. However it is late to suggest that at this stage as you have maintained the urgency of the matter on 18 June 2015. The only option is to withdraw the matter.

During the meeting that we held with you on Wednesday, I informed you that Mr Crouse expressed his intentions to proceed with the application even if it means arguing the matter on his own. He said so in the light of the fact that he is the applicant in this matter and also to uphold his role in terms of the [LRA]. In the light of the conflicting instructions that we are receiving from you as well as from Mr Crouse, we have suggested that the other option could be to withdraw as attorneys of record.'

[31] Later on 20 July 2015, and in response, the official from the department advised the state attorney to withdraw as attorneys of record.

[32] On 21 July 2015, the state attorney formally withdrew as Mr Crouse's attorneys of record. (There is a dispute about whether this was done at the request of the minister.) In effect, Mr Crouse was thus left with having to pursue the CEPPWAWU application without the benefit of legal representation.

[33] It was in these circumstances that, on 23 July 2015, the minister revoked Mr Crouse's designation as registrar on the grounds of 'gross

insubordination' (the impugned decision). The letter addressed by the minister to Mr Crouse reads as follows:

> 'Kindly be advised that your designation as the Registrar of Labour Relations in terms of s 108 of the [LRA] is hereby, in terms of s 208A of the Act revoked with immediate effect on the grounds of gross insubordination. Please note that you will be assigned new responsibilities by the [DDG] in liaison with the head of department.'

[34] Also on 23 July 2015, the minister appointed the second respondent (Mr Ntleki) as the acting registrar.

[35] On 25 July 2015, Mr Crouse caused a letter of demand to be addressed to the minister, in which he demanded his reinstatement by 27 July 2015.

[36] On 30 July 2015, after no response had been received, Mr Crouse launched the present application on an urgent basis, with the application being enrolled for 4 August 2015.

[37] On 4 August 2015, the matter was postponed to 7 August 2015 — this so as to afford the applicants the opportunity of joining Mr Ntleki.

[38] On 6 August 2015, and in circumstances connected with Mr Crouse's designation as the registrar having been revoked, the CEPPWAWU application was again postponed. The application is in the process of being case managed.

[39] On 7 August 2015, in circumstances where Mr Crouse's case for urgency was to a large extent based on his having to secure his reinstatement in order to further prosecute the CEPPWAWU application set down for the previous day, the issue of urgency became somewhat moot in the light of the postponement of the CEPPWAWU application. In the circumstances, by agreement between the parties, the matter was postponed to the motion roll on 24 August 2015, and heard that day on an expedited basis. Costs of both 4 and 7 August 2015 were reserved.

The legal basis of Mr Crouse's case

[40] The review application is brought in terms of s 158(1)*(h)* of the LRA, which establishes a 'jurisdictional footprint'[10] for this court to review conduct by the state in its capacity as employer 'on such grounds as are recognised in law'.[11]

[41] The grounds of review relied on by Mr Crouse are certain of those set out in s 6 of PAJA,[12] with the contention being that the impugned decision constituted 'administrative action'. The specific grounds

[10] *Building Industry Bargaining Council (Southern & Eastern Cape) v Commission for Conciliation, Mediation & Arbitration* (2011) 32 *ILJ* 1305 (LC); [2011] 4 BLLR 330 (LC) at para 13.

[11] In *Hendricks v Overstrand Municipality & another* (2015) 36 *ILJ* 163 (LAC); [2014] 12 BLLR 1170 (LAC) at para 29, the LAC found that 'permissible grounds in law' for the purposes of s 158(1)*(h)* comprise '(i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law …; or (iii) in accordance with the requirements of the constitutional principle of legality … '

[12] Promotion of Administrative Justice Act 3 of 2000.

pleaded by Mr Crouse that are found in s 6 of PAJA include that: the minister was not authorised to revoke his designation in terms of s 208A; the minister was biased or reasonably suspected of bias; the action was procedurally unfair; the action was materially influenced by an error of law; the minister failed to consider materially relevant facts; the action was taken for an ulterior purpose or motive; and the action was unreasonable.

[42] In the alternative, and insofar as the impugned decision does not constitute administrative action, Mr Crouse seeks to review it on the grounds of an infringement of the principle of legality. In this regard, Mr Crouse pleads that the revocation of his designation as the registrar was unreasonable, irrational, disproportionate and procedurally unfair.

The preliminary points raised by the minister

[43] In argument, Mr *Skosana* SC (who appeared together with Mr *Mojapelo* for the minister) advanced the following four main preliminary points:

(a) Firstly, this court lacks jurisdiction because Mr Crouse's complaint falls within the ambit of s 186(2)*(b)* (unfair disciplinary action short of dismissal), which must be referred to conciliation and then arbitration by the bargaining council.

(b) Secondly, Mr Crouse seeks reinstatement, which is a remedy that can only be obtained in terms of s 193(1) following a finding of an unfair dismissal or unfair labour practice, and Mr Crouse cannot obtain such relief without first following the dispute-settlement mechanism provided for in the LRA.

(c) Thirdly, the impugned decision does not constitute administration action, with the result that a review under PAJA is not available to Mr Crouse.

(d) Fourthly, even if PAJA does apply, Mr Crouse failed to exhaust 'any internal remedy provided for in any other law', with the result that, in terms of s 7(2)*(a)* of PAJA, this court should refuse to entertain the review application.

The first preliminary point

[44] The first preliminary point would have been a good one if Mr Crouse had framed his claim as an unfair labour practice. But instead his claim is based in administrative law and on the principle of legality, with this court having the jurisdiction to entertain the review in terms of s 158(1)*(h)*. This is a classic case of where the same conduct on the part of an employer may give rise to different causes of action and remedies in law.[13] The fact that Mr Crouse could have constructed his case as an unfair labour practice (but did not), has no bearing on

[13] *Gcaba v Minister for Safety & Security & others* 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC); [2009] 12 BLLR 1145 (CC) at para 53.

the jurisdiction of this court to entertain an administrative law or legality review.[14]

The second preliminary point

[45] The second preliminary point is also without merit effectively on the same basis as the first one. Reinstatement in terms of s 193(1) is a remedy that flows from a finding of an unfair dismissal. Mr Crouse has not brought an unfair dismissal (or labour practice) claim, and does not seek reinstatement in terms of s 193(1).[15] Instead, he seeks such relief as an adjunct to an order setting aside the impugned decision on review on administrative and constitutional law grounds.

The third preliminary point

[46] Turning to the third preliminary point, the question is whether the revocation by the minister of Mr Crouse's designation as the registrar constitutes 'administrative action' as defined in s 1 of PAJA. For present purposes, the relevant portion of the definition is as follows:

> 'any decision taken … by … an organ of state, when … exercising a public power or performing a public function in terms of any legislation … which adversely affects the rights of any person and which has a direct, external legal effect'.

[47] In addressing this issue, counsel for both parties relied on the following passage from the Constitutional Court's judgment in *Gcaba*:[16]

> 'Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognized by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of s 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. *When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action*.' (Emphasis added.)

[48] In *De Villiers*, Van Niekerk J, having referred to the relevant authorities, summed up the considerations relevant to determining whether a particular decision constitutes administrative action as follows:[17]

> 'In summary: as a general rule, conduct by the state in its capacity as an employer will generally have no implications or consequences for other citizens, and

[14] *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA); (2001) 22 *ILJ* 2407 (SCA); [2001] 12 BLLR 1301 (SCA) at para 27.
[15] *Fedlife Assurance* at para 27.
[16] *Gcaba* at para 64.
[17] *De Villiers v Head of Department: Education, Western Cape Province* (2010) 31 *ILJ* 1377 (LC) at para 19.

it will therefore not constitute administrative action. Employment related grievances by state employees must be dealt with in terms of the legislation that gives effect to the right to fair labour practices, or any applicable collective agreements concluded in terms of that legislation. Departures from the general rule are justified in appropriate cases. An assessment must be conducted on a case-by-case basis to determine whether such a departure is warranted. The relevant factors in this determination (following *SARFU*)[18] are the source and nature of the power being exercised (this would ordinarily require a consideration of whether the conduct was rooted in contract or statute …, whether it involves the exercise of a public duty, how closely the power is related to the implementation of legislation (as opposed to a policy matter) and the subject-matter of the power). I venture to suggest that the existence of any alternative remedies may also be a relevant consideration — this was a matter that clearly weighed with the court in both *Chirwa* and *Gcaba*, who it will be recalled, were found to have had remedies available to them under the applicable labour legislation.'

[49] As appears from the above, *Gcaba* establishes as a general rule that employment issues in the public sector do not constitute administrative action, but acknowledges that the rule is not invariable. One potential exception appears to be the dismissal of high-ranking public servants who hold statutory offices in the public interest.

(a) In *Gcaba*, the Constitutional Court commented as follows:

'The situation might be different where, for example, the appointment or dismissal of the National Commissioner of the SAPS is at stake. This decision is taken by the President as head of the national executive and is of huge public import.'[19]

(b) Consistent with this, Langa CJ (dissenting) held as follows in *Chirwa*:[20]

'It is important to note, however, that my reasoning does not entail that dismissals of public employees will never constitute "administrative action" under PAJA. Where, for example, the person in question is dismissed in terms of a specific legislative provision, or where the dismissal is likely to impact seriously and directly on the public by virtue of the manner in which it is carried out *or by virtue of the class of public employee dismissed*, the requirements of the definition of "administrative action" may be fulfilled.' (Emphasis added.)

(c) Further support for this can be found in Hoexter,[21] where the dismissal of the CEO of the Commission for Gender Equality is given as an example of a case that might still qualify as administrative action post-*Gcaba*.

[50] In two important judgments after *Gcaba*, this court and the LAC have found that certain employment decisions in the public sector

[18] *President of the Republic of SA & others v SA Football Union & others* 2000 (1) SA 1 (CC) (*SARFU*).
[19] *Gcaba* at para 68 fn 107.
[20] *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC); [2008] 2 BLLR 97 (CC) at para 194.
[21] Hoexter *Administrative Law in SA* (2 ed) at 218.

do constitute administrative action (and thus departed from the general rule).[22] The judgments underscore the fact that *Gcaba* does not establish an invariable rule.

(a) The first is the judgment of Van Niekerk J in *De Villiers* referred to above, in which it was found that a decision in terms of s 14(2) of Employment of Educators Act[23] refusing to reinstate an employee deemed to be dismissed under s 14(1) constituted administrative action.[24] Central to Van Niekerk J's finding of administrative action was that the power enjoyed by the employer to refuse reinstatement was sourced in the statute (and not contract), and that the employee concerned had no alternative remedy.[25]

(b) The second important judgment is that of the LAC in *Hendricks*, which dealt with the review of a decision of a presiding officer not to dismiss a senior municipal police official on (in effect) corruption charges. Murphy AJA concluded that:[26]

> '[T]he decision of the presiding officer, looked at in context, was indeed administrative action within the meaning of PAJA, it being the exercise of a statutory public power or the performance of a public function which has a direct, external legal effect in its consequences for ratepayers and citizens in general.'

[51] To my mind, the present matter is one of those exceptional cases where (like in *De Villiers* and *Hendricks*) an employment related decision in the public sector does constitute administrative action. This for the following reasons:

(a) There is no controversy between the parties that the minister is an organ of state, and that she exercised a public power or performed a public function in terms of the LRA in revoking Mr Crouse's designation as the registrar (see the text of the definition of 'administrative action' quoted above). It will be recalled that in doing so, the minister expressly relied on s 208A, although she now contends that this was an administrative error and that the correct reference ought to have been s 108 (see further below). Although s 108 does not expressly provide for the revocation of the designation of a person as the registrar, Mr *Skosana* submitted that the power of revocation must be read into s 108(1) and that the power of revocation is implied in that

[22] The LAC did, however, follow *Gcaba* in *Public Servants Association of SA on behalf of De Bruyn v Minister of Safety & Security & another* (2012) 33 *ILJ* 1822 (LAC); [2012] 9 BLLR 888 (LAC).

[23] Act 76 of 1998.

[24] The judgment was referred to and not overruled by the LAC in *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena* (2014) 35 *ILJ* 2131 (LAC) (*Mangena*) at paras 31-32.

[25] *De Villiers* at paras 19-20.

[26] *Hendricks* at para 20.

section.[27] I am in agreement with these submissions. Consistent with the authorities dealt with above, the fact that Mr Crouse's designation as the registrar was revoked in terms of a specific statutory provision (as opposed to a contractual provision) is indicative of the decision constituting administrative action.

(b) Equally important is the fact that it is by no means clear to me that Mr Crouse has an alternative remedy under the LRA. In terms of s 108(1), the minister designates the registrar from amongst the officers of the department. Following his designation being revoked, Mr Crouse thus continues to be an officer of the department and is to be reassigned, with it being common cause that none of his conditions of employment have been altered. While it might appear that he could pursue an unfair demotion dispute in terms of s 186(2)*(a)*, insofar as he retains the same grade and level of remuneration, it does not follow that he has been demoted. It seems to me that Mr Crouse's position is roughly comparable to a senior executive whose secondment is recalled, but whose terms and conditions of employment remain intact. Such an employee would not have an unfair demotion claim. In a similar vein, it does not seem to me that Mr Crouse has any claim based on a complaint of unfair disciplinary action short of dismissal in terms of s 186(2)*(b)*. This because in revoking his designation, the minister did not purport to take disciplinary action against Mr Crouse, with this being borne out by the fact that, according to the minister's answering affidavit, charges of misconduct are still going to be brought against Mr Crouse.

(c) Regarding the public impact requirement set in *Gcaba* (see the emphasised sentence in the quotation in para 47 above), to my mind, it is met given the class of public employee involved. The registrar occupies an independent office (albeit accountable to the minister) and performs a critically important function under the LRA in the interests of, inter alia, hundreds of thousands of trade union members. In the words of the preamble to the LRA, he is responsible for the regulation of trade unions (and employers' organisations) 'to ensure democratic practices and proper financial controls'. In the context of labour relations in general, the impact of the removal of the registrar is of huge public import. The facts of this case give some insight into this. As Mr *Nxumalo* (who appeared for Mr Crouse) submitted, on a conspectus of the facts, the fate of the CEPPWAWU application, which has implications for 66,000 members, probably lies in Mr Crouse's ability (or otherwise) to review the impugned decision. In all these circumstances, I cannot agree with Mr *Skosana* that simply because an acting registrar has been appointed to replace him, the impugned decision affects only Mr Crouse, and has

[27] See *Masetlha v President of the Republic of SA & another* 2008 (1) SA 566 (CC) at para 68 (dealing with the power to dismiss being an essential corollary of the power to appoint).

no wider consequences. Quite clearly, a broader constituency is affected.[28]

(d) Reverting to the text of the definition of administrative action, there can be no dispute that the impugned decision 'adversely affects the rights' of Mr Crouse, with the remaining issue being whether the decision has 'a direct, external legal effect'.[29] In *Joseph*, the Constitutional Court endorsed an interpretation that the phrase 'serves to emphasise that administrative action impacts directly and immediately on individuals', and went on to find that 'a finding that the rights of the applicants were materially and adversely affected for the purposes of s 3 of PAJA would *necessarily* imply that the decision had a "direct, external legal effect" on the applicants' (emphasis added).[30] On this approach, the requirement in question is met in this case, in that the impugned decision impacted directly and immediately on Mr Crouse and materially and adversely affected his rights under PAJA.

[52] In conclusion, having found that the impugned decision constitutes administrative action (from which it follows that a PAJA review is available to Mr Crouse), the third preliminary point is also dismissed.

The fourth preliminary point

[53] Turning now to the fourth preliminary point, when Mr *Skosana* was pressed to identify precisely what 'internal remedy provided for in any law' Mr Crouse ought to have exhausted before approaching this court, he made mention of an internal grievance procedure and possible recourse to the Public Service Commission. I am in agreement with Mr *Nxumalo* that these vague references (which are not pleaded) are an insufficient basis upon which to sustain the fourth preliminary point, which is accordingly dismissed.

The principle of legality and legality review

[54] If I am wrong that the impugned decision constituted administrative action, given that it clearly involved the exercise of a public power, the ground of review of legality can still be invoked by Mr Crouse. The ground stems from the rule of law in s 1*(c)* of the Constitution.

[55] Recently, in *NDPP*, the SCA described reviews based on the legality principle as follows:[31]

[28] *Mangena* at para 30.

[29] This requirement was not mentioned at all in *Gcaba*, with the public impact requirement set by it being something different and apparently additional.

[30] *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC) at para 27. See also *Union of Refugee Women & others v Director: Private Security Industry Regulatory Authority & others* 2007 (4) SA 395 (CC); (2007) 28 *ILJ* 537 (CC) at para 70.

[31] *National Director of Public Prosecutions & others v Freedom Under Law* 2014 (4) SA 298 (SCA) at paras 28–29; followed in *Hendricks* at para 21.

'The legality principle has by now become well established in our law as an alternative pathway to judicial review[32] where PAJA finds no application. Its underlying constitutional foundation appears, for example, from the following *dictum* by Ngcobo J in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) … para 49:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."

As demonstrated by the numerous cases since decided on the basis of the legality principle, the principle acts as a safety net to give the court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power.'

[56] As stated by Hoexter, the principle of legality (and legality review) now effectively covers most of the grounds of review in 'regular' administrative law as found in PAJA.[33] The following are amongst the primary requirements of the principle of legality:[34]

(a) Firstly, public functionaries are required to act within the powers granted to them by law (ie intra vires).[35] To this it can be added that functionaries also must not misconstrue their powers.[36]

(b) Secondly, the exercise of all public power must be rational, ie rationally related to the purpose for which the power was given (otherwise it is arbitrary).[37]

(c) Thirdly, the courts developed this concept of rationality requiring the executive and public functionaries to exercise their power for the specific purpose for which it was granted, so that they cannot act arbitrarily, for no other purpose or an ulterior motive.[38]

(d) Fourthly, the principle of legality has been expanded by treating procedural fairness as a requirement of rationality.[39]

(e) Fifthly, it is a requirement of the principle of legality that reasons must be provided for the impugned decision.[40]

[32] In *Mangena* at para 33, the LAC described the principle of legality as 'a parallel system of review' for action which falls outside of the strict definition of administrative action in PAJA.

[33] Hoexter at 218.

[34] See generally *Mangena* at paras 34-35.

[35] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) at para 58.

[36] *SARFU* at para 148.

[37] *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC) at para 85.

[38] *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 47.

[39] *Democratic Alliance v President of the Republic of SA & others* 2013 (1) SA 248 (CC) at para 34. Hoexter at 123 states as follows: 'It is worth pointing out that it is also possible for aspects of procedural fairness to be brought in via the requirement of lawfulness … or indeed for procedural fairness to be acknowledged as a requirement in its own right. Natural justice is, after all, an accepted part of the rule of law.'

[40] *Judicial Service Commission & another v Cape Bar Council & another* 2013 (1) SA 170 (SCA) at para 44.

[57] Of these requirements, rationality is the one that is most often invoked in a review based on the principle of legality. From a labour law perspective, the most well-known formulation of the test for rationality is, of course, the *Carephone* test:[41]

> '[I]s there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?'

[58] Rationality does not extend to reasonableness.[42] While there is some overlap between rationality and reasonableness evaluation, the two concepts are conceptually different.[43] Rationality is an element of reasonableness, but reasonableness goes beyond mere rationality, and includes proportionality.[44] A decision that is irrational will be unreasonable, but an unreasonable decision may not necessarily be so because of irrationality.[45] Reasonableness 'is a variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions' than rationality.[46]

[59] Although he did not refer to *Carephone*, this passage from the judgment of Van Niekerk J in *De Villiers*, a key judgment on legality review,[47] clearly has shades of *Carephone* about it:[48]

> 'In the light of the foregoing, it is evident that the respondent, in dismissing the s 14(2) application, relied on reasons that were fundamentally bad. The respondent's decision not to reinstate the applicant was accordingly irrational in relation to the reasons given, and was based on irrelevant considerations at the expense of relevant ones. Having regard to the full conspectus of relevant facts and circumstances, the inference of arbitrariness and irrationality is inescapable. In my view, the respondent's decision to refuse to reinstate the applicant stands to be reviewed and set aside.'

[60] Also echoing the *Carephone* test is this conclusion by the LAC in another leading judgment on reviews based on the principle of legality, *Mangena*:[49]

> 'In my view, applying the test of legality, insufficient evidence was provided by the appellant as to why the decision to reject the representations made was sufficiently rationally related to the purpose for which that power was given to appellant. In particular, and critical to these disputes, insufficient evidence was

[41] *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC); (1998) 19 *ILJ* 1425 (LAC); [1998] 11 BLLR 1093 (LAC) at para 37.

[42] *Building Industry Bargaining Council (Southern & Eastern Cape) v Commission for Conciliation, Mediation & Arbitration* at para 17.

[43] *Democratic Alliance* at para 30.

[44] Hoexter at 340.

[45] *Head, Western Cape Education Department & others v Governing Body, Point High School & others* 2008 (5) SA 18 (SCA) at para 16.

[46] *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) at para 108.

[47] Although the court found the decision in question to constitute administrative action, in the alternative, Van Niekerk J approached the matter as a legality review.

[48] *De Villiers* at para 36.

[49] *Mangena* at para 42.

provided as to why a continued employment relationship had been rendered intolerable by the conduct of these employees.'

[61] In the process of arriving at its conclusion, the LAC referred to this finding by the Constitutional Court in *Democratic Alliance*, where it was found that the failure by a decision maker to have regard to relevant material may rob the decision of rationality:[50]

'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.'

[62] In short, insofar as they attack the rationality of the decision, reviews based on the principle of legality take us back to the *Carephone* test (which was the prevailing law in respect of the review of CCMA arbitration awards up until the judgment of the Constitutional Court in *Sidumo*).[51]

The merits of the review application

[63] As often occurs in matters such as this, despite a wide-ranging attack on the impugned decision in the founding affidavit and heads of argument, Mr *Nxumalo* focused his efforts more narrowly in oral argument. The main legs of his attack were that the impugned decision was reviewable on the following four grounds:

(a) Firstly, the minister was not authorised by s 208A to revoke Mr Crouse's designation as the registrar, and committed a material error of law in doing so.

(b) Secondly, the instruction issued to Mr Crouse was unlawful because, having brought the CEPPWAWU application in terms of s 103A(1)*(c)*, he was functus officio and thus could not suspend the application.

(c) Thirdly, the minister failed to consider relevant material facts in arriving at her decision, namely the ministerial submission of 15/16 July 2015.

(d) Fourthly, the minister unlawfully interfered with or frustrated Mr Crouse's attempt to acquit himself of his statutory function in prosecuting the CEPPWAWU application.

The first ground of review

[64] It will be recalled that, in her letter of 23 July 2015, the minister purported to act in terms of s 208A in revoking Mr Crouse's designation as the registrar. It is common cause between the parties that this section does not serve as a legal basis for the impugned decision. This because, as explained above, s 208A deals with the

[50] *Democratic Alliance* at para 39.

[51] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC).

minister's powers of delegation and the withdrawal thereof, but this does not relate to the registrar, whose powers are original statutory powers vested in him or her by the LRA (as opposed to being delegated powers). A

[65] In response to this ground of review, Mr *Skosana* submitted that notwithstanding the error, the minister had the power to revoke Mr Crouse's appointment in terms of s 108, which Mr Crouse accepts (see para 51*(a)* above). Building on this, Mr *Skosana* submitted that the fact that the minister relied on the wrong section did not serve B to invalidate the decision. For this submission, Mr *Skosana* relied on *Latib*,[52] in which the then Supreme Court held that 'provided … the enabling statute grants the power to make the proclamation, the fact that it is said to be made under the wrong section will not invalidate the notice'. It seems to me that *Latib* remains good law, provided C that the decision maker did not deliberately (ie consciously) act in terms of the particular section, in which case he or she will be bound thereby. But if the wrong reference was 'the result of a simple slip up', then the mistake is immaterial.[53]

[66] The question then is whether the minister consciously opted to rely D on s 208A or whether she made a slip up in referring to it instead of to s 108. In her answering affidavit, the minister states that the incorrect reference 'was an administrative error'. There exists no basis upon which I can reject this explanation. In the result, the first ground of review fails. E

The second ground of review

[67] As set out above, Mr Crouse has adopted the position that having lodged the CEPPWAWU application in terms of s 103A(1)*(c)*, he was functus officio.[54] Flowing from this, he contends that given that he F was functus officio, the instruction to suspend the application was unlawful, and consequently that his removal as the registrar for refusing to obey the instruction is reviewable. According to Mr Crouse, if the minister wanted to suspend the application, she ought to have appealed against his decision to bring it — this in terms of G s 111(3).

[68] To my mind, this ground of review is tied up with what the minister actually meant by her instruction that Mr Crouse should 'suspend the … application until such time that you have briefed me fully on this matter'. Although I can certainly appreciate the difficulties that H

[52] *Latib v The Administrator, Transvaal* 1969 (3) SA 186 (T) at 190J–191A.

[53] *Howick District Landowners Association v uMngeni Municipality & others* 2007 (1) SA 206 (SCA) at para 23; *Minister of Education v Harris* 2001 (4) SA 1297 (CC) at paras 17–18. I

[54] Baxter *Administrative Law* at 372 says this about the functus officio doctrine: 'Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interests, it is J said that the decision-maker has discharged his office or is *functus officio*.'

the use of the term 'suspend' caused in the context of the fact that one was dealing with an urgent application that was before court, it seems to me that what was probably meant was that the matter should be postponed pending the minister being briefed. From a practical perspective, this probably meant that the urgent application would have had to be removed from the urgent roll on 18 June 2015 and postponed sine die. During the course of the debate in court, I understood Mr *Nxumalo* to accept this interpretation (it having been mooted by Mr Crouse himself in his letter to the DG and in the ministerial submission.)

[69] If Mr Crouse had been instructed by the minister to withdraw the CEPPWAWU application, I can appreciate that it might be arguable that he was functus officio in his decision to lodge the application in terms of s 103A(1)*(c)* and accordingly that the instruction was unlawful (although I need make no finding on this). But, to my mind, this cannot extend to an instruction to postpone the application pending the minister being briefed. Put differently, Mr Crouse's decision to enrol the matter for hearing on 18 June 2015 was not an administrative decision that attracts the doctrine of functus officio (as Mr *Nxumalo* was forced to argue). Leaving aside whether it was desirable to do so, there was, in my view, thus no legal impediment to Mr Crouse seeking a postponement of the application on 18 June 2015, which the court would then have had to decide on. (Ironically, the application was in any event postponed on that day, at the instance of CEPPWAWU.) In the result, the second ground of review also fails.

The third ground of review

[70] For present purposes, the following facts and circumstances relating to the ministerial submission of 15/16 July 2015 (the ministerial submission) are of particular relevance:

(a) In his letter of 10 July 2015, the DG instructed the DDG and Mr Crouse to provide a detailed report in a ministerial submission stipulating reasons why the minister's instructions were ignored by the registrar, and advised that this was to be provided by 15 July 2015.

(b) The minister's instructions in question were those set out in her letter to Mr Crouse of 5 June 2015, namely that Mr Crouse 'suspend the Labour Court application until such time that you have briefed me fully on this matter'.

(c) The ministerial submission was submitted by the DDG and Mr Crouse on 15/16 July 2015.

(d) The ministerial submission contains the following handwritten annotation (presumably by the DG):

> 'DG's letter only requires a response as to why the registrar ignored the minister's request for a briefing before proceeding.'

(e) Mr Crouse states as follows in his founding affidavit with apparent reference to the abovementioned annotation:

'This [ministerial] submission was not sent through to the minister but was returned by the acting [DG] as the briefing submission appears to go beyond the request by the DG to only explain why the minister's instruction was ignored.'

(f) In her answering affidavit, the minister denies these allegations (but provides no particularity). On the basis of the minister's denial, it appears to be her case that she did in fact receive the ministerial submission. In circumstances where the (acting) DG did not file a confirmatory affidavit, I accept Mr Crouse's version that the ministerial submission was later returned to him by the DG. And as appears below, the minister, in effect, concurs with the content of the handwritten annotation made on the ministerial submission.

(g) The minister goes on to say this about the ministerial submission:

'The second applicant [Mr Crouse] was given an opportunity by the [DG] to state the reasons why [he] failed to halt the process and to brief me. *Although he filed a ministerial submission, he did not deal with these two issues.'* (Emphasis added.)

(h) Along the same lines, the minister states as follows:

'The [ministerial] submission sought to explain why the registrar decided to bring the court proceedings against CEPPWAWU *but failed to explain why my letter was ignored* by [Mr Crouse].' (Emphasis added.)

[71] The allegation by the minister in the emphasised lines in paras 70*(g)* and *(h)* above are wrong and unjustifiable. The ministerial submission addresses Mr Crouse's explanation for not having suspended the CEPPWAWU application, and not having briefed the minister as per her letter of 5 June 2015. Reference is made in this regard to paras 24*(b)*, *(c)*, *(d)* and *(e)*,[55] and paras 26*(a)*, *(b)* and *(c)* above. The contents present as a detailed, cogent and sincere explanation by Mr Crouse.

[72] Quite what the objection to the ministerial submission was that caused it to be returned is difficult to understand. From what the minister says (see para 70*(h)* above), it seems that this was done because it details why Mr Crouse decided to bring the CEPPWAWU application. But this is highly irrational because the motivation for bringing the application was interlinked with the explanation that Mr Crouse was asked to provide and provided. On the face of it, the length of the ministerial submission and the fact that it contained what was (wrongly) considered to be extraneous material, caused the minister (and the DG) not to apply her mind to the material content of the ministerial submission, which contained Mr Crouse's response to the questions posed of him. In effect, while the ministerial submission was called for and was no doubt intended to serve as the basis for the minister's decision making in relation to Mr Crouse, it was disregarded.

[55] As mentioned, the contents of these paragraphs dealing with Mr Crouse's letter to the DG on 14 July 2015 were repeated in the ministerial submission.

[73] What then are the implications of the minister's failure to consider the ministerial submission (in its material respects) before making the impugned decision? To my mind, they are potentially two-fold. The first is to potentially render the impugned decision both unreasonable (a PAJA ground of review) and irrational (a PAJA and principle of legality ground of review). The second is to potentially render the impugned decision procedurally unfair (a PAJA and principle of legality ground of review).

[74] Dealing first with the issue of unreasonableness,[56] the LAC has often found that the failure to consider relevant facts will typically result in an unreasonable decision.[57] Recently, in *Mofokeng*,[58] the LAC held that this mode of analysis should be undertaken in the present context:

(a) the first enquiry is whether the facts ignored were material, which will be the case if a consideration of them would (on the probabilities) have caused the decision maker to come to a different result;

(b) if this is established, the (objectively wrong) result arrived at by the decision maker is prima facie unreasonable;

(c) a second enquiry must then be embarked upon — it being whether there exists a basis in the evidence overall to displace the prima facie case of unreasonableness; and

(d) if the answer to this enquiry is in the negative, then the decision stands to be set aside on review on the grounds of unreasonableness (and vice versa).

[75] It will be recalled that the minister revoked Mr Crouse's designation as the registrar 'on the grounds of gross insubordination' on his part. Following the mode of analysis set out above, to my mind, if the minister had applied her mind to the facts and considerations detailed in the ministerial submission in a fair and objective manner, this would (on the probabilities) have caused her to come to a different decision. The facts ignored by the minister were thus material and the decision prima facie unreasonable.

[76] This is so because, as I have already found, the ministerial submission presents as a detailed, cogent and sincere explanation by Mr Crouse. Without intending to re-traverse the contents, I highlight by way of example the following series of facts mentioned in the ministerial submission that would surely have had a material impact on the minister's decision:

[56] The test for reasonableness was set as follows in *Sidumo* at para 110: 'Is the decision reached by the commissioner one that a reasonable decision maker could not reach?'

[57] See for example: *First National Bank—A Division of First Bank Ltd v Language & others* (2013) 34 *ILJ* 3103 (LAC) at para 17; *Gaga v Anglo Platinum Ltd & others* (2012) 33 *ILJ* 329 (LAC); [2012] 3 BLLR 285 (LAC) at para 44; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 943 (LAC); [2014] 1 BLLR 20 (LAC) at para 21.

[58] *Head of Department of Education v Mofokeng & others* (2015) 36 *ILJ* 2802 (LAC): [2015] 1 BLLR 50 (LAC) at para 33.

(a) the fact that Mr Crouse considered that the minister had been sufficiently apprised of the matter;
(b) the fact that, according to Mr Crouse, he availed himself for a meeting with the minister immediately upon having received her letter of 5 June 2015, but no meeting was set up by her office;
(c) the fact that, according to Mr Crouse, he was not aware of any formal request to avail himself for a meeting with the minister;
(d) the fact that Mr Crouse had never previously (in 20 years) been required to brief the minister, and did not consider that he was under an obligation to do so;
(e) the fact that the use of the term 'suspend' caused confusion, even in the mind of the state attorney;
(f) the fact that Mr Crouse considered himself functus officio (which was a critically important fact);
(g) the fact that Mr Crouse was motivated by the belief that he was acting in the best interests of 66,000 CEPPWAWU members and acquitting himself of his statutory duties;
(h) the fact that the majority of the regions of CEPPWAWU had successfully joined the application to have the union placed under administration;
(i) the fact that Mr Crouse considered that the suspension of the CEPPWAWU application would result in wasteful expenditure having been incurred; and
(j) the fact that Mr Crouse indicated a repeated willingness to meet with the minister to discuss the matter.

[77] Turning to the next enquiry, to my mind, there exists no basis in the evidence overall to displace this prima facie case of unreasonableness, with the result that the decision stands to be struck down as unreasonable. In short, in my view, on a proper consideration of the facts, a reasonable decision maker would not have concluded that Mr Crouse was guilty of gross insubordination, such as to warrant his removal as the registrar. Accordingly, I find the impugned decision to have been unreasonable and thus liable to review.

[78] Insofar as the impugned decision does not constitute administrative action with the result that PAJA does not apply, I am of the view that the failure to consider the ministerial submission renders the impugned decision irrational and thus liable to legality review. Reference is made in this regard to the quotations from *De Villiers*, *Mangena* and *Democratic Alliance* in paras 59-61 above, which I consider to be on all fours with this matter (read mutatis mutandis). In short, the minister's failure to have regard to relevant material robs the impugned decision of rationality, and is reviewable on this basis.

[79] Turning to the issue of procedural unfairness, while Mr *Nxumalo* did not pursue in argument the pleaded case that Mr Crouse had not been afforded a hearing before his designation as the registrar was revoked (this in circumstances where there had been an exchange of correspondence), his attack on the minister's failure to consider the ministerial submission cannot be divorced from the issue of procedural fairness. The disregarding of the ministerial submission

(containing Mr Crouse's explanation) by the minister constitutes an act of procedural unfairness, and renders the decision liable to review either under PAJA or on the grounds of a breach of the principle of legality.

The fourth ground of review

[80] In terms of this ground of review, Mr Crouse contends that the minister sought to unlawfully interfere with or frustrate his attempt to acquit himself of his statutory function in prosecuting the CEPPWAWU application (for an ulterior motive or purpose). In her answering affidavit, the minister denies these allegations and explains why she considered it necessary to suspend the application pending receipt of a full briefing. No replying affidavit was delivered by Mr Crouse. In the light of the *Plascon-Evans* rule,[59] I hold that this ground of review fails.

The remaining issues

[81] As mentioned at the outset, the acting registrar (Mr Ntleki) has been joined as a party to these proceedings. Further hereto, the applicants seek also to review and set aside his appointment, principally on the basis that the LRA does not provide for the appointment of an acting registrar (as opposed to deputy registrars who are already in place). While it seems to me that it was prudent to join Mr Ntleki as he clearly has a material interest in the outcome of these proceedings, I do not consider it necessary to decide on the challenge to his appointment. This in circumstances where it is my intention to order the reinstatement of Mr Crouse as the registrar, from which it must follow that Mr Ntleki's acting appointment will terminate.

[82] During the hearing, Mr *Skosana* contended that it would be inappropriate to order the reinstatement of Mr Crouse as the registrar, as this would be tantamount to appointing him as the registrar for life. There is no merit in this, as the order would not prohibit lawful termination in the future.

[83] Regarding the issue of costs, Mr *Skosana* submitted that if I were inclined to find against the minister, costs should not include the costs of 4 and 7 August 2015, alternatively, should not include the costs of 7 August 2015. I can find no basis to exclude the costs of 4 August 2015, as it was appropriate for the application to have been brought as a matter of urgency. I do, however, agree that it would be inappropriate to grant costs against the minister in respect of 7 August 2015, as on that day the parties engaged in a consensual process of mapping out an agreed timetable for the final determination of the matter.

In summary

[84] In summary, I have found that: (i) the impugned decision constitutes administrative action and that a PAJA review is thus available to

[59] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H–635B.

Mr Crouse; alternatively, the impugned decision constitutes the exercise of a public power and is subject to legality review; (ii) in arriving at the impugned decision, the minister ignored materially relevant facts, namely the ministerial submission of 15/16 July 2015; (iii) the consequence of this is that the impugned decision was unreasonable, alternatively irrational; and procedurally unfair; and (iv) the impugned decision thus falls to be set aside on review, and Mr Crouse reinstated into the position of the Registrar of Labour Relations.

Order

[85] In the premises, the following order is made:

1 The decision of the first respondent on 23 July 2015 to revoke the designation of the second applicant as the Registrar of Labour Relations is reviewed and set aside.
2 The first respondent is directed immediately to reinstate the second applicant as the Registrar of Labour Relations.
3 The first respondent shall pay the costs, excluding the costs of 7 August 2015.

Applicants' Attorneys: *Thabang Ntshebe Attorneys*.

Respondents' Attorney: *State Attorney*.

SA COMMERCIAL CATERING & ALLIED WORKERS UNION v SUN INTERNATIONAL

LABOUR COURT (J1951/15)

29 September; 6 October 2015

Before RABKIN-NAICKER J

Lock-out—Employment of replacement labour—'In response to a strike' (s 76(1)(b) *of LRA 1995)—Meaning—Constitutionally protected right to strike not equivalent to statutory right to lock out—Interpretation of s 76(1)*(b) *not lending itself to limitation of right to strike—Right to hire replacement labour restricted to period during which protected strike pertains, and not after strike has ceased.*

Lock-out—Protected lock-out—Section 76 of LRA 1995—Use of replacement labour—'In response to a strike'—Section 76(1)(b)*—Meaning—Constitutionally protected right to strike not equivalent to statutory right to lock out—Interpretation of s 76(1)*(b) *not lending itself to limitation of right to strike—Right to hire replacement labour restricted to period during which protected strike pertains, and not after strike has ceased.*

The applicant trade union decided to embark on a limited duration protected strike and issued a strike notice in terms of s 64 of the LRA 1995. The notice informed the respondent company that the strike would start on 25 September 2015 and that the employees would return to their work stations from 05h45 on 28 September 2015. On 22 September 2015, the company issued a notice to commence a lock-out. It also notified the union that the lock-out would continue until its final offer had been accepted and that it would, in terms of s 76(1)*(b)* of the LRA, make use of replacement labour until its offer was accepted. The union brought an urgent application alleging that the company was not entitled to use replacement labour once the strike had ended and interdicting the company from utilising replacement labour for the purpose of performing the work of any employees who were locked out by virtue of the lock-out. The company argued, relying on *Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd* (1999) 20 *ILJ* 896 (LC), that its right to employ replacement labour occurred at the stage that it acted in response to a strike and endured until the protected lock-out ceased.

The Labour Court noted that s 76(1)*(b)* is one of the exceptions to the prohibition on the use of replacement labour where an employer initiates a lock-out. This exception provides that the employer may only do so 'in response to a strike'. It noted further that it had to decide whether it agreed with the decision in *Ntimane* that a 'reasonable interpretation' of s 76(1)*(b)* is that, where the nature of the lock-out is 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. After taking into account the proper approach to the interpretation of statutes and the imperatives laid down by the LRA to give effect to the Constitution 1996, the court found that 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 s 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.

The court therefore decided not to follow *Ntimane*. According to the court, the correct interpretation to be accorded to s 76(1)*(b)* 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.

The court found that, given its interpretation of s 76(1)*(b)*, the union had established a clear right to the interdictory relief that it sought. On the basis of its analysis, the union's constitutional right to strike was being infringed. The court further found that no satisfactory alternative remedy existed for what would in effect be a claim for constitutional damages.

The court accordingly interdicted the company from utilising replacement labour for the purpose of performing the work of employees locked out by virtue of the lock-out.

Application to the Labour Court for a final interdict. The facts and further findings appear from the reasons for judgment.

Annotations

Cases

Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA, 1996 1996 (4) SA 744 (CC); (1996) 17 *ILJ* 821 (CC) (considered)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) (considered)

National Union of Technikon Employees v Technikon SA (2000) 21 *ILJ* 1645 (LC) (referred to)

Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd (1999) 20 *ILJ* 896 (LC) (not followed)

SA Transport & Allied Workers Union & others v Moloto NO & another 2012 (6) SA 249 (CC); (2012) 33 *ILJ* 2549 (CC) (referred to)

Setlogelo v Setlogelo 1914 AD 221 (referred to)

Technikon SA v National Union of Technikon Employees of SA (2001) 22 *ILJ* 427 (LAC) (referred to)

Statutes

Labour Relations Act 66 of 1995 s 76(1)*(b)*

Adv D Z Kela for the applicant.

Adv D R B van Zyl for the respondent.

Judgment reserved.

Rabkin-Naicker J:

[1] This matter came before me as an urgent application and I exercise my discretion to treat it as such. The applicant union initially sought a rule nisi but indicated that it would instead seek final relief and referred the court to its founding affidavit containing the averment that it has established a clear right to the declaratory and interdictory orders contained in the notice of motion. These are as follows:

> 'Declaring that the respondent's unlimited duration lock-out is not meant to counteract the effect of the strike action by the applicant's members and is, therefore, not in response thereto as envisaged by the latter part of the provisions of s 76(1)*(b)* of the Labour Relations Act 66 of 1995 as amended.
>
> Interdicting and restraining the respondent forthwith from taking into its employment any person for the purpose of performing the work of any employee who is locked out by virtue of a lock-out issued by the respondent on 22 September 2015.'

[2] The factual matrix giving rise to this application is not in dispute. The union embarked on a limited duration protected strike and issued a notice in terms of s 64 of the Labour Relations Act 66 of 1995 (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 are contained in the notice.

[3] On 22 September 2015, the respondent issued a notice the heading of which reads as follows: 'Notification of the commencement of a lock-out in terms of s 64(1)*(c)* read with s 76(1)*(b)* Labour Relations Act 66 of 1995, as amended (the LRA).'

[4] For our purposes the salient part of the lock-out notice reads as follows:

> '4 [T]he lock-out will commence after the members of SACCAWU have embarked on their strike and, for the purposes of this notification, the commencement of such lock-out will be on 25 September 2015 at 08h00;
>
> 5 in terms of the lock-out, Sun International will exclude its employees who are members of SACCAWU from its various workplaces for the purposes of compelling such employees to accept Sun International's

final offer regarding changes in wages and/or terms and conditions of employment as set out, in full, in annexure A attached to this writing; and

6 the lock-out will continue until such time as Sun International's aforesaid final offer has been accepted and during this period such employees will not be entitled to any remuneration or benefits.'

A

[5] The crisp issue for determination in this matter is whether in terms of s 74(1)*(b)* of the LRA, an employer may continue to use replacement labour after a strike has ended. The union concedes that the lock-out in casu is protected. However, it submits that an employer's right to

B use replacement labour must be 'in response to a strike' and once a strike has ended, s 76(1)*(b)* of the LRA no longer applies.

[6] Section 76 of the LRA provides a follows:

'76 Replacement labour

(1) An employer may not take into employment any person —

C *(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.

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

[7] The respondent, in lengthy heads of argument, has submitted that, on a proper interpretation of s 76(1)*(b)*, taking into account the

E interpretation clause contained in the LRA, 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

F '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

G 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, in which Landman J (as he then was) had this to say:

H '[16] At the outset it was mentioned that it was common cause between the parties that the lock-out was in response to the strike. This being so there could be no valid objection to Agrinet employing replacements. In the meantime the employees have abandoned their strike. Does this alter the situation? The union contends that it does. It is submitted that the lock-out is no longer in response to a strike and so the general rule

I applies and therefore Agrinet may not utilize replacement labour.

[17] It is clear that the abandonment of the strike has no legal effect on the lock-out. Section 76 interferes with an employer's common-law and constitutional rights, in the interests of levelling the playing fields in an economic battle between employees and their employer. It grants

J an exception to the ban on replacement labour in certain well-defined situations. The section does not provide that it is rendered inapplicable

when the strike in response to which the lock-out was instituted terminates. On the contrary, it seems, on a reasonable interpretation, that the nature of the lock-out as a defensive one, and the concomitant right to employ replacement labour, accrues at the stage the defensive lock-out is implemented and endures until the lock-out ceases.

[18] I am of the view that the employer's right to continue making use of the replacement labour is counterbalanced by the right afforded by the Labour Relations Act 1995 to registered trade unions to picket the employer's premises, inter alia, with the purpose of discouraging persons from accepting work.'

[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 s 76(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.*

[10] A literal interpretation is incomplete. It does not address the employment of replacement labour in the context of the entire Act.

[11] However, ss 64(1) and 76 must be read with s 5 and one of the primary objectives of the Act, namely to promote orderly collective bargaining (s 1*(c)*(i) and *(d)*(i)). They must also be interpreted in the context of the constitutional right to strike and the right of trade unions and employers to engage in collective bargaining (s 23(5) of the Constitution (Act 108 of 1996)). Employees have a constitutional right to strike. Employers merely have recourse to a lock-out. The distinction is substantive and not merely semantic. Furthermore, it signals a clear intention of the legislature not to treat strikes and lock-outs symmetrically.

[12] Furthermore, s 76(1)*(b)* cannot be available in an offensive lock-out if there is to be substantive parity in collective bargaining. It would have untenable results if it were allowed. An employer could then make any demand, lock-out its workforce and employ replacement labour. It is conceivable that an employer may prefer to run its operations under such conditions. The employees will be disproportionately disadvantaged. The right to picket peacefully is, with respect, not an adequate countervailing right. To this extent I disagree, with respect, with my brother Landman J in *Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd* (1999) 20 *ILJ* 896 (LC) at 900I-J. If recourse to replacement labour were available to an employer during an offensive lock-out, then collective bargaining will degenerate to collective begging.' (Emphasis added.)

[10] The above judgment was overturned on appeal in *Technikon SA v National Union of Technikon Employees of SA*,[1] 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

[1] (2001) 22 *ILJ* 427 (LAC).

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.

A [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 B 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.' (Emphasis added.)

[11] The LAC was not called upon to deal directly with the issue before me. In the result, I must decide whether I agree with the decision in C *Agrinet* that a 'reasonable interpretation' of s 76(1)*(b)* is that where the nature of the lock-out is 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.

[12] In interpreting s 76(1)*(b)*, I note that the proper approach to the D interpretation of statutes was recently repeated by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[2] Wallis JA, writing for the court, explained:

'The present state of the law can be expressed as follows: Interpretation is E the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar F and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. G Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation … . The "inevitable point of departure is the language of the provision itself", read in context and having regard H to the purpose of the provision and the background to the preparation and production of the document.'

Evaluation

I [13] Subsection (1)*(b)* of s 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

J

[2] 2012 (4) SA 593 (SCA) at para 18.

provides that it may do so 'in response to a strike'. The plain meaning of 'in response to' is 'in reply or reaction to'.[3] 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 s 76(1)*(b)* is instead to be given the restrictive interpretation the applicant seeks.

[14] The interpretation clause contained in the LRA reads as follows:

> '3 Interpretation of this Act
> Any person applying this Act must interpret its provisions —
> *(a)* to give effect to its primary objects;
> *(b)* in compliance with the Constitution; and
> *(c)* in compliance with the public international law obligations of the Republic.'

[15] The primary objects of the LRA are contained in s 1 as follows:

> '1 Purpose of this Act
> The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are —
> *(a)* to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;
> *(b)* to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
> *(c)* to provide a framework within which employees and their trade unions, employers and employers' organisations can —
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
> (ii) formulate industrial policy; and
> *(d)* to promote —
> (i) orderly collective bargaining;
> (ii) collective bargaining at sectoral level;
> (iii) employee participation in decision-making in the workplace; and
> (iv) the effective resolution of labour disputes.'

[16] It is important when taking into account the imperative laid out by the above sections of the LRA to give effect to the Constitution (and s 23 thereof in particular), to remind ourselves of what was said in to the *Certification* judgment[4] where the Constitutional Court stated:

> 'A related argument was that the principle of equality requires that, if the right to strike is included in the NT, so should the right to lock out be included. *This argument is based on the proposition that the right of employers to lock out is the necessary equivalent of the right of workers to strike and that therefore, in order to treat workers and employers equally, both should be recognised in the NT. That proposition cannot be accepted*. Collective bargaining is based on the recognition of the

[3] *The New Shorter Oxford Dictionary* vol 2 (1993).

[4] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); (1996) 17 *ILJ* 821 (CC).

fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lock-out). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent.'[5] (Emphasis added.)

[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 s 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.[6] In addition, I take cognisance of the ILO Committee of Experts' considerations in reference to the Convention on the Right to Organise and Collective Bargaining Convention (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.'[7]

[18] In *SATAWU v Moloto* the Constitutional Court stated at para 43:

'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 s 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. The requisites for a final interdict are settled law.[8] The applicant must establish a clear right; an injury

[5] at para 66.
[6] *SA Transport & Allied Workers Union & others v Moloto NO & another* 2012 (6) SA 249 (CC); (2012) 33 *ILJ* 2549 (CC) at para 44.
[7] General Survey on the fundamental conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, Report of Experts ILO Conference 101 Session 2012 at para 161.
[8] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

committed or reasonably apprehended; and the absence of protection by any other ordinary remedy.

[20] Given my interpretation of s 76(1)*(b)*, the applicant has established a clear right to the interdictory relief it seeks. On the basis of that analysis, I have found that the applicants' constitutional right to strike is being infringed as a result. Given that I have found that the stance taken by the respondent is in contravention of the provisions of LRA and is in violation of a constitutional right, I do not find that a satisfactory alternative remedy exists for what would in effect be a claim for constitutional damages. Taking into account my analysis above, a declarator is not warranted since it would not serve any purpose.

[21] Both parties asked for costs should they be successful in the application. In all the circumstances I make the following order:

Order

1 The respondent is interdicted forthwith from utilising replacement labour for the purpose of performing the work of any employees who are locked out by virtue of the lock-out declared by the respondent on 22 September 2015.

2 The respondent is to pay the costs of this application.

Applicant's Attorneys: *Ndumiso Voyi Inc.*

Respondent's Attorneys: *Van Zyl Rudd Inc.*

SA LOCAL GOVERNMENT BARGAINING COUNCIL v ALLY NO & ANOTHER

LABOUR COURT (JR2213/11)

30 June; 14 August 2015

Before SNYMAN AJ

Bargaining council—Arbitration award—Enforcement—Section 33A of LRA 1995—Enforcement of costs award in favour of council—Not appropriate to rely on s 33A—Appropriate course for council to rely on execution provision in main agreement and s 143 to enforce costs award.

Bargaining council—Arbitration award—Enforcement—Section 33A of LRA 1995—Purpose—To enforce conditions and benefits of collective agreements in favour of employees.

Bargaining council—Arbitration proceedings—Costs of arbitration—Recovery by council—SALGBC constitution and main agreement—Costs only recoverable where arbitrator makes costs award in favour of council—If arbitrator makes no costs award, council remains liable for all costs of arbitration—Cannot later institute separate proceedings in own name to claim costs.

Bargaining council—Arbitration proceedings—Costs of arbitration—Recovery by council—Section 33A of LRA 1995—Not appropriate to rely on s 33A—Appropriate course for council to rely on execution provision in main agreement and s 143 to enforce costs award.

A *Bargaining council—Jurisdiction—Enforcement of collective agreements—Council having jurisdiction—Includes jurisdiction to enforce costs award by arbitrator in favour of council.*

The applicant bargaining council, the SALGBC, has certain powers and functions in terms of its constitution, its main agreement and the LRA 1995, including
B the power to enforce its own collective agreements and to perform dispute-resolution functions. In terms of its main agreement, the SALGBC is entitled to fees or costs of arbitration in disputes arbitrated between two litigating parties before it. The SALGBC was of the view that the second respondent, the City of Johannesburg — a member of the employer party to the council, was liable
C to it for costs arising out of several arbitration proceedings conducted under its auspices between 2004 and 2010. In some of these matters, costs had in fact been awarded to the SALGBC by arbitrators, but in others there had been no costs award or ruling. The total amount claimed by the SALGBC from the city amounted to just over R116,000, which it contended was payable in terms of
D its main agreement. The city failed to settle these amounts, and the SALGBC, relying on clause 19 of its constitution read with s 33A of the LRA, sought to enforce compliance and referred a dispute to arbitration. The arbitrator found that the SALGBC could not enforce costs using its collective agreement enforcement processes and that he consequently had no jurisdiction to hear the matter. The SALGBC approached the Labour Court to review the award.
E The court found that arbitrator did have jurisdiction to decide the SALGBC's case as pleaded. Its claim was for enforcement of the main agreement against the city, and it did not matter, for purposes of deciding jurisdiction, whether this claim had any substance in law or whether the SALGBC had any other options available to it. The arbitrator clearly had the power to decide the issue of enforcement of
F the main agreement, and he was therefore wrong in deciding that he did not have jurisdiction. His ruling therefore fell to be reviewed and set aside.

Relying on s 145(4)*(a)*, the court decided to determine the dispute and not refer it back to the council. The court noted that the matter, in essence, revolved around costs awards made in favour of the SALGBC as bargaining council in various disputes before arbitrators appointed by the SALGBC to conduct
G dispute resolution between the city as employer party and a variety of different employees. The main agreement made provision for costs to be payable to the SALGBC as bargaining council, and it had to be determined how the SALGBC could recover those costs when the city failed to pay.

In order to decide the matter the court said that it was necessary to interpret the constitution and main agreement of the SALGBC relying on the well-
H established principles of interpretation of legal instruments. The court considered in detail the relevant clauses of the constitution and main agreement relating to the dispute-resolution process and the power of arbitrators to make appropriate costs awards.

The court found that it is clear from its interpretation of the relevant provision of
I the main agreement, clause 2.41, that the SALGBC can only recover the costs awarded to it by arbitrators in the course of dispute-resolution proceedings between two litigating parties conducted under the auspices of the SALGBC. If an arbitrator makes no award or ruling regarding costs in the course of such proceedings, the SALGBC remains liable for all costs of the arbitration
J proceedings. It cannot institute separate proceedings after the fact, in its own name as a litigating party, to claim costs in terms of the main agreement.

It follows, therefore, that the SALGBC cannot institute enforcement proceedings as contemplated in clause 19 of its constitution read with s 33A of the LRA to claim costs not specifically awarded to it by an arbitrator. Neither can the SALGBC rely on these enforcement proceedings to claim costs in instances where arbitrators have awarded it costs. This is so because the purpose of enforcement proceedings under clause 19 of the constitution and s 33A is to determine liability of an errant party and direct it to comply. Where costs awards have already been made by arbitrators, liability has already been determined and a party directed to pay, there is no need for enforcement proceedings. The SALGBC's main agreement provides, in clause 2.40, a procedure for the execution of awards, including costs awards, which can be used by any one entitled to a benefit in terms of an arbitration award, including the SALGBC. In addition, it can rely on s 143 to enforce an arbitration award, but this is unnecessary as it can simply execute under its own main agreement.

The court also considered the real purpose of s 33A, which is to enable bargaining councils to enforce, on behalf of employees within their sectors, employment conditions and benefits regulated by their collective agreements. The SALGBC's reliance on enforcement proceedings under clause 19 of its constitution read with s 33A to claim costs against the city was inappropriate and was thus a bad claim. It ought to have proceeded to execute the various awards and rulings relating to costs in its favour by way of clause 2.40 of the main agreement as read with s 143 of the LRA.

The court accordingly found that the arbitrator's award had to be sustained, not on the basis of want of jurisdiction, but on the basis that the SALGBC's claim was bad in law.

The application was dismissed, but the court refused to award costs in favour of the city because it disapproved of the city's attitude of non-compliance, which it found to be unacceptable and ought to be discouraged.

Application to the Labour Court to review an arbitration award handed down under the auspices of a bargaining council. The facts and further findings appear from the reasons for judgment.

Annotations

Cases

Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others (2012) 33 *ILJ* 363 (LC) (referred to)

Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others (2010) 31 *ILJ* 273 (CC) (referred to)

Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) (referred to)

Commercial Workers Union of SA v Tao Ying Metal Industries & others 2009 (2) SA 204 (CC); (2008) 29 *ILJ* 2461 (CC) (referred to)

Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others (2008) 29 *ILJ* 964 (LAC) (referred to)

Gcaba v Minister for Safety & Security & others 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC) (considered)

Gubevu Security Group (Pty) Ltd v Ruggiero NO & others (2012) 33 *ILJ* 1171 (LC) (referred to)

Hickman v Tsatsimpe NO & others (2012) 33 *ILJ* 1179 (LC) (referred to)

Makhanya v University of Zululand 2010 (1) SA 62 (SCA); (2009) 30 *ILJ* 1539 (SCA) (considered)

Mbatha v University of Zululand (2014) 35 *ILJ* 349 (CC) (considered)

Motor Industries Bargaining Council v Osborne & others (2003) 24 *ILJ* 1700 (LC) (considered)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) (relied on)

National Bargaining Council for the Clothing Manufacturing Industry v J 'n B Sportswear CC & another (2011) 32 *ILJ* 1950 (LC) (considered)

National Bargaining Council for the Road Freight Industry & another v Carlbank Mining Contracts (Pty) Ltd & another (2012) 33 *ILJ* 1808 (LAC) (referred to)

Protect a Partner (Pty) Ltd v Machaba-Abiodun & others (2013) 34 *ILJ* 392 (LC) (referred to)

Qavile v Commission for Conciliation, Mediation & Arbitration & others (2003) 24 *ILJ* 153 (LAC) (referred to)

Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others (2007) 28 *ILJ* 417 (LC) (considered)

SA Bank of Athens Ltd v Cellier NO & others (2009) 30 *ILJ* 197 (LC) (referred to)

SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd (1998) 19 *ILJ* 557 (LAC) (referred to)

SA Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA); (2010) 31 *ILJ* 529 (SCA) (referred to)

SA Municipal Workers Union on behalf of Jacobs v City of Cape Town & others (2015) 36 *ILJ* 484 (LC) (referred to)

SA Police Service v Safety & Security Sectoral Bargaining Council & others (2012) 33 *ILJ* 1933 (LC) (referred to)

SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others (2008) 29 *ILJ* 2218 (LAC) (referred to)

Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC) (referred to)

Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO & others (2013) 34 *ILJ* 1272 (LC) (referred to)

Strategic Liquor Services v Mvumbi NO & others 2010 (2) SA 92 (CC); (2009) 30 *ILJ* 1526 (CC) (referred to)

Trio Glass t/a The Glass Group v Molapo NO & others (2013) 34 *ILJ* 2662 (LC) (referred to)

Workforce Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2012) 33 *ILJ* 738 (LC) (referred to)

Zeuna-Stärker Bop (Pty) Ltd v National Union of Metalworkers of SA (1999) 20 *ILJ* 108 (LAC) (referred to)

Statutes

Labour Relations Act 66 of 1995 s 33, s 33A, s 33A(2)-(3), s 33A(4)*(a)*, s 51(8), s 51(9), s 138(10), s 140(2), s 143, s 145, s 145(4)*(a)*, s 158(1)*(c)*

Attorney I Lawrence for the applicant.

Adv T Ngcukaitobi for the second respondent.

Judgment reserved.

SNYMAN AJ:

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the first respondent in his capacity as an arbitrator of the SALGBC, the latter ironically being the applicant itself. This application has been brought in terms of s 145 of the Labour Relations Act[1] (the LRA).

[2] This matter is unique. Normally, dispute-resolution processes

[1] 66 of 1995.

conducted under the auspices of bargaining councils involve two litigating parties, with the function of the bargaining council being no more than to facilitate the dispute-resolution process and appointing an arbitrator. However, and in this instance, certain benefits, for the want of a better description, accrue to the bargaining council itself from this litigation process, because of certain costs provisions in the bargaining council main collective agreement. The crisp questions then arise as to how would the bargaining council firstly procure these benefits, and how would it enforce the same? These were the issues that were placed before the first respondent as arbitrator.

[3] The applicant, as bargaining council, sought to enforce costs which it contended were owing to it by the second respondent under the provisions of its main collective agreement. It did this by way of the arbitration proceedings that came before the first respondent. The first respondent however decided that he had no jurisdiction to entertain the matter, concluding that these costs could not be enforced by the applicant using the normal bargaining council collective agreement enforcement processes. The first respondent dismissed the matter, giving rise to these proceedings.

Background facts

[4] Fortunately in this matter, most of the background facts are in fact common cause or undisputed.

[5] The applicant is the bargaining council having jurisdiction in the local government sector, duly registered under the LRA. The applicant is governed by a constitution and main collective agreement, concluded between the representative trade unions in the sector, on the one hand, and the SA Local Government Association (SALGA) on the other. SALGA has as its members some 278 municipalities across the entire country, with the second respondent being one of these.

[6] The powers and functions of the applicant are determined by clause 3 of its constitution. Of relevance to the current matter, these include enforcement of its collective agreements,[2] and the performing of dispute-resolution functions as contemplated by s 51 of the LRA.[3] The applicant then also has the jurisdiction, in terms of clause 11.2 of its constitution, to conciliate and arbitrate any dispute arising out of the provisions of its own collective agreements.

[7] Pursuant to the provisions of the applicant's constitution, and the LRA, the parties to the applicant as bargaining council then concluded what was termed the 'main collective agreement', on 18 June 2007. I will refer to this collective agreement in this judgment as 'the main agreement'. The main agreement has several parts, being the following: (1) part A — application of the main agreement; (2) part B — substantive matters which are in essence conditions of employment of employees in the sector; (3) part C — procedural matters which in essence relate to collective bargaining rights and organisational rights; (4) part D — rules of the council which includes

[2] clause 3.1.3.
[3] clause 3.1.4.

the applicant's dispute-resolution process; (5) part E — exemptions; (6) part F — enforcement of the main agreement; (7) part G — disputes about interpretation or application of the main agreement; (8) part H — amendment of the main agreement; (9) part I — repeal of existing agreements; and (10) part J — definitions.

[8] Where it comes to the enforcement of collective agreements concluded under the auspices of the applicant, this is regulated both in the applicant's constitution[4] and the main agreement.[5] Save for inconsequential differences in wording between clause 19.2 of the constitution and clause 2 of part F of the main agreement, the enforcement provisions in these documents are identical and in effect mirror s 33A of the LRA.

[9] Under the applicant's constitution and main agreement, the enforcement proceedings entail a process to try to remedy the default by way of a compliance order, or referring any unresolved issue with regard to compliance to arbitration. As to the arbitration process itself, it is the same as any other arbitration conducted under the auspices of the applicant, and s 138 of the LRA equally applies. The powers of the arbitrator include ordering compliance with any collective agreement, imposing a fine, awarding costs, enforcing a compliance order and charging a party an arbitration fee.

[10] Turning then to dispute resolution under the auspices of the applicant in general, clause 11 of the applicant's constitution provides for the referral of such disputes to the applicant for conciliation[6] and then, if unresolved, ultimately to arbitration. Clause 14 of the constitution then provides for an arbitration procedure, applicable to all arbitrations conducted under the auspices of the applicant. Of importance to the current proceedings, any appointed arbitrator has the power either to award costs at the request of an actual party to the dispute, or to award costs due to any conciliation or arbitration proceedings postponed or delayed unnecessarily.[7] Also of importance is clause 14.9, which reads: 'Unless ordered otherwise by the arbitrator in terms of this clause 14, the council shall bear the costs of the arbitrator, the venue and any interpreter.' Finally, clause 14.18 of the constitution provides that dispute-resolution rules may be issued from time to time.

[11] The main agreement then provides for the rules applicable to dispute resolution under the auspices of the applicant, which can be found in section 2 of part D of the main agreement. These rules are to a large extent the same as the CCMA rules relating to dispute resolution, and include provisions relating to referral processes, forms, completion and service of documents, applications, calculation of time-limits, conciliation and arbitration processes, con/arb, default proceedings, and pre-dismissal arbitrations. Of some relevance to the current matter is clause 2.23, which provides for the process

[4] clause 19.
[5] part F.
[6] clause 12.
[7] See clause 14.2.3 and 14.2.4.

relating to postponement of arbitrations which can take place either by agreement or on proper application as prescribed, by any party to the dispute.

[12] Section 2 of part D concludes with what is headed a 'General' section, encompassing clause 2.35 to 2.41. This includes a general power given to an arbitrator to condone non-compliance with the rules, and provides for the recording of arbitration proceedings, subpoenas, witness fees, taxation, costs, certain fees payable to the council, and certification of awards for execution. Of particular relevance in the current matter is clause 2.39(1), which provides that the basis on which an arbitrator may make a costs award in an arbitration is regulated by s 138(10) of the LRA.

[13] Specific reference must also be made to clause 2.41 in section 2 of part D of the main agreement, which provides as follows:

> '(1) Any party or parties that fails or fail to request for a postponement timeously, as stipulated in rule 2.23 above, shall be liable for the fees of the arbitration, including other incidental costs arising from the convening of the arbitration.
> (2) The arbitrator is required to rule on frivolous or vexatious postponements.
> (3) The council shall pay for a maximum of three (3) days of arbitration only. If the arbitration exceeds three (3) days, the disputing parties shall jointly and equally be responsible for the arbitration fees in excess of three (3) days, unless the arbitrator determines otherwise.
> (4) Any party to a conciliation or arbitration proceeding, who does not comply with any rule in part D, shall bear the costs of the council, due to any postponement or delay of the conciliation or arbitration hearing.'

[14] In short, and pursuant to clause 2.41, fees may be payable to the applicant by one or both of the litigating parties, in the instances where a postponement is not requested timeously, where the arbitration exceeds three days, or where a postponement is occasioned because a party does not comply with a dispute-resolution rule under part D of the main agreement.

[15] The current matter relates to various arbitration proceedings in which the second respondent was involved, for the period from 2004 up to and including 30 October 2010. None of these proceedings related to instances where the applicant itself, as a party to the proceedings, sought to enforce compliance of any of its collective agreements, as against the second respondent. All these proceedings were between the second respondent, as employer party, and either the unions IMATU or SAMWU acting on behalf of individual members, or individual employees themselves.

[16] The applicant filed a bundle of documents containing various awards and rulings made in the course of the dispute-resolution proceedings referred to above which, according to the applicant, entitle it to the payment of costs/fees by the second respondent to it. The bulk of these awards/rulings relate to postponements, being some 21 individual instances where in the course of these disputes the second respondent was directed by an arbitrator to pay costs/fees to the applicant as a result of these postponements. Two further instances where arbitrators directed that the second respondent

pay costs to the applicant are an award issued on 1 December 2004 where an arbitrator directed that the second respondent to pay an arbitration fee to the applicant in terms of s 140(2) of the LRA, and an award issued on 29 May 2009 where the arbitrator directed that the second respondent pay the applicant's costs relating to a delay in the arbitration resulting from a dismissed objection in limine

[17] Then there are also seven individual instances where the applicant was claiming costs from the second respondent where arbitration proceedings exceeded three days, but I could find no actual award by an arbitrator to this effect. Similarly, the applicant claimed postponement costs from the second respondent in the matters of SAMWU obo Miya and SAMWU obo C Oliphant, when there was no award/ruling to this effect by an arbitrator.

[18] The total amount claimed by the applicant from the respondent amounted to R116,021. The applicant contended this amount was payable by virtue of the provisions of clause 2.41 of section 2 of part D of the main agreement, referred to above.

[19] The second respondent however failed to settle any of these fees/costs forming the subject-matter of these proceedings. The applicant contended that such failure to pay, by the second respondent, was in effect non-compliance with the provisions of clause 2.41 in section 2 of part D of the main agreement. The applicant's case was that it was accordingly entitled to enforce compliance with these provisions of the main agreement, in terms of clause 19 of the constitution, as read with s 33A(4)*(a)* of the LRA. The applicant did not refer to part F of the main agreement itself, but as said, this is virtually identical to clause 19 of the constitution.

[20] Accordingly, the applicant squarely founded its case on the contention that by failing to pay the amounts due to the applicant in terms of the various awards, rulings and proceedings referred to above, the second respondent is in contravention of the main agreement which the applicant is then entitled to enforce in terms of the enforcement proceedings under its constitution, as read with s 33A of the LRA. The importance of properly defining the applicant's case will be discussed later in this judgment.

[21] The applicant then in fact applied the process as set out in clause 19 of the constitution. It issued the second respondent on 6 December 2010 with a compliance order as contemplated by clause 19.2, and demanded payment of R116,021. The second respondent did not comply with this compliance order.

[22] The applicant then referred the dispute to arbitration, citing in its arbitration referral that the dispute was being brought in terms of s 33A(4)*(a)* of the LRA as read with clause 19 of the applicant's constitution. It is these proceedings that came before the first respondent for arbitration on 19 July 2011.

[23] At the arbitration proceedings, the second respondent raised an objection in limine as to the jurisdiction of the first respondent to entertain the dispute, contending that the first respondent did not have such jurisdiction. The first respondent upheld this contention of the second respondent, finding that enforcement proceedings under

s 33A could not be brought in this instance and he thus did not have jurisdiction. The first respondent then dismissed the matter. It is this determination that then gave rise to this review application.

The test for review

[24] As stated above, the first respondent disposed of the matter on the basis of a jurisdictional determination, being that he did not have jurisdiction to entertain the enforcement proceedings brought by the applicant. This being the case, and on review, the review test as enunciated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[8] would not apply. As was said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others*:[9] 'If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also, if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.'

[25] When deciding a review where the issue concerns the jurisdiction of the bargaining council to determine a dispute, the proper review test where the existence of the requisite jurisdictional fact is objectively justiciable in court, would be whether the determination of the arbitrator was right or wrong. This was so held in *Zeuna-Stärker Bop (Pty) Ltd v National Union of Metalworkers of SA*[10] where the court said:

> 'The commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justiciable grounds.'

[26] I have had the opportunity to deal with this kind of review test in *Trio Glass t/a The Glass Group v Molapo NO & others*[11] and said:

> 'The Labour Court thus, in what can be labelled a "jurisdictional" review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[27] This 'right or wrong' review approach has been consistently applied in instances where the issue for determination on review concerned the jurisdiction[12] of the CCMA, as is apparent from the judgments in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*,[13] *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others*,[14] *Hickman v*

[8] 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC).
[9] (2008) 29 *ILJ* 964 (LAC) at para 101.
[10] (1999) 20 *ILJ* 108 (LAC) at para 6. See also *SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd* (1998) 19 *ILJ* 557 (LAC) at para 24.
[11] (2013) 34 *ILJ* 2662 (LC) at para 22.
[12] Mostly in the instance as to whether or not a dismissal exists.
[13] (2008) 29 *ILJ* 2218 (LAC) at paras 39-40.
[14] (2012) 33 *ILJ* 363 (LC) at para 23.

Tsatsimpe NO & others,[15] *Protect a Partner (Pty) Ltd v Machaba-Abiodun & others*,[16] *Gubevu Security Group (Pty) Ltd v Ruggiero NO & others*,[17] *Workforce Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*[18] and *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO & others*.[19]

[28] There is no reason why this same approach cannot be applied to bargaining council arbitrations, and where the issue on review concerns the jurisdiction of a bargaining council arbitrator to have entertained a particular dispute. I will therefore decide whether the determination of the first respondent was right or wrong, by way of a de novo consideration of the justiciable facts on record, being the applicable review test.

The applicant's review case

[29] I do not intend to set out all of the applicant's individual review grounds, but will only summarise what I believe to lie at the heart of the applicant's case on review.

[30] The applicant contends that the first respondent misconstrued the nature of the applicant's claim, and failed to properly interpret and apply the provisions of the applicant's constitution and main agreement, as read with the relevant sections of the LRA.

[31] The applicant contends that the costs/fees payable to it by the second respondent are payable in terms of clause 2.41 of the main agreement, as it stands. This liability exists irrespective of any awards or rulings made by arbitrators in the course of dispute-resolution proceedings. The applicant is thus entitled to enforce these provisions in its main agreement in the same manner as it would be entitled to enforce any other provisions of its main agreement. In short, the applicant says it claims are not founded upon awards or rulings of arbitrators.

[32] The applicant further contends that in any event, the awards/rulings made by the arbitrators on the issue of costs/fees are not arbitration awards as contemplated by s 143 or s 158(1)*(c)* of the LRA, and these provisions could thus not find application because of this. The applicant stated that what the arbitrators may have said about costs were just 'observations' by the arbitrators of 'contractual liability' of the second respondent in terms of the main agreement, and thus not a determination of the issue.

[33] The applicant also took issue with the first respondent's reasoning that clause 19 of its constitution as read with s 33A of the LRA only applied to collective agreements relating to terms and conditions of employment of employees, contending that this unduly narrowed the construction of the definition of a collective agreement. According to the applicant, clause 19 and s 33A would apply to any collective agreement, and this included the provisions of clause 2.41 of the

[15] (2012) 33 *ILJ* 1179 (LC) at para 10.
[16] (2013) 34 *ILJ* 392 (LC) at paras 5-6.
[17] (2012) 33 *ILJ* 1171 (LC) at para 14.
[18] (2012) 33 *ILJ* 738 (LC) at para 2.
[19] (2013) 34 *ILJ* 1272 (LC) at para 21.

main agreement, which was intended to protect the finances of the applicant from undue dissipation.

[34] The applicant contended that it was unable to use the provisions of ss 143 and 158(1)*(c)* to enforce the costs/fees payable to it in any event, as it was not a party to the dispute-resolution proceedings, and the machinery under these provisions was only available to litigant parties.

The issue of jurisdiction

[35] I will start with the issue of jurisdiction of the first respondent, as this was the basis for the first respondent's dismissal of the matter. I am compelled to say that I have my doubts as to whether the first respondent's finding that he did not have jurisdiction to entertain the matter is indeed correct. What the first respondent was doing, in simple terms, was confusing the issue of jurisdiction with what may or may not have been a bad case brought by the applicant. The issues are not the same. The first respondent held that he could not entertain the applicant's dispute because the applicant could not bring its enforcement proceedings under s 33A of the LRA. This is not an issue of jurisdiction. It is an issue pertaining to a determination whether the applicant's claim has substance in law.

[36] Van der Westhuizen J in *Gcaba v Minister for Safety & Security & others*[20] considered the very meaning of jurisdiction and jurisdictional challenges, and held:

> 'The specific term "jurisdiction", which has resulted in some controversy, has been defined as the "power or competence of a court to hear and determine an issue between parties".'

The learned judge further said:[21]

> 'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. … In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings — including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits — must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim .'

[37] In *Mbatha v University of Zululand*,[22] Jafta J again had the opportunity to consider the issue of jurisdiction, and said:

> 'Ordinarily the question of jurisdiction is determined with reference to the allegations made in the plaintiff's or applicant's pleadings. … In assessing whether this procedural requirement has been met, the proper approach is to take the allegations in the particulars of claim (summons) or the founding affidavit at face value. Usually those allegations are taken to be true for

[20] 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC) at para 74.
[21] at para 75.
[22] (2014) 35 *ILJ* 349 (CC) at para 157.

purposes of determining jurisdiction. The question whether a court has jurisdiction does not depend on the substantive merits of the case. The allegations which, if established, would prove jurisdiction are sufficient.'

The learned judge then referred with approval to the dictum of Van der Westhuizen J in *Gcaba* referred to above, and held:[23]

'What emerges from *Gcaba* is that in determining whether this court, and for that matter any court, has jurisdiction, one must examine the pleadings with a view to finding "the legal basis of the claim under which the applicant has chosen to invoke the court's competence". The caution that applies to this enquiry, as was observed in *Gcaba*, is that one must consider whether the facts pleaded sustain the pleaded cause of action. Whether the facts also support another cause of action, not pleaded, is immaterial. It follows that the facts, as pleaded, play a crucial role in determining jurisdiction.'

[38] I shall apply the above dicta to the current proceedings, despite the fact that there are no pleadings as such in bargaining council arbitration proceedings. The pleaded facts, by the applicant, can however be gathered from the arbitration referral, the submissions to the arbitrator, as well as the case articulated in the applicant's founding affidavit in the review application. For the purposes of deciding jurisdiction, this pleaded case of the applicant must then be accepted, as it stands. This means that the case before the first respondent, as brought by the applicant, was that the second respondent breached clause 2.41 of section 2 of Part D of the main agreement and the applicant was consequently seeking to enforce it against the second respondent using the enforcement provisions of clause 19 of its constitution as read with s 33A of the LRA.

[39] There can be no doubt that the first respondent would have jurisdiction to decide such a case. The applicant is specifically tasked by its constitution and the LRA to enforce any of the provisions of any collective agreements concluded under its auspices. The main agreement is clearly such an agreement. Where the issue of compliance with a collective agreement remains unresolved, it proceeds to arbitration. There is no difference between enforcement arbitration proceedings and any other dispute-resolution arbitration proceedings conducted under the auspices of the applicant. This is apparent from clause 14.1, as read with clause 19.7, of the applicant's constitution itself. The first respondent was an arbitrator appointed in terms of this arbitration process, tasked by the applicant with deciding the issue of enforcement of the main agreement. This task resorted squarely within his jurisdiction as arbitrator under the arbitration dispute-resolution process convened in terms of the applicant's constitution and main agreement.

[40] What the first respondent did was to decide whether he had jurisdiction on the basis of the merits of the applicant's case. The first respondent in effect adopted the view that the enforcement proceedings and s 33A could not be applied in this case, and that the applicant had alternative remedies under ss 143 and 158(1)*(c)* of

[23] at paras 159 and 160.

the LRA. In simple terms, the first respondent declined jurisdiction because he held the view that the applicant's case was a bad case. This is clearly a decision on jurisdiction based on the outcome or the merits of the applicant's case. This is a flawed approach, and clearly wrong. The simple point is that the first respondent had the jurisdiction to entertain the enforcement case as articulated by the applicant and brought by the applicant.

[41] In *Makhanya v University of Zululand*,[24] Nugent JA specifically dealt with the issue of the difference between an issue of jurisdiction and a bad claim in law. The learned judge held:[25]

> 'Judicial power is the power both to uphold and to dismiss a claim. It is sometimes overlooked that the dismissal of a claim is as much an exercise of judicial power as is the upholding of a claim. A court that has no power to consider a claim has no power to do either (other than to dismiss the claim for want of jurisdiction).'

The learned judge further said:[26]

> '[52] I have pointed out that the term "jurisdiction", as it has been used in this case, and in the related cases that I have mentioned, describes the power of a court to consider and to either uphold or dismiss a claim. And I have also pointed out that it is sometimes overlooked that to dismiss a claim (other than for lack of jurisdiction) calls for the exercise of judicial power as much as it does to uphold the claim. …
>
> [54] … [T]he power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim.'

Nugent JA then concluded:[27]

> 'The first is that the claim that is before a court is a matter of fact. When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution then, as a fact that is the claim. That the claim might be a bad claim is beside the point.'

[42] The applicant's claim was, as said, for enforcement of the main agreement against the second respondent. It does not matter, for the purposes of deciding jurisdiction, whether this claim had substance in law. Neither does it matter whether the applicant had other options available to it. The first respondent always had the power to answer the question whether to enforce the main agreement, or not. The first respondent decided his jurisdiction on the basis of the outcome of the substance of the applicant's claim, even though it is on a question of

[24] 2010 (1) SA 62 (SCA); (2009) 30 *ILJ* 1539 (SCA). See also *SA Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA); (2010) 31 *ILJ* 529 (SCA) at para 8.

[25] at para 23.

[26] at paras 52 and 54.

[27] at para 71.

law, which in the light of the clear ratio in *Makhanya*, is inappropriate and thus wrong.

[43] Recently, and in *SA Municipal Workers Union on behalf of Jacobs v City of Cape Town & others*[28] the Labour Court had the opportunity specifically to deal with the enforcement provisions in terms of clause 19.1 of the SALGBC (the current applicant) constitution in an instance where the arbitrator declined jurisdiction. Steenkamp J specifically referred to s 33A of the LRA and held:[29]

> 'It seems clear from these provisions that an arbitrator acting under the auspices of the bargaining council does have the power to determine whether the city had complied with its obligations under clause 6 of the collective agreement. And if it hasn't, that the arbitrator has the power to issue a declaratory order that the city is in breach of the collective agreement.'

[44] Based on the above, I am satisfied that the first respondent was wrong in deciding that he did not have jurisdiction to entertain this matter. The first respondent always had the power to decide the issue of enforcement of the main agreement, which is the case the applicant asked the first respondent to consider. The fact that the first respondent believed the applicant's claim was a bad claim in law did not detract from his jurisdiction. The point is that if the applicant was right that the second respondent was indeed in breach of the clause 2.41 of the main agreement and was entitled to enforce it against the second respondent, it certainly cannot be said the first respondent would have no jurisdiction to do this. The first respondent's determination that he did not have jurisdiction thus falls to be reviewed and set aside, as he clearly had jurisdiction.

The enforcement provisions

[45] Since I have concluded that the first respondent's finding on jurisdiction is wrong and must be set aside, where to now? I must now decide whether to refer the matter back to the bargaining council for arbitration de novo, or myself decide the merits of the applicant's case. In terms of s 145(4)*(a)* of the LRA, the Labour Court, having set aside an award of an arbitrator, may determine the dispute in the manner it considers appropriate, which includes making its own finding, in place of the arbitrator, as to the merits of the matter.[30] In *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others*[31] the court said:

> 'Section 145(4)*(a)* gives the court the widest possible powers necessary to determine disputes. Such powers given to the court in this section are those powers given to the arbitrator. Put differently, when the court exercises its discretion in terms of s 145(4)*(a)* it sits as an arbitrator in the arbitration hearing.'

[28] (2015) 36 *ILJ* 484 (LC).
[29] at para 13.
[30] See *SA Police Service v Safety & Security Sectoral Bargaining Council & others* (2012) 33 *ILJ* 1933 (LC) at paras 138–139; *Qavile v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 *ILJ* 153 (LAC) at para 7.
[31] (2007) 28 *ILJ* 417 (LC) at para 14.

[46] This matter dates back to 2010. This in itself strongly motivates a situation of it being brought to an end now, once and for all.[32] Furthermore, the evidentiary material placed before the first respondent and now before me is unlikely to change in any material way in any subsequent arbitration proceedings. The merits of the matter were fully canvassed by the parties. The facts in this matter are either common cause or not disputed, fully ventilated in the affidavits, and the outcome in this matter in essence turns on a point of law. As the court said in *SA Bank of Athens Ltd v Cellier NO & others*:[33]

> 'The material presented before me is sufficient to enable me to determine the dispute in accordance with s 145(4)*(a)* of the Labour Relations Act, so as to bring this matter to finality.'

[47] I accordingly see no need to refer this matter back to the bargaining council for determination de novo, and shall decide the merits of the applicant's case of enforcement of the main agreement against the second respondent, for myself.

[48] As reflected in the summary of facts set out above, this matter in essence revolves around costs awards made in favour of the applicant as bargaining council, in various disputes before arbitrators appointed by the applicant to conduct dispute resolution between the second respondent as employer party on the one hand, and a variety of different employee parties on the other. The applicant itself, other than facilitating the dispute-resolution process under its constitution and main agreement, was never actually a party to these proceedings.

[49] It is clear that in terms of the main agreement of the applicant, there are instances where, even in the case of dispute resolution between employer and employee parties, costs would or may be payable to the applicant as bargaining council. The question is how the applicant is supposed to go about recovering these costs, where the party in the dispute resolution process liable to pay the same has failed to do so. In casu, the total amount so payable, as claimed by the applicant, was R116,021. The second respondent did not pay, and the applicant wants to enforce payment.

[50] In a nutshell, the case of the applicant is simply that by failing to pay the above amount, the second respondent is in breach of the provisions in the main agreement, and in particular clause 2.41 in section 2 of part D. The applicant then contends that because the second respondent is so in breach of the main agreement, the applicant is then entitled to enforce this part of the main agreement against the second respondent, using the enforcement provisions as contained in clause 19 of its constitution and s 33A of the LRA. It must now be decided whether this approach is competent in law.

[51] In order the decide this matter, it is necessary to interpret the

[32] See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* (2010) 31 *ILJ* 273 (CC) at para 46; *Strategic Liquor Services v Mvumbi NO & others* 2010 (2) SA 92 (CC); (2009) 30 *ILJ* 1526 (CC) at paras 12-13.

[33] (2009) 30 *ILJ* 197 (LC) at para 38.

constitution and main agreement of the applicant, as a whole, with particular consideration of the dispute-resolution functions of the applicant in terms thereof, as well as the dispute-resolution processes prescribed therein. With the constitution and main agreement being written agreements, the proper approach to be followed in interpreting the same is found in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[34] where the court said:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ''inevitable point of departure is the language of the provision itself'', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[52] In actually considering the main agreement of a bargaining council, the court in *Commercial Workers Union of SA v Tao Ying Metal Industries & others*[35] said:

'The proper approach to the construction of a legal instrument requires consideration of the document taken as a whole. Effect must be given to every clause in the instrument and, if two clauses appear to be contradictory, the proper approach is to reconcile them so as to do justice to the intention of the framers of the document. It is not necessary to resort to extrinsic evidence if the meaning of the document can be gathered from the contents of the document.'

[53] As a point of departure in considering the constitution and main agreement of the applicant, it is pointed out that the applicant as bargaining council is empowered by the LRA to conduct dispute resolution by way of conciliation and arbitration, in s 51(9).[36] In

[34] 2012 (4) SA 593 (SCA) at para 18. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.

[35] 2009 (2) SA 204 (CC); (2008) 29 *ILJ* 2461 (CC) at para 90.

[36] The section provides: 'A bargaining council may, by collective agreement — *(a)* establish procedures to resolve any dispute contemplated in this section; *(b)* provide for payment of a dispute resolution levy; and *(c)* provide for the payment of a fee in relation to any conciliation or arbitration proceedings in respect of matters for which the Commission may charge a fee in terms of section 115(2A)*(l)* … .'

National Bargaining Council for the Road Freight Industry & another v Carlbank Mining Contracts (Pty) Ltd & another[37] the court held:

'Section 51(9) provides that a bargaining council may, by collective agreement, establish procedures to resolve any dispute contemplated in the section.'

[54] The constitution of the applicant, in clause 3.1.4, provides that part of the powers and functions of the applicant shall be the conducting of dispute resolution as contemplated by s 51 of the LRA. In the constitution itself a dispute-resolution process is prescribed, in the form of conciliation and arbitration. The arbitration procedure is found in clause 14, and clause 14.1 provides that the procedure in this clause shall apply to all arbitrations conducted under the auspices of the applicant. Of importance in the current matter, is that the arbitrator appointed by the applicant in terms of this procedure is given the power to make any appropriate costs award, in two instances.[38] The first is where a party to the proceedings asks for it, and the second is where the arbitration proceedings have been 'unnecessarily' delayed or postponed. In the latter instance, it is not necessary for a party to request the costs order, and it is clearly left up to the arbitrator to decide. The crisp point is however that the award of costs is left up to the arbitrator to determine, in any instance.

[55] Also of importance is clause 14.9, which reads: 'Unless ordered otherwise by the arbitrator in terms of this clause 14, the council shall bear the costs of the arbitrator, the venue and any interpreter.' Clearly, this can only mean that where an arbitrator does not make a determination as to costs in terms of clause 14.2.4, the council (applicant) shall bear the costs of the arbitration. This surely cements the interpretation that all issues with regard to costs in the arbitration proceedings are left up to the arbitrator in that particular dispute.

[56] Of final relevance in casu, and where it comes to the constitution of the applicant, is that provision is made for dispute-resolution rules being made, and save where specifically otherwise provided, the provisions of the LRA with regard to dispute resolution will remain applicable.[39] There being no provision to the contrary, s 138(10) of the LRA thus remains applicable, which provides that: 'The commissioner may make an order for the payment of costs according to the requirements of law and fairness in accordance with rules made by the Commission.' Of course, reference to 'commissioner' must just be construed as being the bargaining council arbitrator.

[57] The dispute-resolution rules as contemplated by clause 4.18 of the constitution are then found in section 2 of part D of the main agreement. As stated above, these are very similar to the CCMA Rules and in fact mirror the same in most material respects. As such, the entire section 2 of part D must be read as a whole, and in the context of it seeking to establish the rules that would be applicable to the dispute-resolution functions of the applicant under clauses 12,

[37] (2012) 33 *ILJ* 1808 (LAC) at para 8.
[38] See clause 14.2.3 and 14.2.4.
[39] clause 14.18 and 14.19.

13 and 14 of its constitution. Whilst it is so that the CCMA Rules do not contain a provision similar to clause 2.41, it must be said that it being part of section 2 of part D of the main agreement, clause 2.41 must still be considered in the context of being part of the rules regulating dispute resolution between litigating parties under the auspices of the applicant, as a whole.

[58] The applicant has in effect argued that clause 2.41 must be considered on its own, as establishing a right and benefit in favour of the applicant itself under the main agreement. The applicant argued that as it is not a party to the dispute-resolution process, it would be entitled to institute separate proceedings in its own name to secure these benefits. Mr *Lawrence*, representing the applicant, illustrated the applicant's argument by way of an example, being that what if the arbitrator, in the case where there was a postponement contrary to rule 2.23, does not direct that the responsible party pay the fee of the arbitration? He argued that surely in terms of clause 2.41, the applicant is entitled to that fee and should be able to institute proceedings in its own name to recover it. For the reasons I will now set out, I however cannot agree with Mr *Lawrence's* contentions.

[59] From the outset, it must be considered that the provisions of clause 14 of the constitution and section 2 of part D of the main agreement relate to, and apply to, dispute-resolution proceedings conducted between two litigating parties under the auspices of the applicant. Where it comes to the issue of costs, it is the arbitrator in this dispute-resolution process that decides which of the litigating parties must pay costs, to what extent, and to whom. Provision is then made in this context, in terms of clause 2.41 of the main agreement, which must be read with clause 14.2.4 of the constitution, that the arbitrator has the power to order such a party to pay costs to the applicant in certain instances. But this power does not detract from the fact that it is still a costs order in the course of the conducting of arbitration dispute resolution between two litigating parties.

[60] The point is that even if the applicant is the beneficiary, so to speak, of clause 2.41 costs orders, these costs orders do not have independent existence outside the ambit of the arbitration dispute-resolution process between the litigating parties. It has to be, and can only be, the arbitrator in such proceedings that must decide if any of the litigating parties pays costs to the council. The applicant cannot institute separate proceedings, in its own name as a party itself, purely on the basis of clause 2.41, simply to claim costs it contends would be due to it in terms of this clause. If the arbitrator in the dispute-resolution process between the two litigating parties does not determine it, then no costs accrue to the applicant. This is the only interpretation that is consistent with the power afforded to the arbitrator in clause 14.2.4, especially if read with clause 14.9, which provides that if the arbitrator does not decide this issue, then the applicants remains liable for the costs of the arbitration proceedings.

[61] In my view, clause 2.41 is thus nothing else but the rule in the dispute-resolution process seeking to give effect to the power of the arbitrator in terms of clause 14.2.4 of the constitution. It

serves to provide guidance to the arbitrator as to when he or she should make a costs award as contemplated by this clause in the constitution. This is actually evident from the provisions of clause 2.41 itself, which still requires the arbitrator to rule on vexatious and frivolous postponements, decide on costs payable to the applicant for arbitrations longer than three days, and decide on costs of the application where an arbitration is postponed due to non-compliance with a rule.[40] Always, the decision on costs remains that of the arbitrator, and if he or she does not make such a decision, then the costs of the arbitration proceedings remain the responsibility of the applicant, in toto, and the applicant cannot after the fact seek to hold a litigating party liable for the same by instituting new enforcement proceedings against such party.

[62] It would be up to the applicant to properly train and instruct any arbitrator appointed by it to conduct dispute resolution, as to the powers the arbitrator has where it comes to costs, and in particular that in certain instances, costs may be payable to the applicant. Arbitrators should be informed by the applicant that they can make these kinds of costs awards, even if it not asked for by a party. The applicant should brief its arbitrators to make proper provision for this, in awards or rulings issued by such arbitrators. Of course, it would still be up to and in the discretion of the arbitrator to decide whether to make such an award, considering the requirements of law and fairness.

[63] So, in short, the applicant can only recover those costs awarded to it by arbitrators in the course of the dispute-resolution proceedings conducted by the two litigating parties, under the auspices of the applicant. These costs can be awarded in an arbitration award, or ruling, issued by the arbitrator, which then records that costs are payable to the applicant. If the arbitrator makes no such determination in the course of such proceedings, then the council remains liable for all costs of the arbitration proceedings, meaning the costs of the arbitrator, venue, interpreter and any related costs. The applicant cannot institute separate proceedings after the fact, in its own name as a litigating party, to claim costs in terms of clause 2.41.

[64] Accordingly, it follows that the applicant cannot institute enforcement proceedings as contemplated by clause 19 of its constitution, part F of its main agreement, or s 33A of the LRA, to claim costs not specifically awarded to it by an arbitrator conducting dispute resolution between the two litigating parties in arbitration proceedings conducted under the auspices of the applicant. Such proceedings for such purpose will be incompetent, and at odds with the clear terms of the applicant's constitution and main agreement.

[65] In this case, however, the applicant in most instances was indeed awarded costs in several rulings and/or awards made by various arbitrators in the course of the conduct of arbitration proceedings under the auspices of the applicant as bargaining council, conducted

[40] clause 2.41(2), (3) and (4).

between the second respondent as employer party and various employee parties. The next consideration then is what can the applicant do to execute these costs awarded, in the case of a litigating party failing to pay the same? Would enforcement proceedings as contemplated by clause 19 of the constitution and s 33A of the LRA then be competent? In my view, this latter question must be answered in the negative, for the reasons I will now set out.

[66] Firstly, the purpose of enforcement proceedings under clause 19 of the constitution and s 33A of the LRA is to determine liability in the first place. In other words, these enforcement proceedings establish the liability of the errant party, and direct it to comply. In the matter of costs awards made to the applicant under the circumstances discussed above, liability has already been determined and a party has already been directed to pay. There is no need to enforce that which has already been determined, and in effect enforced. The point can be illustrated by a simple example. Assume the applicant is awarded R3,000 in costs, by an arbitrator in the dispute-resolution process, because of a postponement sought by the employer party, and the employer is directed to pay these costs to the applicant. The employer party then does not pay. Assuming then the applicant institutes enforcement proceedings in terms of clause 19 of the constitution and s 33A of the LRA to enforce payment of the sum of R3,000. All the arbitrator in these enforcement proceedings can then do is to again order the employer to pay R3,000, which the first arbitrator in the first mentioned proceedings has already ordered the same employer to pay. What, with respect, is the point in this?

[67] Mr *Lawrence*, for the applicant, sought to answer this by contending that because the applicant was not a party to the dispute-resolution proceedings in which the costs award in favour of the applicant was made, the applicant was unable to use the provisions of s 143 or 158(1)*(c)* of the LRA to execute the award of costs in its favour, and thus needed to become a 'party' by way of the clause 19 and s 33A enforcement proceedings. However, this contention is not correct. Considering s 143, it provides for the enforcement of an arbitration award as if it was a court order. It does not provide that only a party to the arbitration award can enforce it, which in my view indicates that anyone entitled to a benefit (relief) under such arbitration award can utilise s 143 to enforce it.

[68] Further, the applicant's main agreement has its own provisions relating to the execution of arbitration awards, as contained in clause 2.40 in section 2 of part D of the main agreement. In terms of s 51(8) of the LRA, these main agreement execution provisions have preference over s 143 of the LRA, in any event. In terms of this clause 2.40, application can be made in terms of form 7.18A[41] to certify the award, and once the arbitration award is certified, it can be executed by a warrant of execution where it concerns the payment of a sum

[41] The prescribed form is published under the Labour Relations Regulations under GN R1442 in *Gazette* 25515 of 10 October 2003.

of money.[42] Critically, and in terms of clause 2.40(3), it is provided that an arbitration award susceptible to execution under this clause includes an award of costs. There is equally no prescription that only the actual litigating parties to the dispute-resolution process can utilise these provisions.

[69] In my view, it is clear that clause 2.40 is intended to be used by anyone who is entitled to a benefit in terms of an arbitration award. In the case of costs awarded by an arbitrator under the main agreement, this would include the applicant as well, even though it is not actually a party to the proceedings. Once the arbitrator orders a litigating party to pay costs, whether such costs are in favour of the other litigating party or the applicant as bargaining council or both, such award can be executed by either in terms of clause 2.40 if not satisfied by the party liable to pay. The applicant can thus execute costs awards made in its favour, in the course of dispute-resolution proceedings conducted under its auspices, by bringing application in terms of form 7.18A for certification of the award, in its own name. Then, and once certified, the applicant can proceed to have a warrant of execution issued against the errant litigating party for the amount in costs due to it under the award. This is the only interpretation that in my view makes common sense.

[70] Therefore, I cannot agree with Mr *Lawrence's* contention that the applicant cannot use s 143. Despite the fact that the applicant in my view can use this section, there is simply no need for the applicant to do so in any event, as the applicant can simply execute under clause 2.40 in section 2 of part D of its own main agreement. In *Motor Industries Bargaining Council v Osborne & others*[43] the court said:

> 'The effect of s 51(8) read with the subsections to which it refers is that the procedure in s 143 would be available to enforce an award of a bargaining council without the need to make the award an order of the Labour Court. Upon certification by the Director of the CCMA, an award is deemed to be an order of the Labour Court, for purposes of enforcing it. This is intended to be a more expeditious and less expensive means for a successful party to enforce an award. … However, s 51(9) permits a bargaining council to exclude the operation of the LRA in the circumstances contemplated in that subsection, by establishing its own procedures by means of a collective agreement.'

The applicant thus has proper recourse in casu, in terms of clause 2.40 in section 2 of part D of the main agreement. This clause allows for the execution of costs awards, and this includes execution by the applicant of costs awards in its favour. There is simply no reason to again pursue enforcement proceedings under s 33A of the LRA and clause 19 of the applicant's constitution.[44]

[71] The matter has one final nuance. This lies in the real purpose and context of s 33A of the LRA as read with clause 19 of the applicant's constitution. The real purpose of s 33A was to enable bargaining councils to enforce, on behalf of employees under their jurisdictions,

[42] See clause 2.40(2).
[43] (2003) 24 *ILJ* 1700 (LC) at 1703.
[44] Or in terms of part F of the main agreement itself.

the provisions of the bargaining council main agreements where it comes to employment conditions and benefits applicable to such employees under the collective agreements. This is apparent from s 33A(2), which reads:

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'For the purposes of this section, a collective agreement is deemed to include —
(a) any basic condition of employment which in terms of section 49(1) of the Basic Conditions of Employment Act constitutes a term of employment of any employee covered by the collective agreement; and
(b) the rules of any fund or scheme established by the bargaining council.'

B

Section 33A must also be read with the provisions of s 33, which empowers bargaining council inspectors in a manner similar to labour inspectors under the BCEA, considering that such bargaining council inspectors can issue compliance orders under s 33A(3).[45] Clause 19.2 of the applicant's constitution makes provision for the

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issue of such compliance orders. It is thus all about enforcement of employment conditions and benefits, applicable to employees.

[72] The scheme that emerges from ss 33 and 33A of the LRA, as read with clauses 19 of the applicant's constitution and part F of

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the applicant's main agreement, is clear. It is designed to enforce employment conditions and benefits of employees in the sector, as regulated by the applicant's collective agreements. This would also include levies and contributions payable to the council in terms of the main agreement itself relating to the funding and administration

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of the applicant as bargaining council. Where an errant employer does not comply with these employment conditions and benefits, and does not pay the prescribed levies and/or contributions, compliance is then enforced using clause 19 of the constitution as read with s 33A of the LRA, ultimately culminating in arbitration proceedings,

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where an arbitrator determines the errant employer's liability in the first instance, and if found to be liable, directing compliance and even dispensing punishment. Steenkamp J dealt with similar considerations in the clothing sector in *National Bargaining Council for the Clothing Manufacturing Industry v J 'n B Sportswear CC & another*[46]

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and held as follows, with specific reference to the main agreement of that bargaining council:

'[34] Firstly, the powers of designated agents derive from ss 33 and 33A of the LRA read with schedule 10 thereof, as well as clause 15.6.2 of the council's constitution. These provisions empower an agent, after conducting an investigation of a specific complaint, to "issue a

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compliance order" directing the employer to comply with the collective agreement to the extent of the deficit revealed by the investigation.

[35] These "orders" are not enforceable against the employer, and if contested, must be arbitrated through the usual dispute-resolution procedures of the council concerned, in this case through referral to a member of the

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[45] The section reads: 'A collective agreement in terms of this section may authorise a designated agent appointed in terms of section 33 to issue a compliance order requiring any person bound by

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that collective agreement to comply with the collective agreement within a specified period.'

[46] (2011) 32 *ILJ* 1950 (LC) at paras 34-35.

relevant panel of arbitrators for adjudication of the dispute in terms of clause 15.6.3.5 of the council's constitution.'

This is the proper context and purpose of the enforcement proceedings in terms of clause 19 of the applicant's constitution and s 33A of the LRA, and not what the applicant now intends to use these proceedings for in casu. Therefore, and for the applicant to seek to use enforcement proceedings under clause 19 of its constitution as read with s 33A of the LRA, to claim costs in terms of clause 2.41, is entirely inappropriate.

[73] The applicant's claim under clause 19 of its constitution, as read with s 33A of the LRA, is thus a bad claim. It was not appropriate for the applicant to have instituted enforcement proceedings under these provisions against the second respondent. The applicant should have proceeded to execute the various awards and rulings in its favour, with regard to costs awarded against the second respondent, in favour of the applicant, by way of clause 2.40 of the main agreement as read with s 143 of the LRA.

[74] The ultimate conclusion of the first respondent is thus correct. It was not an issue of jurisdiction, which I have already dealt with, but it was simply a bad claim. In finding that the applicant could not bring its claim under s 33A and that the applicant needed to use s 143 to execute the costs awards, the first respondent correctly decided the merits of the matter. The only mistake he made is classifying this determination as a jurisdictional finding. As the court said in *Tao Ying Metal Industries*:[47]

'Whatever the commissioner sought to convey by her statement, this does not detract from the key findings of the commissioner.'

[75] The first respondent's award must thus be sustained, not on the basis of a want of jurisdiction, but on the basis that the applicant's claim was a bad claim, and it was not competent in law in terms of clause 19 of its constitution as read with s 33A of the LRA. Consequently, the applicant's review application falls to be dismissed.

Concluding remarks

[76] Nothing in this judgment can be construed to detract from the fact that the second respondent may owe the applicant amounts awarded to it in costs, as appears from the record, in terms of the various awards and rulings referred to. The applicant should just have enforced this debt owed to it in terms of clause 2.40 in section 2 of part D of its main agreement.

[77] I can find no reason on the record to indicate why the second respondent did not pay these amounts actually awarded. This kind of behaviour by the second respondent is unacceptable, and indicates an attitude of non-compliance, which is to be discouraged. In my view, this is a relevant consideration where it comes to the issue of costs. In terms of s 162 of the LRA, I have a wide discretion where it comes to

[47] at para 86.

the issue of costs. Therefore, and even though the second respondent was ultimately successful in its opposition of the review, I intend to make no order as to costs.

Order

[78] In the premises, I make the following order:

1 The applicant's review application is dismissed.
2 There is no order as to costs.

Applicant's Attorneys: *Edward Nathan Sonnenbergs.*
Second Respondent's Attorneys: *Werksmans Attorneys.*

VERULAM SAWMILLS (PTY) LTD v ASSOCIATION OF MINEWORKERS & CONSTRUCTION UNION & OTHERS

LABOUR COURT (J1580/15)

7 August; 20 October 2015

Before MYBURGH AJ

Costs—Labour Court—Attorney and client costs—Strike context—Violent and unlawful conduct during protected strike—Picketing rules agreement in place—Union not taking all reasonable steps to prevent violent conduct and ensure compliance with picketing rules—Employer forced to bring urgent application and union conceding to substantive relief sought by company—Punitive costs order appropriate.

Costs—Labour Court—Strike context—Violent and unlawful conduct during protected strike—Picketing rules agreement in place—Union not taking all reasonable steps to prevent violent conduct and ensure compliance with picketing rules—Employer forced to bring urgent application and union conceding to substantive relief sought by company—Punitive costs order appropriate.

Picketing—Picketing rules—Breach—Violent and unlawful conduct during protected strike—Union's legal obligations and potential liability for breach arising from picketing rules agreement itself—Where employer tendering evidence to strike convenor of serious unlawful activity on part of strikers, union under obligation to investigate expeditiously—Union not taking all reasonable steps—Undermining purpose of rules.

Picketing—Picketing rules—Purpose—Attempt to ensure safety and security of persons and employer's workplace—If rules not obeyed orderly system of collective bargaining that LRA 1995 aspires to undermined, and ultimately economic activity and job security threatened.

Strike—Protected strike—Violent and unlawful conduct during strike—Strikers materially breaching picketing rules and union not taking all reasonable steps

to prevent violent conduct and ensure compliance with rules—Courts will not hesitate in such circumstances to grant punitive costs order against union.

On 28 July 2015, a protected strike over wages called by the first respondent trade union commenced at the premises of the applicant company, a sawmill operation situated in Mpumalanga. In the run up to the strike, the parties concluded a picketing rules agreement, incorporating the Code of Good Practice on Picketing, in terms of s 69 of the LRA 1995. On the evening of 4 August 2015, the company launched an urgent application for an order compelling the striking employees to comply with the picketing rules agreement and interdicting them from engaging in various unlawful acts. The union did not oppose the relief sought by the company, save for the punitive costs order, and sought to defend itself against such an order. The relief sought by the company was granted, with the issue of costs being reserved.

Considering the issue of costs, the Labour Court 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. After recognising that the legal basis upon which a union may be held accountable for the unlawful conduct of its members is not settled in all instances, the court said where a picketing rules agreement is in place, the union's legal obligations and potential liability for a breach thereof arise from the agreement itself. Not only are picketing rules there to attempt to ensure the safety and security of persons and the employer's workplace, but if they are not obeyed and violence ensues resulting in non-strikers also withholding their labour, the strikers gain an illegitimate advantage in the power play of industrial action, placing illegitimate pressure on employers to settle. As a result the orderly system of collective bargaining that the LRA aspires to is undermined, and ultimately, economic activity and job security are threatened.

The purpose of appointing a strike convenor and marshals and putting in place a system of communication between them and the company during the course of a strike is to attempt to ensure compliance with the picketing rules with a view to keeping a check on strike violence. Where a company tenders evidence to the strike convenor of serious unlawful activity on the part of the strikers, there can be little doubt that he or she is under an obligation to investigate it expeditiously. A failure to do so represents a failure on the part of the union to take all reasonable steps to ensure compliance with the picketing rules, and undermines the entire purpose of such rules.

After rejecting the trade union's version, the court was satisfied that that the strikers materially breached the picketing rules agreement and engaged in various acts of unlawful conduct; and that the trade union did not take all reasonable steps to prevent such conduct and ensure compliance with the picketing rules agreement. Consequently, the company was forced to bring the urgent application, only for the union to concede to the substantive relief sought by the company. Relying on *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 *ILJ* 998 (LC), the court concluded that courts 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, 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.

The court accordingly granted a punitive costs order against the union on the attorney and client scale.

Ruling by the Labour Court on an application for costs. The facts and further findings appear from the reasons for judgment.

Annotations

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Cases

Southern Africa

Food & Allied Workers Union v In2Food (Pty) Ltd (2014) 35 *ILJ* 2767 (LAC) (referred to)

B Food & Allied Workers Union v Ngcobo NO & another (2013) 34 *ILJ* 3061 (CC) (referred to)

Gois t/a Shakespeare's Pub v Van Zyl & others 2011 (1) SA 148 (LC); (2003) 24 *ILJ* 2302 (LC) (referred to)

In2Food (Pty) Ltd v Food & Allied Workers Union & others (2013) 34 *ILJ* 2589 (LC) (referred to)

C Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others (2012) 33 *ILJ* 998 (LC) (relied on)

United Kingdom

News Group Newspapers Ltd & others v SOGAT '82 & others [1986] IRLR 337 (referred to)

D

United States

Plumbers, Local 195 (McCormack-Young Corp) 233 NLRB 1087 (1977) (referred to)

Statutes

E Labour Relations Act 66 of 1995 s 69, Code of Good Practice on Picketing

Judgment reserved.

Myburgh AJ:

F *Introduction*

[1] On 7 August 2015, I granted an order, inter alia, compelling the second and further respondents (the strikers) to comply with the picketing rules agreement concluded between the parties, and interdicting and restraining the strikers from engaging in various unlawful acts in contravention of the agreement.

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[2] In circumstances where the aforesaid order was granted by consent of the parties, it was not necessary at the time to decide the issue of costs (a punitive order having been sought) on an urgent basis. Having heard argument and considered the papers, this is my decision on that issue.

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Background

[3] On 28 July 2015, a protected strike over wages called by the first respondent (AMCU) commenced at the premises of the applicant (the company), a sawmill operation situated in Mpumalanga.

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[4] On 23 July 2015, and in the run up to the strike, the parties concluded a picketing rules agreement in terms of s 69 of the LRA[1] — this

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[1] Labour Relations Act 66 of 1995.

with the assistance of the Commission for Conciliation, Mediation & Arbitration (CCMA). The agreement, which incorporated the Code of Good Practice on Picketing, is a typical one and its terms need not be narrated for present purposes save for one issue — it being that Mr Mazibuko (AMCU's regional organiser in Mpumalanga) was appointed as the strike control 'convenor' and was to be available to be contacted at all times.

[5] On the evening of 4 August 2015, the company launched an urgent application for the relief referred to above, and enrolled the matter for hearing on 7 August 2015. On that day, AMCU delivered an answering affidavit, in which it indicated that it did not oppose the relief sought by the company, save for the punitive costs order, and sought to defend itself against such an order. It was in these circumstances that the order (by consent) referred to above was granted, with the issue of costs being reserved.

The parties' cases

The company's case

[6] According to the company, immediately upon the strike commencing on 28 July 2015, the strikers failed to comply with the picketing rules. On that day and those that followed in the run up to the urgent application, the strikers contravened the picketing rules by: carrying weapons; picketing outside the designated area; moving into the main road; stopping vehicles and removing commuters from public transport; prohibiting employees from entering the workplace; blockading the entrance to the company's premises; and damaging a vehicle belonging to the company.

[7] Things got so out of control that, on 3 August 2015, the company was forced to shut down its operations completely. The next day, 4 August 2015, the strikers threatened the managing director by stating that he would not leave the premises that day, and chanting 'shoot Edward'. The SAPS riot squad was called in, but it was apparently disinclined to intervene in the absence of a court order. It was in these circumstances that the urgent application was launched.

[8] For present purposes, the attempts made by the company to engage with AMCU to resolve the issue, and its response, warrant consideration (the company's version follows):

(a) On the morning of Tuesday, 28 July 2015 (at 08h01), the company addressed a letter to Mr Mazibuko requesting his urgent intervention. The letter narrates a series of serious breaches of the picketing rules and unlawful conduct on the part of the strikers, including strikers carrying weapons (including machetes), moving to the main road, stopping vehicles and removing commuters from public transport, and preventing entrance to the workplace. The letter also records that the company would hold AMCU liable for the costs associated with the enforcement of the picketing rules.

(b) During the afternoon of 28 July 2015, the company addressed a

further letter of similar content to Mr Mazibuko, bringing to his attention that the strikers were persisting in their breach of the picketing rules. Reference was made in this letter to the severe risks associated with strikers gathering unlawfully on the road used by heavy duty vehicles.

(c) On the morning of Wednesday, 29 July 2015, the company addressed a follow up letter to Mr Mazibuko, again narrating breaches of the picketing rules by the strikers and requesting his urgent intervention. Mention was made of strikers again not being in the demarcated area, wielding dangerous weapons, and prohibiting non-strikers from entering the workplace. The letter ends by recording that the company would be forced to approach this court for an interdict, unless the situation was brought under control.

(d) During the afternoon of 29 July 2015, the company sent another letter of similar content to Mr Mazibuko. It was recorded in this letter that the strikers were 'chanting slogans referring to shooting the employer'. Again, a threat of a Labour Court interdict was made.

(e) Also during the afternoon of 29 July 2015 (at 14h57) (and apparently before receipt of the company's second letter of that day), Mr Mazibuko responded to the company's letters referred to above. The body of Mr Mazibuko's letter reads:

> 'This union abide and confine itself to the picketing rules signed by both parties and as a result of this, our regional secretary (John Sibiya) did address the workers on 28 July 2015, that they need not to block the main road and that they should be within the designated areas that parties have agreed upon.
>
> To date, we have not received any complaints from the SAPS or heard of any forms of intimidation or damage of property by the striking members.'

(f) On Thursday, 30 July 2015, and in response to this, the company addressed a letter to Mr Mazibuko recording that '[t]he records of your members continuing to breach the picketing rules are available for your perusal'. No response was ever received to this invitation.

(g) On Tuesday, 4 August 2015, the company's attorneys of record addressed a lengthy letter to Mr Mazibuko. The letter records the terms of the picketing rules (including Mr Mazibuko's obligation to intervene on an urgent basis) and the history of what had transpired to date. It records that further to AMCU's letter of 29 July 2015, strikers continued to contravene the picketing rules, with mention being made of the fact that: all staff stayed away from work on 3 August 2015 due to fear of intimidation; the plant was now totally shut down as a result of the conduct of the strikers; strikers were carrying weapons and singing intimidating slogans; the strikers refused to remain in the demarcated area; and the safety of the workplace, employees and customers had been placed at severe risk by the strikers.

(h) The letter goes on to put AMCU to terms: should the strikers persist with unlawful conduct in breach of the picketing rules that day, the company would approach this court for urgent relief, and seek a punitive costs order against AMCU. This letter appears to have been sent to AMCU (by email) at 07h43.

(i) No response was received to this letter during the course of 4 August 2015, with the strikers persisting in their unlawful behaviour — it being on this day that the managing director was threatened (this after the aforesaid letter was sent). In the result, the company launched its urgent application.

AMCU's case

[9] The key allegations made by AMCU in its answering affidavit (deposed to by Mr Mazibuko) are as follows:

(a) In effect, Mr Mazibuko's letter of 29 July 2015 adequately dealt with the matter up to that point in time.

(b) Between 30 July and 4 August 2015, AMCU received no further complaints, with it being the deponent's belief that picketing had been conducted in accordance with the picketing rules.

(c) On the morning of 4 August 2015, the company had failed to send busses to collect those of the strikers residing in the nearby townships and convey them to the designated area, as had been done in the past. This necessitated them having to walk to work, which caused them frustration and annoyance (which according to AMCU caused the company to send its letter to AMCU at 07h43). In response to the agitation of the strikers, Mr Ntlamane (the chairperson of the AMCU branch committee and one of the marshals appointed in terms of the picketing rules agreement) addressed them, and prevailed upon them to comply with the picketing rules.

(d) Mr Ntlamane did so again on the afternoon of 4 August 2015, when strikers became disgruntled by the fact that electricity and water at the hostels had been turned off, which they imputed to the company. After addressing the strikers, Mr Ntlamane engaged with management, with AMCU having been informed later that afternoon that the electricity and water supply had been restored.

(e) The company was aware of the concerns of the strikers and the reasons for 'their particular frustration and non-violent demonstration on 4 August 2015'. (What exactly this was meant to convey is unclear.)

(f) With reference to the contents of the company's letter of 4 August 2015, AMCU baldly denied that: any property was damaged; the company ceased operations because of the conduct of the strikers; weapons were carried by the strikers; any threatening or intimidatory chants were made to anyone; and that any vehicles, security guards, clients or visitors were in any way threatened or harassed.

(g) As far as AMCU was concerned, it had at all times 'maintained

positive engagement with the [company] and … responded promptly to each complaint or concern expressed by the [company]'. In all the circumstances, there was (according to AMCU) no basis for the award of a punitive costs order.

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*.'[2] (Emphasis added.)

[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.'[3]

(b) On appeal to the LAC in *Food & Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 *ILJ* 2767 (LAC),[4] Sutherland AJA (as he then was) held:

'[18] 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, …[5]

[2] at para 14.

[3] at 2591H-I.

[4] In this judgment, the LAC reversed this court's decision that the union was in contempt of court. It did so essentially on the basis that while a union may be vicariously liable for the unlawful acts of its members, it cannot be vicariously liable for contempt of court — the union itself must be in contempt, with this not having been established on the facts. But this, in my view, does not detract from the important statements (quoted above) that the LAC went on to make about union accountability generally.

[5] The LAC referred here to *Food & Allied Workers Union v Ngcobo NO & another* (2013) 34 *ILJ* 3061 (CC), where FAWU was held liable to its own members for failure to prosecute the members' interests properly in litigation.

[19] The sentiments expressed by the court a quo which are cited above [see above] have been rightly described by Alan Rycroft as a "significant moment of judicial resolve"… .[6] Indeed, the sentiments deserve endorsement, and are adopted by this court.'[7]

(c) In *Xstrata SA (Pty) Ltd v Association of Mineworkers & Construction Union & 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.'[8]

[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.

[13] This approach of union responsibility accords with the approach adopted in other jurisdictions. In the USA, for example, the National Labor Relations Board has held as follows:

'Where a union authorizes a picket line, it is required to retain control over the picketing. If a union is unwilling or unable to take the necessary steps to control its pickets, it must bear the responsibility for their misconduct. Similarly, if pickets engage in misconduct in the presence of a union agent, and that agent fails to disavow that conduct and take corrective measures, the union may be held responsible.'[9]

[14] Reverting to the position locally, while the precise legal basis upon which a union may be held accountable for the unlawful conduct of its members is not settled in all instances, where a picketing rules

[6] A Rycroft 'Being Held in Contempt for Non-compliance with a Court Interdict: *In2Food (Pty) Ltd v FAWU* (2013) 34 *ILJ* 2589 (LC)' (2013) 34 *ILJ* 2499.

[7] at paras 18-19.

[8] at para 35. The court went on to find (in paras 36-40) that there exist four legal grounds upon which a union is obliged to police its members during the course of a strike/picket. Firstly, the obligation arises from s 17 of the Constitution, which guarantees everyone the right, peacefully and unarmed, to assemble, demonstrate and present petitions. As far as the court was concerned, while the right accrues to union members, the responsibility to ensure that they comply with the limitations implicitly falls on their union. Secondly, the obligation arises from the relationship of guardianship between the union and its members. Thirdly, the obligation arises from the collective bargaining relationship between unions and employers. Fourthly, the obligation arose on the facts from the process of engagement between the parties, including the fact that AMCU had called the strike, various meetings had been held between the parties, and the fact that AMCU had not distanced itself from its members and continued to represent them.

[9] *Plumbers, Local 195 (McCormack-Young Corp)* 233 NLRB 1087 (1977), quoted in Gorman et al *Labour Law Analysis and Advocacy* (Juris Publishing 2013) at 353 para 10.6. See for a comparable UK case, the judgment of the Employment Appeal Tribunal in *News Group Newspapers Ltd & others v SOGAT '82 & others* [1986] IRLR 337, commented on by Deakin et al *Labour Law* (Hart Publishing 2012) at 1059 para 11.22.

agreement is in place, the union's legal obligations and potential liability for a breach thereof arise from the agreement itself. Notwithstanding the express terms of a picketing rules agreement, it seems to me that it is implicit in any such agreement that a union is obliged 'to take all reasonable steps' (to borrow from the words of Van Niekerk J in *Tsogo Sun*)[10] to ensure compliance by its members with the terms of the agreement.

[15] To my mind, this is a fundamentally important obligation. Not only are picketing rules there to attempt to ensure the safety and security of persons and the employer's workplace, but if they are not obeyed and violence ensues resulting in non-strikers also withholding their labour, the strikers gain an illegitimate advantage in the power play of industrial action, placing illegitimate pressure on employers to settle. Typically, one of two things then happens — either the employer gives in to the pressure and settles at a rate above that reflecting the forces of demand and supply (which equates to a form of economic duress)or the employer digs in its heels and refuses to negotiate or settle while the violence is ongoing (which inevitably causes strikes to last longer than they should). Either way, the orderly system of collective bargaining that the LRA aspires to is undermined — and ultimately, economic activity and job security are threatened.

Evaluation and findings

[16] As set out above, AMCU's case is that nothing wrong occurred up until 4 August 2015, save for the strikers having left the demarcated area and blocked the road (which a marshal addressed them on), and that Mr Mazibuko's letter of 29 July 2015 constitutes a proper response by AMCU to the company's complaints up to that point in time. I cannot accept this for the following reasons:

(a) Firstly, it is difficult (if not impossible) to reconcile AMCU's denial of wrongdoing (beyond that admitted) on the part of the strikers with its consent to a wide-ranging court order against them, which was granted on 7 August 2015. Allied to this, it is difficult to accept a bald denial by AMCU in this regard over the contemporaneous complaints recorded by the company in a series of letters on 28, 29 and 30 July 2015.

(b) Secondly, Mr Mazibuko's letter of 29 July 2015 was plainly inadequate for these reasons: (i) it took him almost two working days to respond to the company; (ii) the fact that AMCU had allegedly not received 'any complaints from the SAPS' or 'heard of' any intimidation or damage to property by the strikers, hardly served as an adequate answer to the company's complaints to the contrary; and (iii) the inadequacy in the response was further exposed by the fact that Mr Mazibuko did not take up the company's offer on 30 July 2015 to examine the evidence

[10] See para 10 above.

that was available in support of the company's complaints (see further below).

[17] Furthermore, AMCU's case that no further complaints were lodged with it between 29 July and 4 August 2015 is, to my mind, self-serving. This because, as mentioned above, on 30 July 2015, the company tendered the evidence it had to substantiate its complaints, but AMCU did not take up the offer to examine it. On the face of it, laying complaints with AMCU was not getting the company anywhere.

[18] The very purpose of appointing a strike convenor and marshals and putting in place a system of communication between them and the company during the course of a strike (as is now commonplace in picketing rules agreements) is to attempt to ensure compliance with the picketing rules, with a view to keeping a check on strike violence. Where, in this context, a company tenders evidence to the convenor of serious unlawful activity on the part of the strikers, there can be little doubt that he or she is under an obligation to investigate it expeditiously. A failure to do so represents a failure on the part of the union to take all reasonable steps to ensure compliance with the picketing rules, and undermines the entire purpose of such (agreed) rules.

[19] Turning to AMCU's case regarding the events of Tuesday, 4 August 2015, it is difficult to understand. While AMCU pleaded, in effect, that the strikers were provoked on 4 August 2015 by the absence of transport and the disconnection of water and electricity in the hostels, it never really explained what conduct the strikers engaged in as a result thereof (and the link to the terms of the consent order granted on 7 August 2015). While denying the statement made in the company's letter sent at 07h43 that morning that intimidatory slogans were chanted, AMCU does not deny that — after the letter was sent — the strikers had stated that the managing director would not leave the premises that day, and chanted 'shoot Edward'.[11] There is nothing on the papers to suggest that the strikers were censured by the marshals in this regard. In addition to this, Mr Mazibuko's failure to respond to the company's letter of 4 August 2015 (sent at 07h43) throughout the course of that day is, again, significant.

[20] Regarding AMCU's allegation overall that it had at all times 'maintained positive engagement with the [company] and … responded promptly to each complaint or concern expressed by the

[11] In para 6 of the company's letter of 4 August 2015, the company sets out a list of five unlawful acts/contraventions of the picketing rules that had occurred after 29 July 2015. Paragraph 6.2 recorded, in part, that 'strikers are … singing intimidating slogans'. In para 12 of AMCU's answering affidavit, AMCU deals pertinently with the contents of para 6 of the aforesaid letter, and denies the contents. However, in para 23 of the company's founding affidavit, it is alleged that, on 4 August 2015 and after the aforesaid letter was sent, the strikers threatened the managing director 'by saying that he would not leave the premises today' and 'chanting "shoot Edward"'. (The managing director confirms this in a confirmatory affidavit.) AMCU did not reply on a paragraph by paragraph basis to the founding affidavit, and did not deny this allegation in its answering affidavit.

[company]', it seems to me implicit in this that AMCU recognised that it was under a legal obligation to do so. With this there can be no quarrel. But where I disagree is that AMCU acquitted itself of this obligation. It fundamentally failed to do so in not reacting to the company's tender of evidence on 30 July 2015.

[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*,[12] 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.[13] 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.

Order

[23] In the premises, the following order is made: The first respondent shall pay the costs of the urgent application on the attorney and client scale.

Applicant's Attorneys: *Erasmus-Scheepers Attorneys.*
Respondents' Attorneys: *Larry Dave Inc Attorneys.*

[12] See para 10 above.
[13] *Gois t/a Shakespeare's Pub v Van Zyl & others* (2003) 24 *ILJ* 2302 (LC) at paras 43 and 54.

ZUMA & ANOTHER v PUBLIC HEALTH & SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL & OTHERS

A

LABOUR COURT (D914/12)

13 May; 8 September 2015

Before WHITCHER J

B

Bargaining council—Arbitration proceedings—Conduct of proceedings—Section 138(1) of LRA 1995—Agreement by legally represented parties to proceed by way of written submissions only—Section 138(1) broad enough to accommodate such agreement—Arbitrator's failure to call for oral evidence not reviewable defect.

C

Bargaining council—Arbitration proceedings—Review of proceedings, decisions and awards of arbitrators—Arbitrator failing to award reinstatement for substantively unfair dismissal merely because of unexplained lengthy delay in matter—No evidence of impracticability of reinstatement—Award reviewed and set aside.

D

Reinstatement—Unfair dismissal (LRA 1995)—Lapse of time after dismissal—Lengthy period of delay no bar to reinstatement but may affect its practicability.

Reinstatement—Unfair dismissal (LRA 1995)—Retrospectivity—Period—Court has discretion which must be fairly exercised.

E

The applicants were employed by the Department of Health at the Mahatma Gandhi Memorial Hospital. They were dismissed on various counts of fraud and corruption relating to procurement irregularities after having changed their plea from not guilty to guilty during the disciplinary hearing. They did so, they said, not because they had committed misconduct, but because their union representative had expected a more lenient sanction if they pleaded guilty. They referred an unfair dismissal dispute to arbitration at the first respondent bargaining council. At the arbitration the employees submitted that they were not guilty of all charges. The parties, who were legally represented, presented a list of facts that were common cause and agreed that the arbitration would take place by way of an exchange of written submissions rather than by the leading of oral evidence.

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In its submissions the employer made certain averments regarding the award by the employees of bids and tenders contrary to its procurement rules and, answering a claim made by the employees at their internal appeal that they had been operating under a specified delegation of authority, denied that, as senior employees, they could have been under this impression. In response, the employees admitted that the bids had taken place but denied all of the averments of rule-breaking. They said that the employer had placed no facts before the arbitration, which was a de novo hearing, to support any of the charges. It was therefore not necessary for them to rely on the alleged delegation. Alternatively, however, if they were required to answer the charges, they did rely on the delegation which, they said, permitted the deviations of which they were accused. Further alternatively, if they had acted outside of the delegation on which they relied, all that demonstrated was a failure to follow procedure, and not fraud or corruption. The employer replied, but still

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without putting facts before the arbitrator, and in supplementary submissions the employees repeated that the employer had not discharged the onus of proving the alleged misconduct.

A The arbitrator found that the employees had in fact been operating under a lawful delegation. However, this did not excuse their conduct though it mitigated the sanction. Their dismissal was substantively unfair because the sanction was too harsh. He awarded them two months' salary by way of compensation. He did not reinstate them, he said, because of the considerable delay in finalising the matter, which had not been explained by the parties.

B The employees applied to the Labour Court for the review of the award while the employer applied for a cross-review after having been granted condonation. It argued that the arbitrator had committed a gross irregularity in dealing with the matter by way of written submissions only. The employees responded that, had the employer, which was legally represented, believed that oral evidence was required, it could have raised that issue at the time. It failed to do so.

C The court found merit in the argument that the format followed did not readily allow for the determination of disputes of fact but found that s 138(1) of the LRA 1995 was wide enough to accommodate the procedure adopted. The employer could, on its version of the agreement between the parties, have applied to lead oral evidence at any stage, yet it did not, even when its failure

D to place inculpatory facts before the arbitrator was pertinently drawn to its attention in the employees' answering submissions. In the circumstances of this case, the arbitrator's failure to set the matter down for oral evidence did not constitute a gross irregularity. Unless there is a patent misunderstanding of a legal principle or process, it is not advisable for an arbitrator to interfere with the hearing strategy adopted by legally represented parties. The court

E also dismissed the employer's complaint that the arbitrator had misconstrued the issue concerning the disputed delegation, pointing out that on neither version were the employees guilty of fraud and corruption. The cross-review therefore failed.

F The court then turned to the employees' complaint, which was that the arbitrator's failure to reinstate them with backpay was a decision that no reasonable decision maker could have reached. They argued that the time delay referred to by the arbitrator was not a bar to the primary remedy of reinstatement. The court agreed, stating that, while a long delay might affect the practicability of reinstatement, it was not in itself a bar to it. The employees were not necessarily

G seeking reinstatement to their own positions, but to reasonably suitable work on the same or similar terms. There was no evidence of the impracticability of reinstatement. In the circumstances, the arbitrator's decision to award compensation was one that no reasonable decision maker could have made.

H Exercising its discretion in respect of the retrospectivity of reinstatement, and taking into account considerations of fairness to both employee and employer, the court held that the employees should be reinstated but that their backpay would be limited to 12 months' remuneration.

Simultaneous applications to the Labour Court to review and cross-review an arbitration award handed down by a bargaining council. The facts and further findings appear from the reasons for judgment.

I **Annotations**

Cases

Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others 2009 (1) SA 390 (CC); (2008) 29 *ILJ* 2507 (CC) (applied)

J Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 *ILJ* 943 (LAC) (applied)

Mediterranean Textile Mills (Pty) Ltd v SA Clothing & Textile Workers Union & others (2012) 33 *ILJ* 160 (LAC) (considered)

National Union of Metalworkers of SA & others v Voltex (Pty) Ltd t/a Electric Centre & others (2000) 21 *ILJ* 1173 (LC) (referred to)

Oakfields Thoroughbred & Leisure Industries Ltd v McGahey & others (2001) 22 *ILJ* 2026 (LC) (considered)

Republican Press (Pty) Ltd v Chemical Energy Printing Paper Wood & Allied Workers Union & others 2008 (1) SA 404 (SCA); (2007) 28 *ILJ* 2503 (SCA) (considered)

Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC) (referred to)

Statutes

Labour Relations Act 66 of 1995 s 138(1), s 145, s 193(1)*(a)*-*(b)*, s 193(2)

Adv D S Rorick for the applicants.

Adv N S V Mfeka for the third and fourth respondents.

Judgment reserved.

WHITCHER J:

Introduction

[1] This is an opposed application to review and cross-review an arbitration award made by the second respondent (the arbitrator) on 10 August 2012 under case no PSHS557-09/10.

[2] The first applicant was employed as a senior supply management officer, stationed at Mahatma Gandhi Memorial Hospital. The second applicant was similarly employed as the finance and systems manager. In May 2009, the applicants were charged with 52 counts of fraud and corruption arising from the processing of tenders at the hospital. The majority of these charges related to procurement irregularities that took place between 10 and 14 September 2007.

[3] On the first day of their disciplinary hearing, the applicants pleaded not guilty but changed their plea to guilty on all counts at a subsequent sitting. In October 2009, the internal chairperson issued the sanction of dismissal. Their internal appeal was unsuccessful. They then referred an unfair dismissal case to the Public Health & Social Development Sectoral Bargaining Council (PHSDSBC). The first date on which the arbitration sat was only on 4 June 2012 and the award was issued on 10 August 2012.

[4] The dismissal of the applicants was found to be substantively unfair but the remedy ordered was two months' compensation for each applicant. The applicants timeously instituted review proceedings, limited to an attack on the remedy and seeking retrospective reinstatement, with costs. The third and fourth respondents (the respondent), very belatedly, instituted a cross-review challenging the manner in which proceedings were conducted and the assessment of evidence and seeking that the award be said aside, and the matter be remitted to the PHSDSBC for consideration by another commissioner.

The arbitration hearing

[5] The parties concluded a pre-arbitration minute, which included a list of common cause facts. The legal representatives of the parties also agreed that the format proceedings would take would be an exchange of written submissions. The respondent provided a founding submission, the applicants answered, the respondent replied and the applicants provided a further submission.

[6] In the arbitration, the applicants submitted that they were not guilty on all charges.

[7] In its founding submission, the respondent referred to the charges the applicants faced in the internal hearing. It averred that the applicants were broadly responsible for processing the bids that formed the subject of the charges in the absence of bid specifications, awarding certain tenders to a more expensive bidder and processing the decisions of bid committees that were not quorate. This all resulted in a loss to the respondent. They put this number at over R300,000.

[8] The respondent also pointed out the inconsistency of the applicants' guilty plea in the internal hearing and their guilty plea at the PHSDSBC as a factor discrediting their present version.

[9] In making its initial submissions, the respondent relied to a large extent on deconstructing the applicants' submissions at the internal appeal stage. Chief among these submissions was that the applicants were operating under delegation 701 of the supply chain management policy. They claimed that this delegation was recorded in a letter of 6 September 2007 from the hospital's former chief executive officer, Dr W L Ndlovu. Their argument on appeal was that such a delegation provided for deviations from normal supply chain processes. This was necessary as the hospital wanted to spruce itself up before a visit by eminent persons. At the PHSDSBC, the respondent sought to discredit these submissions. It argued that clause 7 of a 701 delegation could only be invoked if urgent service delivery was required, or there was a natural disaster or life-threatening circumstances. A 701 delegation could not be used to rush work to impress visitors. The applicants were senior employees who admitted being trained in supply chain management and thus could not have been under any mistaken impression to the contrary.

[10] The approach the applicants pursued in answer was to concede that the bids at issue occurred but not any of the inculpatory facts the respondent alleged attached to these bids, such as an absence of bid specifications, violation of procurement policy, irregular constitution of bid committees and financial loss.

[11] The applicants' first line of defence was thus to point out that they had no case to answer on corruption and fraud. Other than referring to the charges the applicants faced in the internal hearing and the documents submitted in their appeal, the respondent placed no evidence, oral or documentary, before the PHSDSBC. This was a significant failure, the applicants argued, as the PHSDSBC's job was to consider the case de novo. Since the respondent, who bore the onus, failed to establish any of its charges, the applicants did not need

to rely on the 701 delegation, which they raised during their appeal as a defence.

[12] The applicants' second line of defence was to say that, if answers to the charges were required, the applicants' defence was then that they were operating under delegation 701 of the supply chain management policy. This delegation permitted the deviations of which they were accused. Separately, the applicants also disputed the factual basis upon which the respondent claimed that certain bid committees made decisions when they were not quorate.

[13] A third line of defence was that, if it were found that the applicants acted outside the boundaries of a proper 701 delegation, all that this established was their failure to follow procedures and not the charges for which they were actually dismissed, fraud and corruption.

[14] On the change of the plea from guilty to not guilty, the applicants stated that they were pressurised by their union representative to plead guilty when this was not the true position. Had the internal hearing chairperson probed their guilty plea, it would have been apparent that they were not admitting to fraud or corruption.

[15] In support of their contention that they were pressurised into pleading guilty, the applicants submitted affidavits deposed to in the early morning of the day on which they were to change their plea in the internal hearing to guilty. The content of the affidavits does not establish duress on the part of the union representative. In essence, the applicants recorded that their union representative expected a lesser sanction to flow from a plea of guilty, and they were persuaded by and relied upon this advice, although they had misgivings that a show of remorse might not be sufficient to escape dismissal as a sanction.

[16] In reply, the respondent repeated that a 701 delegation could not conceivably provide cover for supply chain deviations merely to impress important visitors. The applicants ought to have known this. In any event the respondent did not admit the authenticity of the letter relied upon by the applicants in which the existence of a 701 delegation was recorded.

[17] The respondent also disputed the applicants' explanation about a date on a document. I will not spend time describing this issue because, even assuming the applicants gave the wrong date, the inference that this constituted *fraud or corruption* is not securely drawn on the facts of this case.

[18] In their supplementary submissions the applicants again took refuge in the point that no evidence, even in the form of written statements, had been placed before the arbitrator to support the allegation that the bids were wrongfully handled by the applicants. The respondent had thus failed to discharge the onus.

[19] In the event that it was shown that the applicants deviated from set procedures (as opposed to merely being accused of this), the applicants repeated their defence that they were operating under a 701 delegation. In the further event that the commissioner found that the 701 delegation ought not to have been resorted to, the worst

that could be inferred was the applicants' negligent failure to follow procedures. In that case, if negligence be the fault, then fraud be the outcast.

A [20] The applicants sought retrospective reinstatement at the arbitration.

The arbitration award

[21] The commissioner did not find in the applicants' favour on the basis that they had no case to answer. The commissioner found in the
B applicants' favour utilising their secondary defence that they were operating under a lawful 701 delegation. However, this was not to excuse their conduct but rather to mitigate the sanction. The commissioner found that Dr Ndlovu's 'instruction' contained in the letter of 6 September 2007 was likely cascaded to them. He took into
C consideration the pressure the applicants would have been under to 'impress a delegation' of important visitors. In these circumstances, with a superior's sword hanging over their heads, he noted that shortfalls in their compliance with policy were to be expected. The commissioner described the applicants as being caught in the
D crossfire of the wishes of their superiors.

[22] Reading paras 27–33 of his award as a whole, it is implicit that the charges of fraud and corruption were, so to speak, off the table. Nevertheless, the formal basis for his finding that the dismissal was substantively unfair was that the sanction of dismissal was too harsh.

E [23] The remedy the commissioner provided was two months' salary. He departed from the default relief of retrospective reinstatement because of 'the delay in finalisation of the matter' and the absence of an explanation for this delay by the parties.

F *Condonation for cross-review*

[24] On 3 June 2014, the matter was set down for hearing before Gush J. He was, quite correctly, of the view that the application for the late filing of the respondent's cross-review application did not contain a proper explanation for the delay of approximately 12 months. As
G such there was no proper condonation application before him and the respondent's submissions regarding the review of the arbitration award would not be considered.

[25] The respondent sought the indulgence of the court that the matter be adjourned with the respondent given leave to file supplementary
H affidavits explaining the delay in instituting a cross-review, the respondent tendering wasted costs. Leave was granted.

[26] The law on condonation is trite. It may be granted on good cause in terms of Labour Court rule 12(3). The requirement of good cause involves an assessment of the extent of the delay, the explanation
I for it and the prospects of success in the main application. A late application for the review of an award may be granted if the reason for non-compliance is compelling, the grounds of attack on the award are cogent and the defect would result in the miscarriage of justice. A good explanation might compensate for a long delay.

J [27] Turning to the facts of this case, the delay of one year was

obviously extensive. However, the explanation as contained in the supplementary affidavit, although attesting to grave inefficiency in record management in the respondent's legal department, was convincing.

[28] The prospects of success are fair to good in the sense that the format adopted by the commissioner for the conduct of the arbitration was unusual. The respondent's attack on this deserves ventilation.

[29] The prejudice to the applicants is also limited in the sense that the late application is a cross-review. The applicants' own case was already in the process of being decided and any delay in adjudication will be caused mainly by the extra work needed to adjudicate the respondent's submissions. I also take note of Gush J's ruling on wasted costs attendant upon the last adjournment. The delays caused by the condonation application however may be relevant to the final relief sought by the applicants.

[30] Considering all of the above, condonation for the late filing of the cross-review is granted.

Reviews: The law

[31] The Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*[1] provided a useful summation of the law which is relevant to this case. In a review application under s 145 of the Labour Relations Act 66 of 1995 (LRA), the court must ask the following questions: (1) In terms of his or her duty to deal with the dispute with the minimum of legal formalities, did the process used by the commissioner give the parties a full opportunity to have their say? (2) Did the commissioner identify the dispute he or she was required to arbitrate? (3) Did the commissioner understand the nature of the dispute he or she was required to arbitrate? (4) Did the commissioner deal with the substantial merits of the dispute? (5) Is the commissioner's decision one that another decision maker could reasonably have arrived at based on the totality of the evidence?

The grounds of review

[32] It is convenient to deal with the grounds of cross-review first.

The format of arbitration proceedings

[33] The first ground is that the commissioner committed a gross irregularity in dealing with the matter purely on written argument.

[34] The respondent submits that disposing of an application on the basis of written representations per se does not constitute arbitration proceedings; and although the commissioner had the option available to set the matter down for oral evidence, he failed to do so.

[35] The respondent admits that at the arbitration hearing it was agreed that the matter would be dealt with purely on the written argument

[1] (2014) 35 *ILJ* 943 (LAC) at para 20.

submitted by the parties. The applicants in turn emphasise that the parties were legally represented when this format was agreed.

[36] The respondent claims that it was further agreed that should any evidentiary gaps be identified, the commissioner would set the matter down for oral evidence. The applicants dispute that this additional term was part of the format agreement. They add that even if such a term existed it was not for the commissioner to decide what evidence should or ought to be led; and if the respondent was of the view that evidence ought to be led, it was for it to raise this issue

[37] The essence of the respondent's attack is that the format adopted for the conduct of the hearing prevented factual disputes being properly resolved. Permitting the arbitration to proceed in this way was a material misdirection and thus constituted a gross irregularity. In the language of *Sidumo*,[2] it is a decision no reasonable decision maker would have taken.

[38] The format the arbitration took resembles that of application proceedings. A difference is that, instead of evidence being adduced by way of affidavit, it came in the form of written submissions. Perusing the arbitration award, it is apparent that neither party had difficulty analysing the credibility of claims and the probability of versions when these submissions were based on common cause facts. For example, the respondent argued that the applicants' change of plea from 'guilty' at the internal hearing to 'not guilty' in the hearing de novo constituted a discrediting inconsistency. The respondent also contended that the seniority of the applicants rendered their claim of ignorance of 701 delegations improbable. The commissioner was able to weigh and critically analyse the extent to which the admitted facts supported the versions of either party.

[39] There is merit in the respondent's submission that the application format does not readily allow for the determination of disputes of fact. It is by no means an ideal method of adjudication in cases rich in disputes of fact. Having said that, it is not simply that the party bearing the onus loses the case whenever a dispute of fact arises. It is possible in application proceedings rationally to prefer one factual submission over its polar opposite by attention to the pleadings, although this is not always the case.

[40] The crisp question before this court is whether, in the circumstances of this case, the commissioner's decision to adopt an application format constituted a gross irregularity. Was it a decision that no reasonable decision maker would have made?

[41] The respondent provided me with no authority for its argument that conducting a hearing in an application format per se cannot constitute arbitration proceedings. Section 138(1) of the LRA and rule 16(7) of the PHSDSBC are, in my view, wide enough in scope to encompass the adoption of the procedure the commissioner did.

[2] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC).

[42] In *Oakfields Thoroughbred & Leisure Industries Ltd v McGahey & others*[3] this court found that an arbitrator's discretion as to how proceedings are conducted still imposed a duty to ensure a semblance of order reminiscent of a trial. The court also faulted the commissioner for not advising an unrepresented party of the implication of his not leading crucial pieces of evidence. In that case, the commissioner's rough-shod manner as well as his failure to assist an unrepresented party constituted a disordered manner of conducting a hearing, a reviewable irregularity.

[43] In contrast, the arbitration under review took place in an orderly manner. Unlike *Oakfields*, the trial format was the result of two agreements between legal representatives. First, by way of a pre-arbitration minute, the parties agreed a list of common cause facts to be placed before the commissioner. They further agreed that the rest of the evidence would be tendered by way of founding, answering, replying and supplementary submissions. This format was furthermore not imposed by the commissioner. According to the respondent, an express facility even existed to fill in any evidentiary gaps through oral evidence, if the need existed.

[44] My attention was directed to *National Union of Metalworkers of SA & others v Voltex (Pty) Ltd t/a Electric Centre & others*.[4] I am not sure how this case assists the respondent. In *Voltex*, an arbitrator imposed the application format upon the parties, depriving an applicant of the participation it sought at the time to advance its case. In the present matter, the parties themselves chose and agreed that their participation in the proceedings would be by way of written submissions. Another distinguishing feature is that, in *Voltex*, participation by the parties by way of written submissions was far more limited as there was no facility for replying or supplementary submissions. The 'pleadings', as it were, in the present case are richer in material to contrast and assess.

[45] It is presumably because the respondent's legal representative believed that he could discharge the onus of proof that lay against his client by way of admitted facts, documentary evidence and written submissions that he agreed to the application format of tendering evidence. Not only did he agree at the outset to this format but, even after perusing the applicants' answering submissions, he persisted in it, without complaint. If the ground shifted in the sense that new disputes of fact arose which could only be settled in his client's favour through hearing oral evidence, it was open to the respondent's representative to make the necessary application. This was not done.

[46] Indeed, in their answering submissions during the hearing, the applicants alerted the respondent that it had 'placed no evidence before this tribunal, either in the form of oral or statement, to support any of its arguments'.

[47] The true complaint of the respondent is thus clear. It is that the

[3] (2001) 22 *ILJ* 2026 (LC); [2001] 10 BLLR 1147 (LC) at para 25.
[4] (2000) 21 *ILJ* 1173 (LC) at 1177-8; [2000] 5 BLLR 619 (LC) at 623.

commissioner did not, realising the evidentiary difficulty the respondent was in, mero motu call for oral evidence. I am not able to find that the parties agreed that the commissioner must play this expanded role. The remaining question is whether his failure to exercise his discretion to do so constitutes a gross irregularity.

[48] The fact that the commissioner did not set the matter down for oral evidence does not strike me as a gross irregularity in the circumstances of this case. Setting the matter down for oral evidence would have been contrary to the express agreement among legal representatives as to the format of proceedings, a format I have found is permissible under s 138 of the LRA. While the commissioner certainly had the power to intervene in the flow of the case by setting the matter down for oral evidence, his exercise of discretion not to do so is understandable where the parties, who were both legally represented, made no moves to do so themselves.

[49] When parties are legally represented, it is safe to assume that the procedural elections made on their behalf have a strategic basis. Indeed, unless there is a patent misunderstanding of legal principle or process, or an obvious incapacity in representing a client's interests, interfering with a trial strategy may well give rise to separate complaints of bias or overreach.

Misconstrued evidence

[50] The respondent contends that the commissioner misconstrued the evidence about a letter from Dr Ndlovu, a hospital manager, to Dr Nkosi, the chief operating officer. The letter of 6 September 2007 seems to confirm that a delegation was given to deviate from normal supply chain polices in order to ready a hospital for a visit by eminent persons.

[51] It is true that in the award, the commissioner incorrectly characterises the letter as being an instruction from Dr Ndlovu to Dr Nkosi when the lines of authority in reality flow the other way. However, this error does little to affect the evidentiary import of the letter. It is information that supports the applicants' version that they were operating under a 701 delegation when they dealt with the bids that form the basis of the charges against them.

[52] The reasonableness of the outcome of the award is not disturbed by the fact that the 701 delegation was not lawfully issued by Dr Nkosi to Dr Ndlovu either. The commissioner correctly noted that the probabilities favour the existence of a (purported) delegation having been 'cascaded' to the applicants. If such a 701 delegation was issued, but improperly, this alone does not make those operating under it guilty of fraud and corruption, if anything at all.

[53] The respondent's further attack is that it never admitted the authenticity of this Dr Ndlovu delegation letter and that the reliance placed on it by the commissioner was thus misplaced for this reason too. The letter may not constitute irrefutable evidence of the existence of a delegation but within the agreed format of

proceedings, it constitutes some proof. Against this evidence, the respondent does not even place a bare denial, only a non-denial.

[54] In the circumstances, the commissioner's reliance on this document as some sort of corroboration for the applicants' defence that they were operating under what they took to be a 701 delegation is not unreasonable.

[55] The last ground of cross-review is that the commissioner failed to assess the respondent's argument that a 701 delegation ought not to have been invoked to impress important visitors and they should have known this. The commissioner, in my view, did not have to specifically discount this argument. Assuming it held, it would have been a stretch to infer that the applicants were thereby guilty of the fraud and corruption. At worst it would have established a failure to resist pressure and a knowing violation of proper procedure. The line of argument is irrelevant to the issue in dispute, the substantive fairness of dismissal *for fraud and corruption*.

Relief flowing from a finding of substantive unfairness

[56] The applicants submit that the failure to apply the primary remedy of reinstatement with backpay attendant upon a finding that their dismissal was substantively unfair is contrary to s 193(1)*(a)* and *(b)* read with s 193(2) of the LRA. As a result it is a decision a reasonable decision maker would not make.

[57] They correctly argue that the primary remedy can only be departed from if the applicants did not seek reinstatement, circumstances rendered the continued employment relationship intolerable, it was not reasonably practicable to reinstate, or the dismissal was only procedurally unfair.

[58] The applicants submit that, on the evidence, none of the above apply.

[59] They argue that the delay in time cited by the commissioner as his reason for departing from the primary remedy should be no bar to the primary remedy.

[60] It is important to qualify immediately that a delay in finalisation of a matter is not *on its own* a bar to reinstatement. To find otherwise is to ignore the statutory provisions cited above. However, a long delay may very well be a factor affecting the practicability of reinstatement.

[61] The Supreme Court of Appeal considered the circumstances under which reinstatement may be departed from as relief for a substantively unfair dismissal. In *Republican Press (Pty) Ltd v Chemical Energy Printing Paper Wood & Allied Workers Union & others*[5] the SCA found:

> 'While the Act requires an order for reinstatement or re-employment generally to be made a court order an arbitrator may decline to make such an order where it is "not reasonably practicable" for the employer to take the worker back into employment. Whether that will be so will naturally depend on the particular circumstances, but in many cases the impracticability of resuming

[5] 2008 (1) SA 404 (SCA); (2007) 28 *ILJ* 2503 (SCA).

the relationship of employment will increase with the passage of time. In my view the present case illustrates the point.'[6]

[62] The *Republican Press* case dealt with the selection criteria in the retrenchment of numerous employees. The court pointed out:

> 'Had a court made a finding immediately after the dismissal had occurred that the workers concerned in this case were unfairly chosen and ordered their reinstatement the company would have been entitled to revisit its selection process and select others to dismiss instead. In the ordinary course it will clearly be progressively prejudicial with the passage of time for an order to be made that has that effect, both to the employer who must arrange its affairs, and to other workers who are prone to being selected for dismissal. In the present case the problem is exacerbated by the fact that by the time the Labour Court made its order there had been further retrenchments and some of the company's operations had been restructured.'[7]

By the time the case was ripe for hearing in the Labour Court, even further retrenchments had occurred.

[63] The court continued:

> 'That is not to suggest that an order for reinstatement or re-employment may not be made whenever there has been delay, nor that such an order may not be made more than 12 months after the dismissal. It means only that the remedies were probably provided for in the Act in the belief that they would be applied soon after the dismissals had occurred, and that is a material fact to be borne in mind in assessing whether any alleged impracticality of implementing such an order is reasonable or not. In the present case the passage of six years from the time the workers were dismissed, all of which followed consequentially upon the failure of the union to pursue the claim expeditiously, was sufficient in itself to find that it was not reasonably practicable to reinstate or re-employ the workers.'[8]

[64] It strikes me that notwithstanding a similar delay in finalising the matters, important differences exist in the cases. The first is that only two posts are at issue in casu. The disruption to the employer's business caused by the applicants' reinstatement is logically far less than in the circumstances of *Republican Press*. This is especially if the alternative order sought by the applicants is given effect to, in terms of which they are not reinstated to the same positions they held at the third respondent but to any other reasonably suitable work on the same or similar terms and conditions.

[65] The most important distinction between this matter and *Republican Press* is that in the latter there was evidence before the court about the impracticability of reinstatement. In this case, the best the respondent had to say on reinstatement was: 'The applicants cannot be reinstated to their former posts as they were correctly found guilty and dismissed after they pleaded guilty to all the charges which were very serious and which had an element of dishonesty.' This fails to

[6] at para 20.
[7] at para 21.
[8] at para 22.

address the practicability of reinstatement within the context of delay.

[66] While delay may impact upon the practicability of reinstatement in the circumstances of a particular case, I do not read *Republican Press* to suggest that delay may be accepted *without evidence of the impracticability* to deny reinstatement.

[67] It is not as if the respondent was taken by surprise in the relief the applicants sought in this matter. In the applicants' answering submissions they also very pertinently alerted the respondent that it had 'not established any grounds as to why the positions of the applicants ought not to be returned to them or why it would be unreasonable to do so'.

[68] The respondent also had the opportunity at the arbitration to argue against reinstatement on a ground other than impracticability, but failed to exercise same. There was evidence before the commissioner that the applicants pleaded guilty to fraud and corruption at the internal hearing and had a weak explanation for not honestly pleading their case. When such employees later successfully convince a commissioner that they were in fact not guilty of corruption, despite having pleaded guilty at the internal hearing, it is possible to argue that their conduct during the internal hearing has made a continued employment relationship intolerable. Although the dismissal was later found to be substantively unfair, at the time it occurred it was the perfectly proper decision. The employee's own, prima facie dishonest and imprudent actions have cost the employer money, time and organisational disruption. The respondent was thus in possession of facts necessary to resist reinstatement as a remedy on the basis of intolerability at the arbitration. I make this point by way of illustration only. It is not for a reviewing court to invent a new submission for the respondent. Doing so would also deprive the applicants of an opportunity to reply to it.

[69] In the circumstances then, in the absence of evidence supporting any of the reasons set out in s 193 of the LRA that justify departing from reinstatement as a remedy for a substantively unfair dismissal, the commissioner's decision to only award compensation was a decision no reasonable decision maker could have made.

Relief

[70] The applicants argue that instead of remitting the matter to the PHSDSBC for a rehearing, I should replace the finding of the commissioner, ordering their reinstatement. I intend to do that.

[71] However, I am not convinced that, standing in the shoes of the commissioner as I have been invited to do, reinstatement should be accompanied by full retrospective backpay to the date of dismissal.

[72] The Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*[9]

[9] 2009 (1) SA 390 (CC); (2008) 29 *ILJ* 2507 (CC).

considered the retrospectivity of an award of reinstatement and found that the adjudicator hearing the matter exercises a discretion in terms of s 193(1). The court in *Equity Aviation* said:

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> 'The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards
B workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of s 193(1)*(a)* indicates, the extent of retrospectivity is dependent upon the *exercise of a discretion* by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual
C date of the dismissal.'[10] (Emphasis added.)

[73] Guidance on how to exercise this discretion judicially is to be found in a judgment of the LAC in *Mediterranean Textile Mills (Pty) Ltd v SA Clothing & Textile Workers Union & others*.[11] Ndlovu JA found:

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> 'However, the only issue for critical consideration is the extent of retrospectivity of the employees' reinstatement. This is a matter in respect of which I am not convinced that the Labour Court gave due and sufficient regard to, particularly given, amongst others, the above-quoted observation made by the Labour Court itself on the obvious and objective dire financial straits of the appellant
E currently, as well as at the time of the dismissals. On this basis, therefore, the pronouncement by the Labour Court (at para 57) that "[w]hatever challenges come the way of the respondent, it should be able to comply with the order of reinstatement which the applicants have shown an entitlement to" is, with respect, neither consistent with the court's own factual finding aforesaid on
F the appellant's financial capacity nor the principle that "fairness ought to be assessed objectively on the facts of each case". In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others* 1996 (4) SA 577 (A); (1996) 17 *ILJ* 455 (A), the Appellate Division (as it was then known) stated as follows:
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> "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make
G a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances. And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act."'

[74] The court in *Mediterranean Textile Mills* found that full retrospective
H reinstatement unjustifiably burdened the employer financially, also considering the conduct of the employees, and was not fair and objective on the facts. The court limited backpay to 12 months, which the court considered 'just and equitable in the circumstances'.

[75] As alluded to above, I believe I have both the power and a sufficient
I factual basis to exercise the same discretion the commissioner would

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[10] at para 36.
[11] (2012) 33 *ILJ* 160 (LAC) at para 43.

have enjoyed in respect of the amount of backpay the applicants should be given.

[76] In this regard I take into consideration the applicants' own role in triggering their dismissal by pleading guilty for no good reason. Indeed, their deposing to affidavits the morning of their change of plea has a distinct cloud of cynicism hanging above it. I doubt very much they would have complained at all about their union representative's 'pressure' had the gambit of showing remorse worked.

[77] However, I also take into consideration the admitted delay caused by the respondent in instituting a cross-review.

[78] In the circumstances, I believe that 12 months' backpay is just and equitable in the circumstances.

Order

[79] The finding in respect of remedy issued by the second respondent is hereby reviewed and set aside.

[80] The finding is replaced with the following:

(i) The fourth respondent shall re-employ the applicants either at the third respondent or in any other reasonably suitable work on the same or similar terms and conditions and without any break in service being recorded.

(ii) The reinstatement referred to above is with backpay limited to 12 months, calculated on the basis of what the applicants would have been earning as of the date of this judgment had they not been dismissed.

(iii) The third and fourth respondents are to pay the applicants' costs.

Applicants' Attorneys: *Brett Purdon Attorneys.*

Third and Fourth Respondents' Attorney: *The State Attorney* (KwaZulu-Natal).

DHEANESHWER and TRI MEDIA

CCMA ARBITRATION (KNDB5730-15)

13 July 2015

Before PILLEMER, Commissioner

Constructive dismissal—Sexual harassment—Newly employed employee sent sexually suggestive and inappropriate text messages by senior manager she believed to be owner of business—Employee unaware of grievance procedure and manager to whom she mentioned unhappiness instead assisting her with wording resignation letter—Continued employment intolerable—Dismissal proved.

Sexual harassment—Constructive dismissal—Newly employed employee sent sexually suggestive and inappropriate text messages by senior manager she believed to be owner of business—Employee unaware of grievance procedure and manager to whom she mentioned unhappiness instead assisting her with wording resignation letter—Continued employment intolerable—Dismissal proved.

The applicant employee was employed as a telephone sales agent by the respondent employer. Three weeks later she resigned citing a 'better opportunity' as her reason for leaving. The employee then referred a constructive dismissal dispute to the CCMA in which she claimed she had been sexually harassed at work. The matter was not resolved at conciliation and was referred for arbitration.

The employee testified that she had been sent inappropriate WhatsApp text messages by M, an executive manager who had described himself to her as the owner of the business. The employee produced a transcript of the messages which were blatantly inappropriate and sexually suggestive. She had rebuffed his suggestions but had not been as firm as she should have been, given that she believed M owned the business. Inexperienced and afraid, she was not aware of the grievance procedure and felt she had no alternative but to resign her employment. She did not mention this in her resignation letter as she was advised by K, the development manager, what to write. The employee told K what M had said but he never advised her to lodge a grievance or report the matter.

The employer declined to call M or K as witnesses and was thus unable to challenge the employee's version of events. The HR manager argued that the employee had not proved that she was dismissed and submitted that she never escalated her concern to management and thus could not claim that resignation was her only option. M was not the owner and had the employee raised a complaint, the employer would have dealt with him accordingly.

The commissioner had little hesitation in accepting the employee's version. She was satisfied that M's conduct was unwelcome, inappropriate and constituted an abuse of his power. The employee was only 18 years' old and it was understandable that she would have been afraid and unwilling to continue working in that environment. Despite telling K what was going on, he did nothing to assist her and instead encouraged her to resign. The commissioner was satisfied that the employee had proven that she was dismissed and further that her dismissal was unfair.

The employee had requested compensation and in determining the appropriate amount to be awarded to her, the commissioner took into account her

relatively short service, balanced against the fact that but for M's predatory behaviour the employee would have continued working for the employer. She awarded the employee an amount equivalent to four months' salary as compensation.

The commissioner found that the employee had been unfairly dismissed.

Annotations

Statutes

Labour Relations Act 66 of 1995 s 186(1)*(e)*

PILLEMER, Commissioner:

Details of hearing and representation

[1] The arbitration was held at the CCMA in Durban on 9 July 2015.

[2] The applicant appeared in person. The respondent was represented by Mr M Bhikhari, its HR compliance manager.

Issues to be decided

[3] The issue to be decided is whether the applicant was constructively dismissed in terms of s 186(1)*(e)* of the Labour Relations Act 66 of 1995 (LRA), and, if so, whether the dismissal was substantively and procedurally unfair. The applicant described her dismissal as a constructive dismissal and so the issue is whether the employer made continued employment intolerable for her.

Background to the issue

[4] The pertinent common cause facts are set out below:

4.1 The respondent employed the applicant on 15 April 2015. She received one week's training and thereafter worked as a telephone sales agent. Mohamed Kareem, the development manager, conducted the training. On 8 May 2015, a little more than three weeks after being employed, the applicant resigned from the company. She handed in a letter of resignation in which she thanked the company for the opportunity and training it had afforded her and gave as the reason for her resignation that she had 'come across a better opportunity'. The applicant stated at the arbitration that it was not true that she had had a better work opportunity, and she explained that she had put this in the letter on the advice of Kareem.

4.2 A few days after her resignation, on or about 12 May 2015, the applicant referred an unfair dismissal dispute to the CCMA. In the referral she stated that the respondent had made her 'working condition unbearable and intimidating' as she had been 'sexually harassed with WhatsApp text messages and inappropriate messages' sent to her on her cellphone. These text messages were sent to her by an executive manager in the company, Jeremy Moonsamy, an older married man who described himself as the owner of the business. The applicant claimed in the referral that she was scared, new in the working world and did not know what to do.

4.3 The applicant's case was that she resigned her employment because she was afraid of Moonsamy. She was young, a new employee and was unaware at that time of the grievance procedure. She thought that Moonsamy was the owner of the company and because of that she had no alternative but to resign from her employment, even though she had enjoyed the work she was doing at the company. She had not been informed of the disciplinary procedures. She had not found other employment.

4.4 Neither Moonsamy nor Kareem attended the arbitration. They were material and crucial witnesses if the respondent intended challenging the veracity of the applicant's evidence. Mr Bhikhari explained that they were busy elsewhere, said he understood the repercussions of not calling the two witnesses, and he did not challenge the applicant's version of the events. The respondent's case and argument was that it had not dismissed the applicant and that she could not complain that her work conditions were intolerable before she had lodged a grievance or approached other managers with her complaint. She had not given the employer an opportunity to rectify the situation. Mr Bhikhari made the point that the applicant admitted in her evidence that she had enjoyed her work, so she could not now complain that the employer made continued employment intolerable when she had not afforded the employer the opportunity of addressing the situation. Mr Bhikhari submitted that if she had followed internal procedures and lodged a grievance her complaint would have been properly dealt with. Mr Bhikhari pointed out that Moonsamy was not the only manager, and his representation that he was the owner was not true. There were a number of managers whom the applicant could have approached for assistance. Mr Bhikhari admitted that the telephone texts sent by Moonsamy were far from 'platonic' but argued that the applicant's work conditions were not intolerable, especially as she enjoyed her work, and he asked that the application be dismissed.

4.5 The company has approximately 20 employees who conduct telesales. Moonsamy is not the only executive manager.

Evidence

[5] The applicant testified on her own behalf. Mr Bhikhari, the respondent's representative, led evidence on behalf of the respondent.

Applicant's evidence

[6] The applicant described the events that led to her resignation. She had received the first text message from Moonsamy soon after she had made her first telesale, congratulating her on the sale. She had kept a record of the texts received from Moonsamy, and handed in a transcript of the content of the texts. She circulated her cellphone at the hearing to allow the parties to see the photograph that Moonsamy had sent her. She did not hand in a printed copy of the

photograph. Amongst frequent sexual innuendos in other general conversation, Moonsamy made the following comments: that if the applicant wanted to train again he would 'free up his schedule'; that applicant dressed like a tomboy 'but I like … think its sexc'. He said the following as well: 'ok … u know I'm married n pls forgive me but I think u so fine n wanted to know if ud like to fly to JHB today n have lunch with me?'; 'I just think u dam hot'; 'U wana fly to jhb in an hour or ud like me to fly down n take u shopping n show u wat I'd love u to wear with that new hairdo?'; 'K Can I like ask u to fly to jhb just now n we can discuss it in person or r u afraid?'; 'N I own the company'; 'my wife lets me explore certain things'; 'N stop behaving like a nun'; 'N my offer was only to fly u to jhb n buy u those boots, skirt n that bag'; 'what if only today we break the rules'.

[7] The applicant did not respond to some of the suggestive comments and when she did her response was guarded. She eventually told Moonsamy that, 'I told u already its wrong and u married weather ur wife approves or not..! And besides you are my boss. I'm sorry but I have rules'. In spite of this Moonsamy persisted in sending further sexually suggestive text messages to the applicant.

[8] The applicant explained that she had not been as firm with Moonsamy as she perhaps should have been when dealing with his text messages as he was her boss. Moonsamy had emphasised that he owned the business, both when he made a speech welcoming the new employees to the company and in text messages he had sent her. Until she had been approached in this way she had thoroughly enjoyed the work, and the working environment. The applicant politely refused his invitations but eventually she was too afraid to continue to work because of the persistent nature of the texts, especially as Moonsamy was a boss who frequently called individual employees into his office to discuss their work. She was afraid to return to work and perhaps be alone with Moonsamy. She was disgusted at his suggestions, and felt he had spoken to her like she was something cheap.

[9] The applicant, not knowing how to handle the situation, said that she decided to resign, but before doing so she discussed her pending resignation with Kareem, the development manager, who coached and mentored the new employees. She showed him the texts Moonsamy had sent to her. Kareem did not explain the grievance procedure or suggest any other remedy but he proposed the wording for the applicant's resignation letter. She accepted the wording as she respected Kareem, although what she was told to put in the letter was not wholly true.

[10] When asked under cross-examination why she had not lodged a grievance, the applicant explained that she was new in the company with relatively little work experience and had not been aware of the grievance procedure. She also had been led to believe by Moonsamy that he owned the company. It also emerged during cross-examination that besides the cellphone text messages there had been no physical contact between the two except on one occasion when Moonsamy ran his hand up and down her back while she was working, and busy on a telephone call.

Respondent's evidence

[11] Bhikhari's evidence did not take the matter further. He merely set out the respondent's case, which I have set out in para 4 above. He did not challenge the applicant's testimony in any material respect.

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Motivation and analysis of evidence and argument

[12] Moonsamy is an executive director at the respondent. He described himself as the boss. He is a married man. He has a position of power, and because of this was in a position to exert influence over
B the applicant's conditions of employment, such as promotions and salary increases. Moonsamy initiated and entered into a wholly inappropriate predatory WhatsApp (text message) relationship with a vulnerable new employee, 18 years old, making unacceptable advances and suggestions to her. His action of stroking the applicant's
C back, after the text conversations when he told her she was sexy, was setting the scene for further abuse.

[13] The applicant gave her evidence well, and there was no reason to doubt her version. In any event her testimony was not challenged. The applicant's evidence that she was afraid to continue the employment
D relationship in the circumstances of Moonsamy's behaviour is fully understandable. The applicant is a young, attractive woman and merely 18 years old. She has a right to enjoy working in the workplace, free of harassment, free of sexual innuendo and unacceptable advances. To take that away from her renders continued employment
E intolerable for her. Moonsamy regularly called employees into his office to discuss their work with him, and she did not want, after the suggestions that he had made in the texts, to be placed in the position where she would be alone with him in his office. It was because
F of this she said that she resigned from her employment. I believe her. Moonsamy's conduct, she said, demeaned her — impairing her dignity by making her feel cheap and fearful. She had told her mentor and trainer about the manner in which Moonsamy had behaved, and instead of advising her to lodge a grievance, he had encouraged her to resign and even told her what to write in the letter of resignation.
G [14] I find in these circumstances that the applicant has established that she was dismissed, ie that her conditions of employment were so intolerable that she was forced to resign. Moonsamy's behaviour as an executive manager is behaviour of a kind that is not acceptable in
H the employment environment, and has destroyed the employment relationship. This would not be altered even if she had lodged a grievance. And I accept her reasons for not doing so.

[15] I accordingly find that by reason of the unfair dismissal the applicant is entitled to compensation. In terms of s 194(1) of the
I LRA as amended, compensation must be just and equitable in all the circumstances. It is always a difficult question to fix a precise amount for compensation and I must bear in mind the interests of the applicant and the respondent in fixing the figure. The applicant worked for the employer for a little more than three weeks. The
J predatory behaviour of Moonsamy, an executive manager, destroyed her enjoyment of the workplace and rendered her conditions of

employment intolerable. His conduct also destroyed the trust relationship. In these circumstances I consider R16,000, equal to four months' salary, to be fair compensation.

[16] The applicant is reminded that she is entitled to pursue any claims she might have relating to sexual harassment (discrimination) in terms of the Employment Equity Act 55 of 1998. The present arbitration and award deals only with the unfair dismissal claim.

Award

[17] I make the following award:

17.1 The applicant, Nikita Ashleigh Dheaneshwer, was constructively dismissed and the dismissal is declared to be unfair.

17.2 The applicant is awarded compensation of R16,000.

17.3 The respondent, Tri Media, is directed to pay the applicant the amount set out in para 17.2 above within 14 days of being notified of this award.

NDLELA & OTHERS and PHILANI MEGA SPAR

CCMA ARBITRATION (KNDB13477-14)

17 March 2015

Before PILLEMER, Commissioner

Discrimination—Unfair discrimination—Arbitrary ground—Employer offering provident fund benefit only to employees having five years' service—Benefit intended as reward for long service and as retention strategy—No empirical evidence that provident fund resulting in staff retention and no objective basis for cut-off period of five years—Differentiation arbitrary and lacking sound reason—Constituting unfair discrimination.

Employment Equity Act 55 of 1998—Grounds of discrimination—Unlisted grounds—Length of service—Employer offering provident fund benefit only to employees having five years' service—Benefit intended as reward for long service and as retention strategy—No empirical evidence that provident fund resulting in staff retention and no objective basis for cut-off period of five years—Differentiation arbitrary and lacking sound reason—Constituting unfair discrimination.

Employment Equity Act 55 of 1998—Unfair discrimination—Arbitrary ground—Employer offering provident fund benefit only to employees having five years' service—Benefit intended as reward for long service and as retention strategy—No empirical evidence that provident fund resulting in staff retention and no objective basis for cut-off period of five years—Differentiation arbitrary and lacking sound reason—Constituting unfair discrimination.

The respondent employer offered a provident fund to all of its employees once they had completed five years' service with it. It was common cause that the employer's decision was not related to affordability and that it introduced the benefit as a means of retaining employees. The benefit in question included a savings scheme, a retirement scheme, a funeral scheme and a disability scheme. The applicant employees all had less than five years' service and contended that the employer discriminated against them by refusing to grant them the provident fund based purely on their length of service. It was submitted that the employer's decision was arbitrary and constituted unfair discrimination in terms of s 6(1) and (4) of the Employment Equity Act 55 of 1998.

The employer led the evidence of one witness, its HR manager. He gave evidence about the employer's high staff turnover and the necessity for it to redress the problem and retain its trained staff. The decision was made to reward loyalty by offering employees a provident fund once they had completed five years' service. Offering the benefit from the outset did not induce employees to stay. The employer had no legal obligation to offer this benefit to any of its employees and did so in the bona fide belief that it would help retain staff. The employer did not discriminate against any employee in this regard and everyone who stayed in its employ for five years was given the benefit. The differentiation was, it submitted, not irrational, without reason or without justification and did not constitute direct or indirect discrimination against any group or person.

The employees argued that length of service was an arbitrary ground on which to differentiate between employees. The employees worked for the same employer, performing the same duties and earning the same salary, and yet some were denied the benefit of a provident fund based on their length of service. The fact that employees with less than five years' service did not enjoy access to a funeral benefit, disability and savings scheme impaired their dignity in the workplace.

The commissioner confirmed that the question to be decided was whether the provision of a benefit that offers retirement saving, funeral benefits and disability benefits to some but not others based only on length of service is discriminatory and unfair, or whether it amounts to a rational and justifiable difference in terms and conditions of service.

Although the employer had no obligation in law to provide its employees with a provident fund, once it chose to do so it had to do so in a manner that did not unfairly discriminate against any of its employees. The benefit in question was not simply an increase in pay or longer leave for employees who had long service, but rather provided significant security for employees offering them life-changing benefits such as disability and funeral benefits. An employee who had the benefit might be able to pay to bury his child whereas a colleague working alongside him, who had less than five years' service might not. This could result in an impairment to the dignity of the employee with less service and the benefit offered was, in the commissioner's view, disproportionate to its purpose. Moreover, the employer provided no evidence to substantiate its cut-off of five years nor did it produce any empirical or objective evidence that offering the provident fund did, and would, result in staff retention. The HR manager's evidence in that regard was based purely on his own personal experience. In fact, given that many of the employer's competitors did not offer the benefit at all, it would seem logical that employees would choose to remain in the employment of an employer who offered the benefit from inception. The commissioner concluded that the employer had no sound reason for its differentiation and that the period and basis of qualification for the provident fund was arbitrary and unfair. She therefore held that the employer had unfairly discriminated against the applicant employees.

In terms of the relief to be awarded, the commissioner directed the employer to do all things necessary to ensure that the employees became members of the provident fund on substantially the same terms and conditions as the other employees. The commissioner declined the employees' request to make the order retrospective because of the obvious logistical and practical difficulties involved.

The commissioner found that the employer had unfairly discriminated against the employees.

Annotations

Statutes

Employment Equity Act 55 of 1998 s 6(1), s 6(4)

PILLEMER, Commissioner:

Details of hearing and representation

[1] The arbitration was held at the CCMA in Durban on 3 March 2015.

[2] M Jama, an official of PTAWU, represented the applicants. F Barnard, an official of GDPEO, represented the respondent.

Issues to be decided

[3] Whether once an employer offers to provide some of its employees, those of five years or more standing, with a provident fund (that provides in addition to retirement savings other benefits such as life and funeral cover), its actions amount to unfair discrimination against the others of its employees to whom the benefit is not offered, merely because they have less than five years standing.

[4] It was common cause that affordability was not an issue. The only question therefore was whether the distinction drawn between those employees who had more and those who had less than five years' service was legitimate in law, having regard to s 6(1) and (4) of the Employment Equity Act 55 of 1998, as amended (the EEA).

[5] The applicants had all been employed for less than five years. The relief they sought is for an award directing the respondent to offer them the same opportunity as their counterparts who had worked for five years or more, namely to be able to participate in the provident fund benefit on the same terms and conditions as the existing members and to backdate their membership to the date of their employment.

Background to the issue

[6] The parties agreed a statement of facts and in the light of the agreement the applicants elected not to lead evidence. The respondent led the evidence of one witness, its human resource director, Gunter Havemann.

[7] I set out the agreed statement of facts below but have inserted words to make the statement clearer or grammatically sound where I felt this was appropriate.

> '[1] Respondent is a wholesale and retail store.
>
> [2] The respondent currently employs 123 employees and is considered a large business.

[3] There are currently 33 employees on the provident fund which is administered by Momentum. …

[5] All persons who are employed by the respondent for a period of five years and longer are entitled to join the provident fund, but not those who are employed for a lesser period.

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[6] K E Mkhize (who was cited as an applicant) has been discharged from the employment of the company and no longer forms part of this application and as such there are 12 applicants. [I dismissed his application on the day of the arbitration hearing.]

[7] The parties agreed the commencement dates of employment of the

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applicants and agreed that none of the applicants have been employed by the respondent for five years or longer.

[8] All persons employed for longer than five years are members of the Momentum Provident Fund scheme.

[9] The parties agree that the applicants are currently not on the Momentum Provident Fund scheme.

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[10] The parties agree that the employer contribution (to the provident fund scheme) is 7% of the salary and the employee members' contribution is 5%.'

[8] It was agreed and not disputed that:

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(a) There was no contractual obligation to provide employees with a provident fund.

(b) The benefits provided by the provident fund were, inter alia, a savings scheme, retirement scheme, funeral scheme and a disability scheme.

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(c) The respondent introduced the provident fund as part of its employee retention policy.

(d) The applicants earned below the BCEA threshold of R205,433.30.

(e) The respondent complies with the sectoral determination applicable to the wholesale and retail sector.

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[9] The applicants' case was that the respondent had discriminated against them on the ground that they had not worked for it for five years or longer and that this was arbitrary and unfair.

[10] The respondent's case was that the differentiation between employees

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of five years standing and those who had not yet been employed for five years was rational, as it was done as part of its retention policy to create an incentive to employees to remain with the company for a long-term career and to reward employees for their loyalty and long service if they did so remain. In the result it was contended that it

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was a justified distinction that it drew and that the differentiation was not unfair discrimination.

Respondent's evidence

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[11] Havemann explained that the respondent had what he referred to as a huge problem with high staff turnover and it was his evidence that the respondent needed to do something to redress this problem so as to be able to retain employees who were trained and knew the business. The respondent needed to find a way to reward

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employees who gave long service and demonstrated loyalty to it. It was Havemann's experience that employees who were provided with

a provident fund from inception did not stay. The company decided to implement a provident fund scheme for those of its employees who had worked for it for more than five years, although there was no contractual obligation on it to do so, as this provided an incentive to everyone to remain with the company, and hopefully would reduce the problem of high staff turnover. Havemann expressed the opinion that the reason was bona fide and justifiable and that what had been done was fair and not discriminatory as any employee who stayed for five years or more would be able to enjoy the benefit. Everyone was treated the same in this regard.

Applicant's argument

[12] Mr Jama submitted that the employees were discriminated against on an arbitrary ground, that being less service than other employees. Those who had service of five years and longer were entitled to a provident fund, those with less service were not. The union had met with the respondent to resolve the issue, but the respondent refused to do so. Mr Jama argued that there was differential treatment, which discriminated against those who worked less than five years, which treatment granted benefits to some employees, but not others, and which was unreasonable and without justification. He made the point that although the applicants worked for the same employer in the same workplace and held similar positions and responsibilities, and earned the same salary, they were nevertheless treated differently and denied the benefit of a provident fund because they had worked for less than five years. Five years he claimed was a long period to work without a provident fund. He submitted that the applicants did not enjoy the same conditions as their colleagues such as funeral benefits, disability and savings schemes — and were not treated equally, which impaired their dignity in the workplace. Mr Jama claimed that this was discriminatory, unreasonable, unfair, and contrary to the constitution, the Labour Relations Act 66 of 1995 (LRA) and case law.

Respondent's argument

[13] Mr Barnard argued that there is no duty in law imposed on the employer to provide staff members with a provident fund, nor is there a contractual duty to do so contained in the employment contracts. He submitted that the employees have no legal right to a provident fund.

[14] Mr Barnard elaborated that if the employer wished to establish a provident fund it has the discretion to do so. In this case the respondent had offered a provident fund scheme to its staff who had been employed for longer than five years.

[15] The respondent made this decision as a staff retention scheme to reward employees for long service. The reason for this decision is because of the high staff turnover in the industry. Mr Barnard made the point that none of the applicants had yet been employed for longer than five years, although some of them were reaching that

yardstick and when they did they, like others who had five years' service, would become eligible for membership.

[16] While Mr Barnard admitted that the respondent treated employees differently in this respect he argued that the differential treatment was reasonable, based on logic, not unfair and good business practice. The differentiation was aimed at retaining staff and recognising and rewarding staff for long service. The differentiation was not irrational, without reason or without justification. Mr Barnard contended that it was not established that there was direct or indirect discrimination against any group or person or that the differential treatment was unfair.

[17] Mr Barnard contended that this is a matter of mutual interest, and should be dealt with through collective bargaining. If the commission ordered the respondent to provide the applicants with a provident fund it would be creating a new right. Mr Barnard stated that in such circumstances the respondent had not unfairly discriminated against the applicants, as it had a rational reason for implementing the provident fund scheme in the way it had.

Motivation and analysis of evidence and argument

[18] Section 6(1) and (4) of the EEA as amended provides as follows:

> '(1) No person may unfairly discriminate, directly or indirectly, against an employee, 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. …
> (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.'

[19] It is common cause that employees, regardless of whether their work was of equal value to comparable workers, were not provided with a provident fund until they had worked for the company for five years. This was done as part of the employer's retention policy to keep and reward long-term employment. In terms of the regulations published under the EEA seniority and length of service may justify a difference in terms and conditions of employment. The question that I have to consider is whether the provision of a benefit that offers retirement saving, funeral benefits and disability benefits to some but not others based only on length of service is discriminatory and unfair, or whether it amounts to a rational and justifiable difference in terms and conditions of service based on length of service.

[20] An employer has no obligation to provide a provident fund to its employees. However once, as in this case, it decides to do so it cannot do so in a manner that unfairly discriminates against some of its workforce in breach of s 6(1) and (4) of the EEA. In other words if it decides to provide a benefit to some and not others there must be a rational, justifiable, fair basis for the differentiation, otherwise the

basis will be arbitrary and amount to unfair discrimination in terms of s 6(4) of the EEA.

[21] It must be borne in mind that this benefit is not simply an increase in pay for long service, a few days extra leave, or some similar measure that may form part of a retention strategy or a reward for long service. It goes much deeper than that. It provides significant security for individuals who become members by providing them with life changing benefits such as disability and funeral benefits if hardship befalls them, which is something that was stressed during argument. It was submitted that the life insurance and funeral policy features of the fund potentially impact on and will impair the dignity of an employee, who unlike his or her colleague performing exactly the same work, is unable to afford to bury a child whereas the colleague could turn to the provident fund. The one employee may suffer this indignity merely because of a little less service.

[22] The cut-off period of five years appears to me to be entirely arbitrary. Why not four years or three or two? Why not six or ten years? One may ask: Why shouldn't an employee who performs exactly the same work as the person working next to him be entitled to the same funeral benefit to bury his child as his workmate, even if the one has worked for five years and the other for four years and 11 months? There was no evidence dealing with why five years was selected as the cut off and no reason is apparent.

[23] There was no empirical, objective evidence provided by the employer to show that there was merit in the reasons advanced by the employer for the differentiation. Havemann testified that it was his personal experience that employees who are provided with a provident fund at inception leave soon after they are employed. While he may well have had such an experience and I have no reason to disbelieve that this is his genuine view based on his experience, it does not follow as a matter of logic that this should be the position generally. It seems to me to be a subjective and entirely arbitrary basis without some objective, empirical evidence or research to support it, and, what is more, it is illogical. It seems logically more likely that if the benefit is important to employees that they will stay if it is offered earlier, particularly if it is not offered by other employers. If a competitor offers the benefit on employment, then there is a reason why the shorter serving employee will leave if he or she is not given the benefit, rather than stay to get the benefit in five years' time. The reason just does not add up and is not a sound reason in my judgment. So it seems to me that if the reason is genuinely to retain all staff then there is no rational reason to delay the benefit for five years.

[24] The other reason that was given was that the provident fund was intended to reward long service. This kind of reward goes way beyond a mere financial benefit. The unfairness of providing a reward of this kind to some but not others in a workforce and only some but not others having the security the benefit offers, is disproportionate to the purpose of providing a reward for employees who remain loyal for five years or more. The benefit is obviously a reward in the manner that it is now offered, but the fact that there is some

rational element in an employer deciding to reward long service, in my assessment, does not save the differentiation in this instance from being arbitrary and essentially irrational. It must be measured against the arbitrariness of the five-year period and the invalidity of the main reason that was given of it being a means to encourage employees to remain for the long term. In addition this kind of reward impacts significantly on the shorter-serving employees performing the same or similar work as their longer-serving colleagues. It undervalues their relative worth as employees in a way that undermines their dignity as human beings. A reward of a higher salary, more leave or some other less fundamental work benefits would not do this.

[25] There was no suggestion that there were financial constraints in providing a provident fund to all employees. Affordability was not an issue and the only question is whether or not providing or withholding a benefit to co-workers simply as a retention policy based on a period of employment is arbitrary. Five years bears no rational relationship to the intended purpose and is an utterly arbitrary period. The reasons do not stand up to analysis, are not logical and are therefore also unsound and arbitrary.

[26] For the reasons set out above I have concluded that the reasons the respondent has given are not sound and the period and basis of qualification for a provident fund is arbitrary and accordingly unfair.

[27] I am accordingly satisfied that the respondent has unfairly discriminated against the applicants in accordance with s 6(4) read together with s 6(1) of the EEA. The applicants are accordingly entitled to relief.

[28] The respondent is discriminating unfairly against all of its employees who have less than five years' service. However since it is only the applicants who are the parties to the application before me, the relief I have granted in this award relates only to them. The parties, namely the union and the respondent should be guided nonetheless by this award with the view to reaching agreement on the extension of the provident fund benefit to all employees and for the respondent to bring the unfair discrimination to an end.

[29] In respect of the 12 applicants I will issue an award that directs that the respondent to do all things necessary to ensure that they become members of the provident fund offered to other employees on substantially the same terms and conditions as the other employees and to do this as soon as possible, but in any event on or before 31 May 2015. I have in mind that there may be administrative processes that have to be completed which may take some time, but that over two months to achieve this is more than enough time.

[30] I have not made any order of retrospective operation as in my view the respondent was bona fide, albeit misguided, and there are obvious logistical and practical difficulties that militate against doing so. The insurer that administers the fund is not a party to these proceedings and no retrospective award that could impact upon it or the fund can be made in its absence. Accordingly it is my view that this is one of those cases where the remedy should be limited to a direction to correct the wrong going forward rather than to award compensation or make an award of retrospective operation.

Award

[31] The respondent has discriminated unfairly against the applicants.

[32] The respondent is directed to do all things necessary to facilitate and provide the applicants with substantially the same provident fund membership benefit that it provides to those of its employees who have more than five years' service and on the same terms and conditions, and is directed to ensure that they are admitted as members as soon as possible and in any event by no later than 31 May 2015.

ROBERTSON and VALUE LOGISTICS

BARGAINING COUNCIL ARBITRATION (RFBC35099)

31 August 2015

Before PILLAY, Arbitrator

Disciplinary penalty—Dismissal—Social media—Employee dismissed for making offensive comment on Facebook regarding her retrenchment—Comment only partially incorrect and not constituting defamation or bringing employer into disrepute—Employee not guilty of serious misconduct—Dismissal not appropriate sanction.

Dismissal—Social media—Employee dismissed for making offensive comment on Facebook regarding her retrenchment—Comment only partially incorrect and not constituting defamation or bringing employer into disrepute—Employee not guilty of serious misconduct—Dismissal not appropriate sanction.

The applicant employee was employed by the respondent employer as a customer relations manager and at the time of her dismissal had approximately 20 years' service. On 10 April 2015 the employee was invited to a meeting at which she was told about her possible retrenchment. On 17 April 2015 the employee made comments about this impending retrenchment on her Facebook page. She was charged with misconduct in relation to those comments and, after a disciplinary hearing, was found guilty and dismissed. Believing her dismissal to be unfair she referred an unfair dismissal dispute to the relevant bargaining council. The matter was not resolved at conciliation and was referred for arbitration. The arbitrator was called on to determine whether the dismissal was substantively fair as procedural fairness was not in dispute.

The employer led the evidence of five witnesses. The HR manager testified that she consulted with the employee on 10 April and again on 17 April, at which time she furnished the employee with the information she had requested at their first meeting. She also took her through the content of the notice in terms of s 189(3) of the LRA 1995 and requested that the employee keep the process confidential. The employee was certainly not dismissed on 17 April 2015 as her Facebook post stated and hence the employer's view that her comment was misleading, damaged its reputation and was intended to cause disruption in the workplace. The employer was aware that the employee

had been diagnosed with cancer but her illness had nothing to do with her retrenchment. It was common cause that the employee mentioned the name of her regional manager, W, in her Facebook post and that W in fact had nothing to do with her retrenchment. W testified that the employee's Facebook post defamed her and brought her into disrepute. It also caused unhappiness in the department.

The employee testified that she was devastated when she found out about her retrenchment on 10 April 2015 as she had only five years left until she retired, her husband was on pension and she had recently been diagnosed with throat cancer. She disputed being told to keep the process confidential. On 17 April 2015 the HR manager mentioned that she could leave immediately and she therefore believed that her retrenchment was final. That evening she was on Facebook and saw two friends posting messages. She posted her own status update and did not realise that it would be read by anyone other than two friends. The reason she mentioned W in her Facebook post was because her name appeared on the s 189(3) letter. The employee conceded that W had tried to speak to her about her retrenchment on 13 April and that she refused to discuss it with her. She admitted also that she had erred in posting the comment on Facebook and said she regretted it. She had removed the post the next day.

The arbitrator found that the employer had failed to link the employee's conduct in making the Facebook post with its code of conduct but noted that this did not mean that her conduct was acceptable. The question to be decided was whether the comments posted by the employee constituted serious misconduct and justified her dismissal.

In answering that question, the arbitrator considered the context to be crucial. He found that the sudden announcement of her potential retrenchment on 10 April 2015 was emotionally distressing for the employee, particularly given her age and her ill-health. She ought to have been given the s 189(3) letter before the consultation meeting on 10 April but instead it was handed to her in the meeting. The employee was unprepared and overwhelmed. At the second meeting on 17 April she was presented with the calculation of her severance package and told that she had the option to leave immediately. The arbitrator was satisfied that the employee's belief that her retrenchment was a fait accompli was reasonable in those circumstances. Her post ('Amazing ladies, I have been retrenched by J W and Ci (sic). 20 yeRs (sic) and now good bye, no prior notification') was more an expression of hurt than an attack on the respondent's integrity. Although it was not true that she had no prior notification (as she had been forewarned of the possibility in the 10 April 2015 meeting), the post was otherwise not incorrect or offensive. The arbitrator also noted that there was no evidence that the employer had suffered reputational damage as a result of the post. Lastly, the arbitrator found that, although it was factually incorrect that W had been involved in the employee's retrenchment, he did not believe she had been defamed in the post. As the regional manager she was the 'face' of the respondent in the branch and in essence the functionary responsible for the employee's retrenchment.

Having concluded that the Facebook post was not offensive, the arbitrator found that the employee should not have been dismissed. As an aside he noted that if the post had been offensive, he would still have found that dismissal was not the appropriate sanction, taking into account the circumstances of the case. The employee sought reinstatement and the arbitrator awarded her the relief sought based on the employer's contention that the retrenchment process had not been finalised and that retrenchment was not a foregone conclusion.

The arbitrator found that the dismissal was substantively unfair.

Annotations

Statutes

Labour Relations Act 66 of 1995 s 189(3)

PILLAY, Arbitrator:

Details of hearing and representation

[1] This arbitration hearing was heard on 17 July 2015 and 21 August 2015 at the offices of the NBCRFLI in Durban.

[2] The applicant, Lynn Robertson, appeared in person and was represented by Dean Caro, an attorney. The respondent, Value Logistics, was represented by Ms Ruth Sibisi, its HR manager.

Issue to be decided

[3] Whether the dismissal of the applicant was unfair, and if so decided, to determine the appropriate relief to award.

Preliminary issues

[4] The first issue raised by the respondent was that the applicant's referral (form 7.11) was defective because it was signed by the attorney and not the applicant. After it was pointed out to the respondent that there was nothing improper in the applicant's attorney signing the referral on behalf of the applicant, the point was not pursued.

[5] The applicant thereafter applied for legal representation. After hearing arguments, legal representation was granted for the following reasons:

(i) The applicant had no formal qualifications besides her matriculation certificate and absolutely no prior experience in disciplinary or arbitration proceedings, or any knowledge of IR related matters. The respondent's representative was a HR manager and therefore would have the requisite knowledge and skills in respect of disciplinary hearings and IR related matters, including arbitration proceedings. Although she did not have any legal training, the comparative abilities of the parties favoured the granting of legal representation.

(ii) The respondent intended calling five witnesses and each would have had to be cross-examined in a coherent manner. It was unlikely that the applicant would be able to cross-examine witnesses coherently.

(iii) The law in respect of misconduct related to comments made on social media was still developing.

(iv) The applicant intended arguing unfairness in respect of the severity of the sanction. Legal arguments were therefore necessary.

Background to the issue and facts that are not in dispute

[6] The applicant was employed by the respondent as a customer relations manager at the time of her dismissal. She commenced employment on 1 October 1994 and her employment was terminated on 29 April

2015. The applicant earned R47,594 per month at the time of her dismissal.

[7] Prior to the applicant's dismissal, the respondent was in consultation with the applicant about the possible dismissal of the applicant owing to the operational requirements of the respondent.

[8] Ms Jill Whittle printed a letter, the s 189(3) notice, and gave it to Ms Ruth Sibisi on 10 April 2015. Ms Sibisi, at a meeting with the applicant on the same day, issued the letter to the applicant and explained each of the clauses to the applicant. The applicant was very surprised and upset at the prospect of being retrenched.

[9] Ms Sibisi spent much time motivating the applicant and considering possible alternatives. She did, however, indicate to the applicant that she did not see an alternative to retrenchment at that stage.

[10] The applicant disclosed to Ruth that she (applicant) had been diagnosed with cancer and since her husband was a pensioner, she was concerned about her medical aid. The applicant was also concerned about her future because she had five years to go before retirement.

[11] Ruth Sibisi had a second consultation meeting with the applicant on 17 April 2015. Owing to the applicant's questions on 10 April 2015, Ruth presented the applicant with the details of the retrenchment package. The applicant was assured that the reason for the retrenchment was the respondent's operational requirements and not the applicant's illness. Ruth also offered the applicant the option of leaving immediately if the applicant so desired. The applicant indicated that she would consider that option and revert to Ruth.

[12] On 17 April 2015, the applicant was on Facebook with some of her friends (ex-employees of the respondent) and posted the following comment: 'Amazing ladies, I have been retrenched by Jill Whittle and Ci (sic). 20 yeRs (sic) and now good bye, no prior notification.'

[13] The post was also seen by some of the current employees of the respondent and the applicant received various messages of support. The next day the applicant removed the post from Facebook.

[14] It was the respondent's case that the applicant was guilty of gross misconduct for posting the abovementioned message on Facebook. The respondent alleged that the comments —

(i) defamed the character of a senior employee, ie Jill Whittle;
(ii) deliberately provided information that was untrue or misleading;
(iii) caused disruption in the workplace; and
(iv) brought the respondent's name into disrepute in a public forum.

[15] It was the applicant's case that she believed that she was being retrenched and that Jill was involved in the matter. She subsequently accepted that Jill was not involved in the retrenchment and that she should not have posted the message on Facebook. She was very upset at that time and regretted what she had done. The day after the post she removed it from Facebook and the post thus caused the respondent no serious damage.

Survey of evidence and argument

[16] The respondent and the applicant both submitted bundles of

documents. The hearing was digitally recorded hence I shall summarise only the evidence used to arrive at my finding.

The respondent's evidence

[17] Ruth Sibisi, Jill Whittle, Celeste Vermeulen, Eugene van Niekerk and Paul Linnetts testified under oath on behalf of the respondent. Further to the facts reflected above the relevant aspects of their testimony are summarised below. Much of the respondent's evidence related to the applicant's negative attitude towards the respondent on various occasions. This however was not the reason for the applicant's dismissal. The dismissal of the applicant was based on the Facebook comment she made on 17 April 2015. The respondent's bundle clearly states the reason for the applicant's dismissal. I have therefore disregarded the evidence related to the applicant's alleged negativity unless it was related to the Facebook comments made on 17 April 2015.

[18] On 10 April 2015, the applicant requested information regarding her package and that information was provided to her on 17 April 2015. It was not a fait accompli that the applicant would be retrenched. Although there were no alternative positions at the time of the consultation, the consultations were not concluded and anything could have happened. It is possible that the applicant could have been retained.

[19] Ruth Sibisi discussed the s 189(3) letter with the applicant clause-by-clause hence it should have been clear to the applicant that the process was continuing. Therefore the applicant was aware that she was not dismissed at that time. Despite being aware that she was not dismissed, the applicant stated, as a fact, that she was dismissed. This comment was intended to damage the reputation of the respondent and cause disruption in the workplace.

[20] The respondent acknowledged the applicant's request for the second meeting to be held on 23 April 2015 but due to the fact that a meeting was already scheduled by the respondent, it was not possible for it to be rescheduled.

[21] The meeting proceeded on 17 April and in addition to proposed retrenchment package figures, Ruth informed the applicant that there were complaints about the applicant's negativity which caused disruption in the business of the respondent. These complaints also reached the office of the CEO. Ruth informed the applicant that they could discuss the option of the applicant leaving the respondent immediately but her continued negativity whilst in the employ of the respondent was unacceptable as it adversely affected the business of the respondent.

[22] Ruth requested the applicant not to discuss the retrenchment with others and that it should be confidential.

[23] Ruth was aware that the applicant was diagnosed with cancer of the throat but assured the applicant that her illness was not the reason for her dismissal.

[24] The evidence of Jill Whittle was that she was not aware of the

proposed retrenchment of the applicant until she printed the s 189(3) notice for Ruth on 10 April 2015.

[25] Jill heard that the applicant believed that she was involved in the retrenchment. She therefore attempted to speak to the applicant on 13 April 2015 but the applicant was very rude to her. The applicant did not give Jill an opportunity to explain her side of the story. The applicant raised her voice at Jill and told her to leave the applicant's office (f… off).

[26] It was common knowledge in the department that the applicant was being retrenched. The impact on the department was negative and employees were scared to talk to each other.

[27] Subsequently, Jill saw the applicant's posting on Facebook and was furious. Her name was brought into disrepute by the applicant's false comments. People in the department were uneasy and others believed that they may also lose their jobs.

[28] Since the applicant's departure, the atmosphere in the department had become harmonious.

[29] The applicant did apologise to Jill at the disciplinary hearing but Jill did not accept the apology.

The applicant's evidence

[30] The applicant testified under oath and the relevant aspects of her evidence are summarised below.

[31] The applicant had a clean disciplinary record and no counselling was ever given to the applicant for any negativity created in the workplace.

[32] After the respondent purchased Freightpak, the applicant became the sales manager and managed all divisions of the respondent. When Jill returned to the respondent she took over the truck rental business.

[33] At a meeting in Johannesburg, the applicant was informed that Celeste, who was the applicant's subordinate, would take over management of 'new business' and the applicant would be the client relations manager. In that period, the applicant was diagnosed with throat cancer.

[34] The applicant heard about the retrenchment for the first time on 10 April 2015 and was devastated because she had five years left until retirement, had a serious medical condition and her husband was on pension. She was 55 years old and prospects of employment were poor.

[35] She was not informed by Ruth that the matter was confidential. People in the office saw that the applicant was upset and she informed them that she was being retrenched.

[36] The applicant was very upset and could not remember clearly what was said at the meeting on 10 April 2015, or whether the next meeting date was agreed.

[37] At the meeting on 17 April 2015, Ruth did inform the applicant about rumours of negativity and that the applicant could leave with immediate effect. The applicant therefore believed that there were no alternatives and that the decision to retrench her had been made.

[38] That evening the applicant was on Facebook and saw Bernadette and

Annette posting messages. The applicant then posted her message. She was not techno savvy and believed that she was only talking to Bernadette and Annette. She only mentioned Jill because Jill was the branch manager and her name was mentioned in the retrenchment letter. The applicant believed that Simon was her direct line manager.

[39] There were emails between the applicant and Ruth and the applicant was aware that Ruth was scheduled to meet her on 17 April 2015.

[40] Under cross-examination the applicant accepted that:

40.1 She did enquire why Jill's name appeared in the retrenchment letter but she did not remember the explanation given by Ruth.

40.2 Ruth enquired whether the applicant was in a position to drive and she offered to take the applicant home.

40.3 On Monday 13 April 2015 the applicant refused to discuss the matter of her retrenchment with Jill or Simon.

40.4 The applicant's posting on Facebook was a rash decision that the applicant regretted. The applicant removed the post the next day and was not aware of any negative consequences that arose as a result of the post.

40.5 The applicant was remorseful and apologised to Jill at the disciplinary hearing as she was not permitted to communicate with any other employee whilst she was suspended.

40.6 The applicant was not aware that others would also see her message and when she received messages from others the next day, she contacted her son and removed the post.

Analysis of evidence and argument

[41] In order to prove that the dismissal of the applicant was fair, the respondent is required, in terms of s 188 of the Labour Relations Act 66 of 1996 (LRA), to have a good reason for the dismissal (substantive fairness) and to have followed a fair procedure (procedural fairness).

[42] Most of the facts on which this case can be decided are common cause.

[43] Procedural fairness was not challenged by the applicant.

[44] Clearly, the reason for the applicant's dismissal was the comments she posted on Facebook.

[45] The respondent attempted in vain to link the applicant's conduct to its own code of conduct and prove that the applicant was guilty of misconduct and that dismissal was an appropriate sanction. It failed to link the Facebook posting to the code of conduct; however that in itself does not mean that the applicant's conduct was acceptable and that dismissal was not appropriate. The issue is whether the applicant could reasonably have been aware that posting the comments that the applicant posted would constitute serious misconduct and that dismissal could follow.

[46] The central issue is whether the comments posted by the applicant constituted serious misconduct and justified dismissal. In order to answer this question, I have to consider the context in which the comments were made.

[47] The applicant was being consulted by the respondent in respect of

her proposed dismissal on grounds of the respondent's operational requirements. She heard, for the first time on 10 April 2015, that retrenchment was contemplated by the respondent. She experienced a wave of emotion as she had throat cancer at that time, her husband was already on pension, the prospect of future employment was poor and she was 55 years old. After 20 years of service to the respondent and a mere five years from retirement, she did not expect to be retrenched.

[48] It was common cause that the applicant saw the s 189(3) letter for the first time on 10 April 2015, the day of the meeting. Section 189(3) of the LRA requires the employer to issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including but not limited to —

(a) the reasons for the proposed dismissals;
(b) the alternatives that the employer considered before proposing the dismissals;
(c) the number of employees likely to be affected;
(d) the proposed method for selecting the employees to dismiss;
(e) the time when or period during which the dismissals are likely to occur.

[49] The reason for the above requirement is so that the applicant could prepare for the meeting, seek advice, and ask the relevant questions at the meeting. The respondent however issued the letter inviting the applicant to the consultation meeting at the meeting itself. It is therefore not surprising that the applicant was totally unprepared. Waves of emotions seemed to surge within her. Thoughts of her health, husband on pension, alternative employment, income, retirement, etc consumed her and she could not remember what was explained to her. I am not surprised that the applicant could not remember exactly what happened at the meeting or that each of the clauses in the notice was explained to her.

[50] I accept that the respondent did not force the applicant to sign the document at that time and gave her an opportunity to take the document home and to contact Ruth if she had any queries. On 15 April 2015, the applicant requested the respondent to hold the next meeting on 23 April 2015, after she received her blood results, but the respondent refused and the meeting proceeded on 17 April 2015 as scheduled.

[51] At that meeting, Ruth presented the applicant with the figures in respect of the retrenchment package, albeit at the request of the applicant. She also informed the applicant that there were concerns about her negativity and that they could discuss the applicant's immediate departure without any loss of benefits. The applicant was also informed that there were no other positions available for her.

[52] Under the circumstances I am not surprised that the applicant believed that the retrenchment was a fait accompli. The applicant's version was that she was offered the option of leaving immediately. There was no evidence before me that further meetings were scheduled or that the applicant was informed that a decision on retrenchment

had not been taken. As a lay person therefore she believed that the decision to retrench her was already made.

[53] As mentioned earlier, I do not consider the explanation given by Ruth to the applicant on 10 April 2015 to be a proper explanation owing to the circumstances of the meeting and the applicant's mental state. If the s 189(3) notice had been served on the applicant a few days prior to the meeting, she would not have been so shocked, and explanations would have been meaningful. In any event, the s 189(3) letter was, for most part, a standardised letter and parts of it were not even relevant to the applicant, for example the applicant was the only employee affected but clause 9 deals with selection criteria.

[54] I accept the applicant's argument that to all intents and purposes the decision to retrench was decided. The argument that she was not retrenched because she had not received a letter of dismissal is a mere technicality.

[55] In any event, the comment posted by the applicant on Facebook was the following: 'Amazing ladies, I have been retrenched by Jill Whittle and Ci. 20 yeRs and now good bye, no prior notification.'

[56] This seems to me to be more of an expression of the hurt that the applicant felt than a broadside attack on the integrity of the respondent. The Code of Good Practice on Dismissals for Operational Requirements states categorically that operational requirements dismissals are 'no fault' dismissals. In the same vein the applicant was reassured by Ruth that the retrenchment had nothing to do with her illness. How then is the name of the respondent brought into disrepute by the applicant stating that she was being retrenched after 20 years of service? Prior to 10 April 2015 there was no notification that the respondent contemplated her retrenchment. The Facebook post was made on 17 April 2015 at which time the applicant would have known for one week that she was likely to be retrenched. Had the applicant indicated on the post that she had no notification prior to 10 April 2015, the statement would have been factually correct but nothing else would have changed. The offence to the respondent would have been the same. Therefore, the inaccuracy of the statement is of little or no relevance. There was also no evidence that the respondent actually suffered reputational damage owing to the applicant's comment.

[57] On the issue of defamation of a senior manager, it is common cause that Jill Whittle is a senior manager at the respondent. She is the regional manager and is responsible for all operations and sales at the Pinetown branch. It was her evidence that all sales representatives for all divisions reported to her. Although it was factually incorrect that Jill Whittle was responsible or involved in the applicant's proposed retrenchment, I do not believe that she was defamed by the mentioning of her name in the Facebook post. She was the 'face' of the respondent at that branch. Whether it was Jill Whittle, the CEO of the respondent, or Ruth Sibisi that actually consulted with the applicant and gave effect to the retrenchment, it is the respondent that is ultimately responsible for the retrenchment. The persons are functionaries and would not have acted in their personal capacities

and cannot be blamed as individuals for the unfortunate predicament related to the retrenchment of the applicant. Whilst the statement was untrue, it was not defamatory towards Jill Whittle.

[58] Retrenchment is a traumatic event in the working life of any individual and it is not uncommon for workers to suffer from depression and in some instances to become suicidal. Support from friends and family is most needed at these times and the applicant's post on Facebook was an attempt at receiving such support. Whilst it is understandable that the respondent would want to avoid panic amongst other employees by requesting confidentiality from the applicant, it seems unfair that the applicant, during such a traumatic time, should be prevented from discussing the matter with her friends or others who could offer support.

[59] As mentioned above I do not believe that the Facebook post was objectively offensive to the respondent but even if it was, I find that dismissal was too harsh a sanction. What the applicant actually needed was counselling, which would have been far more appropriate. I therefore find that the dismissal of the applicant was substantively unfair.

[60] The applicant requested reinstatement as relief for the unfair dismissal and I believe that such an order should be granted as it is the primary remedy envisaged by the LRA. Further, it was the respondent's version that the consultation process was not concluded and that retrenchment was not a foregone conclusion

[61] In calculating the retrospective salary due to the applicant for the period 29 April 2015 to the date of this award, I have used the applicant's basic salary of R47,594.71 per month.

[62] The retrospective salary is therefore calculated as follows: R47,594.71 x 4 months = R190,378.84.

Award

[63] In the circumstances I make the following award:

63.1 The dismissal of the applicant, Lynn Robertson, by the respondent, Value Logistics, is found to be substantively unfair.

63.2 The respondent is ordered to reinstate the applicant into her position as a customer relations manager, on the same terms and conditions of employment that prevailed prior to her dismissal.

63.3 The applicant is required to report to the premises of the respondent to commence work within three days of receiving this award.

63.4 The respondent, Value Logistics, is ordered to pay the applicant retrospective salary amounting to R190,378.84.

63.5 The abovementioned amount is to be paid to the applicant within 14 days of the respondent being informed of this award.

63.6 There is no order as to costs.