

THE SOUTH AFRICAN

LABOUR LAW REPORTS'



in association with



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A. INTRODUCTION

The present seminar workbook contains an analysis of important decisions handed down by the Commission for Conciliation, Mediation and Arbitration (CCMA), various bargaining councils, the labour court, the labour appeal court, the high court, the supreme court of appeal and the constitutional court under the Labour Relations Act 66 of 1995, as amended (the LRA), the Constitution of the Republic of South Africa 108 of 1996 (the Constitution), various other selected statutory provisions and, lastly, the common law, during the preceding 12-month period.

Attention, in this workbook, will be focussed on key issues that have emerged in recent decisions in the following main areas:

- (a) contractual rights and obligations
 - (i) Basic Conditions of Employment Act 75 of 1997 (BCEA)
- (b) civil jurisdiction
 - (i) delict
 - (aa) employer's vicarious liability for delictual acts of employees in deviation matters
- (c) statutory rights and obligations
 - (i) Labour Relations Act 66 of 1995 (LRA)
 - (aa) dismissals
 - (I) individual misconduct
 - (1) principles governing confessions made during an internal disciplinary enquiry/investigation
 - (2) termination by operation of law: section 59(3) of the Defence Act 42 of 2002 – misconduct dismissal
 - (II) collective misconduct
 - (1) employees dismissed for associating themselves with conduct in breach of picketing rules
 - (III) dismissals on the grounds of incapacity poor work performance
 - (IV) dismissals on the grounds of ill-health or injury
 - (1) section 13(1)(a) and section 13(1)(i) of the Prescription Act 68 of 1969: mental incapacity as a result of an injury on duty prevents the completion of the period of prescription
 - (V) dismissals on the grounds of operational requirements
 - (1) section 41(4) of the BCEA: entitlement to severance pay and the extent of the assistance provided by the retrenching employer
 - (VI) dismissals in terms of section 186(1) of the LRA

- (VII) automatically unfair dismissals
 - (1) section 187(1)(f) read with section 187(2)(b) of the LRA: dismissal based on age where the employee has reached the normal or agreed retirement age for persons employed in that capacity
 - (2) section 187(1)(f) read with section 187(2)(a) of the LRA: requirements to be met to comply with the defence of inherent requirements of a job where a dismissal takes place on the basis of religious belief
- (VIII) miscellaneous terminations
- (bb) unfair labour practices in terms of section 186(2) of the LRA
 - (I) s186(2)(a) of the LRA: benefits dispute
 - (II) s186(2)(b) of the LRA: unfair suspension
 - (1) regulation 32 of the Appointment and Conditions of Employment of Senior Managers Regulations read with regulation 6 of the Local Government: Disciplinary Regulations for Senior Managers – special leave utilised as precautionary suspension
- (cc) collective bargaining
 - (I) collective agreements
 - (1) whether individual employee(s) not party to a collective agreement are excluded from referring disputes about the interpretation or application of such collective agreement to the CCMA or relevant bargaining council
 - (II) role of political parties
 - (1) whether the high court (in terms of the Regulation of Gatherings Act 205 of 1993) or the labour court (in terms of the LRA) has jurisdiction over protest action
 - (III) trade unions/employers' organisations
 - (1) trade union constitution
 - (1a) registered constitution: providing for inclusion of specific industries in the union's scope, as well as providing for the inclusion in such scope of any other activity, industry or interest group as determined by the national executive committee or national office-bearers, by resolution
 - (1b) registered scope of the constitution: all workers in South Africa – no limit to specific region, sector or industry
 - (2) registration by the registrar of labour relations
 - (2a) sections 95 and 96 of the LRA: guidelines and procedures for registrability

- (2b) registration in terms of the LRA as well as a non-profit organisation in terms of the Companies Act 7 of 2008
 - (3) bargaining councils
 - (3a) section 33A of the LRA: enforcement of collective agreements by bargaining councils
 - (3b) whether membership of a party to a council automatically terminates if the party fails to maintain the level of representivity required to be admitted
 - (dd) industrial action
 - (I) strikes
 - (1) defective strike notice and entitlement to interdict prohibiting such strike
 - (II) lock-outs
 - (III) picketing
 - (ee) section 197 of the LRA
- (ii) miscellaneous topics
- (aa) section 198B(5) of the LRA
 - (I) employee employed on limited fixed-term contract repeatedly extended – no evidence to justify this: employment deemed by operation of law to be indefinite; employee entitled to be treated no less favourably than permanent employee
 - (bb) section 198D of the LRA
 - (I) general provisions applicable to sections 198A to 198C
- (iii) powers and functions of the CCMA and bargaining councils
- (I) section 193(2)(b) of the LRA: reinstatement or re-employment not appropriate remedies if continued employment relationship intolerable
 - (II) the extent to which an arbitrator may deviate from the reason for dismissal relied upon by the employer when it conducted the internal investigation
 - (III) the scope of a pre-arbitration agreement: limitation on the parties and the arbitrator
 - (IV) section 33A(4)(b) of the LRA: consideration of institutional bias when the CCMA appoints an arbitrator in enforcement proceedings initiated by a bargaining council and a non-party to such council objects to the appointment by the council of an arbitrator
- (iv) powers and functions of the labour court
- (I) section 145(3) read with sections 145(7) and 145(8) of the LRA: considerations applicable to the stay of an arbitration award pending the decision of the labour court, if the applicant furnished security in terms of s145(8) of the LRA

- (II) consequences of archiving a review application: does not invalidate valid security bond; award remains suspended until review application finally determined on merits or application to dismiss successfully brought
- (III) review of demarcation award
- (v) powers and functions of the labour appeal court
- (d) other statutory provisions that received judicial attention
 - (i) Basic Conditions of Employment Act 75 of 1997 (BCEA)
 - (ii) Pension Funds Act 24 of 1956 (PFA)
 - (iii) Employment Equity Act 55 of 1998 (EEA)
 - (aa) income differentials in terms of section 27 of the EEA (vertical pay differentials) as opposed to unfair discrimination claims in terms of section 6(1) of the EEA (horizontal pay differentials)
 - (bb) shortlisting for promotion only under-represented candidates and excluding the possibility of white males being shortlisted (and appointed)
 - (iv) Local Government: Municipal Finance Management Act 56 of 2003 (MFMA)
 - (aa) liability of political office-bearers and municipal officials for fruitless and wasteful expenditure and unauthorised expenditure

This seminar workbook also contains the following features, namely:

- (a) table of cases
- (b) table of literature
- (c) table of statutes

The seminar workbook, once again, contains a summary of labour-related legislation covering the last 12 months.

It is to be noted that this year's seminar also deals with a number of topics not covered in the workbook but set out in the PowerPoint presentations that delegates receive and these include the SALLR earnings guidelines for the corporate, formal, informal and non-corporate sectors.

B. CONTRACTUAL RIGHTS AND OBLIGATIONS

1. BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997 (BCEA)

1.1 AGREEMENT REGARDING EARLY RETIREMENT AS OPPOSED TO VOLUNTARY WITHDRAWAL FROM PENSION FUND: CONSENSUS NOT REACHED; ENQUIRY OF THE APPLICATION OF THE DOCTRINE OF QUASI-MUTUAL ASSENT

University of Zululand v Dlongolo
 Unreported case no DA23/23
 (2025) 46 ILJ 1146 (LAC)
 (2025) 36 SALLR 11 (LAC)

- (a) **What are the elements of consensus identified by the labour appeal court to indicate that an agreement exists between an employer and employee as to an issue like early retirement or the voluntary withdrawal from a pension fund?**

- (b) In the scenario where, on the standard theory of consensus, a party fails to prove the contract that it relies upon, with reference to *Smith v Hughes* [1871] 6 LR 597 (QB) and *Sonap Petroleum SA (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A), on what basis may the finding be made that quasi-mutual assent exists founded on the approach that a party is precluded from denying the existence of an agreement, based on their own conduct and the circumstances?
- (c) What does the three-fold enquiry entail to determine the presence of quasi-mutual assent?
- (d) In determining whether an agreement has been reached on the basis of quasi-mutual assent, what is the extent of the duty on the party wishing to rely upon such an agreement to, on the basis of reasonableness, enquire as to the contradictions that exist in the position of the other party as contained in correspondence?

INTRODUCTION

concluding contracts via email can be risky: a poorly worded email might be interpreted in a manner contrary to what was intended; an offer and acceptance by email may result in a claim

1. Concluding contracts via an email exchange can be risky. The language used may be overly informal, ambiguous, contradictory or shorn of the details necessary for the intended contract. A poorly worded email might also be interpreted in a manner contrary to what was intended. As the facts of the present matter illustrate, the peril is heightened when the subject matter of an offer involves various permutations couched in technical language. The cross-pollination of employment jargon with terminology contained in pension fund rules, in an offer and acceptance by email, resulted in the claim in this appeal.

PERTINENT FACTS OF THE CASE

Mr Dlongolo requested permission to take early retirement; the University indicated that it was prepared to deviate from standard practice and compensate him for 'pension penalties' imposed by the pension fund (the fund) as a result of early retirement – however, Mr Dlongolo elected to withdraw from the fund so that he could receive his full account balance of R5.1m without any penalty deduction being imposed by the fund – the university refused to make any payment on the basis that the employee opted to withdraw from the fund rather than to select voluntary early retirement ito the fund rules

2. The respondent (Mr Dlongolo) was employed by the appellant (the University) as Director: Physical Planning. Following death threats, due to his role in implementing the University's insourcing process and a period of absence from work, Mr Dlongolo, who was only 57 years of age at the time, requested permission to take early retirement. Various discussions ensued. Given the unusual circumstances, the University indicated that it was prepared to deviate from standard practice. It was willing to compensate Mr Dlongolo for 'pension penalties' imposed by the University's pension fund (the fund) as a result of the early retirement.
3. In effect, Mr Dlongolo elected to withdraw from the fund so that he received his full account balance of R5,1 million, without any penalty deduction being imposed by the fund. The University subsequently refused to make any payment to Mr Dlongolo on the basis that he had opted to withdraw from the fund rather than select voluntary early retirement in terms of the fund rules (the rules).

Mr Dlongolo instituted a claim ito s77(3) of the BCEA; the university's pleaded defence was that the withdrawal of the employee's share of the pension fund did not constitute

an early retirement option and, therefore, it was not obliged to compensate him for 'pension penalties' imposed by the fund on the basis of early retirement

4. Mr Dlongolo instituted a claim in terms of s77(3) of the BCEA. The University's pleaded defence was that Mr Dlongolo's 'withdrawal of his share of the pension fund did not constitute an early retirement option in terms of clause 4.3 of the pension fund rules but rather a voluntary withdrawal in terms of clause 7 of those rules.'
5. It was also pleaded that Mr Dlongolo had not exercised the option of early retirement before the time stipulated by the University.

the labour court judgment

LC: employee led to believe he would be compensated by the university irrespective of which option he exercised on his retirement – quasi-mutual assent (reliance theory): in cases of dissent, it enables the contract asserter to contend that the contract denier misled him into the reasonable belief that the contract denier had actually assented to the contractual terms in question

6. The labour court determined the dispute on the basis of quasi-mutual assent, also referred to as the reliance theory:

'...I find that the applicant was misled to believe that he would be compensated by the university, irrespective of which option he exercised on his retirement. The undertaking by the university to financially compensate the applicant for the penalties suffered by early retirement, in the large sum of R824 700.00, in my view would most certainly induce and influence any reasonable person in the circumstances of the applicant to take the early retirement. I find that that misrepresentation indeed induced the applicant to take early retirement ... Ngcobo created the impression that the parties were *ad idem* on the material terms of the agreement. I find that the applicant has discharged the onus and has established the necessary *animus contrahendi* on the part of both parties.' (*Van Huyssteen N.O. and Another v Milla Investment and Holding Company* (593/16) [2017] ZASCA 84 (2 June 2017), at paragraph [23]: 'the doctrine of quasi-mutual assent constitutes an application of the reliance theory in cases of dissent', enabling 'the 'contract asserter' to contend that the 'contract denier' misled him or her into the reasonable belief that the contract denier had actually assented to the contractual terms in question'.)

7. The labour court held that Mr Dlongolo had been misled by the University to believe that he would receive separate compensation for the loss of pension benefits occasioned by the early retirement. He had also been persuaded by this offer of compensation to take early retirement. A reasonable person in his position would also have been misled, according to the court.

FINDINGS OF THE LABOUR APPEAL COURT

Govindjee AJA (with Savage ADJP, Van Niekerk JA concurring)

consensus?

requirement for an agreement: a complete meeting of minds, i e the intention of the one party corresponds exactly to that of the other

8. A contract is an agreement entered into with the intention of creating a legal obligation or obligations. The definition postulates an agreement (a meeting of minds or mutual understanding) between two or more persons as the basis of a contract. Without agreement in this sense there can, generally speaking, be no contract. The parties must not only be of the same mind, but know that this is the case. Agreement is reached when parties have come into 'conscious accord' on the fact that they intend to create

between them an obligation (or obligations) with a specific content. Persons cannot be said to be in agreement unless there has been a complete meeting of their minds, that is, unless the intention of the one corresponds exactly to that of the other (ADJ Van Rensburg 'Contract' in *The Law of South Africa* (3rd Ed) (vol 9) (LexisNexis) (2014), at paragraphs 295–305).

the offer of the university: if the employee retires on 31 December 2017 with penalties (see clause 4.3 of the fund rules attached), the penalties amount to R824 700.00, the university will consider this as a contribution towards retirement – to be partially made up of his credit of R271 780.72 (to the university's leave policy limiting such leave credit to a maximum of 90 days); 'it is your option how you receive the retirement benefits as reflected on the quotation issued by Absa' – full withdrawal (estimated at R5 117 233.79) or monthly pension without commuting a third

9. Mr Dlongolo's case was based on acceptance of an offer made by Mr Ngcobo, on behalf of the University. The offer in question was contained in the following email sent by Mr Ngcobo, on 14 December 2017 (the offer), and requires repetition in full:

'As discussed at our last meeting on Friday 8th, the scenario is as follows:

1. If you retire as at 31 December 2017 without penalties, as if you were aged 60, the university has to pay in R1 614 644,63 to buy out the outstanding service. It was made clear that because of budgetary constraints this cost is unaffordable.
2. If you retire as at 31 December 2017 with penalties (see clause 4.3 of the fund rules attached), the penalties amount to R824 700.00. The university can consider this as a contribution towards your retirement.
3. Your leave credit as at 31 December 2017 is 102 days, which in value is R297 086.78.
4. However there is a capping of 90 days (in terms of the leave policy, upon termination of service, the university only pays out leave days up to a maximum of 90 days), the value of which is R271 780.72. This amount will not be paid out to you but set-off against the penalty of R824 700.00.
5. You then requested that the difference of 12 days – R25 306.06 in leave values (R297 086.78 less R271 780.72) be paid out to you.

In summary, at the end of the meeting, this was the understanding:

- That you will retire as at 31 December 2017 with penalties amounting to R824 700.00.
- That the university will compensate you for the penalties suffered because of early retirement. You will contribute your 90 days leave pay-out of R271 780.72 towards the penalties.
- That the leave difference (12 days) of R25 306.06 will be paid out to you.
- It is your option how you receive the retirement benefits as reflected on the quotation issued by Absa directly to you, i.e.,
 - full withdrawal (estimated R5 117 233.79)

OR

- monthly pension without commuting a third (estimated R21 463.41)

OR

- commuting a third (estimated R1 213 568.66) AND then receive a reduced monthly pension (estimated R14 308.94).

NOTE THAT ALL OF THE AMOUNTS QUOTED ABOVE ARE BEFORE APPLICABLE STATUTORY DEDUCTIONS.

THERE MAY BE SMALL VARIATIONS DEPENDING ON FINAL DATE OF CALCULATIONS THESE VALUES (sic).

May I also point out to you that

- the undertaking by the university to compensate you for the penalties suffered is not standard practice but is done to reach an amicable solution to the predicament (your circumstances) that presents.
- The undertaking by the university is only valid if exercised in the 2017 financial year as there is no budget for it in 2018.

It is, therefore, imperative that you communicate your decision to management before 12h00, Friday 15 December 2017, in order for the amounts to be accrued.

If anything is unclear, please do not hesitate to contact me. Urgency is of essence in this matter.'

10. The rules were attached to this correspondence. Clause 4 dealt with retirement and clause 7 with withdrawal, as follows:

'4 Retirement

4.1 Retirement Benefits

....

4.2 Normal Retirement

...

clause 4.3 of the fund rules: with the consent of the employer, a member may retire at any time after the age of 55 years (Mr Dlongolo was 57 years old); the member shall receive an annual pension from the date of such early retirement and the annual pension shall be reduced by 0.4% for each month by which the member's retirement date precedes the date on which such member would reach the age of 60 years

4.3 Voluntary Early Retirement

Subject to the written consent of the EMPLOYER, a MEMBER may retire at any time after attaining the age of 55 (fifty-five) years. In this event no further CONTRIBUTIONS shall be payable by or in respect of the MEMBER. The MEMBER shall receive an annual pension from the date of such early retirement and equal to such MEMBER'S SCALE PENSION. Such annual pension shall be reduced by 0,4% for each month by which the MEMBER'S RETIREMENT DATE precedes the date on which such MEMBER would attain 60 (sixty).

4.4 Cash Option

4.4.1 A MEMBER shall be entitled to take up to one-third of such MEMBER'S pension in cash...

7 Withdrawal

7.1 Withdrawal benefits

If a MEMBER leaves the service of the EMPLOYER before reaching NORMAL RETIREMENT DATE and is not entitled to any other benefit in terms of the RULES ... the MEMBER shall be entitled to one of the options available under RULE 7.2, 7.3 or 7.5 as the case may be...

7.2 Cash benefit

7.2.1 If a MEMBER leaves the service of the EMPLOYER, due to any reason other than retrenchment, a lump sum benefit shall be payable...

7.3 Preservation benefit

7.3.1 In lieu of the cash benefit in terms of RULE 7.2, a MEMBER may elect to transfer such benefit to another APPROVED FUND chosen by the MEMBER...'

LAC: each party intended to make a contract but on different terms; university – willing to make a contribution to negate the anticipated penalty due to early retirement (annual pension reduced by 0.4% for each month the employee’s retirement precedes the date on which he would attain the age of 60 years); Mr Dlongolo, by contrast – withdraw from the fund and personally receive the early retirement penalty contribution promised by the university

11. The record reveals that the parties each intended to make a contract, but on different sets of terms. The university was willing to make a contribution to negate the anticipated penalty, to be imposed in terms of the rules, due to early retirement. That penalty amounted to 0,4% for each month by which Mr Dlongolo’s retirement preceded the date on which he would attain the age of 60 (the calculation provided by ABSA reflected the reduction factor as 14,4%, being calculated as follows, based on retirement three years prior to the age of 60: $(0,40\% \times 12) \times 3 = 14,4\%$). Importantly, the effect of the penalty would be to reduce the annual pension he would receive after retirement.
12. Mr Dlongolo, by contrast, wanted to leave the university’s service early, withdraw from the fund and personally receive the early retirement penalty contribution promised by the university. As a result, despite the purported acceptance of the offer, there remained disagreement in respect of the intended obligations. This was also readily apparent from the University’s response, on 20 December 2017, to Mr Dlongolo’s selection, emphasising that the selected option was not ‘early retirement’ in terms of clause 4.3 and highlighting that there would be no compensation for penalties that would have been suffered because of early retirement and that the maximum 90-days leave pay out would be made to Mr Dlongolo. There was also a further basis to arrive at the same conclusion: Mr Dlongolo did not unconditionally accept the whole offer (including voluntary early retirement and receipt of a penalised annual pension in terms of clause 4.3 of the rules) and effectively made a counter-offer to be accepted or rejected by the University.

LAC: no agreement between the parties and on standard theory, Mr Dlongolo failed to prove contract upon which he relied (*Vincorp (SCA)*)

13. There was, therefore, no agreement between the parties and, on the standard theory, Mr Dlongolo failed to prove the contract on which he relied (*Vincorp (Pty) Ltd v Trust Hungary ZRT* (0611/2017) [2018] ZASCA 35 (27 March 2018) (*Vincorp*), at paragraph [25]).

quasi-mutual assent?

on a strict approach to the pleadings, that would have been the end of the matter: the parties are to identify the dispute and it is for court to determine that dispute and that dispute alone

14. On a strict approach to the pleadings, that would have been the end of the matter. It is generally for the parties to identify the dispute and for the court to determine that dispute and that dispute alone (*Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA), at paragraphs [13] to [14]; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) (*Novartis*), at paragraph [11]).
15. Mr Dlongolo's case was poorly pleaded. He did not rely on any oral variation of what was contained in the offer, despite it being obvious that he had failed to accept, within the strict time period indicated, so that the written offer had lapsed (*Laws v Rutherford* 1924 AD 261, at 262). Mr Ngcobo's evidence was that he had agreed, at the meeting of 15 December 2017, that Mr Dlongolo and Khan, his financial advisor, could respond by 18 December 2017, but this was not the pleaded basis of the claim. Mr Dlongolo's suggestion, during cross-examination, that Mr Ngcobo had offered to pay the penalties directly to him, instead of to the fund, was similarly not the basis of the pleaded claim.

the pleaded case: there was an express offer in writing containing three options, one of which was properly accepted; he did not plead a contract based on quasi-mutual assent – on appeal he relied exclusively on this argument

16. The pleaded case was simply that there was an express offer in writing containing three options, one of which was properly accepted. That aside, he also did not plead a contract concluded with the University based on quasi-mutual assent (see Christie RH and Bradfield GB, *Christie's The Law of Contract in South Africa* (8th Ed) (*LexisNexis*) (2022), at 36–37; *Constantia Graswerke BK v Snyman* 1996 (4) SA 117 (W), at 124I–J, cited in *Vincorp (supra)*, at paragraph [32] and also at paragraphs [27]–[33]).
17. On appeal, however, he relied exclusively on this argument. It seemed fair to adopt a lenient approach and to consider the point given the equally imprecise state of the University's pleadings and considering that this dispute was fully ventilated before the labour court and determined on that basis.

quasi-mutual assent: a party is precluded from denying the existence of an agreement based on their own conduct and the circumstances

18. In cases of quasi-mutual assent, a party is precluded from denying the existence of an agreement based on their own conduct and the circumstances (*Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA), at paragraph [9]: 'contractual liability, however, arises not only in cases where there is consensus or a real meeting of the minds, but also by virtue of the doctrine of quasi-mutual assent').
19. The established test builds on the sentiments expressed in *Smith v Hughes* [1871] 6 LR 597 (QB), at 607:

'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

threefold enquiry: was there a misrepresentation as to one party's intention? – who made the representation?; was the other party misled thereby? – the answer has two

possibilities: was the other party actually misled?; would a reasonable man have been misled? (Sonap (A))

20. A threefold enquiry is usually applied prior to accepting a contract on this basis:

‘...firstly, was there a misrepresentation as to one party’s intention; secondly, who made that representation; and thirdly, was the other party misled thereby? ...The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?’ (*Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) (*Sonap*), at 239J–240B).

the university’s main mistake: to include in the offer the ‘full withdrawal’ amount from the fund (R5.1m) as an option linked to the early retirement with penalties – this was contrary to the rules of the fund, making it clear that a withdrawal from the fund is treated differently from early retirement: material mistake (Botha (SCA))

21. As is often the case, the answers to the first two questions are readily apparent (see, for example, *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) (*Constantia*), at paragraph [18]).

22. Mr Ngcobo’s main error was to include in the offer the ‘full withdrawal’ amount from the fund (in the amount of R5,1 million), as received from ABSA, as an option linked to early retirement with penalties. That was contrary to the rules, which were provided to Mr Dlongolo, which made it clear that withdrawal from the fund was treated differently to retirement. Including that option was unintended and amounted to a material mistake on the part of the University (see *Botha v Road Accident Fund* 2017 (2) SA 50 (SCA), at paragraph [10]).

whether the university (whose actual intention did not conform to the common intention expressed in its offer) led the employee, as a reasonable person, to believe that the declared intention represented its actual intention (Sonap (A)) – answering the above question entails:

23. The decisive question was whether the University, whose actual intention did not conform to the common intention expressed in its offer, led Mr Dlongolo, as a reasonable person, to believe that the declared intention represented its actual intention (*Sonap (supra)*, at 239I–J). Answering this question inevitably required a detailed examination of the factual matrix (*Novartis (supra)*, at paragraph [35] – this included all the facts proven that showed what the intention was in respect of entering into a contract: the contemporaneous documents, the conduct in negotiating and communicating with one another and the steps taken to implement the contract).

examination of the factual matrix (Novartis (SCA)): considering all the facts, contemporaneous documents, conduct in negotiating, communications, steps taken to implement a contract

24. The reasonableness of Mr Dlongolo’s belief turned on the information provided to him in and with the offer, as well as information he had requested and received prior to the purported acceptance of the offer.

starting point: the bullet-point summary in the offer

25. The terms extracted from the bullet-point summary contained in the offer received by Mr Dlongolo were a useful starting point:

25.1 Mr Dlongolo would ‘retire’ on 31 December 2017 ‘with penalties amounting to R824 700.00’;

- 25.2 he would be compensated by the university for the penalties that would be suffered due to early retirement;
- 25.3 he would himself contribute 90 days leave pay-out of R271 780.72 'towards the penalties';
- 25.4 the 12-day leave difference of R25 306.06 would be paid to him; and
- 25.5 Mr Dlongolo could select to receive 'retirement benefits' in one of three ways: full withdrawal; monthly pension; or commuting a third and then receiving a reduced monthly pension.

furthermore: to retire without penalties would require a pay in of R1.6m to buy out the outstanding service, which was unaffordable to the university; retirement with penalties would be possible with the employee contributing R271 780.72 of his leave entitlement; by attaching the rules and drawing the employee's attention to clause 4.3 of the rules, the university expected Mr Dlongolo to read at least that particular clause when interpreting its offer

- 26. The repeated reference to 'penalties' had to be construed in the light of what was contained in the preceding portion of the offer. As that portion of the correspondence indicated, two broad scenarios emerged during the meeting of 8 December 2017. To retire 'without penalties' would require a 'pay in' of R1,6 million 'to buy out the outstanding service', which was unaffordable from the University's perspective. But retirement 'with penalties', in terms of clause 4.3 of the rules, would be possible, the University agreeing to contribute to the penalty amount, less the value of the leave pay-out due to Mr Dlongolo. As framed in the offer, that leave amount (in the amount of R271 780,72) was to be forfeited by Mr Dlongolo as his contribution 'towards the penalties'.
- 27. The University specifically drew Mr Dlongolo's attention to clause 4.3 of the rules in explaining this option, and attached the rules to the offer to emphasise their importance. By attaching the rules, the University expected Mr Dlongolo to read at least that particular clause when construing its offer.

for the above reason, the subsequent expression in the offer, of a full withdrawal option, coupled with the monthly pension estimates and reference to compensation for penalties, should have raised a flag (these various options emanated from 2 separate Absa quotations, one dealing with early retirement benefits and the other about withdrawal from the fund)

- 28. For this reason too, the subsequent expression in the offer of a full withdrawal option, coupled with the monthly pension estimates and reference to compensation for penalties, should have raised a flag. The various options emanated from two separate Absa quotations, one provided following Mr Dlongolo's request for information about early retirement benefits, the other containing information about withdrawal from the fund.

in any case, if the employee withdrew from the fund, there would be no penalties payable to the fund and he would directly claim the amount representing the penalties, namely, R824 700.00

- 29. It could be added that Mr Dlongolo recalled, during cross-examination, that Mr Ngcobo had advised him, during the meeting of 8 December 2017, that there would be penalties for early retirement payable to the fund. He also conceded that withdrawal from the fund implied that he would no longer be a member of the fund so that there would be no penalties payable to the fund.

the employee should have realised, or he should have realised as a reasonable person: there was a real possibility of a mistake in the offer, which entails a duty on him to speak and enquire whether the express offer was the intended offer – only thereafter could he accept the offer (Sonap (A))

30. The options contained in the offer had to be considered with this in mind. If Mr Dlongolo realised (or should have realised as a reasonable person) that there was a real possibility of a mistake in the offer, he would have had a duty to speak and to enquire whether the expressed offer was the intended offer. Only thereafter could he accept (*Sonap (supra)*, at 240J–241B).
31. Leaving aside the inconsistencies highlighted above, the labour appeal court was prepared to accept that Mr Dlongolo probably did not realise the University's mistakes. The conduct of both Mr Ngcobo and a financial advisor, Mr Iqbal Khan, supported this approach. Mr Ngcobo, by his own admission, had been uncertain about the information he conveyed to Mr Dlongolo at the meeting on 8 December 2017. His lack of clarity was also reflected in the offer and continued at the meeting of 15 December 2017. He could not explain why the commutation amount was not one third of the withdrawal amount, despite that being the reason for the meeting. He resorted to calling the ABSA consultant (Mr Mncube), who had arranged the actuarial penalty calculation, so that she could explain the matter to Mr Khan. He also appeared to have simply copied and pasted the various figures received from ABSA without appreciating the impact of the promised 'contributions' (on the part of both the University and Mr Dlongolo) towards reducing the penalty. This was the only plausible explanation for the offer containing identical monthly pension figures to what was already provided in the October quotation. Given the special arrangement proposed, those figures were outdated and wrong. To make matters worse, Mr Dlongolo had been pushed to make a quick decision without an updated actuarial calculation reflecting the penalty contributions.
32. Mr Khan was engaged to provide financial advice to Mr Dlongolo, since November 2017. The offer containing both the monthly pension estimates and the withdrawal amount was received by Mr Dlongolo and shared with Mr Khan a day before they met with Mr Ngcobo to clarify the figures on 15 December 2017. He was consulted on various occasions before and after receipt of the offer for his 'calculation', 'quotes' and 'further advice'. Despite this, he restricted his focus mainly to accessing and investing the lump sum to be withdrawn from the fund. There had been little consideration of the broader picture and seemingly no appreciation of the rules provided to him or the manner in which the compensation towards the penalties would impact on the two monthly pension options. He had seen the quotation and, on the probabilities, had perused a letter drafted by Mr Dlongolo before this was sent to the University at the end of November 2017. He had clearly understood that the promised contribution was something separate from the lump sum amount under consideration but acknowledged that the offer had been unclear to him in respect of what would happen to the penalties in the case of a full withdrawal. He appeared not to have any understanding of the meaning of a defined benefit fund or the notion of penalties. This was surprising, to say the least, considering his years of experience as a financial advisor.
33. Considering those circumstances, as well as the underlying reason for his hospitalisation and need for early retirement, there had to be a measure of sympathy for Mr Dlongolo's position.
34. In the final analysis, the appeal turned on whether Mr Dlongolo had a 'duty to speak and to enquire' based on the facts of the case. He had been a senior employee who proactively engaged with ABSA about the retirement benefits due to him and who had solicited advice from both Messrs Mncube and Khan. The quotation received in October afforded two clear, easily understandable, early retirement options, both resulting in a monthly pension. Yet the summarised options contained in the offer conflated those options with full withdrawal from the fund, based on an amount contained in a separate actuarial calculation received from ABSA.

the requirement of reasonableness: a party asserting a contract should not be negligent, must exercise proper care in coming to the conclusion that the parties have reached consensus; a reasonable person would have read the offer in its entirety, noting the cross-reference to clause 4.3 of the rules, thus the contrast between receipt of an annual benefit as opposed to a lump sum withdrawal was glaring; a reasonable person would have realised the real possibility of a mistake in the offer

35. The requirement of reasonableness implies that a party asserting a contract should not be negligent but must exercise proper care in concluding that the parties have reached consensus.
36. The contradiction in the offer was evident: on the one hand, the University and Mr Dlongolo would each contribute to negate the penalties associated with the annual benefit amount to be received, with or without one-third commutation, upon early retirement and, on the other, Mr Dlongolo could withdraw from the fund, suffer no penalty in terms of the rules and yet receive the equivalent penalty amount in cash.
37. A reasonable person would have read the offer in its entirety, noting the cross-reference to clause 4.3 of the rules. Considering that clause, the contrast between receipt of an annual benefit as opposed to a lump-sum withdrawal was glaring and a reasonable person would have realised the real possibility of a mistake in the framing of the offer (*Constantia (supra)*, at paragraph [22]).

Sonap (A): the snapping up of a bargain with the knowledge of the possibility that the declared intention did not represent actual intention is not *bona fide*

38. The conclusion was that Mr Dlongolo had acted unreasonably in construing the offer as he had, by selectively relying on part of the offer and by ignoring information previously gleaned, without any further enquiry. Moreover, he had communicated acceptance despite his own financial advisor being unable to make sense of a key component of the offer. Borrowing from *Sonap*, Mr Dlongolo had snatched at a bargain in circumstances where a reasonable person would have acted more carefully by enquiring into the matter, having realised the real possibility of a mistake in the framing of the offer (*Sonap (supra)*, at 241D: 'the snapping up of a bargain, however, in the knowledge of the possibility that the declared intention did not represent actual intention, would not be *bona fide*').

LAC conclusion: no consensus, actual or imputed – LC had erred in concluding to the contrary

39. There was, therefore, no consensus, actual or imputed and, reading Mr Dlongolo's pleadings generously, the alleged contract was of no effect. The labour court had erred in concluding to the contrary, based on its limited assessment of whether a reasonable person would have been misled by the offer. The appeal succeeded. Given the circumstances already described, it was appropriate that there be no order as to costs.

order

40. The appeal was upheld, with no order as to costs.

C. **CIVIL JURISDICTION**

2. **DELICT**

2.1 **EMPLOYER'S VICARIOUS LIABILITY FOR DELICTUAL ACTS OF EMPLOYEES IN DEVIATION MATTERS**

Underwriters at Lloyd's of London v Minister of Safety and Security
Unreported case no 40975/2016
(2024) 45 ILJ 1339 (GP)
(2024) 35 SALLR 437 (GP)

- (a) **How did the high court, with reference to *F v Minister of Safety and Security and Another 2012 (1) SA 536 (CC)*, formulate the general principles applicable to vicarious liability of an employer for the delicts committed by its employees?**
- (b) **What is the test to be applied to determine vicarious liability when an employee commits the delict while going about the employer's business?**
- (c) **What is the test to be applied to determine vicarious liability when the wrongdoing takes place outside the course and scope of employment – the so-called deviation cases?**

INTRODUCTION

employees accused of operating within the scope of their duties while engaging in the planning and execution of a robbery, obstructing the detection and investigation of a crime and hindering the recovery of stolen money

1. The current claim rested on the vicarious liability of the Minister of Safety and Security (the Minister/the defendant) for the actions of his employees. Those employees were accused of operating within the scope of their duties while engaging in the planning and execution of a robbery, as well as obstructing the detection and thorough investigation of the crime and hindering the recovery of the stolen money.

PERTINENT FACTS OF THE CASE

SBV had service contracts with Standard Bank, First Rand, Nedbank and Absa – taking custody of cash on behalf of clients and providing secure cash handling, safekeeping and transport; April 2014, a robbery took place at the Witbank premises of SBV

2. Almost a decade ago, during the late evening of 27 April 2014 and in the early morning of 28 April 2014, a well-planned and executed robbery took place at the Witbank premises of a company named SBV. SBV conducts business, *inter alia*, by taking custody of cash on behalf of clients in the banking sector and providing secure cash handling, safekeeping, transport and related services to its clients in terms of written service contracts concluded between it and each of its clients.
3. SBV had concluded service contracts with Standard Bank of South Africa Limited (Standard Bank), FirstRand Bank Limited (FirstRand), Nedbank Limited (Nedbank) and Absa Bank Limited (Absa).
4. Each of the service contracts incorporated a written service level agreement (the SLA). The SLAs would, *inter alia*, provide to the relevant bank and to the retail customers of the bank the services contemplated therein, including cash management and retail cash processing services.

insurance policy in effect at the time of robbery: Lloyds of London (Underwriters) undertook to indemnify SBV for losses of cash under its control or in its custody (obo its clients), including losses due to robbery while in transit or at rest anywhere in SA

5. In terms of a policy of insurance, which was in effect at the time of the robbery, the plaintiff (Underwriters) undertook to indemnify SBV for losses of cash under the control or in the custody of SBV on behalf of its clients, including losses sustained due to robbery, while in transit or at rest anywhere in the Republic of South Africa.
6. The robbers broke into SBV's premises and stole R101 207 456.28 in cash which had been secured in a vault by SBV on behalf of all its banking clients, including cash deposited by the banks' retail customers.

Detective Constable Khubeka (Khubeka) and Warrant Officer Lekola (Lekola) were members of SAPS, employed by the Minister of Safety and security (Minister)

7. At all material times, Detective Constable Tamsanqa Gladstone Khubeka (Khubeka) and Warrant Officer Lekele Reckson Lekola (Lekola) had been employed as members of the South African Police Service (SAPS) by the Minister. Khubeka was attached to the SAPS Trio Unit at the Witbank Police Station – a unit specially established to investigate, prevent and combat hijacking, murder and robbery in the Witbank area. Lekola had been stationed at the Witbank Police Station. His duties included investigating, preventing and combatting crime in the Witbank area.

plaintiff's case: before, during and after robbery, Khubeka and Lekola, acting in the course and scope of their employment and duties as members of SAPS, had knowingly participated in the planning, directing and executing of the robbery and preventing the detection and proper investigation of the robbery, as well as preventing and frustrating lawful attempts to recover the stolen cash

8. The plaintiff alleged that, at all relevant times before, during and after the robbery, Khubeka and Lekola, whilst acting in the course and scope of their employment and duties as members of SAPS, had knowingly participated in planning, directing and executing the robbery and in preventing the detection and proper investigation of the robbery, as well as preventing and frustrating lawful attempts to recover the stolen cash.

SBV was liable under its service contracts to indemnify each banking client and its retail customers for the loss they suffered as a result of the robbery – SBV duly indemnified each

9. SBV became liable under the service contracts to indemnify each banking client and its retail customers for the loss they suffered as a result of the robbery. SBV duly indemnified each banking client and its retail customers in the total sum of R101 207 456.28. The amount was made up of each of the amounts deposited by the relevant banking client and its retail customers that was in SBV's custody at the relevant time and stolen during the robbery.

Underwriters' claim against Minister: its written contracts of cessions concluded between it, SBV and its banking clients, alternatively having indemnified SBV, claimed against Minister by subrogation

10. The Underwriters' claim against the Minister was in terms of written contracts of cessions concluded between them and SBV and its banking clients. In the alternative, the Underwriters, having indemnified SBV, claimed against the Minister by subrogation.
11. It was the plaintiff's case that the Minister had become vicariously liable to each of SBV's clients who had suffered loss due to the robbery. Alternatively, the Minister had become vicariously liable to indemnify SBV for its own loss, further alternatively, for the loss SBV suffered having indemnified its clients and their retail customers.

12. The Minister contended that Khubeka and Lekola had been acting on a frolic of their own and, hence, he could not be held vicariously liable for their participation in the robbery.
13. Several of the gang of robbers were apprehended, tried and convicted (including Khubeka and Lekola) in a criminal trial before Bam J on various charges in relation to the robbery.

FINDINGS OF THE HIGH COURT

Ranchod J

elements of delictual liability

4 elements of delictual liability: causation, wrongfulness, fault and harm – all present in casu

14. In the constitutional court case of *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC), at paragraph [34], it was stated that it is trite that the elements of delictual liability are causation, wrongfulness, fault and harm.
15. In the high court's view, the admissions made by the defendant, *inter alia*, regarding Khubeka and Lekola's involvement in the robbery, as well as admission of the relevant portions of Bam J's judgment in the criminal case, establish all the elements of the delict.
16. However, the defendant disputed that it was vicariously liable in delict.

vicarious liability

17. The plaintiff sued the defendant as the employer of, more particularly, Khubeka and Lekola, who took part in the robbery, on the basis that the defendant was vicariously liable for the delicts committed by its employees.

Minister admitted that Khubeka and Lekola were employed by him before, during and after robbery – however he alleged that they were not acting within the course and scope of their employment but on a frolic of their own (i e no evidence that the planning and execution of the robbery took place while they had been 'officially on duty')

18. The defendant strenuously disputed it. The defendant admitted that Khubeka and Lekola were employed by him during the time before, during and after the robbery. However, he contended that they were not acting within the course and scope of their employment but were on a frolic of their own. In other words, that the requirements for vicarious liability had not been established because the following necessary evidence was not led by the plaintiff (and that no findings had been made in the criminal case by Bam J to support such a finding):
 - 18.1 of when and how Lekola and Khubeka had participated in the planning and execution of the robbery;
 - 18.2 of what Lekola and Khubeka had done while on duty to plan the robbery;
 - 18.3 that Lekola and Khubeka had participated in the planning and executing of the robbery, whilst they had been 'officially on duty'; and
 - 18.4 that the members had actively participated in the actual robbery whilst on duty or that they had created any trust with any individual.

F v Minister of Safety and Security (CC): a person may be held liable for the wrongful act or omission of another, even though the person did not, strictly speaking, engage in such wrongful conduct – an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course/scope/sphere of employment or whilst the employee was engaged in any activity reasonably incidental to it (standard test); deviation matters concern wrongful conduct outside the course/scope/sphere of employment, or any activity reasonably incidental to it

19. In *F v Minister of Safety and Security and Another* 2012 (1) SA 536 (CC) (F), the constitutional court described the general principles of vicarious liability as follows:

‘40 Vicarious liability means a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct. This would arise where there is a particular relationship between those persons, such as employment. As a general rule, an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of employment, or whilst the employee was engaged in any activity reasonably incidental to it.

41 Two tests apply to the determination of vicarious liability. One applies when an employee commits the delict while going about the employer’s business. This is generally regarded as the “standard test”. The other test finds application where wrongdoing takes place outside the course and scope of employment. These are known as “deviation cases”. The matter before us is a typical deviation case.’

Booyesen (CC): deviation matters refer to circumstances where an employee deviates from the normal performance of his or her duties

20. In *Booyesen v Minister of Safety and Security and Another* 2018 (6) SA 1 (CC), the constitutional court accepted the following definition of the phrase ‘deviation case’;

‘A “deviation case” refers to a case in which a delict is committed in circumstances where an employee deviates from the normal performance of his or her duties.’

Minister of Police v Rabie (A): step 1: determine whether the subjective intention of the perpetrator was to act solely for his/her own interests; step 2: if so, determine objectively whether the wrong committed is sufficiently connected to the business of the employer

21. The test for determining an employer’s vicarious liability for the wrongful conduct of its employees in deviation cases was set out in *Minister of Police v Rabie* 1986 (1) SA 117 (A), as follows:

‘It seems clear that an act done by a servant solely for his own interest and purposes, although occasioned by his employment, may fall outside the course and scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant’s intention (*cf Estate Van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant’s acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.’

K v Minister of Safety and Security (CC): accepted the above test from Rabie and developed it in accordance with the spirit, purport and objects of the Constitution

22. In *K v Minister of Safety and Security and Another* 2005 (6) SA 419 (CC) (*K*), the constitutional court accepted the above test from *Rabie* and developed it to accord with the spirit, purport and objects of the Constitution.

'44 ...The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.'

the development of the Rabie test, to infuse it with the value of the Constitution, was confirmed and applied by the constitutional court in F v Minister of Safety and Security

23. This development of the *Rabie* test, to infuse it with the value of the Constitution, was confirmed and applied by the constitutional court in *F v Minister of Safety and Security and Another* (*supra*), at paragraph [52].

facts in K: 3 on-duty policemen, dressed in police uniforms and driving a police vehicle (all of them unknown to the 20-year old stranded woman at the petrol station) offered her a lift home; raped by them, taking turns, threw her on the ground and left her there

24. The facts in *K* are apt and may briefly be summarized as follows. A 20-year-old woman was stranded at a petrol station at 4 am away from her home. Three on-duty policemen, dressed in police uniforms and driving a police vehicle, all of whom were unknown to her, offered her a lift home. She accepted the offer and climbed into the car. Along the way, they took a turn in the wrong direction. When she told them that they were going the wrong way, a police jacket was thrown over her head and held tight. Thereafter, the policemen took turns and raped her, threw her on the ground and left her there. The three policemen were charged and convicted of rape.

K: Minister found to be vicariously liable for the intentional criminal and delictual conduct of the policemen – step 1: objectively viewed, the policemen were acting solely for their own interest; step 2: objectively, the wrong was sufficiently connected to their employer's business – (i) policemen bore a statutory and constitutional duty to prevent crime and protect the members of the public; (ii) by offering assistance to the woman and by her accepting such offer, she placed her trust in the policemen; (iii) the conduct of the policemen caused harm simultaneously as a commission and omission – commission was the brutal rape of the woman, the omission was their failure to protect her from harm

25. The Court applied the test referred to in *K* as follows to find the Minister vicariously liable for the intentional criminal and delictual conduct of the policemen:

'50 It is necessary now to apply the test set in *Rabie*, adapted in the light of the preceding discussion, to the facts of this case. As to the first leg of the test, it is clear that the three policemen did not rape the applicant upon the instructions of the respondent. Nor did they further the respondent's purposes or obligations when they did so. They were indeed, subjectively viewed, acting in pursuit entirely of their own objectives and not those of their employer. That conclusion is not the end of the matter.

- 51 The next question that arises is whether, albeit that the policemen were pursuing their own purposes when they raped the applicant, their conduct was sufficiently close to their employer's business to render the respondents liable. In this regard, there are several important facts that point to the closeness of that connection. First, the policemen all bore a statutory and constitutional duty to prevent crime and protect the members of the public. That duty is a duty which also rests on their employer and they were employed by their employer to perform that obligation. Secondly, in addition to the general duty to protect the public, the police here had offered to assist the applicant and she had accepted their offer. In so doing, she placed her trust in the policeman although she did not know them personally. One of the purposes of wearing uniforms is to make public officers more identifiable to members of the public who find themselves in need of assistance.
- 52 Our Constitution mandates members of the police to protect members of the community and to prevent crime. It is an important mandate which should quite legitimately and reasonably result in the trust of the police by members of the community. Where such trust is established, the achievement of the tasks of the police will be facilitated. In determining whether the Minister is liable in these circumstances, courts must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed. In this case, and reviewed objectively, it was reasonable for the applicant to place her trust in the policemen who were in uniform and offered to assist her.
- 53 Thirdly, the conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in their brutal rape of the applicant. Their simultaneous omission lay in their failing while on duty to protect her from harm, something which they bore a general duty to do, and a special duty on the facts of this case. In my view, these three inter-related factors make it plain that viewed against the background of our Constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent, the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable.'

facts in F strikingly similar to those in K: differences (i) single policeman on standby duty and driving an unmarked police vehicle; (ii) after she escaped, she stood in the road hitchhiking and the same policeman offered her a lift home again, which she reluctantly accepted

26. The facts in *F* were strikingly similar to those in *K*. Ms *F* was a fourteen-year-old girl. She had attended a night club that night and, in the early hours of the morning, she needed a lift home. She was offered a lift home by a policeman who was on standby duty and driving an unmarked police vehicle, equipped with a police radio which *F* noticed before she accepted the lift. There were two other passengers in the car, one of whom was known to her. She was sitting in the back seat, but, after the other passengers had been dropped off at their homes, she had moved to the front seat, at the policeman's request. There, she saw a pile of police docketts bearing his name and rank. The policeman drove the car away and stopped in a dark place, raising her suspicion about his motives. She immediately opened the door, alighted from the car and ran away and hid from him. After a while, he drove away. She later emerged from hiding and stood in the road and hitchhiked. A vehicle stopped, which turned out to be the same policeman. He offered her a lift home again, which she reluctantly accepted, owing to her desperate situation. He then turned off the road again and stopped the car. When she tried to run away again, he stopped her and proceeded to assault and rape her.

approach adopted in F by the court similar to that adopted by the court in K: consideration of the same factors to base the finding of vicarious liability on the Minister

27. In finding the Minister vicariously liable for the policeman's conduct, the court reasoned as follows:

'52 The normative components that point to liability must here, as K indicated, be expressly stated. They are: the State's constitutional obligations to protect the public; the trust that the public is entitled to place in the police; the significance, if any, of the policeman having been off duty and on standby duty; the role of the simultaneous act of the policeman's commission of rape and omission to protect the victim; and the existence or otherwise of an intimate link between the policeman's conduct and his employment. All these elements complement one another in determining the State's vicarious liability in this matter. I deal with them in the same order below. ...

53 The State has a general duty to protect members of the public from violations of their constitutional rights. In grappling with the question of the State's vicarious liability, the constitutional obligations to prevent crime and to protect members of the public, particularly the vulnerable, must enjoy some prominence.

...

61 These constitutional duties resting upon the State, and more specifically the police, are significant in that they suggest a normative basis for holding the State liable for the wrongful conduct of even a policeman on standby duty, provided a sufficiently close connection can be determined between his misdeed and his employment. This leads to the discussion of the trust that people are entitled to repose in the police.

...

80 It is so that Mr Van Wyk was not in uniform, that his police car was unmarked and he was not on duty but on standby. But his use of a police car facilitated the rape. That he was on standby is not an irrelevant consideration. His duty to protect the public while on standby was incipient. But it must be seen as cumulative to the rest of the factors that point to the necessary connection. He could be summoned at any time to exercise his powers as a police official to protect a member of the public. What is more, in that time and space he had the power to place himself on duty. I am therefore satisfied that a sufficiently close link existed to impose vicarious liability on Mr Van Wyk's employer.'

HC: *in casu*, the intentional criminal deviant conduct of the police was closely connected to the Minister's business to establish the vicarious liability for the Minister in respect of the damages caused by his employees – judgment granted in favour of the plaintiff for R93m plus interest

28. Thus, when intentional criminal deviant conduct of the police is closely connected to the Minister's business he may be held vicariously liable in a delictual claim for damages. In the high court's view, that was the case here and the Minister was liable on that basis.

29. In all the circumstances, judgment was granted in favour of the plaintiff for payment by the defendant of:

29.1 the sum of R93 919 298.47;

29.2 interest on the above amount at the prescribed rate per annum at the relevant time from 28 April 2014 to the date of payment; and

29.3 costs of suit, including the costs of two counsel.

D. **STATUTORY RIGHTS AND OBLIGATIONS**

3. **LABOUR RELATIONS ACT 66 OF 1995 (LRA)**

3.1 **DISMISSALS**

3.1.1 **INDIVIDUAL MISCONDUCT**

3.1.1.1 **PRINCIPLES GOVERNING CONFESSIONS MADE DURING AN INTERNAL DISCIPLINARY ENQUIRY/INVESTIGATION**

Brauns and Others v Wilkes NO and Others

Unreported case no JA47/22

(2024) 45 ILJ 1183 (LAC)

[2024] 4 BLLR 365 (LAC)

(2024) 35 SALLR 439 (LAC)

(a) **The scenario is as follows: an employee is charged with fraud. It is alleged that he unlawfully and intentionally defrauded and prejudiced his employer by misrepresenting that he and two other employees were entitled to overtime payment while knowing that they were not entitled to such payment. With reference to such circumstances, how did the labour appeal court deal with the following issues:**

- (i) **what are the requirements to be met for a statement made during an internal disciplinary enquiry to constitute a confession before a magistrate?**
- (ii) **in criminal cases, s217(1) of the Criminal Procedure Act 51 of 1977 regulates admissions. Apart from this statutory provision, what are the other requirements to be met in criminal law to prevent false and coerced confessions leading to wrongful convictions?**
- (iii) **what are the essential elements in labour disciplinary proceedings for a statement to constitute a confession?**
- (iv) **what are the principles governing the admissibility of confessions in labour law?**
- (v) **on what basis did the labour appeal court identify a further principle governing confessions in labour matters, amounting to the approach that a valid confession does not, without more, justify an employee's dismissal?**
- (vi) **can a confession be invalid because it was made in fear of a criminal prosecution?**
- (vii) **is an employee entitled to information relating to the charges the employer contemplates bringing against him, before confessing?**
- (viii) **if an employee confessed to an offence, can such employee still plead not guilty to the charges, or challenge the confession itself at the disciplinary enquiry?**

- (b) It is generally accepted that not every act of dishonesty justifies dismissal. It is also accepted that an act of gross dishonesty seriously impacts negatively on the trust relationship between the parties in an employment relationship. What are some of the factors identified by the labour appeal court, with reference to *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others (2017) 38 ILJ 881 (LAC)*, to determine whether dismissal is the appropriate sanction and a sensible operational response to risk management?

INTRODUCTION

appeal against judgment and order of the LC dismissing the review application of the arbitration award of the bargaining council

1. This appeal, with the leave of the labour appeal court, was against the judgment and order of the labour court (per Moshoana J) in terms of which the appellants' application to review the arbitration award of the Safety and Security Sectoral Bargaining Council (the bargaining council) was dismissed with no order as to costs.

PERTINENT FACTS OF THE CASE

2016: SAPS dismissed 3 appellants for dishonesty – Quinton, Vanessa and Yolanda; Quinton was employed as a financial clerk: his duties involved remuneration for work done on public holidays, coordinating and controlling the budget and financial expenditure at the police station, etc

2. In July 2016, the third respondent, the South African Police Services (SAPS), dismissed the three appellants for dishonesty. The three appellants, Quinton Brauns (Quinton), Vanessa Brauns (Vanessa) and Yolanda Schoeman (Yolanda) were employees of SAPS, based at Brakpan, Gauteng.

Quinton charged with 10 counts of fraud: unlawfully and intentionally defrauded and prejudiced his employer by misrepresenting that he and the other appellants had been entitled to overtime payment, while knowing well that they were not so entitled; also charged with conspiring with the other 2 appellants to commit a crime

3. At the time of his dismissal, the first appellant, Quinton, was employed as a financial clerk. His duties involved the management of work and remuneration for work done on public holidays, monitoring medical accounts for pensioners, coordinating and controlling the budget and financial expenditure at the police station and monitoring and calculating prisoners' meals per month, including tracking the budget. He was charged with ten counts of fraud. It was alleged that Quinton had unlawfully and intentionally defrauded and prejudiced the state by misrepresenting that he and the other two appellants (Vanessa and Yolanda) had been entitled to overtime payment while knowing that they were not entitled to such payment. He was also charged with conspiring with the other two appellants to commit a crime.

Vanessa: administrative clerk – 6 counts of fraud: unlawfully and intentionally defrauded and prejudiced her employer by way of misrepresentation, not revealing or informing SAPS that she had received an amount of ±R202 000 in overtime payments, which was not due to her; also charged with conspiracy to commit fraud by conspiring with the other 2 appellants to defraud SAPS

4. The second appellant, Vanessa, was an administrative clerk employed as such in the loss control management section of SAPS dealing with civil claims, damages to state vehicles and improvement of data integrity. She was charged with six counts of fraud in that she had unlawfully and intentionally defrauded and prejudiced the state by way of misrepresentation, by not revealing or informing SAPS that she had received an amount of R202 418.02 in overtime payments, which payments were not due to her. She was also charged with conspiracy to commit fraud by conspiring with Quinton and Yolanda to defraud SAPS.

Yolanda: personnel officer – 3 counts of fraud: unlawfully and intentionally defrauded and prejudiced her employer by way of misrepresentation, by failing to reveal to SAPS that she had received ±R8 000 as payment for overtime, which was not due to her; also charged with conspiracy to commit fraud with the other 2 appellants

5. The third appellant, Yolanda, was a personnel officer responsible for verifying information on leave application forms and the processing and finalising of leave applications of employees. She was charged with three counts of fraud, in that she had unlawfully and intentionally defrauded and prejudiced the state by way of a misrepresentation by means of an omission, in that she had failed to reveal to SAPS that she had received a total amount of R8 984.52 as payment for overtime, which was not due to her. She was also charged with conspiring to commit fraud with Quinton and Vanessa.

charges proffered against appellants: ito regulation 20(z) of SAPS' disciplinary regulations promulgated ito the South African Police Service Act 68 of 1995

6. The charges proffered against each of the appellants had been in terms of regulation 20(z) of the SAPS disciplinary regulations promulgated in accordance with the provisions of s24(1)(g) of the South African Police Service Act 68 of 1995.

appellants related to each other: Quinton and Vanessa were husband and wife and Yolanda was the sister-in-law of Quinton

7. The appellants were related to each other, with the first and second appellants being husband and wife, and the third appellant being the sister-in-law of the first appellant.

common cause: unauthorised payments made into each appellant's bank account; payments effected through computer-enabled access credentials to SAPS' payment system of other employees, with their knowledge; appellants had not worked the overtime for which they were paid

8. There was no dispute that the unauthorised payments had been made into each of the appellants' bank accounts. The payments were effected through computer-enabled access credentials to the SAPS payment system of other employees, without their knowledge. It was also common cause that the appellants had not worked the overtime for which they were paid.

Quinton made confession about his fraudulent conduct before a magistrate

9. It was further common cause that the first appellant had made a confession about his fraudulent conduct before a magistrate.

appellants all charged with misconduct, found guilty and dismissed; unsuccessful internal appeal; bargaining council commissioner found the dismissals to be substantively fair

10. The appellants were suspended without pay on 4 May 2016, following the discovery of the alleged dishonest conduct. They were all charged with misconduct, found guilty and dismissed. Their attempt at overturning their dismissal through the internal appeal process had been unsuccessful. Following that outcome, the appellants filed an unfair dismissal dispute with the second respondent, the bargaining council. The dispute was referred to arbitration after conciliation failed. The bargaining council commissioner found the dismissals of all the appellants to be substantively fair.

SAPS' case

11. According to Commander Smith (Smith), arrangements had been made for Quinton to appear before a magistrate for him to make a confession. He appeared in this regard before Magistrate Parson.

Quinton appeared before a magistrate to make a confession – his commander, Smith, took him there; used Captain Bold's password to capture and approve overtime, could not pay the money into his own account and therefore paid it into his wife's account

12. Magistrate Parson reduced Quinton's confession to writing. She explained the procedure she had followed in taking down the confession, which included writing down what Quinton had told her and thereafter reading it back to him. She stated that the essence of Quinton's confession had been that he had taken money that did not belong to him. According to her, Quinton explained his conduct as follows:

'Ek het finansiële strain gegaan, ek het oortyd ge capture en ge approve op iemand ander se naam Kaptein Bold sonder haar consent. Ek kon nie die geld in my eie rekening betaal nie het ek dit in my vrou se rekening betaal. Die oortyd was nie aan my verskuldig en die geld ook nie. Ek het geweet ek mag dit nie doen nie, ek is bereid om the geld terug betaal, ek het vanaf laas jaar November af tot Februarie 2016 gedoen en dit beloop plus minus R10 000-00, dit is al.'

the case of the appellants

13. Quinton disputed having captured the overtime in question and contended that he had been on fifteen days' leave at the time of the capturing and authorisation of the overtime.
14. He stated that he had been told by Smith what to say to the magistrate during the confession. According to him, he was told to say that he had captured and approved overtime using Captain Bold's password and that he would pay the overtime money back.

Quinton: denied capturing the overtime, seeing that he was on 15 days' leave at the time of the capturing and authorisation of the overtime; was told by Smith what to say to the magistrate during the confession; he did not inform the magistrate that Smith told him what to say because he thought that Smith was helping him to ensure that criminal charges would not be proffered against him

15. In response, during cross-examination, as to why he had not informed the magistrate that he had been influenced to say what he had, he stated that it was because he thought Colonel Smith had been helping him so as to ensure that criminal charges would not be proffered against him. In response to the question by the magistrate whether the money had been due to him, he said, "ek het geweet die geld was nie verskuldig aan my nie".

FINDINGS OF THE LABOUR APPEAL COURT

Molahlehi ADJP (Musi JA and Malindi AJA concurring)

16. The duty of the commissioner in arbitrating the dispute in this matter was to decide whether the dismissal of the appellants had been fair. He was enjoined to do so by considering all the facts and the circumstances, without having to decide afresh what to do or deferring to the decision of the SAPS.
17. It is trite that a reviewing court would be justified to interfere with the outcome of an arbitration award in an instance where the commissioner failed to identify the real issue(s) between the parties, or mischaracterised the nature of the dispute between them. A failure to properly characterise the nature of the dispute between the parties is regarded as gross irregularity.

Gold Fields (LAC): review test referred to

18. In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2013] ZALAC 28; (2014) 35 ILJ 943

(LAC); [2014] 1 BLLR 20 (LAC) (*Goldfields* (LAC)), the labour appeal court held that the inquiry does not end with the establishment of gross irregularity but rather with whether the final outcome or result was unreasonable. In other words, in a process-related irregularity, the court would be justified to interfere with the arbitration award if the award was one that a reasonable decision-maker could not have made.

LAC: commissioner *in casu* did not misconstrue the nature of the enquiry he had to undertake; conclusion was one that a reasonable decision-maker could have reached

19. In the labour appeal court's view, the commissioner, in the present matter, did not misconstrue the nature of the enquiry he had been tasked to conduct. The approach he adopted in dealing with the issue before him had been correct in that the conclusion reached was one that a reasonable decision-maker could have reached. He could not be accused of having failed to properly identify the dispute he was required to resolve.

did the commissioner adopt an incorrect approach in accepting the evidence of the confession?

20. For the reasons below, there is no dispute that the statement Quinton made before the magistrate was a confession. Quinton had freely and voluntarily confessed to events and facts associated with the offence for which he was charged, found guilty of and dismissed. The issue raised by Quinton was whether the confession had been valid. Put differently, the question raised was whether it had complied with the requirements of admissibility as evidence.

criminal law confession: statement acknowledging all facts necessary for a conviction of a crime; criminal law, civil law (including labour matters) confession: statement made against the interest of the person making the statement

21. It is trite that a confession is a statement in which a person acknowledges that he or she has committed one or more offences or crimes. In criminal law, a confession is a statement acknowledging all the facts necessary for conviction of a crime. In both criminal and civil cases, including labour matters, it is a statement made against the interests of the person making the statement. It is defined in the *Cambridge English Dictionary* (Cambridge University Press, Cambridge 2013), 4th edition, as 'the act of admitting that you have done something wrong or illegal'.

criminal cases: s217(1) of Criminal Procedure Act requirements – a confession is admissible in evidence against a person if the following requirements are met: (i) confession made freely and voluntarily; (ii) by a person in sound and sober senses; (iii) without having been unduly influenced

22. In criminal cases, s217(1) of the Criminal Procedure Act 51 of 1977 (CPA) provides:
- 'Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.'
23. In *R v Becker* 1929 AD 167, at 171, the appellate division held that a confession means 'an unequivocal acknowledgement of guilt...'.
24. In *S v Yende* 1987 (3) SA 367 (A), the court held that, in order to decide whether a statement amounts to a confession, the statement must be viewed in its totality.

criminal law: confession must be confirmed by other evidence – prosecution has to prove guilty beyond reasonable doubt

25. To prevent false and coerced confessions from leading to wrongful convictions, the law in criminal cases requires that a confession be confirmed by other evidence. In this regard, the prosecution has to prove the guilt of the accused beyond reasonable doubt.

disciplinary proceedings confession: acknowledgment by an employee of a fault, wrongdoing or breach of a rule

26. An essential element in labour disciplinary proceedings is that a confession is an acknowledgement, on the part of an employee, of a fault, wrongdoing or breach of a rule.

labour law disciplinary enquiry confession requirements: (i) made freely and voluntarily; (ii) made by the person in sound and sober senses; (iii) no undue influence; (iv) confession was clear and unambiguous; (v) employee understood the consequences of the confession

27. It is trite that an employee may be found guilty of misconduct upon proof on the balance of probabilities in labour matters. In other words, an employer has the onus to prove that the confession was made and is valid. A confession is said to be valid if it is freely and voluntarily made without undue influence, coercion, or intimidation from the employer or any other person. The other requirement for a valid confession is that the employer has to show that the confession was clear and unambiguous and that the employee understood the consequences of the confession.

admissibility of confessions in labour law: the taking of the statement and the statement as such should not be looked at in a vacuum but against the background and circumstances upon which the statement was taken

28. In assessing the admissibility of the confession, the taking of the statement and the statement as such should not be looked at in a vacuum, but rather against the background and the circumstances under which the statement was taken. A further principle governing confessions in labour matters is that a valid confession does not, without more, justify an employee's dismissal.

a confession does not amount to a plea of guilty: even if it is a valid confession, employer must determine whether a substantive reason exists to terminate the employment relationship (i.e. dismissal was the appropriate sanction in the circumstances of the case)

29. A confession does not amount to a plea of guilty on the part of the employee and, thus, the employer is still, even in the face of a valid confession, required to follow a fair procedure and determine if there exists substantive reason to terminate the employment relationship. In other words, the employer has to show that the dismissal was an appropriate sanction in the circumstances of the case.

evidence of the magistrate before the bargaining council: (i) made freely and voluntarily; (ii) sound and sober senses; (iii) not unduly influenced; (iv) employee was informed of his rights; (v) – if this oral evidence was not presented, it would render the confession hearsay evidence; commissioner could not be faulted for the approach adopted

30. In this matter, the appellants contended that the commissioner's reliance on the confession of Quinton had been misplaced because, at the time it was made, he '[w]as emotionally threatened with criminal prosecution and operated under the oblique notion that he was ostensibly liable on account of his User ID having been used in the transactions'.

31. It was further argued, in the heads of argument, that the confession had been made before Quinton had managed to consider the evidence, especially the fact that he had not been at work when transactions were performed.
32. It was evident, from the reading of the record, that the respondent had placed the contents of the confession before the arbitrator to advance its case that the dismissal of the appellants had been substantively fair. In seeking to satisfy the admissibility requirements of the confession (like any other document), the respondent presented the oral evidence of the magistrate who took the confession. It was clear that the evidence had been presented to authenticate and show the origins of the confession.
33. It is trite that failure to satisfy the requirements of the admissibility of a document would render the contents thereof hearsay evidence. The other inquiry the commissioner had to conduct was whether the confession had been voluntarily and freely made.
34. In admitting Quinton's confession, the commissioner reasoned as follows:
- ‘The document handed in as a confession contains several questions by a completely independent magistrate enquiring into the voluntary nature of the statement, and there is no indication that the statement was involuntarily or not made in the 1st applicant's full and sober senses.’
35. The commissioner further reasoned:
- ‘It therefore means that the statement made by the Magistrate Parsons was authentic and can be relied on for exactly what was said there. The Magistrate's evidence was that she had been at pains to ensure that the applicant was informed of his rights and asked several questions to ascertain that there was no undue influence or threat.’
36. In the labour appeal court's view, the commissioner could not be faulted for the approach he had adopted in dealing with the issue of Quinton's confession. He had complied with the requirements of the admission of the written statement and, more importantly, it being a confession, whether it had been freely and voluntarily made.
37. There was no evidence that any of the members of SAPS had told Quinton that he had paid the money into his bank account and those of the other appellants. There was no evidence that anyone had threatened him if he failed to make the confession to the magistrate.
38. The version of SAPS, that the statement to the magistrate had been freely and voluntarily made, had never been challenged.

can a confession be invalid because it was made in fear of a criminal prosecution?

depending on the circumstances of each case, confession based on fear of criminal prosecution may be considered involuntary, or influenced by a promise or a threat, rendering such confession inadmissible or unreliable: not the case *in casu* on account of the oral evidence of the magistrate

39. The question of whether a confession may be rendered invalid, based on fear of criminal prosecution, depends on the circumstances of each case.
40. In *Mudau v S* [2013] ZASCA 56; 2013 (2) SACR 292 (SCA), the supreme court of appeal held that the confessions made by the appellants to the police were inadmissible because they were induced by the fear of being charged with a more serious offence and the hope of receiving a lesser sentence if they were to make a confession. The supreme court of appeal found that the police officers who obtained the confessions had acted improperly and violated the appellants' right to a fair trial. The court also found that the confessions were not confirmed by a magistrate or a justice of the peace

and that there was no other independent evidence to corroborate them. The supreme court of appeal, therefore, set aside the convictions and sentences of the appellants.

41. This means that a confession that is based on fear of criminal prosecution may be considered involuntary or influenced by a promise or threat and is, therefore, inadmissible or unreliable. This will, however, not be the case where the confession is voluntary and corroborated.
42. In *S v Mokoena* [2009] ZASCA 14; 2009 (2) SACR 309 (SCA), the supreme court of appeal held that the confession made by the appellant to the police was admissible, even though the appellant had been afraid of being prosecuted for another offence. The court *a quo* found that the appellant's fear had not been induced by any promise or threat from the police and that he had made the confession willingly and knowingly. The court also found that the confession was confirmed by a magistrate and that there was other evidence to support it. The supreme court of appeal, therefore, upheld the conviction and sentence of the appellant.
43. In the present matter, as indicated earlier, Quinton had voluntarily and freely made the confession before the magistrate.
44. The contention that the confession was invalidated by the fact that it was made before Quinton had managed to consider the evidence, especially the fact that he had not been at work when transactions were performed, was unsustainable and had no merit.

is an employee entitled to information relating to the charges before confessing?

LAC: confession is not made by first finding out what information the employer has and then making the confession

45. The charges of misconduct against Quinton were based on the evidence gathered by SAPS, including the confession. The charges against Quinton could have been amended or dropped by SAPS at any time before the commencement of the disciplinary hearing, depending on the strength of the evidence and the availability of witnesses.
46. A confession is extra-curial and generally forms part of an investigation into an employee's misconduct; thus, it is not made by first finding out what information the employer has and only then making the confession.

LAC: despite a confession, employee may still, at the internal disciplinary enquiry: (i) plead not guilty to the charges; (ii) challenge the confession itself, including its reliability; (iii) present evidence and argument to prove innocence; (iv) present evidence and argument mitigating the severity of the punishment

47. While a confession can significantly impact the charges proffered against an employee, it is not the only factor determining the outcome of the disciplinary inquiry. An employee who confessed to an offence can still plead not guilty to the charges or even challenge the confession itself, including its reliability, at the disciplinary inquiry. An employee can also present evidence and argument to prove his innocence, including mitigating the severity of punishment.
48. Therefore, the contention that the confession was invalid, because Quinton did not have information relating to the charges against him before making the confession, had no merit.

was the sanction harsh?

appellants' clean disciplinary record and offer to repay money

49. The appellants contended that the dismissal was an extremely harsh penalty because they all had a clean disciplinary record and had offered to repay the money in terms of the SAPS policy.
50. It is generally accepted that not every act of dishonesty justifies a dismissal. It has also been accepted that an act of gross dishonesty does seriously impact negatively on the trust relationship between the parties in the employment relationship. However, as appears from the authorities, the issue of the impact of dishonesty on the employment relationship has to be determined on the merits of each case.

Sidumo (CC): in deciding whether employer fairly dismissed employee, the commissioner is not required to defer to the decision of the employer, but must consider all relevant circumstances

51. In dealing with the issue of dismissal sanction, the constitutional court, in *Sidumo and Congress of SA Trade Unions v Rustenburg Platinum Mines the CCMA and Moropa NO* (2008) 19 SALLR 35 (CC); 2008 (2) SA 24 (CC); [2007] ZACC 22; (2007) 28 ILJ 2405 (CC), at paragraph 79, held that:

'...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.'

LAC: with reference to G4S Secure Solutions (LAC): dismissal for dishonest conduct is fair where the continued employment relationship is intolerable and the dismissal is a sensible operational response to risk management – case *in casu*

52. In *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others* [2016] ZALAC 55; (2017) 38 ILJ 881 (LAC), at paragraphs [25] to [26], the labour appeal court, in dealing with the issue of the fairness of a dismissal, held that:

[25] In determining the fairness of a dismissal, each case is to be judged on its own merits. Item 3(4) of the Code of Good Practice recognises that dismissal for a first offence is reserved for cases in which the misconduct is serious and of such gravity that it makes continued employment intolerable, with instances of such misconduct stated to include gross dishonesty. When deciding whether dismissal is appropriate, the Code requires consideration, in addition to the gravity of the misconduct, of personal circumstances, including length of service and the employee's previous disciplinary record, the nature of the job and the circumstances of the infringement itself. Other relevant considerations include the presence or absence of dishonesty and/or loss and whether remorse is shown.

[26] The employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is "a sensible operational response to risk management".'

53. In the view of the labour appeal court, the decision of the commissioner, relating to the dismissal sanction, could not be said to be extremely harsh because, in arriving at the decision, the commissioner had considered the facts and the circumstances relevant to the determination of the fairness of the dismissal of the appellants by SAPS. The labour court could thus not be faulted for finding that the decision of the commissioner did not fall outside the ambit of reasonableness.
54. In light of the above, the labour appeal court found that the labour court could not be faulted in its finding that the award of the commissioner was one which a reasonable decision maker could reach and accordingly dismissing the appellants review application.

order

55. The appeal was dismissed with no order as to costs.

3.1.1.2 **TERMINATION BY OPERATION OF LAW: SECTION 59(3) OF THE DEFENCE ACT 42 OF 2002 – MISCONDUCT DISMISSAL**

Mamasedi v Chief of the SA National Defence Force and Others

Unreported case no CCT359/22

(2024) 45 ILJ 2475 (CC)

[2024] 12 BLLR 1207 (CC)

(2024) 35 SALLR 435 (CC)

- (a) **The scenario is as follows: the workplace is subject to a provision that indicates that, if an employee absents himself or herself from official duty without the permission of the employer for a period exceeding 30 days, such employee will be regarded as having been dismissed, on account of misconduct, with effect from the day immediately following his or her last day of work, but the employer may, on good cause shown, authorise the reinstatement of such employee on such conditions as it may determine. This is referred to as termination by operation of law. Such provision serves the same purpose as a deeming provision which is to the effect that, if an employee is absent without permission for a certain specified time period, such employee is deemed to be discharged, but may make written representations for his or her reinstatement. With reference to the aforesaid scenario, how did the constitutional court deal with the following issues:**
- (i) **does such ‘cut-off’ period of 30 days exclude Saturdays, Sundays, public holidays and any other days on which the employee was not required to be at work?**
- (ii) **does such provision confer on anyone the power to dismiss an employee who absents himself or herself contrary to the aforesaid provision?**
- (iii) **under what circumstances will it not be competent for the employer to reinstate the employee?**
- (iv) **with reference to *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* 2001 (1) SA 545 (CC), what is the approach to be adopted when interpreting any legislation?**
- (v) **if an employee is absent from work without the required authorisation for a period less than 30 days and the aforesaid provision is applicable at the workplace, is the employer nevertheless entitled to subject an employee to a disciplinary process for being absent, without the necessary authority, for such shorter period?**

INTRODUCTION

s59(3) of Defence Act: an employee absents himself from official duty without permission of his commanding officer for a period exceeding 30 days 'must be regarded as having been dismissed' on account of misconduct; with effect from the day immediately following his last day of attendance at his place of duty or his last day of official leave; chief of the defence force may, on good cause shown, authorise the reinstatement of such member on such conditions as he may determine

1. Section 59(3) of the Defence Act 42 of 2002 (the Act) provides:

- (3) A member of the Regular Force who absents himself or herself from official duty without the permission of his or her commanding officer for a period exceeding 30 days must be regarded as having been dismissed if he or she is an officer, or discharged if he or she is of another rank, on account of misconduct with effect from the day immediately following his or her last day of attendance at his or her place of duty or the last day of his or her official leave, but the Chief of the Defence Force may on good cause shown, authorise the reinstatement of such a member on such conditions as he or she may determine.'

the aforesaid provision serves the same purpose as the deeming provision common in public service: if employee is absent without permission for a specified period, such employee is deemed to be discharged, but may make written representations as to his reinstatement (Grootboom (CC))

2. The provision serves the same purpose that is served by deeming provisions that are quite common in the public service which are to the effect that, if an employee or official is absent without permission for a certain specified period, such employee or official is deemed to be discharged but may make written representations for his or her reinstatement (*Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); *Masinga v Minister of Justice Kwazulu Government* 1995 (3) SA 214 (AD); *Phenithi v Minister of Education and Others* 2008 (1) SA 420 (SCA); *Minister van Onderwys en Kultuur en Andere v Louw* 1995 (4) SA 383 (AD); *Solidarity and Another v Public Health & Welfare Sectoral Bargaining Council and Others* 2014 (5) SA 59 (SCA); *Du Toit v Minister of Safety and Security and Another* 2009 (12) BCLR 1171 (CC); *Mbatha v University of Zululand* 2014 (2) BCLR 123 (CC); *Maswangayi v Minister of Defence and Military Veterans and Others* 2020 (4) SA 1 (CC)).

issue in casu: whether or not the 30 days in s59(3) of the Defence Act refers to days on which the employee would have been obliged to have been on official duty

3. This was an application brought by Mr Molefi Jonas Mamasedi (the applicant), for leave to appeal against a judgment and order of the Gauteng Division of the High Court by Kollapen J. This case revolved around the interpretation of s59(3) of the Defence Act. Specifically, it was about whether or not the 30 days referred to in the provision are days on which the member concerned would have been obliged to be on official duty.

PERTINENT FACTS OF THE CASE

employee not obliged to work on Saturdays, Sundays and public holidays – his working week was from Monday to Friday

4. The applicant, was a member of the Regular Force of the South African National Defence Force (SANDF) in 2011. He held the rank of a sergeant. Section 59(3) of the Defence Act was applicable to him. The applicant was not obliged to work on Saturdays, Sundays and public holidays. His working week was from Monday to Friday.

since 29 November 2011 to 2 January 2012, absent without permission of commanding officer and return to work on 3 January 2012: a period of more than 30 calendar days – if such days include Saturdays, Sundays and public holidays, employee’s absence was in excess of 30 days and s59(3) triggered; if such days are not included in the 30 days, then the period of the employee’s absence was less than 30 days and s59(3) not triggered

5. The applicant was absent from official duty for the period 29 November 2011 to 2 January 2012 without the permission of his or her commanding officer and he returned to work on 3 January 2012. That was a period of more than 30 calendar days. If the 30 days referred to in s59(3) included Saturdays, Sundays and public holidays, then the applicant’s absence from official duty was in excess of 30 days, in which case s59(3) was triggered. However, if weekends and public holidays were not to be included in the 30 days, then the period of the applicant’s absence was less than 30 days. If the applicant’s absence from official duty was for a period of 30 days or less, then s59(3) would not be triggered because it is only triggered if the period of absence exceeds 30 days.
6. It is to be observed that s59(3) does not confer on anybody the power to dismiss a member of the Regular Force who absents himself in the manner contemplated by s59(3). It simply provides that such a member must be regarded as having been dismissed if he or she is an officer, or discharged if he or she is of another rank. That means that the relevant officials must reflect him in the records as dismissed or discharged, as the case may be.
7. When the applicant returned to work on 3 January 2012, the third respondent, namely, Chief of Army: Lt-General Yam, set up a board of inquiry to inquire into and investigate the circumstances surrounding the applicant’s absence from work. This Board of Inquiry was set up early in 2012. This could be referred to as the first board of inquiry because, in 2018, there was another board of inquiry that was set up, which will be referred to herein as the second board of inquiry.

employee’s explanation for absence from work: kidnapped and taken to an initiation school against his will; this was disputed – apparently his father gave evidence that he went to the school voluntarily

8. The applicant’s explanation for his absence from work, from 29 November 2011 to 3 January 2012, was that he had been kidnapped and taken to an initiation school against his will. However, that version was disputed. Apparently, his father had given a version to the effect that the applicant had gone to the initiation school voluntarily. It was not necessary to pronounce on whether the applicant had had a valid reason for his absence because the case had been argued on the footing that the question was whether or not s59(3) was triggered. The idea was that, if s59(3) was triggered, then the respondents had correctly regarded the applicant as having been dismissed or discharged. If, however, s59(3) was not triggered, the respondents were wrong to have regarded him as dismissed or discharged, as he was not dismissed or discharged.

FINDINGS OF THE CONSTITUTIONAL COURT

Zondo CJ (Bilchitz AJ, Chaskalson AJ, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J, and Tshiqi J concurring)

question of law: whether 30 days included days on which the employee was not obliged to work or whether it only referred to days when the employee was obliged to work

9. The constitutional court had jurisdiction in respect of this matter because it raised an arguable question of law of general public importance which deserved to be determined by the constitutional court. The question of law was whether the ‘30 days’ referred to in s59(3) of the Act included days on which a member of the Regular Force was not

obliged to work, or to be on official duty, or whether it only referred to the days when the member was obliged to work or was obliged to be on official duty.

10. If the position was that the days on which a member was not obliged to work were not included in the 30 days referred to in s59(3), that would mean that the applicant's absence from official duty in the present matter did not exceed the 30 days referred to in s59(3) and that, therefore, s59(3) of the Act was not triggered.
11. If s59(3) was not triggered, it meant that the applicant should not have been regarded as having been dismissed or discharged. In such a case the constitutional court would not have to deal with the question of whether the member should or should not have been reinstated. This was because an order of reinstatement would not be competent in the absence of a prior dismissal.
12. If, however, the constitutional court concluded that the 30 days referred to in s59(3) included days on which a member was not obliged to work, that would mean that s59(3) was properly triggered in the present case. In such a case the next question would be whether the high court had erred in refusing to order the applicant's reinstatement.

leave to appeal

CC grants leave to appeal if it is in the interests of justice – some relevant factors: (i) importance of the issue; (ii) is the issue of interest to only the parties before the court or does it go beyond the parties before the court?; (iii) will a substantial number of other people who are not before the court be affected?; (iv) prospects of success – leave to appeal granted *in casu*

13. The constitutional court grants leave to appeal, if granting leave would be in the interests of justice. In this regard, some of the factors the constitutional court takes into account, in determining whether it would be in the interests of justice to grant leave, are the importance of the issue that must be determined on appeal, if leave to appeal is granted, whether the issue to be decided on appeal is only of interest to the parties before the court, or whether the issue goes beyond the parties before the court, and will affect a substantial number of other people who are not before the court, and whether the applicant has reasonable prospects of success.
14. The question to be decided by the constitutional court on appeal, if leave to appeal were granted, was of great importance. The issue did not only affect the parties before the court but affected all members of the SANDF who were members of the Regular Force. It would also affect persons who would join the Regular Force as members in the future.
15. Lastly, there were reasonable prospects of success for the applicant. In the circumstances, it was in the interests of justice to grant the applicant leave to appeal.

the appeal

s39(2) of the Constitution deals with the interpretation of legislation: to promote the spirit, purport and objects of the Bill of Rights

16. The determination of the issue in the present appeal called for the interpretation of s59(3) of the Defence Act. Section 39(2) of the Constitution deals with the interpretation of legislation. It enjoins every court, tribunal or forum, when interpreting any legislation, to 'promote the spirit, purport and objects of the Bill of Rights'. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* 2001 (1) SA 545 (CC) (*Hyundai*), the constitutional court explained the purport and objects of the Bill of Rights thus:

[22] The purport and objects of the Constitution find expression in section 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.'

important features of interpretation of legislation: (i) mischief that is sought to be addressed; (ii) purpose of the legislation

17. An important feature of the interpretation of any legislation is the mischief that is sought to be addressed through the legislation as well as the purpose of the legislation.

purpose of s59(3) of the Defence Act: if employee is absent for longer than 30 days without the required permission, employer regards employee as dismissed on basis of misconduct, without following the procedural fairness requirements related to misconduct

18. In considering the present matter, it was necessary to understand the purpose of s59(3). The purpose of that provision is to enable the SANDF to, without any disciplinary enquiry, treat any member of the Regular Force as guilty of misconduct and as dismissed, or discharged if he or she absented himself or herself from official duty for more than 30 days, without the permission of his or her commanding officer. The SANDF is able to dispense with procedural fairness requirements and yet treat such a member as dismissed or discharged if s59(3) has been triggered.

19. The constitutional court said that, this alone, showed that they were dealing here with a piece of legislation that governed the discipline of members.

20. In the present case, the high court held that there was nothing in s59(3) to suggest that the period of 30 days was confined to working days. In the view of the constitutional court, the high court had erred in this regard.

CC: 30 days is a reference to the days employee was obliged to be on duty or to work and not days that he was not obliged to be on duty or at work

21. There were three features of s59(3) which suggested that the reference to 30 days in s59(3) was a reference to 30 days on which a member was obliged to be on duty or to work and not days on which he or she was not obliged to be on duty or at work. The first one was made up of the words 'absent from official duty' in the first line of s59(3). The first line talked about a member of the Regular Force being 'absent from official duty.' The second feature was constituted by the words: 'must be regarded as having been dismissed or discharged.' The third feature was constituted by the words: 'on account of misconduct.' The second and third features were made up of the words 'must be regarded as having been dismissed' and 'on account of misconduct' in s59(3) in the line that was to the effect that a member of the Regular Force had to be regarded as 'dismissed' if he or she was an officer, or 'discharged' if he or she was of another rank, 'on account of misconduct' in s59(3).

absence from work does not amount to a breach of contract constituting misconduct, unless there was an obligation on the employee to be at work (or on official duty) on the days in question

22. Section 59(3) provided that a member of the Regular Force, who absented himself, or herself, from official duty without his or her commanding officer's permission for a period exceeding 30 days

'must be regarded as having been dismissed, if he or she is an officer, or discharged if he or she is of another rank on account of misconduct with effect from the day immediately following his or her last day of attendance at his or her place of work or the last day of his or her official leave...'

23. That such a member was to be regarded as dismissed on account of misconduct meant that the member's absence from work constituted a breach of the contract between the member and the SANDF. Such absence could not conceivably be regarded as misconduct if it did not constitute a breach of contract. The absence from official duty could not be a breach of contract unless there was an obligation on the part of the member to be at work or to be on official duty on the days in question.
24. A critical feature of the conduct prohibited by s59(3) was the absence of the permission by the commanding officer of the member for his absence from work. A member did not need the permission of his or her commanding officer to be absent from work or official duty on a Saturday or Sunday or public holiday if those were not working days for him or her. Therefore, a member could not be disciplined for his or her absence from work or duty on a day when he or she was not obliged to be at work or to be on official duty. The constitutional court said this because it was clear from s59(3) that disciplinary action would be imposed on the member by operation of law if he or she was absent from official duty for 30 days without the permission of his or her commanding officer. Section 59(3) also made it clear that the dismissal or discharge was 'on account of misconduct.'
25. Section 59(3) enjoined that a member of the Regular Force, who was absent from official duty without the permission of his or her commanding officer for 30 days,

'must be regarded as having been dismissed if he or she is an officer, or discharged if he or she is of another rank, on account of misconduct.'
26. This emphasised portion of s59(3) revealed that the absence from official duty referred to at the beginning of the provision was absence from official duty that constituted misconduct. The only absence from official duty that could constitute misconduct was absence from official duty when there was an obligation to be at work or to be on official duty. An employee could not be disciplined for being absent from duty when he or she was entitled not to be at work or on official duty.
27. The constitutional court, therefore, concluded that the reference to 30 days in s59(3) was a reference only to the days on which the member was obliged to be on official duty. Weekends and public holidays could not be included in calculating the 30 days if such days were not days on which the member was obliged to be on official duty. Of course, if weekends and public holidays were days on which the member was obliged to be on official duty, then those days would be counted in determining whether a member was absent from official duty without his or her commanding officer's permission for a period exceeding 30 days.
28. The second part of s59(3) conferred upon the Chief of the Defence Force power to authorise the reinstatement of the member if good cause was shown. This was good cause for the member's absence from official duty for a period of more than 30 days without the requisite permission. The Chief of the Defence Force's power to authorise the reinstatement of the member could only be exercised if s59(3) was triggered. Of course, s59(3) was triggered if a member of the Regular Force was absent from official duty without the permission of his or her commanding officer for a period exceeding 30 days during which the member was obliged to work. It was not triggered where a member of the Regular Force was absent from official duty without his or her commanding officer's permission for 30 days or less if during those days the member was obliged to work.
29. Where s59(3) was not triggered, the power of the Chief of the Defence Force to authorise the reinstatement of the member did not apply because, in such a case, the

member was not regarded as having been dismissed or discharged. In such a case, the member remained in the service of the SANDF. Nevertheless, such a member could still be subjected to a disciplinary process for being absent from official duty without his or her commanding officer's permission for a period of 30 days or less. In other words, although such a member might not be dealt with under s59(3) if he or she was absent from official duty for 30 days or less, nevertheless, he or she could be dealt with in terms of other disciplinary processes.

30. Where s59(3) was not triggered but a member was absent from official duty without the commanding officer's permission for a period of 30 working days or less, reinstatement was not competent because the member would not have been dismissed or discharged. The result thereof was that, to the extent that the respondents would have erroneously regarded such a member as having been dismissed or discharged in terms of s59(3) and, thus, did not allow the member to work or resume his or her official duties after the absence from official duty, he or she would be entitled to his or her remuneration for all the time that he or she was erroneously prevented from working or not allowed to render his or her services.
31. In the present case, the applicant's period of absence from official duty without the permission of his commanding officer was for less than 30 working days.

order

32. The high court order was set aside and replaced with, *inter alia*, the following:
 - 32.1 leave to appeal was granted;
 - 32.2 the appeal against the decision of the high court, refusing to declare that Saturdays, Sundays and public holidays were not to be included in calculating the 30 days referred to in s59(3) of the Defence Act where a member of the Defence Force was not obliged to work on those days, was upheld;
 - 32.3 it was declared that the reference to 30 days referred to in s59(3) of the Defence Act was a reference to those days on which a member of the Regular Force was obliged to be on official duty;
 - 32.4 it was declared that, for the period from 3 January 2012 to date, the applicant had been and continued to be a member of the Regular Force of the South African National Defence Force;
 - 32.5 the respondents' conduct in regarding the applicant, since 3 January 2012, as having been dismissed or discharged was unlawful. The applicant had to report for duty within 7 calendar days from the date of the handing down of the judgment or, at the latest, within 7 days after the payment to him of his arrear remuneration in terms of this order;
 - 32.6 the first, second and or third respondents' refusal or failure to pay the applicant his remuneration and other benefits since January 2012 to date was unlawful; and
 - 32.7 the applicant was entitled to payment of his remuneration for the period 3 January 2012 to the date of the handing down of this judgment.

3.1.2 **COLLECTIVE MISCONDUCT**

3.1.2.1 **EMPLOYEES DISMISSED FOR ASSOCIATING THEMSELVES WITH CONDUCT IN BREACH OF PICKETING RULES**

Worldwide Staffing (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others

Unreported case no JR1367/23

(2024) 45 ILJ 1128 (LC)

(2024) 35 SALLR 458 (LC)

- (a) How did the labour court apply the review test formulated by the labour appeal court in *Quest Flexible Staffing Solutions (Pty) Ltd (a division of Adcorp Fulfilment Services (Pty) Ltd v Legobate* (2015) 36 ILJ 968 (LAC) in the scenario where an employee admits associating himself/herself with the primary misconduct committed by others?
- (b) What is the extent of the duty to disassociate, to be undertaken by an employee himself/herself, from such primary misconduct in order to escape complicity, with reference to *Commercial Stevedoring Agriculture and Allied Workers Union and Others v Oak Valley Estates and Another* (2022) 43 ILJ 1241 (CC)?
- (c) With reference to *National Union of Metalworkers of SA and Others v Dunlop Mixing and Technical Services (Pty) Ltd* [2021] 3 BLLR 221 (SCA), what approach did the labour court adopt to determine when a picket loses its protected status?
- (d) What are the factors identified by the labour court to determine whether a dismissal is a sensible operational response to risk management?

INTRODUCTION

application to review and set aside an arbitration award

1. This judgment concerned an application for the review and setting aside of an arbitration award in terms of s145 of the LRA.

PERTINENT FACTS OF THE CASE

Worldwide Staffing is a TES; for reward, it procured the services of employees to work at its client, Zest

2. The applicant carried on business as a temporary employment service provider (TES). For reward, it procured the services of Heavyman Vukea (the third respondent) and Terrence Chauke (the fourth respondent) to work at its client, Zest Weg Electric (Pty) Ltd (Zest).

Zest's employees embarked on protected strike; employees placed at Zest embarked on secondary strike in support of the demands that Zest permanently employs all TES employees and that medical aid and a 13th cheque be granted such TES employees

3. In August 2022, Zest's staff embarked on a protected strike.
4. Meanwhile, the third and fourth respondents' trade union, Dynamic Peoples Union of South Africa (DYPUSA), gave notice of a secondary strike in support of the demands that Zest permanently employ all TES employees and that medical aid and a thirteenth cheque be afforded to them.

picketing rules prohibited: displaying placards, posters, banners or similar items containing words or pictures defamatory to a director, agent or employee of the TES or its client. Zest; also prohibited from: engaging in inciteful, provocative or intimidating behaviour; could only picket within a designated area, 40m from a private entrance

5. Picketing rules, however, prohibited participants from displaying placards, posters, banners, or similar items containing words or pictures that were defamatory of any director, agent or employee of the applicant or its client. They were also prohibited from engaging in inciteful, provocative or intimidating behaviour and could only picket within a designated area, some forty metres from a private entrance.

employees (i) attended a picket at Zest's premises; (ii) in breach of picketing rules, joined a group carrying offensive placards with slogans, such as 'wafa'; (iii) in breach of picketing rules, marched outside the designated areas; (iv) blocked roads; (v) damaged property

6. On the morning of 7 September 2022, the third and fourth respondents attended a picket at Zest's premises. Notwithstanding the aforesaid picketing rules, they joined a group carrying offensive placards with slogans such as 'cruel corrupt Zest', 'abuse at Zest', 'one must die' and 'wafa' – which, loosely translated, means 'whoever dies, dies'.
7. It was undisputed that these utterances were grossly unacceptable. In further contravention of the picketing rules, the group marched around the premises as opposed to peacefully picketing in the designated area. Chaos erupted when the protesters started blocking roads and damaging property.

employees dismissed for associating with the offensive placards and picketing outside designated area in breach of picketing rules

8. Along with others, the third and fourth respondents were subsequently called to account for their actions at a disciplinary inquiry. Thereafter, they were dismissed for associating with the offensive placards and picketing outside the designated area in violation of the picketing rules.

bargaining council commissioner: dismissals substantively unfair and awarded retrospective reinstatement

9. Aggrieved by this outcome, the third and fourth respondents approached the first respondent (the bargaining council) to challenge the fairness of their dismissal. The second respondent (the arbitrator) concluded that their dismissal had been substantively unfair and awarded retrospective reinstatement.

FINDINGS OF THE LABOUR COURT

Wehncke AJ

10. On review to the labour court, the applicant attacked the reasoning process in making the award on an array of alleged gross irregularities. Essentially, that the arbitrator had misconceived the issues, had undertaken the enquiry in the wrong manner and had failed to properly evaluate the evidence presented at arbitration, culminating in an unreasonable result.

Quest Flexible Staffing Solutions (LAC): review test referred to and applied

11. In *Quest Flexible Staffing Solutions (Pty) Ltd (a division of Adcorp Fulfilment Services (Pty) Ltd) v Lebogate* (2015) 36 ILJ 968 (LAC); [2014] ZALAC 136, at paragraph [12], the labour appeal court appropriately summarised the test as follows:

[12] ...Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the labour court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator...'

analysis

common law obligation on an employee to promote employer's interest and refrain from misconduct, includes a specific duty to disassociate from misconduct perpetrated by others

12. An employee's common law obligations of promoting the employer's interests and refraining from misconduct encompass a specific duty to disassociate from misconduct perpetrated by others (see *Association of Mineworkers and Construction Union and Another v Metal and Engineering Bargaining Council and Others* (2019) 40 ILJ 1262 (LC)).

LC: employees associated with the group – joined the picket in breach of picketing rules; to escape complicity in this context, they had to actively have distanced themselves from the primary misconduct committed by others, which they failed to do (Oak Valley Estates (CC))

13. In the present case, the third and fourth respondents' association with the group did not require inferential reasoning. They had admitted to joining the picket, where some carried offensive placards in violation of the picketing rules. They had admittedly also crossed the relevant picketing lines with the group. Thus, to escape complicity in this context, they had to actively have distanced themselves from the primary misconduct committed by the others (see *Commercial Stevedoring Agricultural and Allied Workers' Union and others v Oak Valley Estates (Pty) Ltd and Another* (2022) 43 ILJ 1241 (CC) [2022] 6 BLLR 487 CC; 2022 (5) SA 18 (CC)). They had failed to do so.

SALLR comment: (i) guilt is more appropriately based on the principles of common purpose misconduct (Marley Pipe Systems (CC)); (ii) Marley Pipe Systems (CC) clearly indicates that Oak Valley Estates (CC) principles, so applicable in an interdict environment, are not applicable in a common purpose misconduct environment – and, furthermore, the failure to take positive steps to disassociate with a group is relevant in an interdict environment and not common purpose misconduct environment (in a final interdict environment, a sufficient link must be established between the employee and the actual or threatened injury or such injury reasonably apprehended)

14. It was grossly irrational for the arbitrator to find that the third and fourth respondents had been dismissed merely for witnessing the misconduct of others.

LC: grossly irrational for arbitrator to find that employees had been dismissed merely for witnessing the misconduct of others – arbitrator had misconstrued the nature of the enquiry and, had he properly applied his mind, he would have, at least, considered (i) the slogans written on the placards were defamatory and aimed at creating a hostile intimidating atmosphere; (ii) the offensive slogans had most probably contributed to the ensuing violence; (iii) upon contravention of the picketing rules, the picket had lost its protected status

15. Because he proceeded from the wrong premise, the arbitrator had misconstrued the nature of the enquiry. Had the arbitrator properly applied his mind, he would have, at least, considered that a protected picket is meant to be an extension of collective bargaining, not a licence to intimidate or to simply tarnish an employer's reputation. The slogans written on the placards were undoubtedly defamatory and aimed at creating a

hostile and intimidating atmosphere. Upon contravention of the picketing rules, the picket had lost its protected status (see *National Union of Metalworkers of South Africa and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* [2020] ZASCA 161; [2021] 3 BLLR 221 (SCA); (2021) 42 ILJ 475 (SCA); 2021 (4) SA 144 (SCA)). These offensive slogans had most probably contributed to the ensuing violence. So had the crossing of the picketing lines.

LC: employees had voluntarily aligned with the group – the sole basis of the defence had been that they had not physically carried the offensive materials, which was irrelevant

16. The third and fourth respondents had voluntarily aligned with the group. The sole basis of their defence had been that they had not physically carried the offensive materials. For reasons already stated, that was irrelevant.

LC conclusion: an employer's viability depends very much on the trustworthiness of its employees; conduct destructive of this trust renders continuous employment untenable or, at least, undesirable; dismissal was a sensible operational response to risk management (sends an unequivocal message to others that individual misconduct, in a collective setting, would not be tolerated); dismissal was proportionate and fair and application for review had to succeed

17. It has been held that fairness rests at the equilibrium between competing rights and interests. An enterprise's viability depends very much on the trustworthiness of its staff. Conduct destructive of this trust would render continuous employment untenable or, at least, undesirable (*De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1051 (LAC); [2000] ZALAC 10).
18. Despite overwhelming evidence against them, the third and fourth respondents denied any wrongdoing and had shown no remorse for their actions. Conceivably, this cemented the intolerable notion that they could not be entrusted with refraining from committing the same misconduct in future.
19. Accordingly, their dismissal was a sensible operational response to risk management, as it would also send an unequivocal message to others that individual misconduct in a collective setting would not be tolerated.
20. Under those circumstances, dismissal was proportionate and fair.

conclusion

21. Ultimately, the decision by the arbitrator was one that a reasonable decision-maker could not reach. For this reason, the application for review had to succeed.

order

22. The arbitration award rendered by the second respondent (commissioner) under the auspices of the first respondent (bargaining council) was reviewed, set aside and replaced with the following:
- 22.1 the dismissal of Heavyman Vukea and Terrence Chauke was substantively fair;
- 22.2 their claim was dismissed; and
- 22.3 there was no order as to costs.

3.1.3 **DISMISSALS ON THE GROUNDS OF INCAPACITY POOR WORK PERFORMANCE**

3.1.4 **DISMISSALS ON THE GROUNDS OF ILL-HEALTH OR INJURY**

3.1.4.1 **SECTION 13(1)(a) AND SECTION 13(1)(i) OF THE PRESCRIPTION ACT 68 OF 1969: MENTAL INCAPACITY AS A RESULT OF AN INJURY ON DUTY PREVENTS THE COMPLETION OF THE PERIOD OF PRESCRIPTION**

Shoprite Checkers (Pty) Ltd v Mafate NO
Unreported case no CCT55/23
(2024) 45 ILJ 2491 (CC)
(2024) 35 SALLR 436 (CC)

(a) In terms of s12(1) of the Prescription Act 68 of 1969 (the Prescription Act), prescription begins to run as soon as a debt is due. Section 12(3) of such Act provides that the debt is deemed to be due once the creditor has knowledge of the identity of the debtor and of the facts giving rise to the debt. The proviso to section 12(3) is to the effect that, even where such knowledge has not been acquired, the knowledge shall be deemed to have been acquired if it could have been acquired through the exercise of reasonable care. However, paragraph 13(1)(a) of such Act reads as follows: ‘[If] the creditor is a minor or is a person with a mental or intellectual disability, disorder or incapacity or is affected by any other factor that the court deems appropriate with regard to any offence referred to in section 12(4), or is a person under curatorship or is prevented by a superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1)’. With reference to the above, and in the circumstances where, during the execution of employment duties, an employee sustained severe head injuries, resulting in mental incapacity which is permanent, how did the constitutional court deal with the following issues:

(i) section 13(1)(i) of the said Act reads as follows: ‘the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed from the day referred to in paragraph (i).’ How are the impediments referred to in paragraphs (a) to (h) to be interpreted?

(ii) on what basis was it found that, as long as the impediments referred to in paragraphs (a) to (h) exist (i e mental incapacity and being a person under curatorship), a claim will not prescribe?

(iii) the period of prescription will only be completed upon expiry of the period stipulated in the said s13(1)(i) – how is the stipulated period to be calculated?

(iv) on what basis was it found that the appointment of a curator *ad litem* for a person suffering from mental incapacity does not divest such a person of the protection afforded by s13(1)(i) for as long as the mental incapacity exists?

(v) with reference to the above, on what basis was it found that, as long as the employee’s mental incapacity exists, the prescription period will not have been completed?

INTRODUCTION

1. In the supreme court of appeal judgment that is the subject of this appeal, Petse AP aptly opened by saying that the appeal raised 'crisp but vexed questions' (*Shoprite Checkers (Pty) Ltd v Mafate* [2023] ZASCA 14; 2023 (4) SA 537 (SCA), at paragraph [1]).

application for leave to appeal against judgment of SCA – concerns, in particular, the interpretation of s13(1)(a) and s13(1)(i) of the Prescription Act

2. This is an application for leave to appeal against that judgment. In the main, the application was about extinctive prescription, in particular the interpretation of s13(1)(a) and (i) of the Prescription Act 68 of 1969 (the Prescription Act).

PERTINENT FACTS OF THE CASE

employee worked as a packer doing merchandising at retail stores; whilst working at Checkers Hyper at the Meadowdale Mall in Edenvale, she was being lifted in a cage attached to a forklift to pack merchandise on high-up shelves; the cage tilted and the employee fell off – when she lay on the floor, the cage came hurtling down, hitting her on the head: resulted in severe head injury, permanent mental incapacity

3. Ms Nolunga Mkhwanazi worked as a packer for a business entity called Smollan Sales and Marketing which offers merchandising services at retail stores. On 15 October 2014, Ms Mkhwanazi was doing merchandising work at Checkers Hyper at the Meadowdale Mall in Edenvale. Part of what she did on the day entailed being lifted high up in a cage that was attached to a forklift. This was done to enable her to pack merchandise on high-up shelves. When the cage was a few metres up, it tilted and Ms Mkhwanazi fell off. As she lay on the floor, the cage came hurtling down, hitting her on her head. The severe head injury she sustained resulted in mental incapacity, which, it is common cause, is permanent.

respondent Mafate was appointed as a curator *ad litem* to prosecute a damages claim obo the employee – instituted such delictual claim against Shoprite Checkers

4. On 1 February 2017, Mr Cecil Tshepo Mokopane Mafate, the respondent, was appointed as curator *ad litem* to prosecute a damages claim on behalf of Ms Mkhwanazi (a curator *ad litem* is a person appointed by a court to institute specified legal proceedings on behalf of another, usually a mentally incapacitated person or sometimes a minor).
5. Exercising his mandate, Mr Mafate instituted a delictual claim in the high court against Shoprite Holdings Limited (Shoprite Holdings) on 22 February 2017. In a special plea, which raised misjoinder and non-joinder, filed on 28 July 2017, Shoprite Holdings pleaded that the Checkers Hyper at the Meadowdale Mall in Edenvale did not belong to it, but to Shoprite Checkers (Pty) Ltd (Shoprite Checkers), the applicant before the constitutional court. In the special plea, Shoprite Holdings explained that Shoprite Checkers was its wholly owned subsidiary. Just under a year later, on 28 June 2018, Mr Mafate withdrew the action against Shoprite Holdings. About four months later, on 19 October 2018, he served the summons in the present action on Shoprite Checkers.

Shoprite Checkers raised, by way of special plea, the defence that the claim had prescribed – a year had lapsed since the appointment of Mafate as curator *ad litem*

6. By way of a special plea, Shoprite Checkers raised a defence that the claim had prescribed. This, on the basis that a year had elapsed since the appointment of Mr Mafate as curator *ad litem*. In this regard, Shoprite Checkers relied on paragraph (i) read, with paragraph (a), of s13(1) of the Prescription Act.

7. The effect of s13(1)(a) to s13(1)(h), read with (i) and the end-part of s13(1), is that, for as long as a person falls under the categories set out in paragraphs (a) to (h) (all of which the section refers to as impediments and which include, in paragraph (a), affliction with mental incapacity and being a person under curatorship), their claim would not prescribe because the period of prescription would not be completed. By 'the end-part' of s13(1), the constitutional court was referring to the part that comes after paragraphs (a) to (i) of the section and which reads:

'the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)'.

8. The context in which this appears will be given later.
9. The period of prescription would be completed only upon the expiry of a period stipulated in s13(1). The stipulated period is reckoned from the date of cessation of the relevant impediment.
10. With this in mind, Shoprite Checkers' special plea proceeded from the proposition that the appointment of Mr Mafate as curator *ad litem* constituted a cessation of the impediment of mental incapacity. The thinking behind this proposition was that interposing a curator *ad litem* made it possible for the delictual claim to be instituted. According to Shoprite Checkers, the relevant impediment had thus ceased. The impediment ceased to exist because, although Ms Mkhwanazi could not personally prosecute the claim, the curator *ad litem* could do so on her behalf.
11. The substance of the special plea was that, from 15 October 2014, the date on which the tragedy befell Ms Mkhwanazi, the three-year prescription period had commenced and, by 15 October 2017, it had elapsed. Therefore, in terms of a conjoined reading of paragraphs (a) and (i) and the end-part of s13(1), as at 19 October 2018, when Mr Mafate served summons on Shoprite Checkers, the additional period of a year stipulated in s13(1) had also elapsed. The result was that the claim had prescribed.
12. In a replication, Mr Mafate took issue with the special plea of prescription. He contended that the running of prescription was interrupted by the service of process on Shoprite Checkers on 19 October 2018, and that less than three years had elapsed since the debt became due within the meaning of s12(3), which provides that:

'[a] debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

13. Mr Mafate took the view that he acquired knowledge of the identity of the debtor only after Shoprite Holdings had raised the defences of misjoinder and non-joinder, and that acquiring this knowledge at the time that he did was not the result of a failure on his part to exercise reasonable care.

FINDINGS OF THE CONSTITUTIONAL COURT

Madlanga J (with Bilchitz AJ, Chaskalson AJ, Dodson AJ, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring)

jurisdiction

obvious examples of prejudice arising from delay of time within which a claim may be brought: forgetfulness of witnesses, loss of witnesses through death, loss of evidence (e g documents or electronic and mechanical material)

14. The constitutional court's jurisdiction was engaged. Extinctive prescription limits the time within which a claim may be brought. The timeous prosecution of a claim impacts

the fairness of a hearing which, in turn, better guarantees justice between the litigating disputants. Section 34 of the Constitution affords everyone the right to a fair hearing. Inordinate delays detract from the fairness of a hearing and, indeed, 'damage the interests of justice' (obvious examples of prejudice arising from delay are the forgetfulness of witnesses, loss of witnesses through death or other phenomena and loss of evidence, for example, documents or electronic and mechanical material).

15. In *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC), at paragraph [11], Didcott J said:

'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.'

16. In similar vein, Mahomed CJ had this to say, in *Uitenhage Municipality v Molloy* [1997] ZASCA 112; 1998 (2) SA 735 (SCA), at 146:

'One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription that purpose would be subverted.'

17. Despite the fact that the principle to be gleaned directly from these two cases concerned balancing the interests of creditors and debtors, on a proper reading, the cases supported the point the constitutional court made regarding its jurisdiction.

must the appeal succeed?

s13(1) of Prescription Act amended by Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020, to read: (i) if creditor is a minor; or (ii) a person with a mental or intellectual disability disorder or incapacity; or (iii) is affected by any other factor that the court deems appropriate with regard to any offence referred to in s12(4); or (iv) is a person under curatorship; or (v) is prevented by a superior force, including any law or any order of court from interrupting the running of prescription as contemplated in s15(1)

18. Section 13(1) of the Prescription Act reads as follows:

'If –

- (a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or
- (b) the debtor is outside the Republic; or
- (c) the creditor and debtor are married to each other; or
- (d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or

- (e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or
- (f) the debt is the object of a dispute subjected to arbitration; or
- (g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act 28 of 1966); or
- (h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and
- (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

s13(1)(i): the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after the day on which the relevant impediment has ceased to exist and the period of prescription shall not be completed before a year has lapsed after the day so referred to in this subsection, namely, before, or on, or within one year after the day on which the relevant impediment has ceased to exist

19. It is to be noted from paragraph (i) of this section that what are itemised in paragraphs (a) to (h) are referred to as 'impediments', that is, impediments to a creditor's ability to institute proceedings. These are not necessarily all impediments in the true sense. Saner explains:

'The use of the word "impediment" in section 13(1)(i) is not to be taken too literally and interpreted as meaning an absolute bar to the institution of legal proceedings. While some of the circumstances set forth in section 13(1)(a) to (h) give rise to an absolute bar, others do not. An example of the former is section 13(1)(h), and an example of the latter is section 13(1)(e). The word 'impediment' therefore covers a wide spectrum of situations ranging from those in which it would not be possible in law for the creditor to sue to those in which it might be difficult or awkward, but not impossible, to sue. In short, the impediments range from the absolute to the relative' (Saner J, *Prescription in South African Law* (LexisNexis, Cape Town 2023) Service Issue 34 at 222-3).

impediments to a creditor's ability to institute proceedings – range from absolute (s13(1)(h) – the creditor or debtor is deceased and an executor of the estate has not yet been appointed) to a non-absolute bar – e g s13(1)(e) – the creditor is a juristic person and a debtor is a member of the governing body of such juristic person

20. Before clarifying how the period of prescription runs under s13(1), the constitutional court first set out the context provided by s12.

s12(1): prescription begins to run as soon as debt is due; s12(3): debt is deemed to be due once creditor has knowledge of the identity of the debtor, as well as the facts giving rise to the debt; proviso to s12(3): even where such knowledge has not been acquired, the knowledge shall be deemed to have been acquired if it could have been acquired through the exercise of reasonable care

21. In terms of s12(1), prescription begins to run as soon as the debt is due. Section 12(3) provides that the debt is deemed to be due once the creditor has knowledge of the

identity of the debtor and of the facts giving rise to the debt. So, where the creditor has immediate (i.e. immediately after the occurrence in issue) knowledge of the identity of the debtor and the facts from which the debt arises, the debt becomes due immediately. Where that is not the case, the debt will become due at a later date, which will be when the creditor acquires actual knowledge of the two categories of mentioned factual material. The proviso to s12(3) is to the effect that, even where such knowledge has not been acquired, the knowledge shall be deemed to have been acquired if it could have been acquired through the exercise of reasonable care.

CC: where creditor does not have a mental incapacity when the debt arises, but thereafter suffers mental incapacity: if the creditor became aware of the identity of the debtor and the facts from which the debt arises (or is deemed to have acquired such knowledge) before the mental incapacity occurred, the debt may have become due prior to the mental incapacity – prescription would have started to run, but the subsequent mental incapacity would affect the completion of the prescription period

22. There may be instances where the creditor does not have a mental incapacity when the debt arises but several months later they suffer a brain injury or are afflicted with a brain disease that causes mental incapacity. There, depending on whether the creditor had become aware of the two categories of factual material referred to above or ought reasonably to have become aware of them, the debt may have become due prior to the mental incapacity. In that event, prescription would have started to run, but the subsequent brain injury or disease and mental incapacity would affect the completion of the prescription period.
23. Insofar as people with mental incapacity are concerned, it is clear from paragraph (i) of s13(1) that there is a notional date of commencement of the running of prescription. There is such a notional commencement date because paragraph (i) refers to a time when, but for an impediment referred to in paragraphs (a), (b), (c), (d), (e), (f), (g) or (h), the period of prescription would have been completed. There cannot be 'completion' without commencement, even if the commencement be notional. If the idea of notional commencement was not accepted, s13(1) would otherwise be rendered inoperable. Fortunately, in the present matter, the constitutional court did not have to decide the point from which the notional date had to be reckoned.
24. The constitutional court then clarified how the period of prescription runs and gets completed under s13(1).
25. Paragraph (i) envisages the possibility – in some instances – of the relevant impediment referred to in paragraphs (a) to (h) ceasing to exist. Since the relevant period of prescription (three years, in the present matter) would have been running throughout, there was the possibility that, when the impediment ceased, the three-year period would, or would not, have expired.

CC: s13(1)(i): (i) if, on or before date of cessation of the impediment, the period of prescription would have been completed (3 years), claimant only has 1 year within which to institute proceedings; (ii) where period of prescription would have been completed within a year after impediment had ceased, claimant still had a year from date of cessation of the impediment to bring action; (iii) if, by the date of cessation of the impediment, the period still remaining was more than a year, the claim had to be instituted within that remaining period (IGI Insurance Company (SCA))

26. Paragraph (i) provides that, if the relevant period of prescription would, but for the impediments contained in s13(1)(a) to (h), be completed before, or on, or within one year after the day on which the relevant impediment ceased to exist, the period of prescription would not be completed before a year had elapsed after the day of cessation of the impediment. That meant that if, on or before the date of cessation of the impediment, the period of prescription would have been completed, the claimant had only a year – not three years – within which to institute proceedings. Even where the period of prescription would have been completed within a year after the

impediment had ceased, the claimant still had a year from the date of cessation of the impediment to bring action. If, by the date of cessation of the impediment, the period still remaining was more than a year, the claim had to be instituted within that remaining period (*ABP 4x4 Motor Dealers (Pty) Limited v IGI Insurance Company Limited* 1999 (3) SA 924 (SCA), at paragraph [10]).

s13(1)(a), as amended, covers the following scenarios applicable *in casu*: (i) is a person with a mental or intellectual disability, disorder or incapacity?; (ii) is a person under curatorship?

27. Paragraph (a) – as amended by the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020 – now reads:

‘the creditor is a minor or is a person with a mental or intellectual disability, disorder or incapacity, or is affected by any other factor that the court deems appropriate with regard to any offence referred to in section 12(4), or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1).’

CC: employee’s condition *in casu* referred to as mental incapacity

28. The amendment served the important purpose of getting rid of the offensive word ‘insane’ in the old paragraph (a). The amendment introduced a substitute descriptor that refers to ‘a person with a mental or intellectual disability, disorder or incapacity’. The constitutional court did not think this amendment was intended to introduce a change in the category of people referred to. In referring to Ms Mkhwanazi’s condition, the constitutional court did not use the old terminology. For convenience, it did not use the full new, long descriptor but, instead, used the shortened terminology, ‘mental incapacity’.

Endumeni Municipality (SCA): (i) consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; (ii) the context within which the provision appears must be considered; (iii) the apparent purpose to which it is directed is relevant; (iv) the material known to those responsible for its production must be considered; (v) where more than one meaning is possible, each possibility must be weighed in the light of all these factors

29. In accordance with the *Endumeni* interpretative triad of language, context and purpose, the language concerned with here is that of an impediment arising from mental incapacity.

30. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA), Wallis JA held, at paragraph [18]:

‘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.’

31. The constitutional court has endorsed *Endumeni* a number of times, but, so as not to clutter annotations, it referred only to *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR

749 (CC) and *Diener N.O. v Minister of Justice and Correctional Services* [2018] ZACC 48; 2019 (2) BCLR 214 (CC); 2019 (4) SA 374 (CC) in this judgment.

32. This language was used in the overall context of the balance that the Prescription Act seeks to strike between the conflicting interests of creditors, on the one hand, and of debtors, on the other (see *Mohlomi* above and *Molloy* above).

the purpose of the inclusion of the impediment in s13(1)(a): to safeguard the interests of persons suffering from mental incapacity by guaranteeing that the running of prescription will not be completed as long as the impediment exists

33. The purpose of the inclusion of this impediment in s13(1)(a) is to safeguard the interests of the vulnerable group of persons suffering from mental incapacity in a manner that guarantees that the running of prescription will not be completed for as long as the impediment persists.

CC disagreed that, upon appointment of curator *ad litem*, the person suffering from mental incapacity ceased to be subject to such impediment because the curator *ad litem* could institute proceedings on her behalf – held the view that the appointment of a curator *ad litem* still rendered the person mentally incapacitated

34. The interpretation advocated by Shoprite Checkers said that, upon the appointment of the curator *ad litem*, Ms Mkhwanazi's impediment had ceased to exist and the curator *ad litem* could institute proceedings on her behalf. Therefore, she had only had one year from the date of such cessation to institute proceedings. This interpretation afforded Ms Mkhwanazi and similarly placed persons less protection. Even with the appointment of a curator *ad litem*, such persons remained mentally incapacitated. They continued to be subject to the vagaries of the competence, or lack thereof, or tardiness of the curator *ad litem*. And – because of their mental incapacity – this was a situation about which they could not do, or be expected to do, anything.

35. On Shoprite Checkers' interpretation, the fortunes of a mentally incapacitated person are contingent on the competence and diligence of the appointed curator. The constitutional court did not think that paragraph (i) and the end-part of s13(1), read with paragraph (a), insofar as the latter paragraph relates to mentally incapacitated persons, meant to divest such persons of the paragraph (a) protection in circumstances where there was no guarantee of an optimal safeguard of their interests.

36. Why then should the impediment contained in paragraph (a) not continue unaffected by the appointment of a curator *ad litem*? The constitutional court could not see why not. This was less about whether there was a person (the curator *ad litem*) who could bring action on behalf of the person with a mental incapacity. It was more about the optimal protection of the interests of a person belonging to a vulnerable group, a person certainly deserving of such protection.

appointment of a curator *ad litem* is a chance occurrence – such chance occurrence should not result in affected people with mental incapacity being divested of the wholesome protection enjoyed by a substantial number of other persons with mental incapacity where there were no such appointments

37. The appointment of curators *ad litem* in respect of persons with mental incapacity is a chance occurrence. It does not accord with the constitutional court's sense of justice that such chance occurrence should result in the affected people with mental incapacity being divested of the wholesome, meaningful protection enjoyed by a substantial number of other persons with mental incapacity in respect of whom there were no such appointments. Any benefits that might be derived from the appointment of a curator *ad litem* are not reason enough to divest a person with mental incapacity of continued protection. This interpretation sits comfortably with the language of the section.

38. Ms Mkhwanazi and similarly placed persons are persons with a mental incapacity as envisaged in s13(1)(a). The overall context of balancing the interests of creditors and debtors does not detract from this interpretation. This is especially so here as – on one side of the scale – we have creditors who are mentally incapacitated. The scale must tilt in their favour.
39. The interpretation proffered by the constitutional court advanced the purpose of protecting the vulnerable group of persons with mental incapacity from the completion of the period of prescription for as long as the incapacity persisted.
40. The appointment of a curator *ad litem* does not divest a person with mental incapacity of the protection afforded by s13(1) for as long as mental incapacity exists. Simply put, and as said by the constitutional court above, the scale had to tilt to the side of preserving the interests of mentally incapacitated creditors given that, if the claim were to prescribe, the denial of their rights to institute a claim would be absolute.
41. In sum, the s13(1) protection founded on mental incapacity was to continue for as long as Ms Mkhwanazi's incapacity persisted. For as long as that was the position, the prescription period would not be completed. That being the case, there was no need to engage with the interface between s13(1) and s12(3) as was done by the high court.

order

42. Leave to appeal was granted and the appeal was dismissed with costs.

3.1.5 **DISMISSALS ON THE GROUNDS OF OPERATIONAL REQUIREMENTS**

3.1.5.1 **SECTION 41(4) OF THE BCEA: ENTITLEMENT TO SEVERANCE PAY AND THE EXTENT OF THE ASSISTANCE PROVIDED BY THE RETRENCHING EMPLOYER**

Khanya Cleaning Group (Pty) Ltd v SA Transport and Allied Workers Union and Others
 Unreported case no PR32/23
 (2025) 46 ILJ 363 (LC)
 (2025) 36 SALLR 448 (LC)

- (a) **Two schools of thought developed over the years in South Africa as to the purpose of severance pay. The first school held that an employee would be entitled to severance pay from her employer on the loss of employment – severance pay's purpose was to compensate an employee for the loss of his accrued rights to his job, irrespective of whether, after the dismissal, the employee was unemployed. The opposing school of thought was of the view that the purpose of severance pay was to tide the employee over after his dismissal, in his efforts to search for another job – consequently, severance pay received was influenced by the period of unemployment. The period of unemployment and the reason for such unemployment are important factors in applying the second school of thought. The labour appeal court, in *Irvin & Johnson Ltd v CCMA and Others* [2006] 7 BLLR 613 (LAC), per Zondo JP, thus held that the legislature did not intend, in its enactment of s41(4) of the BCEA, that an employee dismissed for operational requirements would be able to secure for himself severance pay and a salary from alternative employment. With reference to s203(3) of the LRA and item 11 of the Code of Good Practice on Dismissals Based on Operational Requirements (which no longer exists), Zondo JP further held that, where an employee accepts alternative employment, arranged by the employer, he forfeits his right to receive severance pay. How did the labour court recently apply this approach in the scenario where, in essence, the retrenching employer assisted the acquiring employer with whatever information was required to offer alternative employment to retrenched employees and there was no specific term in an agreement between these two employers to the effect that**

the acquiring employer will employ the employees at the same rate of remuneration?

- (b) The scenario is as follows: the retrenching employer provided the acquiring employer with a list of employees who were likely to be affected by the proposed retrenchment. The retrenching employer arranged for a meeting room on its premises so that the acquiring employer could meet the potentially affected employees. At such meeting, the affected employees were given employment applications by the acquiring employer. The meeting was scheduled during the employees' working time, for which no pay was deducted. At no stage were the employees so employed by the acquiring employer unemployed. With reference to this scenario, on what basis did the labour court recently hold that the said retrenched employees were not entitled to severance pay?
- (c) On what basis did the labour court recently find that a retrenched employee bore the overall onus of proof to prove that he was entitled to compensation in the form of severance pay? On what basis did the labour court also make the finding that the employer bore an evidential burden to lead its defence in rebuttal of the allegations made against it in the above regard?

INTRODUCTION

review into s145(1)(a) of LRA to decide an award made by the commissioner under the auspices of the CCMA

1. The applicant prosecuted this review application, in terms of s145(1)(a) of the LRA, to review and set-aside an award made by the fourth respondent (the commissioner) under the auspices of the third respondent (the CCMA).
2. As its relief, the applicant sought an order that the labour court make a substituted finding, or that it remit the dispute back to the CCMA for re-consideration afresh before a different commissioner. The applicant also sought a costs order, only in the event of opposition.

whether employees entitled to severance pay (s41(4) of BCEA) and notice pay (s37(1)(c) of BCEA)

3. The issue in dispute – which was referred by the first and second respondents, on behalf of their individual members (the employees), who had been employed by the applicant – was whether those employees had been entitled to severance and notice pay in terms of s41(4) and s37(1)(c) respectively of the BCEA.
4. The applicant placed in dispute the employees' entitlement to receive such severance pay, on the basis that the employees, who had found alternative employment with a different employer, had done so through the applicant's intervention. Similarly, it placed in dispute the individual members' entitlement to receive notice pay as it had given in excess of 4-weeks' notice of their intended retrenchment.

CCMA: employees entitled to severance pay, seeing they had secured for themselves alternative employment through no assistance of the applicant; also entitled to notice pay in lieu of a termination notice into s38 of BCEA

5. In his award, the commissioner found that the affected employees were entitled to severance pay because they had secured for themselves the alternative employment through no assistance of the applicant. He also found that the affected employees were entitled to notice pay *in lieu* of a termination notice in terms of s38 to the BCEA.

PERTINENT FACTS OF THE CASE

employer is a contract cleaning services company rendering services to a tyre fabrication factory; its contract period came to a natural end but was extended on a month-to-month basis for its client's tender application process to be completed – eventually the employer embarked on a s189 exercise

6. The applicant is a contract cleaning services company, which rendered services to a tyre fabrication factory in Kariega. Its contract validity period with its client came to its natural end but was extended on a month-to-month basis to allow its client's tender application process to be completed.
7. The likely effect of the above would be (and which proved to be the instance) that the applicant would be unable to employ its employees who rendered cleaning services to the Kariega factory on the applicant's behalf.
8. This was communicated to the applicant's employees who were likely to be affected by the eventual termination when the applicant embarked on a s189 to the LRA retrenchment process.
9. The applicant sent notice of retrenchment circulars, the first of which was dated 5 May 2022 and the second dated 23 May 2022. The reason for sending two circulars was because the proposed retrenchment date was changed from 31 May 2022 to 30 June 2022. The reason for this change of stance was because the tyre factory had kept its engagement of the applicant's contract cleaning whilst due diligence was underway in the formal appointment of its new service provider.
10. Ultimately, the applicant's efforts to be awarded the bid for the new cleaning contract came to naught and a new contract was awarded to its competitor, Supercare.

the commissioner's reasoning in his award

CCMA: material facts *in casu* distinguishable from the facts in *Irvin & Johnson (LAC)*, referred with approval by the LAC in *Astrapak*; used *Fidelity Supercare* as authority that the mere fact that the interviews had been conducted during the employees' working time does not equate to an offer of alternative employment

11. The commissioner based his decision, that the material facts in this referral were distinguishable from the facts before the labour appeal court, on the often-quoted *Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2006) 27 ILJ 935 (LAC); [2006] 7 BLLR 613 (LAC) (*Irvin & Johnson*) decision, per Zondo JA, Willis AJA *et Jafta* AJA concurring (this case was again referred to with approval by the labour appeal court, in *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union* [2013] 12 BLLR 1194 (LAC); [2013] ZALAC 19 (*Astrapak*); *per* Davis JA, with Tlaletsi ADJP and Molemela AJA concurring). He found authority in a similarly often referred to judgment in the labour court by Bhoola J, in *Fidelity Supercare Cleaning (Pty) Ltd v Busakwe NO and Others* [2010] 3 BLLR 260 (LC); [2009] ZALC 165 (*Fidelity Supercare*).

***Fidelity Supercare (LC)*: merely introducing the retrenched employee to the recruiting employer and providing a reference does not amount to 'arranging' alternative employment (this indeed amounts to 'facilitation')**

12. Using the authority of *Fidelity Supercare*, he found that the mere fact that the interviews had been conducted during the applicant's affected employees' working time could not be equated with an offer for alternative employment.

FINDINGS OF THE LABOUR COURT

Smith AJ

analysis of the law

generally, an employee dismissed for operational requirements is entitled to severance pay (s41(2) of BCEA); method for calculation is contained in s41(3) of BCEA

13. As a general rule, an employee dismissed for operational requirements is entitled to severance pay. This is codified in s41(2) of the BCEA (*Irvin & Johnson*, at paragraph [39]). Its method of calculation is to be found in subsection (3). An exception to this general rule is to be found in subsection (4).

an exception to the general reason is in s41(4) of BCEA: an employee who unreasonably refuses an offer of alternative employment is not without blame and should, therefore, not be compensated (*Freshmark* (LAC) and *Irvin & Johnson* (LAC))

14. The *raison d'être* of s41(4) is to compensate an employee, who has been dismissed for operational requirements through no fault of his or her own, for loss of employment. However, the legislature considered that an employee, who unreasonably refuses an offer of alternative employment, is not without blame. They should, therefore, shoulder the loss of employment without any compensation (see *Freshmark (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2003) 24 ILJ 373 (LAC); [2003] 6 BLLR 521 (LAC), *per* Zondo JP, with Nicholson JA and Van Dijkhorst AJA concurring, at paragraph [24]; the labour appeal court, in *Irvin & Johnson*, at paragraph [26], also referred with approval to the speech of Lord Slynn of Hadley in *Barry v Midland Bank PLC* [1999] IRLR 581 [HL], for the purpose for which severance pay is paid to an employee dismissed for operational requirements.).

first school of thought: employee entitled to severance pay as compensation for loss of accrued rights to a job, irrespective of the period of unemployment

15. Previously, in this country during the 1980s and 1990s, two schools of thought presented themselves on the purpose of severance pay. The first school was heavily influenced by Lord Denning MR, in *Lloyd v Brasseley* [1969] 1 All ER 382, at 383. The court of appeal in England and Wales held that, as a director would be entitled to a golden handshake on the loss of her office, so too would an employee be entitled to a severance or redundancy payment from her employer on the loss of her employment. It was considered that severance pay was used to compensate an employee for the loss of her accrued rights to her job, irrespective of whether, after her dismissal, she spent any period of time unemployed. This reasoning, amongst others, influenced the old industrial court in at least two of its previous decisions (*Jacob v Prebuilt Products (Pty) Ltd* (1988) 9 ILJ 1100 (IC), at 1104D–F; *Cele and Others v Bester Homes (Pty) Ltd* (1990) 11 ILJ 516 (IC), at 527G–J).

opposing school of thought: employee to be compensated to tide employee over, after dismissal, in his efforts to search for another job

16. The opposing school of thought was of the view that the purpose of severance pay was to tide the employee over, after her dismissal, in her efforts to search for another job (*Young and Another v Lifegro Assurance* (1990) 11 ILJ 1127 (IC), at 1137B–E).
17. Both schools of thought, therefore, considered the payment of severance pay to a dismissed employee to be a form of compensation. Where they differed was what the palliative sought to cure.

Irvin & Johnson: Zondo JP – (i) employee not able to secure severance pay and salary for alternative employment; (ii) if employee accepted or unreasonably refused to accept an offer of alternative employment, not entitled to severance pay; (iii) if employee accepts alternative employment arranged by employer, he forfeits the right to receive severance pay

18. It is not for nothing that Zondo JP (then known) underscored, in *Irvin & Johnson*, that the legislature did not intend, in its enactment of s41(4), that a dismissed employee for operational requirements would be able to secure for herself severance pay and her salary for the alternative employment (*Irvin & Johnson*, at paragraphs [44] and [45]).
19. Zondo JP, on behalf of the full court above, justified his reasoning with reference to s203(3) of the LRA, and to the Code of Good Practice on Dismissals Based on Operational Requirements (which now no longer exists), which stated, at clause 11, in its then current form, that, if an employee either accepted or unreasonably refused to accept an offer of alternative employment, the employee's right to severance pay was forfeited. It was held by Zondo JP, at 949B–C, that, where an employee accepts alternative employment arranged by the employer, she forfeits her right to receive severance pay.

s41(4) not applicable in casu as retrenching employer did not assist the affected employees securing employment with recruiting employer (Supercare)

20. The second respondent argued that s41(4) does not find application in the facts of this referral as the applicant did not assist in the affected employees securing for themselves alternative employment with Supercare. It was necessary to examine the evidential material placed before the commissioner, which was used by him in the preparation of his award, through the lenses provided to the labour court by the case authority.

Servest (LC): retrenching employer did not conclude an agreement with the recruiting employer to the effect that it had to employ all the employees to be retrenched; attempt by the CCMA commissioner on this basis to distinguish the facts from Irvin & Johnson (similar attempt was made by CCMA commissioner to distinguish Irvin & Johnson on the facts in Kanya Cleaning Group (2023))

21. The applicant referred the labour court to a decision by Lagrange J, in *Servest Landscaping Turf Maintenance (Pty) Ltd v SA Commercial Catering & Allied workers Union and Others* (2023) 44 ILJ 380 (LC); [2022] ZALCCT 54 (*Servest*). That case was also a review of a commissioner's award in the CCMA. The commissioner, like the one *in casu*, also sought to distinguish *Irvin & Johnson* on the facts. It will be recalled, from reading that earlier decision, that I&J had entered into an agreement with a food services management company, KKS, to manage its staff canteen and that I&J's entire workforce in the canteen would be employed by KKS at the same rate of remuneration (*Irvin & Johnson*, at paragraphs [3] and [4]).
22. It was argued, before Lagrange J, that the commissioner's conclusion, that *Irvin & Johnson* was distinguishable, was reasonable (*ibid* at paragraph [8]). There, the commissioner found that Servest had never concluded a term in an agreement between it and Bidvest, that Bidvest had to employ all the Servest employees who were retrenched by it. This motivated her decision on outcome that the authority of *Irvin & Johnson* could not assist the retrenching employer and was distinguishable. She awarded that the employer was to pay severance pay to the applicant.
23. A similar line of reasoning was adopted by a CCMA commissioner in *South African Transport and Allied Workers Union and Another v Khanya Cleaning Group* [2023] 5 BALR 579 (CCMA) (*Khanya Cleaning Group*), also an application to review and set-aside an award. There, the commissioner also sought to distinguish *Irvin & Johnson* on that basis that the respondent in the referral had not concluded an express provision in

an agreement for the new employer who offered alternative employment to employ the employees affected by the retrenchment.

Lagrange, in Servest, guided by Vergenoeg vir Seniors (LAC): for a retrenching employer to escape paying severance pay, it is not a requirement that there must be a special term in an agreement with the recruiting employer that entails that it will employ those employees at the same rate of remuneration

24. Lagrange J, in *Servest*, was guided by an unreported decision in the labour appeal court (*Vergenoeg vir Seniors v Stone and Others* [2010] ZALAC 35, per Tlaletsi JA, with Patel JA and Hendricks AJA concurring).
25. The labour court found, from its understanding of *Irvin & Johnson*, that, in order for a retrenching employer to escape the statutory obligation to pay severance pay to employees dismissed for operational requirements, it is not incumbent on it to insist on the inclusion of a special term in an agreement with a prospective employer, who is to offer employment to their retrenched employees, that it will employ those employees at the same rate of remuneration. To the extent that the commissioners referred to above tended to base the outcomes of their awards on this singular distinction, they committed an error of reasoning so egregious that it could render their respective outcomes as being unreasonable (*Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) (*Herholdt*), at paragraph [25]).
26. The labour court found that there were a range of facts to consider. Those facts were considered by Lagrange J in *Servest*, in paragraphs [13] to [17] of his judgment.

evidence led before the commissioner

upper-end of the scale obligations on a retrenching employer: *Irvin & Johnson* and *Astrapak* – to escape the payment of severance pay, the retrenching employer must arrange alternative employment (if not accepted, employee not entitled to severance pay)

middle-end of the scale obligations: *Servest* and *Vergenoeg vir Seniors* – not a requirement that retrenching employer must conclude an agreement with the recruiting employer that it will employ employees at the same rate of remuneration

lower-end of the scale obligations on a retrenching employer: *Fidelity Supercare* – introducing employee to the recruiting employer and providing a reference is facilitation and not arrangement: employee still entitled to severance pay

27. In *casu*, the evidence led before the commissioner had to be read against the backdrop of both the *Irvin & Johnson* and *Fidelity Supercare Cleaning* decisions. The former case was at the upper-end of the scale of what a retrenching employer would need to do in order to stave off its obligation to pay severance pay to retrenched employees for operational requirements. At the lower-end of the scale was the latter case, where all the employer did was to introduce the retrenched employees to an alternative employer, and to provide a reference to that other employer which employed its retrenched employees (see paragraphs [8](a) and [14] of *Fidelity Supercare Cleaning*). The labour court, per Bhoola J, held that the applicant did not 'arrange' alternative employment and merely provided a reference. This amounted only to a 'facilitation'. Somewhere in the mid-range lies Lagrange J's judgment in *Servest*.
28. As mentioned, Mr Ngqoboka was the site manager for the cleaning contract at the Kariega tyre factory. He was employed as the applicant's operations manager. He gave evidence that he had given Supercare a list of its employees who were likely to be affected by the proposed retrenchment. Additionally, he had put Supercare in contact with his managing director, Mr Marius Olivier, for the purposes of Supercare meeting

the affected employees. After this meeting, Mr Ngqoboka had booked a boardroom for Supercare's Mr Martin to meet the affected employees.

relevant facts according to the retrenching employer: provided the recruiting employer with a list of employees likely to be affected; arranged for the recruiting employer to meet the affected employees in its boardroom; the employment application forms provided by the recruiting employer were given back to the retrenching employer, who placed same in a box and gave it to its security; the meeting took place during the employees' working hours, for which pay was not deducted; at no stage were the employees unemployed

29. At this meeting, the affected employees were given employment application forms by Supercare. This meeting was scheduled during the applicant's employees' working hours, for which their pay was not docked. Some or all of those employees had arrived in their cleaning uniforms. Once the forms were completed, they were given back to Mr Ngqoboka, who had placed them into a box and gave the box to security. All of this occurred before the retrenchment of the affected employees.
30. The second respondent's representative disputed Mr Ngqoboka's live evidence as follows:
 - 30.1 the affected employees had met Supercare's Mr Martin on their own time and not during company time; and
 - 30.2 it was Supercare which had booked the boardroom for the interviews.
31. It was common ground between the parties that Supercare had met with the affected employees and that their application for employment forms had been placed inside a box which Mr Ngqoboka took care of and eventually gave to security. It was furthermore common ground that at no stage had those employees been unemployed.
32. Despite those bare denials, Mr Zengetwa, the second respondent's union official, who had given live evidence earlier on in the day, before Mr Ngqoboka, couldn't take those denials any further. In argument, it was raised by the applicant that Mr Zengetwa had not been in attendance at the interview in the boardroom with Supercare's Mr Martin. Therefore, so it was argued, he had no personal knowledge of those events and his evidence was thus hearsay.
33. In the second respondent's answering affidavit, much was made of a point of Mr Ngqoboka's re-examination in which a clearly leading question was asked of him by his representative, whether he had regarded himself as playing an instrumental role in ensuring that the affected employees were offered alternative employment with Supercare. Mr Ngqoboka's answer was non-committal. He said that it depended on whoever saw it that way.
34. As the labour court understood the gravamen of the second respondent's argument, this amounted to a concession that the applicant had not seen itself as being instrumental in the employment of the affected employees by Supercare.

CCMA: unlike in *Irvin & Johnson*, the retrenching employer did not negotiate with the recruiting employer that it employs all of the affected employees – introducing the employees to the recruiting employer and allowing interviews during company time does not equate to arranging alternative employment

35. In his award, the commissioner placed great purchase on the fact that Mr Ngqoboka had not negotiated with Supercare that it employ all of the applicant's affected employees, which was what had occurred in *Irvin & Johnson*. The mere fact that the interviews had been held during company time was found by him to be insufficient and could not be equated with the applicant having arranged alternative employment.

reasonableness of the award on the evidential material placed before the commissioner

36. The labour court had to determine whether the outcome reached by the commissioner was not one that could reasonably be reached on the evidence and the other evidential material properly before him (*Herholdt*, at paragraph [12]). Ultimately, an emphasis was placed on the result of the referral, rather than the reasons for arriving at that result (*Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration and Others* (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC), at paragraphs [97] and [100]).
37. The applicant pleaded, as its grounds for review, that the commissioner's outcome was motivated by a material mistake in law, constituted a gross irregularity in the proceedings, that he had deprived it of a fair hearing and had arrived at an unreasonable result.

employees bore the overall onus to prove they were entitled to compensation in the form of severance pay as well as notice pay; the employer bore an evidential burden to lead its defence in rebuttal of the allegations made against it

38. The labour court found that the commissioner had committed a material error of law. It was the first and second respondents (as applicants in the referral on behalf of their individual members) who bore the overall onus of proof to prove that their members had been entitled to compensation in the form of severance and notice pay. The applicant (as respondent) bore an evidential burden to lead its defence in rebuttal of the allegations made against it.
39. Even if the labour court were wrong in that regard since the dismissals were admitted, the first and second respondents had opened their respective cases and had led evidence first. Section 73A(1) to the BCEA refers to an employee's monetary claim for the payment of any amount in either the BCEA, LRA, collective agreement or contract of employment. The individual members were the claimants and were required to prove their claims using evidence.
40. Leaving this aside, it was necessary to examine the nature of the evidence led before the commissioner. The evidence of Mr Nqgoboka has been discussed in some detail above. Admittedly, this evidence was subject to challenge by the second respondent. Despite minor skirmishes as to which party had organised a boardroom for Supercare to meet the affected workers and who had ultimately had custody of the box of application forms, the inescapable conclusion from the admitted facts remained that the applicant had met with Supercare. The labour court had to find whether the applicant had assisted Supercare with the presentation of further information when requested to do so by it.

LC: not too much emphasis must be placed in determining whether the retrenching employer reached out first to the recruiting employer or vice versa; the emphasis should rather be on whether there had been collaboration between the employers and, furthermore, whether the retrenching employer had been moved into action to assist the recruiting employer with whatever information was required so that it could make an offer of employment

41. Whether it was the applicant which had reached out to Supercare first or *vice versa*, in the labour court's view, placed far too granular an interpretation of Bhoola J's use of the word 'arrange', at paragraph [27] of her judgment. The labour court stated that the emphasis should have been on whether there had not only been collaboration between retrenching and acquiring employers, but also that the retrenching employer had been moved, as a matter of some urgency, into action to assist the acquiring employer with whatever information was required by it in order for it to offer alternative employment to employees retrenched for operational requirements.

42. Instead of using Mr Nqgoboka's evidence in the determination of his outcome, as he ought to have done, the commissioner lasered in on the fact that the applicant had not concluded a special term in an agreement between it and Supercare, in order for Supercare to employ all of its employees who were likely to be retrenched for operational requirements. The commissioner explained in his award that there had been no negotiation between the applicant and Supercare.

LC: each case must be evaluated and determined with reference to its own factual matrix: *Irvin & Johnson* did not elevate as a principle that the retrenching employer is to negotiate a special term with the recruiting employer for alternative employment; *Fidelity Supercare* held that the employer had not done enough in its efforts to secure alternative employment

43. The commissioner has misconstrued the true nature of s41(4) and the *Irvin & Johnson* and *Fidelity Supercare* decisions. The labour appeal court, in *Irvin & Johnson*, had never elevated, to a point of principle, that, in order for an employer not to pay severance pay, it had to negotiate a special term with another employer to offer alternative employment to its retrenched employees. Bhoola J, in *Fidelity Supercare*, held that the employer there had not done enough in its efforts to ensure that its retrenched employees would secure alternative employment. Each of those decisions was decided within their own factual matrix. Each referral to the CCMA or bargaining councils with jurisdiction on this point was to be determined on its own merits.

LC: *in casu*, like in *Servest*, the retrenching employer had not just sat on its hands and impassively watched the world go by – it assisted the recruiting employer, who had offered the retrenched employees alternative employment

44. *In casu*, the applicant, much like the applicant in *Servest*, and the respondent employers in *Nikelwa Ntuli v Empact Group* GAJB6968-20 (CCMA) and *DETAWU obo Tanya Du Piesanie and 95 Others v Supercare Cleaning Services* ECPE2602-21 (CCMA), had not just sat on its hands and impassively watched the world go by. It had assisted the acquiring employer who had offered their retrenched employees' alternative employment.
45. Next was a concession apparently made by Mr Nqgoboka that he did not regard himself as being instrumental in the alternative employment of the retrenched employees. In the labour court's view, this did not take the referral very far. A concession made by a witness is not one that goes to a fact or facts, but is rather what this witness makes of his treatment of the disputed facts (*Harlech-Jones Treasure Architects CC and Others v University of Fort Hare* [2001] JOL 8151 (E), at paragraphs [104] to [108], per Kroon J, with Leach and Jansen JJ concurring) – which is not the witness's ultimate function, but that of the finder-of-fact, the commissioner.
46. Even still, the question asked of Mr Nqgoboka was inappropriate in that he was neither qualified as an expert witness, nor would his answer be relevant and admissible because it was clearly an opinion which was expressed about the applicant's role in Supercare's appointment of the retrenched employees (*S v H* 1981 (2) SA 586 (SWA). See also *Holtzhausen v Roodt* 1997 (4) SA 766 (W), at 772B–773D). This disputed issue, in any event, was the ultimate issue before the commissioner for determination and not that of Mr Nqgoboka.
47. The legislature has recognised the need to compensate employees who are retrenched through no fault of their own. The legislature recognises the primacy of keeping employees in the labour market rather than out of it. Whether the purpose of this compensation is to tide employees over while they seek alternative work, or whether it is in recognition of accrued rights to their job, irrespective of whether, after their dismissal, they spent any period of time being unemployed, is a debate that can rage another day.

LC: purpose of s41(4) is to incentivise employers to ensure that their employees secure alternative employment – recognising the primacy of keeping employees in the labour market, rather than out of it

48. From those two opposing schools of thought, it is accepted that the purpose of severance pay is to cushion employees from the loss of their employment. It is also accepted that the purpose of s41(4) is to incentivise employers to ensure that their employees secure alternative employment.

LC in casu obiter: employee also not entitled to severance pay where the employee found alternative employment for itself (assuming on the same or better terms as the previous job) and did not spend a moment unemployed – the employee thus does not need a soft cushion of severance pay to land on: employee will not be able to quantify the basis of his claim in these circumstances (as an employee is required to do for a contractual breach in the civil courts)

49. In *Astrapak*, the labour appeal court recognised that there was no basis upon which employees could obtain for themselves both alternative employment and severance pay. The labour court asked the following question *obiter*: but what is the purpose to compensate an employee with severance pay for the loss of their employment when they have already found alternative employment (assume on the same or better terms as their previous job) and not spent a moment unemployed? This is done all through the employee's own efforts and without the aid of their retrenching employer. Quite clearly then, this employee needed no soft cushion of severance pay to land on. Surely if an employee were to prosecute a referral for that type of compensation, they would need to clearly quantify the basis of their claim as they would do for a contractual breach in the civil courts.
50. Returning now to the outcome of the award, what was to be made of the commissioner's material errors? Errors, on their own, would not be sufficient to render violable an arbitral award. Something more is needed. These errors must have, as their consequence, their ability to render the award as being one which no reasonable decision-maker could have made in the same circumstances (*Herholdt*, at paragraph [25]; see also Van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC); [2009] 11 BLLR 1128 (LC), at paragraph [17]).
51. These errors notwithstanding, could the commissioner's award be justified as being reasonable on the basis of the evidential material placed before him?
52. It was clear to the labour court that the commissioner's misunderstanding of the principle in *Irvin & Johnson*, in which he regarded that anything less than a special term between the applicant and Supercare, that Supercare would employ all of its retrenched employees, could only relieve the applicant from its statutory obligation to pay severance pay to the individual members, was the wrong approach. This approach caused the commissioner to commit irregularities in terms of s145(2)(a)(ii) of the LRA. He either misconceived the nature of the enquiry or arrived at an unreasonable result.
53. In this review, the labour court found that this threshold had been met and the award was liable to be set-aside as a result.

substitution or remittal?

54. In its prayer for relief, the applicant sought an order that the labour court issue a substituted order in which it declares that the individual respondents were not entitled to notice pay and severance pay. This was the order the labour court intended to make.
55. The constitutional court has indicated the importance of the expeditious resolution of employment disputes (*Commercial Workers Union of SA v Tao Ying Metal Industries*

and Others (2008) 29 ILJ 2461 (CC); [2009] 1 BLLR 1 (CC); 2009 (2) SA 204 (CC), at paragraph [63]). The individual respondents were retrenched on or about 31 May 2022.

56. The evidence was led by both parties before the commissioner. There was no argument before the labour court that a differently constituted CCMA commissioner would be better placed than the labour court to deliver an award – especially with particular reference to the credibility and demeanour of the individual witnesses. There was also no indication to the labour court that the outcome of a remitted referral to the CCMA would turn favourably on a credibility and demeanour assessment of the individual witnesses.
57. To remit this matter back to the CCMA would only heap further cost on both parties and could unnecessarily cause further delay and prejudice to each of the parties (see Wagley J (then known) in *Consol Ltd t/a Consol Glass v Ker NO and Others* [2002] 4 BLLR 367 (LC); 2005 (6) SA 23 (C), at 369–371).

order

LC: the commissioner's misunderstanding of the principle in *Irvin & Johnson*, entailing that nothing less than a special term between the two employers, to the effect that the recruiting employer will employ all the retrenched employees, could relieve the retrenching employer of its statutory obligation to pay severance pay, was an error that caused the commissioner to commit irregularities into s145(2)(a)(ii) of the LRA – the commissioner either misconceived the nature of the enquiry or arrived at an unreasonable result

58. The following order was made:
- 58.1 the arbitral award under the auspices of the CCMA was reviewed and set aside;
- 58.2 the individual respondents, who were members of the first and second respondents, were not entitled to both notice pay and severance pay; and
- 58.3 there was no order as to costs.

3.1.6 **DISMISSALS IN TERMS OF SECTION 186(1) OF THE LRA**

3.1.7 **AUTOMATICALLY UNFAIR DISMISSALS**

3.1.7.1 **SECTION 187(1)(f) READ WITH SECTION 187(2)(b) OF THE LRA: DISMISSAL BASED ON AGE WHERE THE EMPLOYEE HAS REACHED THE NORMAL OR AGREED RETIREMENT AGE FOR PERSONS EMPLOYED IN THAT CAPACITY**

3.1.7.1.1 *Slabbert v Muji Motor Group (Pty) Ltd*

Unreported case no D315/21

(2024) 45 ILJ 2817 (LC)

(2024) 35 SALLR 445 (LC)

- (a) **In the scenario where an employer permits an employee to work until 72 years of age, how did the labour court recently deal with the following issues where it is alleged that the employee's termination of services amounts to dismissal on the basis of age, thus constituting an automatically unfair dismissal in terms of s187(1)(f) of the LRA:**
- (i) **s187(2)(b) of the LRA provides that, despite s187(1)(f), a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons in that capacity – is there an applicable timeframe within which dismissal should take place for such protection to exist?**

- (ii) if the employer permits the employee to continue working after reaching the retirement age, does the original employment contract terminate by effluxion of time?
 - (iii) in the above scenario, does s187(2)(b) contemplate a new tacit contract coming into existence between the employer and the employee, which then governs their employment relationship where the employee continues to work after reaching the normal or agreed retirement age?
 - (iv) does s187(2)(b) envisage a tacit amendment to the original employment contract, to the effect that the employee would continue to work indefinitely or, alternatively, that a new retirement age applies?
 - (v) where an employer permits an employee to continue working beyond the agreed or normal retirement age, does this constitute a waiver of the right to dismiss the employee in terms of s187(2)(b) of the LRA?
 - (vi) with reference to *Cash Paymaster Services (Pty) Ltd v Browne* (2006) 17 (8) SALLR 1 (LAC); (2006) 27 ILJ 281 (LAC), under which circumstances will normal retirement age apply instead of an agreed retirement age?
 - (vii) with reference to *Rubin Sportswear v SA Clothing and Textile Workers Union and Others* (2004) 15 (9) SALLR 1 (LAC); (2004) 25 ILJ 1671 (LAC), under what circumstances will an agreed retirement age trump a normal retirement age?
- (b) In terms of s187(2)(b), despite s187(1)(f), a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons in that capacity. How is the term 'normal' to be established? How is the term 'capacity' to be established?
 - (c) To what extent may an employer rely on the rules of its provident/pension fund to establish a 'normal retirement age'?
 - (d) Under what circumstances may a retirement age, that is not agreed upon, become a normal retirement age? In this regard, what roles do the number of employees employed in a particular category, who have been retired, as well as the period over which they have been retired, play in answering this question?
 - (e) With reference to *Solidarity obo Strydom and Others v State Information Technology Agency Soc Ltd* (2022) 43 ILJ 1881 (LC), to what extent can an employer or employee successfully rely on both a normal and agreed-upon retirement age, with reference to s187(2)(b) of the LRA?
 - (f) The scenario is as follows: the nature of the employer's business is that it falls within the registered scope of a specific bargaining council. The collective agreements within such bargaining council, that refer to a 'retirement age' are not applicable to the specific employee retired, seeing that such employee did not fall within the category of employees obliged to become a member of the relevant provident fund. With reference to these specific facts, what are the relevant considerations to be taken into account when determining what the normal retirement age is in the specific industry and so applicable to the said employee?
 - (g) To what extent is the employer entitled to utilise the 'retirement age' contained in the relevant collective agreements of the bargaining council as guidelines to impose retirement on employees?

INTRODUCTION

whether the reason for the dismissal was a transfer or a reason related to a transfer ito s197 of the LRA or whether the dismissal was based on age – in both instances, thus automatically unfair

1. In terms of the pre-trial minute concluded by the parties, the labour court was required to decide whether the reason for the applicant's dismissal by the respondent was a transfer, or a reason related to a transfer, contemplated in s197 of the LRA, alternatively, whether the applicant's dismissal based on age was automatically unfair.
2. The applicant sought the following monetary relief:

'Basic (gross) salary times 24 months (R677 738.64), plus average commission earnings for 12 months (R614 633.04), plus patrimonial damages equivalent to one month's salary of R28 239.11 in respect of the applicant's contractual notice pay, plus costs of suit.'
3. The respondent sought an order dismissing the applicant's claim, with costs.

PERTINENT FACTS OF THE CASE

the material facts

employee employed by employer's predecessor-in-law, Ladysmith Autohaus, ito oral agreement, as sales consultant

4. The applicant was employed by the respondent's predecessor-in-law, Ladysmith Autohaus, in terms of an oral agreement entered into on 1 February 2003 as a sales consultant.

oral agreement made no reference to a retirement age, nor was retirement age discussed or agreed upon after the conclusion of the agreement – thus, no agreed retirement age

5. The agreement made no mention of a retirement age, nor was the matter discussed and agreed upon later in the relationship. Accordingly, there was no agreed retirement age between the applicant and Autohaus.

employee promoted to sales manager when he was 65 years; when he was almost 70 years, job redefined as that of new car sales manager

6. The applicant was promoted to the position of sales manager in 2013, when he was 65 years of age. In 2018, his role was refined as that of new car sales manager. At that stage, he was almost 70 years of age.

received a percentage of his sales team in addition to his own commission earned, as well as a basic salary

7. As a senior manager, the applicant received percentages of his sales team in addition to his own commissions earned and his basic salary.

2 years after being appointed as new car sales manager, Ladysmith Autohaus was bought by the respondent – a schedule to the sale agreement identified the employee as 'retirement age'

8. In July 2020, the respondent purchased Autohaus. A schedule to the sale agreement identified the applicant as 'retirement age.'

business was purchased as a going concern ito s197 of LRA – employee’s terms and conditions of employment in place immediately preceding transfer continued

9. After purchasing the business, on or about 3 August 2020, the respondent took transfer of Autohaus as a going concern. As a consequence, the applicant’s terms and conditions of employment in place immediately preceding the transfer of the business were transferred to the respondent in terms of s197 of the LRA.

at time of transfer of the business, employee was 72 years’ old

10. At the time of the transfer of the business, the applicant was 72 years’ old.

sole director of respondent (Mngadi) advised employee that he had reached retirement age (argued that normal retirement age of 65 in the motor industry exists) or, alternatively, employee continues earning an income based only on sales commission, without the basic salary and participation in the commission of the sales team – alternative offer rejected by employee

11. On 3 August 2020, the applicant attended a meeting with Mr Mngadi, the sole director of the respondent. Mr Mngadi advised the applicant that he had reached retirement age, based on what he argued was the normal retirement age of 65 in the motor industry. Mngadi proposed an option for the applicant to continue earning an income from the respondent post-retirement on a sales commission basis, basically 50% of the profits from all vehicles sold. The applicant rejected the offer.
12. In the words of the applicant, ‘the offer essentially entailed that he freelances as a salesperson’ on a sales commission basis, except without a guaranteed salary and the overriding commission he had received as sales manager.

subsequently, employee received notice of retirement, based on rules associated with the Motor Industry Bargaining Council (MIBCO) prescribing 65 as retirement age; further indicating that respondent’s ‘retirement policy’ is 60 years

13. Immediately following the meeting with Mr Mngadi, the applicant was served with a notice. The notice read as follows:

‘As you are aware, [the respondent] bought [Autohaus] as a going concern and as such has accordingly entered into new contracts of employment and also implemented its own internal policies.

[The respondent] also complies with the rules associated with the Motor Industry bargaining council MIBCO which prescribes age 65 as retirement age. [The respondent’s] retirement policy is 60 years.

We are aware that you have reached your retirement/pensionable age some time ago, and therefore we hereby give you notice of your retirement from [Autohaus]’

respondent’s business fell within the registered scope of MIBCO

14. The nature of the respondent’s business (and thus that of its predecessor in law, Autohaus) at all material times fell within the registered scope of the Motor Industry Bargaining Council (MIBCO) which regulates, by way of a Main Agreement and other collective agreements, the terms and conditions of employment in the motor and auto industry.

only collective agreements mentioning and regulating retirement age are two provident fund collective agreements, which stipulate a retirement age of 65 years – membership of these funds is compulsory for only certain categories of employees employed within the registered scope of MIBCO; employees who fall within the registered scope of

MIBCO, and not obliged to become members of the funds, may be admitted on a voluntary basis – employee was not a member of either fund and was not obliged to become a member of either fund

15. The only collective agreements which regulate and mention a retirement age are the Motor Industry Provident Fund Collective Agreement and the Auto Workers Provident Fund Collective Agreement (the Funds), which stipulate a 'retirement age' of 65 years. Membership of the Funds, however, is compulsory for only certain categories of employees employed within the registered scope of MIBCO (it covers employees that earn below prescribed thresholds and occupy certain grade levels). Employees who fall within the registered scope of MIBCO, and who are not obliged to become members of the Funds, may be admitted to voluntary membership at the sole discretion of the regional council concerned.
16. The applicant was not a member of either Fund, and there was no averment by the respondent that he fell within the categories of employees obliged to join either Fund.

FINDINGS OF THE LABOUR COURT

Whitcher J

the statutory framework

s187(1)(g) of LRA: dismissal is automatically unfair if reason for dismissal is a transfer or a reason related to a transfer, contemplated in s197 or s197A of LRA

17. Section 187(1)(g) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is a transfer, or a reason related to a transfer, contemplated in s197 or s197A of the LRA.

s187(1)(f) of LRA: dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including, but not limited to age

18. Section 187(1)(f) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to, age.

s187(2)(b) of LRA: despite s187(1)(f), a dismissal based on age is fair if employee has reached the normal or agreed retirement age for people employed in that capacity

19. Section 187(2)(b) of the LRA provides that, despite s187(1)(f), a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons in that capacity.

interpretation of s187(2)(b)

timeframe

Great South Panel Beaters (LAC): (i) the right to retire accrues to both the employee and the employer immediately after the employee's retirement date and can be exercised at any time after this date; (ii) the employment contract does not terminate by the effluxion of time when the employee reaches his or her retirement age, but is deemed to continue; (iii) a new tacit contract coming into existence is not contemplated when the employee continues to work after reaching the normal or agreed retirement age; (iv) it is not envisaged that a tacit amendment to the contract takes place to the effect that the employee would continue to work indefinitely or that a new retirement age applies; (v) where an employer permits an employee to work beyond the agreed or normal retirement age, this does not constitute a waiver of the right to dismiss the

employee to s187(2)(b) of the LRA (unless waiver can be inferred from the clear and unequivocal conduct of the employer)

20. In its most recent judgment on the subject, the labour appeal court, in *Motor Industry Staff Association obo Landman v Great South Autobody CC t/a Great South Panel Beaters* (2022) 43 ILJ 2326 (LAC); (2022) 33 SALLR 268 (LAC) (*Great South Panel Beaters*), held that:

[15] Section 187(2)(b) does not prescribe a time frame within which the dismissal should take place, provided it is after the employer has reached his or her agreed or normal retirement date. Properly construed, s187(2)(b) of the LRA affords an employer the right to fairly dismiss an employee based on age, at any time after the employee has reached his or her agreed or normal retirement age. This right accrues to both the employee and the employer immediately after the employee's retirement date and can be exercised at any time after this date. The focus is not so much on when the employee reached his or her retirement date, but rather that the employee has already reached or passed the normal or agreed retirement age.

[16] ...

[17] Section 187(2)(b) of the LRA contemplates that where an employee continues to work for the employer uninterrupted after reaching retirement age, the employment relationship and employment contract continue. In other words, for purposes of a dismissal in terms of section 187(2)(b), the employment contract does not terminate by the effluxion of time when the employee reaches his or her retirement age but is deemed to continue. This effectively means that the agreed or normal retirement age of the employee remains unchanged.

[18] On this interpretation, a dismissal contemplated in section 187(2)(b) would have the same meaning as the definition of dismissal in section 186 of the LRA, which does not include the termination of a contract by effluxion of time as the latter is not a dismissal. Properly construed, section 187(2)(b) does not contemplate a new tacit contract coming into existence between an employer and employee (by virtue of their conduct) which governs their employment relationship when the employee continues to work for his or her employer after reaching the normal or agreed retirement age. In the same vein, section 187(2)(b) does not envisage a tacit amendment of the contract to the effect that the employee would continue to work indefinitely or that a new retirement age applies, as is contended for by the appellant in this appeal.

[19] This interpretation gives effect to the right that accrues to an employer in terms of section 187(2)(b) to fairly dismiss an employee who has passed the agreed or normal retirement age. Significantly, it is consistent with the purpose of section 187(2)(b) which is to allow the employer to dismiss employees who have passed their retirement age to create work opportunities for younger members in society.

...

[28] Where an employer expressly permits an employee to work beyond the agreed or normal retirement age, this does not constitute a waiver of the right to dismiss that employee in terms of section 187(2)(b) of the LRA, unless waiver of that right can be inferred from the clear and unequivocal conduct of the employer. Equally, an employer's failure to take steps to secure the retirement of his employee on reaching the agreed or normal age of retirement, does not constitute a waiver of its right, in terms of

section 187(2)(b), to dismiss that employee any time after he or she has reached retirement age unless such waiver can be inferred from the clear and unequivocal conduct of the employer.'

21. The labour appeal court disagreed with the proposition that, if an employer is permitted to rely indefinitely on an agreed or normal retirement age, this would leave the employee in a vulnerable position by enabling the employer to abuse its position to dismiss the employee based on his age. The labour appeal court confirmed that it would be impermissible for an employer to invoke the defence in s187(2)(b) where the employee's age is not the real reason for the dismissal.

in conclusion: where an employee continues to work for an employer uninterrupted after reaching retirement age, the employment contract continues and the agreed or normal retirement age remains unchanged; it is impermissible for an employer to utilise the defence in s187(2)(b) where the employee's age is not the real reason for the dismissal

22. Accordingly, where an employee continues to work for an employer uninterrupted after reaching retirement age, the employment relationship and employment contract continue, and the agreed or normal retirement age remains unchanged. The employer would then be free to dismiss the employee based on age at any stage thereafter by relying on s187(2)(b) of the LRA. This would be the case unless it could be proven that a new retirement age had been agreed between the parties, or it was clear from the employer's unequivocal conduct that it had waived its right to dismiss the employee after she/he had reached retirement age.

normal or agreed retirement age

Cash Paymaster Services (LAC): normal retirement age only applies where there is no agreed retirement age; Rubin Sportswear (LAC): agreed retirement age will always trump a normal retirement age

23. The labour appeal court, in *Cash Paymaster Services (Pty) Ltd v Browne* (2006) 27 ILJ 281 (LAC); (2006) 17 (8) SALLR 1 (LAC), held that the provision relating to the normal retirement age only applies to the case where there is no agreed retirement age between the employer and the employee and, in *Rubin Sportswear v SACTWU and Others* (2004) 15 (9) SALLR 1 (LAC); (2004) 25 ILJ 1671 (LAC) (2004) 15 (9) SALLR 1 (LAC), that an agreed retirement age would always trump a normal retirement age.

the meaning of 'normal retirement' age as used in s187(2)(b)

Bester (LAC): normal, includes industry practices relating to persons working in similar positions as the employee in question 'for persons employed in that capacity' – introduces a comparator, 'capacity' which means a specific role or position and comparator extends to outside the specific employer (that is why persons and not employees are utilised)

24. In *Bester v SITA* [2023] BLLR 303 (LC) (*Bester*), the labour court held that 'normal' includes the industry practice with respect to persons working in positions similar to that of the individual in question (relying on a judgment of the Canadian Federal Court of Appeal, in *Air Canada Pilots Association v Kelly* 2012 FCA 209 (CanLII), at paragraph [52]). The court held that the phrase 'for persons employed in that capacity' introduces a comparator, the word 'capacity' means a specific role or position and the category or capacity extends to outside a specific employer. It is for this reason that the legislature employed the term 'persons' as opposed to 'employees'.
25. The labour court found that retiring Bester, when he reached the age of 60, did not constitute an automatically unfair dismissal. This was because, within the industry in which SITA operates, the age of 60 is a normal retirement age.

26. The labour court reasoned as follows:

‘...the norm in the government industry, regard being had to the GEPP (Government Employees Provident Fund), is for employees to cease employment at the age of 60. SITA is an organ of state, thus it is not incongruent to compare its situation with regard to retirement with the government industry.’

Legal Aid (LAC): in absence of any express contractual entitlement, the position was governed by employer’s policy on retirement

27. In *Legal Aid South Africa v Theunissen* [2019] ZALAC 71 (25 November 2019); (2020) 41 ILJ 625 (LAC); (2019) 30 SALLR 34 (LAC); [2020] 4 BLLR 370 (LAC) (*Legal Aid*), the labour appeal court held that, in the absence of any express (contractual) entitlement to the respondent to retire at the age of 65 years, the position was governed by the employer’s policy on retirement, which had been amended from 65 to 60 years. The labour appeal court held that the employer had been entitled to apply the amended policy (even though it was amended long after the respondent had commenced his employment) because the amendment had followed upon good reason and a proper consultation process with the general workforce.

Hibbert (LAC): in certain circumstances, employer is entitled to rely on the rules of the provident/pension fund to establish a normal retirement age, even if the affected employee had not been a member thereof

28. A further important labour appeal court judgment is the one of *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC); (2015) 26 SALLR 14 (LAC); [2015] 11 BLLR 1081 (LAC) (*Hibbert*). It appears that the labour appeal court was prepared to accept that, in certain circumstances, an employer is entitled to rely on the rules of its provident/pension fund to establish a ‘normal retirement age’ in the company even if the affected employee had not been a member thereof.

29. The labour appeal court held (at paragraphs [16] to [17]):

‘The fund is instructive to establish the retirement age applicable at the Appellant and having regard to the rules of the Fund ... What the Fund’s contract does evince is that the normal retirement age at the Appellant can be up to the age of 65.’

30. *Workplace Law* articulated the test as follows: the norm is determined by the ‘capacity’ in which the person is employed and, presumably, by reference to the practice in the particular enterprise or sector (John Grogan, ‘Workplace Law’ (10th ed), 194).

Rubin Sportswear (LAC): a normal retirement age for persons employed in that capacity – section does not make it clear that such persons must be persons employed by the same employer/employed in the same capacity by other employers in the same industry/in general; one employer may have different normal retirement ages for different categories of employees within its workforce

31. The best guide lies in the labour appeal court judgment in *Rubin Sportswear v SACTWU and Others* (2004) 25 ILJ 1671 (LAC), where Zondo JA (as he then was) articulated the position as follows:

[19] It seems to me that the word ‘normal’ as used in sec 187(2)(b) really means what it says. It means that which accords with the norm. However, it is important to bear in mind that that word is used in relation to persons employed in the same capacity as the person whose dismissal on the basis of having reached normal retirement age is in issue. Sec 187 (2) (b) must, therefore, not be read as if it says “(d)espite subsection 1 (f), a dismissal based on age is fair if the employee has reached the normal or agreed retirement age.” It includes the words at

the end “for persons employed in that capacity”. What the section does not make clear is whether the words ‘persons employed in that capacity’ refer to such persons who are in the same employer’s employ or whether it also refers to persons who are employed in the same capacity by other employers in the same industry or in general.

[20] It seems to me conceivable that one employer could have different normal retirement ages for different categories of employees within its workforce. There may, for example, be different normal retirement ages for professionals and artisans. In such a case the employer cannot retire an employee on the basis of a normal retirement age applicable to employees employed in a capacity different from that of his own. In other words, where an employer seeks refuge in the provisions of sec 187(1)(b) against a claim of unfair dismissal and his defence is that the employee had reached normal retirement age, he must show not only that the employee had reached normal retirement age but that the retirement age is normal to employees employed in the same capacity as the employee concerned.

[21] In this matter it seems that the appellant sought to make 60 the normal retirement age for all its employees, irrespective of the capacity in which they were employed. Of course, there can be nothing wrong with the fixing of a normal retirement age for all the employees of an employer irrespective of their different capacities in which they may be employed. However, as I have said, the manner in which the appellant sought to achieve the objective of a normal retirement age applicable to Val’s former employees in its employ was not lawful. In law the appellant had no right to unilaterally impose such a condition to the employment of the second and further respondents because their terms and conditions of employment did not include a normal retirement age and the appellant was seeking to unilaterally introduce a new condition of employment into their conditions of employment.

Rubin Sportswear (LAC): to establish the norm – period must be sufficiently long and the number of employees sufficiently large to justify saying that it is a norm – if the period is not sufficiently long, but the number is large, it may still be a norm; if the period is sufficient but the number of employees not large enough, it might be difficult to prove a norm

[22] In my view a certain age cannot suddenly become a normal retirement age for employees or for a certain category of employees simply because the employer wakes up one morning and decides that he wants a certain age as the normal retirement age for his employees or for a certain category of his employees. He can put a proposal to his employees on what should be the retirement age and, if they agree, then there will be an agreed retirement age in that workplace applicable to all those who have agreed to the proposal. A retirement age that is not an agreed retirement age becomes a normal retirement age when employees have been retiring at that age over a certain long period - so long that it can be said that the norm for employees in that workplace or for employees in a particular category is to retire at a particular age. An example would be where, without any formal agreement, employees in a particular category have over 20 years been retiring at a particular age without fail. The period must be sufficiently long and the number of employees in the particular category who have retired at that age must be sufficiently large to justify saying that it is a norm for employees in that category to retire at that age. If the period is not sufficiently long but the number is large, it might still be that a norm has not been established. If the period is very long but the number of employees in the particular category who have retired at that age is not large enough, it might be difficult to prove that a norm has been established.

other related principles

32. The onus lies on the employer to prove (on a balance of probabilities) that the employee has, in fact, reached the normal or agreed retirement age.

Solidarity (LC): not possible for an employer or employee to rely successfully on both a normal and agreed-upon retirement age, as the scenarios are mutually exclusive

33. The labour court, in *Solidarity obo Strydom and others v State Information Technology Agency SOC Ltd* (2022) 43 ILJ 1881 (LC); [2022] 9 BLLR 843 (LC) (*Solidarity*), stated the following:

[31] ...the prerequisites in section 187(2)(b) are mutually exclusive. As stated in *Cash Paymaster* [supra] "...normal retirement age only applies to the case where there is no agreed retirement age between the employee and employee..."

...

[33] ...In light of the observation in *Cash Paymaster*...it is inconceivable that an employee [employer] could successfully rely on both the normal and the agreed retirement age as these scenarios are mutually exclusive.'

34. Where there is a dispute as to the reason for the dismissal of the employee, the test is the most proximate cause of the dismissal (see *Great South Panel Beaters* (*supra*), at paragraph [16]).

the reason for the applicant's dismissal

LC: reason for dismissal – age: next question, was the dismissal justified its 187(2)(b)? No

35. On the evidence - the schedule to the sale agreement, the applicant's discussion with Mngadi and the termination notice viewed together – the labour court found that the most proximate cause of the dismissal was based on age, as claimed by the respondent. The fact that the respondent gave the applicant 'notice of [his] retirement' immediately after the transfer of the business took place is not a sufficient basis to conclude that the reason for the dismissal was the transfer, or a reason related to the transfer. More was needed from the applicant for the labour court to have drawn that inference. That was not provided.

was the dismissal justified on the basis of s187(2)(b)?

36. The labour court found no merit in the respondent's pleaded defence.

employee was not a member of the provident fund and he did not fall within the category of employees obliged to join the fund: could not use the fund rules as a guideline to establish a norm; also no evidence outside of the prescripts of the rules of the fund that 65 years is the norm in the motor industry for those employees employed in the capacity of the applicant (i e sales manager/manager)

37. First, the collective agreements relied on by the respondent - the main agreement and the Motor Industry Provident Fund agreement - established that the retirement age of 65 years was a term and condition of employment of only certain categories of employees employed within the registered scope of MIBCO. This was because membership of the Provident Fund Collective Agreement was compulsory for only those employees employed within the registered scope of MIBCO. Given that the applicant was not a member of the Motor Industry Provident Fund and given the absence of any averment, let alone proof that he fell into the category of employees

who were obliged to join the Fund, it followed that the retirement age of 65 years was not a term and condition of the applicant's employment.

38. Second, no evidence was adduced that, in the motor industry, employees who fall outside the prescripts of the rules of the Fund also retire at the age of 65 years, that is, that the norm and practice in the motor industry is that those employees also retire at 65 years and, more fundamentally, that it is the norm for employees in positions similar to that of the applicant (i.e. sales managers/managers) to also retire at the age of 65 years.
39. Was the respondent entitled to nevertheless use the retirement age of 65 years as a guideline to impose retirement on the applicant? The answer was 'No', because of the wording of s187(2)(b), namely 'normal ... for persons in that capacity'. The provision enjoined the respondent to show that the retirement age of 65 years was normal to employees employed in the capacity of the applicant in Autohaus, which, as the labour court found, it did not.

LC: case distinguishable from *Hibbert, Bester and Legal Aid* – those cases concerned internal/company retirement schemes or industry retirement schemes which did not distinguish membership; further distinction from *Legal Aid*: in such case, retirement was imposed following a proper consultation process, which was not the case *in casu*

40. The case of the applicant was distinguishable from *Hibbert, Bester and Legal Aid* decisions in that those cases concerned internal/company retirement schemes or industry retirement schemes which did not distinguish membership and, in *Legal Aid* (*supra*), the retirement age was imposed following a proper consultative process.
41. Accordingly, in all the circumstances, the dismissal of the applicant could not be justified on the basis of s187(2)(b) of the LRA but was contrary to the provisions of s187(1)(f) and was automatically unfair.

compensation

42. In terms of s194(3) of the LRA, the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.
43. Given the applicant's age at the time of dismissal, the labour court found it just and equitable to award the applicant compensation equivalent to 12 months' remuneration (made up of his gross salary plus average commission), which amounted to R953 496.00, plus costs of suit.

order

44. The labour court found the dismissal of the applicant to be automatically unfair and the respondent was ordered to pay the applicant the amount of R953 496.00 within 30 days of receipt of this judgment, plus costs of suit.

3.1.7.1.2 *Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panelbeaters (Landman); Solidarity obo Strydom and Others v State Information Technology Agency Soc Ltd (Solidarity)*

Unreported case nos CCT298/22 and CCT346/22
(2025) 46 ILJ 481 (CC)
(2025) 36 SALLR 53 (CC)

- (a) **In terms of s187(1)(f) of the LRA, a dismissal on the basis of age is an automatically unfair dismissal. Section 187(2)(b) of the LRA is an exception to this prohibition, in that it states that the dismissal of an employee is fair if he or she has reached the normal or agreed retirement age for persons in that capacity.**

Since 1998, the courts have followed the decision of the labour court in *Schweitzer v Waco Distributors (A Division of Voltex (Pty) Ltd)* (1998) 19 ILJ 1573 (LC) (*Waco*), to the effect that, in terms of s187(2)(b) of the LRA, an employer is entitled to dismiss an employee at any time after he or she had reached the normal or agreed-upon retirement age for persons in that capacity. This issue was recently considered by the constitutional court. It handed down three judgments, but there was no majority on the interpretation of s187(2)(b) of the LRA. With reference to the aforesaid scenario, what approach was adopted in respect of the following issues:

- (i) is a dismissal on the basis of age fair, in terms of s187(2)(b) of the LRA, only if the employee's employment is terminated on the date upon which the employee attains his or her normal or agreed-upon retirement age?
 - (ii) in answering the above question, what are the different permutations where an employee reaches the normal or agreed-upon retirement age on a day other than the last day of the month?
 - (iii) to what extent, when an employee reaches his or her normal or agreed-upon retirement age, has the employer an election whether to terminate the employee's employment on the basis of age?
 - (iv) what are the consequences if the employer fails to exercise the aforesaid termination election within a reasonable period of time?
 - (v) on what basis did the third judgment (per Rogers J, with Dodson AJ, Kollapen J and Tshiqi J concurring) hold that, once an employee has reached his or her normal or agreed-upon retirement age, s187(2)(b) permits the employer then, or at any time thereafter, to terminate the employee's appointment on the basis of age, upon giving reasonable notice?
 - (vi) in the above circumstances, is it required of the employer to give the employee a hearing?
- (b) With reference to the content of s187(2)(b) of the LRA, how did the constitutional court:
- (i) determine the meaning of the verb 'reach', the verb 'retire' and the noun 'retirement'?
 - (ii) what meaning did the first judgment attach to the term 'agreed retirement age'?
- (c) On what basis was it found, in the first judgment, that, if an employee is subject to an agreed retirement age, a normal retirement age does not apply?
- (d) On what basis did the first judgment hold that the approach adopted in *Waco* is open to abuse?
- (e) The scenario is as follows: the employer and employee agree that the normal retirement age for the employee will be determined in terms of a retirement fund and, in terms of such fund, the normal retirement age is the last day of the month in which the employee reaches the age of 60. However, in terms of such fund rules, it is further stated that a member who has reached his or her normal retirement age may remain in service 'and retire at a date no later than the last day of the month in which the member attains the age of 67'. With reference to the said scenario, how did the first judgment deal with the following issues:

- (i) to what extent does such retirement fund regulate the retirement of the employee not on the day that he or she reaches retirement, but subsequently on the last day of the month that such employee reaches the said retirement age?
 - (ii) where an employee, with the consent of the employer, works beyond the normal retirement age, then, in terms of the aforesaid retirement fund, is the employee entitled to retire before the age of 67?
 - (iii) in the above scenario, is the employer entitled to retire an employee before he or she reaches the age of 67?
- (f) On what basis did the first judgment find that procedural fairness plays no role whatsoever when considering an automatically unfair dismissal, on any basis, including age?
- (g) On what basis did the second judgment find that the choice with which an employer is presented by s187(2)(b) of the LRA, when an employee reaches the normal or agreed-upon retirement age, amounts to an election by an employer to either let the contract 'live or die'?
- (h) On what basis did the third judgment disagree with the first and second judgments' interpretation of s187(2)(b) of the LRA?
- (i) On what basis did the third judgment hold that the correct interpretation of s187(2)(b) of the LRA is that, at any time as from an employee's retirement age date, the employer may fairly dismiss the employee based on age, provided the employee receives reasonable notice?
- (j) On what basis did the third judgment indicate that it would be desirable to afford an employee a hearing to put up reasons as to why the employer should refrain from exercising its right of dismissal in terms of s187(2)(b) of the LRA?

INTRODUCTION

summary of judgment

Solidarity (LAC) and Landman (LAC) both concerned the interpretation of s187(2)(b) of the LRA – there was no majority on the interpretation of this provision

1. These two cases concerned the interpretation of s187(2)(b) of the LRA. The delay in delivering judgment was in part attributable to the fact that the court had been unable to reach agreement on the matter. The result was that there was no majority on the interpretation of the section. There were, however, majorities for the orders to be made in the two cases.

first judgment: per Zondo CJ – (i) a dismissal on the basis of age is only fair if the employee's employment is terminated on the date upon which the employee reaches the normal or agreed retirement age; (ii) unless an agreement or collective agreement provides where the employee reaches the normal or agreed retirement age on a day other than the last day of a month, his last working day, or his retirement day, will be the last day of the month; (iii) termination on the basis of age at a later date is automatically unfair; (iv) Waco and the cases that followed it, indicating that a dismissal can take place at any time after reaching the normal or agreed-upon retirement age, wrongly decided

2. On the interpretation of s187(2)(b), four members of the court (per Zondo CJ, with Chaskalson AJ, Mathopo J and Schippers AJ concurring) (first judgment) concluded that a dismissal on the basis of age is fair in terms of that section, only if the employee's employment is terminated on the date upon which the employee attains his or her

normal or agreed retirement age, unless the agreement or collective agreement provides that, where the employee reaches the normal or agreed retirement age on a date other than the last day of the month, his or her last working day or his or her retirement date will be the last day of the month. A termination on the basis of age at a later date is automatically unfair. The first judgment holds that *Schweitzer v Waco Distributors (A Division of Voltex (Pty) Ltd)* (1998) 19 ILJ 1573 (LC) (*Waco*) and the cases that have followed it were wrongly decided.

second judgment of Van Zyl AJ: (i) upon reaching normal or agreed-upon retirement age, employer had an election whether to terminate the employment on the basis of age – election governed by ordinary contractual principles; (ii) such termination can take place on a date later than the employee’s normal or agreed-upon retirement age; (iii) the election, whether to terminate to be exercised within a reasonable period of time; (iv) *Waco* and the cases that followed were wrongly decided for different reasons from the first judgment

3. A fifth member of the court, Van Zyl AJ (second judgment), held that, upon the employee reaching his or her normal or agreed retirement age, the employer had an election whether to terminate the employee’s employment on the basis of age. This election was governed by ordinary contractual principles. Such a termination, and notice thereof, could take place on a date later than the employee’s normal or agreed retirement age. An employer had, however, to be found to have elected not to terminate the employee’s employment if the employer failed to exercise the termination election within a reasonable period of time. This depended, though, on whether the employer had knowledge of the correct legal position. The second judgment thus also disagreed with *Waco*, but for reasons differing from those contained in the first judgment.

third judgment of Rogers J: (i) once the employee reaches the normal or agreed retirement age, the employer can, at any time thereafter, terminate the employee’s appointment on the basis of age, provided reasonable notice is given; (ii) left open the question as to whether the employer was required to give the employee a hearing but indicated that it was desirable; (iii) interpretation accords with *Waco*, although for different reasons as those stated in that case

4. The remaining four members of the court (per Rogers J, with Dodson AJ, Kollapen J and Tshiqi J concurring) (third judgment) held that, once an employee reached his or her normal or agreed retirement age, s187(2)(b) permits the employer, then or at any time thereafter, to terminate the employee’s appointment on the basis of age, upon the giving of reasonable notice. The third judgment left open the question of whether the employer was required to give the employee a hearing, since a decision on that point was unnecessary. It did, however, point to the desirability of affording such a hearing. The third judgment thus accorded with the interpretation adopted in *Waco*, albeit for somewhat different reasons to those stated in that case.

CC: order in *Landman* (first case): second and third judgments constituting a majority concluded, for different reasons, that the appeal should be dismissed with no order as to costs

5. As to the order to be made in the first case, CCT 298/2022 (*Landman*), there was unanimity that the case engaged the court’s jurisdiction and that leave to appeal should be granted. The first judgment would have upheld the appeal and awarded Mr Landman compensation equal to 24 months’ remuneration together with costs in the labour court, the labour appeal court and the constitutional court. The second and third judgments concluded, however, and albeit for differing reasons, that the appeal should be dismissed with no order as to costs. The latter disposition of the case thus commanded a majority.

CC: Solidarity (second case): there was a majority based on the first and third judgments and thus the appeal was upheld, awarding the employees compensation equal to 24 months' remuneration – but no majority in favour of awarding the applicants costs in any of the courts concerned

6. As to the order to be made in the second case, CCT 346/2024 (*Solidarity*), there was again unanimity that the case engaged the court's jurisdiction and that leave to appeal should be granted. The first judgment concluded – both as a matter of law based on its interpretation of s187(2)(b) and, in any event, on the particular facts of the case – that the appeal should succeed, that the six employees in question should be awarded compensation equal to 24 months' remuneration and that the applicants should be granted costs in the labour court, the labour appeal court and the constitutional court. The second judgment would have dismissed the appeal with no order as to costs. Based on the particular facts of the case, the third judgment agreed with the disposition proposed in the first judgment, save that the third judgment would not grant the applicants costs in any of the courts concerned. There was, thus, a majority in favour of upholding the appeal and awarding the employees compensation equal to 24 months' remuneration, but no majority in favour of awarding the applicants costs in any of the courts concerned.

PERTINENT FACTS OF THE CASE

the Landman case

the parties

Landman was a member of the Motor Industry Staff Association; his employer ran a panel beating business;

7. This case was presented to the labour court as a stated case. The first applicant in the *Landman* case was the Motor Industry Staff Association (the staff association) which represented certain employees within the motor industry. Mr Landman was a member of the staff association. The respondent was Great South Autobody CC t/a Great South Panelbeaters. The respondent was the former employer of Mr Landman. It was clear from the respondent's trading name that it ran a panel beating business.

background

in contract of employment, the agreed retirement age was 60 years; Landman reached the age of 60 on 15 March 2018; employer did not dismiss Landman on 15 March 2018; he continued to work as usual and the employer continued to pay him as usual; 10 months after employee reached agreed retirement age, employer gave him a letter that his services will terminate approximately a month later as he had reached the agreed-upon retirement age of 60

8. The agreed facts between the parties were the following:
 - 8.1 Mr Landman commenced his employment with the respondent as a procurement officer during November 2007.
 - 8.2 During January 2008, Mr Landman and the respondent concluded a written contract of employment.
 - 8.3 In terms of the contract of employment the agreed retirement age for Mr Landman was 60 years of age. Clause 9 of the letter of appointment signed by both parties and thus constituting the contract of employment read:

‘Your retirement age will be 60 years of age.’
 - 8.4 Mr Landman reached 60 years of age on 15 March 2018.

- 8.5 The respondent was aware, on 15 March 2018, that Mr Landman was reaching the retirement age but did not dismiss him at that stage on the basis of the agreed retirement age. After he had reached the retirement age, Mr Landman continued to work as usual and the respondent continued to pay him as usual.
- 8.6 During 2018, the respondent never referred to Mr Landman's retirement age or the retirement clause.
- 8.7 On or about 14 January 2019 – ten months after Mr Landman had reached the agreed retirement age – the respondent gave Mr Landman a letter informing him that his services would terminate with effect from 12 February 2019 as he had reached the agreed retirement age of 60 years.
- 8.8 Mr Landman's last working day was 12 February 2019.
- 8.9 The respondent dismissed Mr Landman due to his age.

Landman was a member of the Motor Industry Provident Fund (Provident Fund); the Provident Fund Collective Agreement (Fund Collective Agreement) provided a retirement age of a member to be 65 years

- 8.10 Mr Landman was a member of the Motor Industry Provident Fund (Provident Fund). The Motor Industry Provident Fund Collective Agreement (Fund Collective Agreement) provided that the retirement age of an employee who was a member of that fund was 65 years.
- 8.11 To the extent that the employer was arguing that Mr Landman's agreed retirement age was 60, the inclusion of this statement, in its statement of defence, conflicted with that case or contention. However, it was accepted that the parties agreed that the agreed retirement age for Mr Landman was 60 years.

Landman's case: (i) a new employment contract came into existence, which either did not contain an agreed retirement age or, alternatively, a retirement age of 65; (ii) employer had waived its right to rely on the retirement age; (iii) the parties tacitly amended the employment contract to the effect that the agreed retirement age of 60 no longer applied; (iv) by dismissing Landman ±10 months after reaching the agreed retirement age of 60, employer unfairly discriminated against him on the basis of age and such dismissal is automatically unfair ito s187(1)(f) of the LRA

9. The applicant's case, as set out in its pleadings, was that, by virtue of the parties' conduct as set out above:
- 9.1 a new (second) employment contract had come into existence, which contract did not contain an agreed retirement age, or, at best for the respondent, contained a retirement age of 65 years; alternatively
- 9.2 the respondent had waived its right to rely on the retirement age as stipulated in the written employment contract, alternatively, Mr Landman and the respondent had waived the retirement clause; further alternatively
- 9.3 the parties had tacitly amended the terms of the employment contract to the effect that the agreed retirement age of 60 years no longer applied; and
- 9.4 by dismissing Mr Landman during February 2019 on the basis of his age, the respondent had unfairly discriminated against him on the basis of his age and, as such, his dismissal constituted an automatically unfair dismissal in terms of s187(1)(f) of the LRA.
10. In terms of the stated case, the constitutional court was required to decide whether a new employment contract had come into existence between Mr Landman and the

respondent. If the court concluded that no new contract of employment had come into existence after Mr Landman had reached the agreed retirement age of 60 years, the court would decide whether the respondent had waived its right to dismiss in terms of the retirement clause in the written employment contract or whether,

‘alternatively [it] waived the rights and obligations that [arose] from the said clause as alleged in paragraph 12 of the statement of claim or alternatively [whether] Mr Landman and the respondent amended the written contract as alleged in paragraph 12 of the statement of claim’.

11. In terms of the stated case, the constitutional court was also required to decide whether Mr Landman’s dismissal by the respondent constituted an automatically unfair dismissal in terms of s187(1)(f) of the LRA. The court was additionally required to decide whether, by virtue of s187(2)(b) of the LRA, the respondent was permitted, in law, during January 2019, to rely on the retirement age clause as contained in the employment contract to justify the dismissal.

the Solidarity case

12. In the *Solidarity* matter, Solidarity, a registered trade union, made an application for leave to appeal against a decision of the labour appeal court refusing it leave to appeal against a judgment and order of the labour court. Solidarity brought that application on behalf of six individuals who were its members and were dismissed by the State Information Technology Agency Soc Ltd (SITA), the respondent in the *Solidarity* matter.

background

Solidarity case: conditions of employment referred to as the SITA conditions of employment and included the SITA termination of employment policy

13. Unlike the *Landman* case, which was adjudicated as a stated case, the *Solidarity* case was a trial. In respect of each individual applicant involved in the case, Solidarity filed and served a statement of claim. The respondent filed a statement of defence or a response to each individual applicant’s statement of claim. Solidarity filed one or more amended statements of case. The respondent filed and served its amended statement of defence.
14. In respect of each individual applicant’s case, the parties concluded and signed a pre-trial minute. Later, Solidarity and all the individual applicants, on the one hand, and the respondent, on the other, concluded and signed a joint pre-trial minute.
15. The individual applicants had signed contracts of employment with the respondent.
16. The respondent had its conditions of employment, which will be referred to as the SITA conditions of employment, which were effective from 2 December 2011. Such conditions included the SITA termination of employment policy, which became effective from 19 February 2008.

SITA termination of employment policy: retirement age is defined in the SITA conditions of employment and/or respective pension retirement fund rules; an employee may apply to continue working beyond the normal retirement age

17. Clause 6.3 of the SITA Termination of Employment Policy bore the heading: ‘Termination of Services.’ Clause 6.3.1 had two paragraphs, which read thus:

‘6.3.1 Termination on reaching retirement age

The retirement fund provides retirement benefits for employees who complete their careers in SITA’s service. The retirement age for

employees is as defined in the SITA Conditions of Employment and/or the respective Pension Retirement Fund rules.

An employee may apply to continue working beyond normal retirement age. Any decision to allow an employee to continue working beyond normal retirement age shall be taken by the head of department in consultation with the Human Resources department. Any decision in this regard should be based on operational requirements, fitness of the employee (should be confirmed in writing) and applicable fund rules.'

SITA conditions of employment: retirement age according to rules of the relevant pension or retirement funds

18. Clause 9.18 of the SITA employment conditions reads:

'Retirement age

Retirement age specifications shall be set according to the rules of the relevant pension or retirement funds.'

SITA employment conditions relating to the Alexander Retirement Fund: (i) normal retirement age of the fund is the last day of the month in which an employee reaches the age of 60; (ii) if a member is transferred from another company approved pension/provident fund, he shall retain his previous retirement age of 65 to the rules of such fund; (iii) subject to the consent of SITA, a member who has reached his normal retirement date and normal retirement age of 60 or 65 (whichever is applicable) may remain in the service and retire at a date no later than the last day of the month in which the member reaches the age of 67

19. Clauses 9.19.1(b)(i) and (ii) of the SITA employment conditions, which relate to Alexander Retirement Fund, read as follows:

'9.19.1 Defined contribution funds

(a) Denel Retirement funds

(i) ...

(b) Alexander Forbes Retirement Fund

(ii) The normal retirement age of the fund is the last day of the month in which a member reaches the age of 60. A member who transfers from another company approved pension fund or approved provident fund shall retain his previous retirement age of 65 in terms of the rules of such approved pension fund or approved provident fund.

(iii) Subject to the consent of SITA, a member who has reached his normal retirement date and normal retirement age of 60 or 65, whichever is applicable, may remain in service and retire at a date not later than the last day of the month in which the member attains the age of 67. Contributions by and on behalf of the member shall cease after the normal retirement date and the employee forfeits the death, disability and funeral benefits should the employee pass away or become disabled while in the service of SITA.'

20. In the trial bundle used by the parties there was a document titled:

'Alexander Forbes Retirement Fund (Pension Section)

Special Rules Applicable to State Information Technology Agency (Proprietary Limited).'

21. The following appeared immediately below this title:

'The General Rules of the Alexander Forbes Retirement Fund (Pension Section) shall be read in conjunction with these Special Rules which shall apply to the Eligible Employees of the Employer with effect from the Participation Date.'

22. The participation date was 1 April 2005.

23. Rule 6 of the Special Rules reads:

'6 Normal Retirement Date in terms of General Rule 2:

The last day of the month in which a member reaches age 60 years; provided that a member who transfers from another Approved Pension Fund or Approved Provident Fund or shall retain his previous retirement age of 65 years in terms of the rules of such Approved Pension Fund or Approved Provident Fund.'

early retirement age to the Alexander Forbes Retirement Fund Special Rules applicable to SITA: (i) a member who has reached the age of 55 years may retire on the last day of the month of reaching such age (before he reaches his normal retirement date); (ii) provided that a member who is not a member of the Alexander Forbes Retirement Fund (Provident Section) is at least 50 years old and is within 10 years of his normal retirement date, may retire on the last day of any month before he reaches his normal retirement date

24. However, Rule 5.2, which is titled: 'Retirement from Service', provides as follows in Rules 5.2.1 and 5.2.2:

'5.2.1 A member who has reached age 55 years may retire from Service on the last day of any month occurring before he reaches his Normal Retirement Date provided that a member who is not a member of the Alexander Forbes Retirement Fund (Provident Section) who is at least 50 years of age and is within 10 years of his Normal Retirement Date may retire on the last day of any month occurring before he reaches his Normal Retirement Date.

5.2.2 A member who has not retired in terms of Rule 5.2.1 must retire from Service on reaching his Normal Retirement Date unless his Employer agrees in writing to his remaining in Service after that date.'

contract of employment defines 'termination date': retirement age, according to the rules of the relevant pension/retirement funds, or any earlier date as envisaged to the agreement

25. Clause 2.1.18 of the contract of employment defines 'Termination Date' as meaning 'the retirement age specifications set according to the rules of the relevant pension or retirement funds or any other earlier date as envisaged in terms of this Agreement'.

all applicants received similar letters: (i) reached retirement age; (ii) worked beyond such retirement age; (iii) indicating that 'as a result of your retirement' services will end on a specific date

26. In October 2017, Ms Petra van den Berg received a letter of dismissal from the respondent, dated 11 October 2017. That letter read as follows:

'Dear Ms Petra Van den Berg

Our records indicate that on the 05th of August 2017 you reached another milestone celebrating your 62nd birthday. According to the SITA conditions of employment clause 9.18 you were due to retire at the end of August 2015. We would like to take this opportunity to inform you that your services with SITA will as a result of your retirement come to an end on the 31st December 2017.'

27. All the individual applicants received similar letters except for the differences in the names of the addressees and dates for reaching the retirement age and when each one was advised he or she would leave the organisation.

FINDINGS OF THE CONSTITUTIONAL COURT

Zondo CJ (Chaskalson AJ, Mathopo J and Schippers AJ concurring) (first judgment):

introduction

28. Section 187(1)(f) of the LRA provides:

'(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, or, if the reason for the dismissal is –

...

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;'

29. Section 187(2)(b) of the LRA makes provision for an exception to s187(1)(f). It reads:

'(2) Despite subsection (1)(f) –

...

(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.'

Waco: Zondo J (as he then was) held: once an employee reached an agreed retirement age, at any time thereafter the dismissal, based on such agreed retirement age, is fair

30. In *Waco*, Zondo J (as he then was) held that, once an employee reached an agreed retirement age, his or her dismissal, on the ground that he or she had reached an agreed retirement age, was fair. Zondo J (as he then was) also held that, where, as in that case, an employee was not dismissed on reaching the agreed retirement age but was dismissed long after that date on the ground of age, the dismissal would be fair.

the Landman case

in the constitutional court

jurisdiction

31. The constitutional court had jurisdiction because the matter required an interpretation of the LRA which is a constitutional issue (*National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC) (*NEHAWU*)).
32. The main constitutional issue was whether, upon a proper construction of s187(2)(b) of the LRA, an employer could dismiss an employee who had been allowed to work beyond an agreed retirement age on the basis that he or she had reached the agreed retirement age.

question to be answered: whether an employer, who did not dismiss an employee when the latter reached an agreed retirement age, but dismissed him subsequently, could rely on the defence contained in s187(2)(b) of the LRA

33. Put differently, the question was whether an employer, who did not dismiss an employee when the latter reached an agreed retirement age but dismissed him or her after the employee has worked beyond such agreed age, could rely on s187(2)(b) as a defence to a claim that the dismissal was automatically unfair.
34. In Mr Landman's case, he had been allowed to work for many months after he had reached the agreed retirement age before he was dismissed on the basis that he had reached the agreed retirement age.
35. Dismissal on the ground of age also constitutes a limitation of the right not to be unfairly discriminated against on the ground of age, as entrenched in s9 of the Constitution. The constitutional validity of s187(2)(b) was not challenged in these proceedings.

the meaning of s187(2)(b)

36. In order to determine this appeal, it is important to understand the meaning of s187(2)(b). To understand the meaning of s187(2)(b), it is important to understand the phrase '... if the employee has reached the normal or agreed retirement age ...'. To determine the meaning of this phrase, an understanding of the verb 'reach' the verb 'retire' and the noun 'retirement' is important.

meaning of the verb 'reached': to arrive at or come to; reaching a certain age means: a person has reached his birthday that renders him to be a certain age

37. What does reaching a certain age mean? The *Cambridge International Dictionary of English* describes the verb 'reach' as meaning 'to arrive at or come to'. Reaching a certain age means that the person has reached his or her birthday that renders him or her to be a certain age.

meaning of the verb 'retire': leave one's job and cease to work, especially because one has reached a particular age

38. What does 'retire' mean? What does 'retirement' mean? The *South African Concise Oxford Dictionary* gives as one of the meanings of the verb 'retire' as to 'leave one's job and cease to work, especially because one has reached a particular age.'
39. There are two very interesting features about the meaning of the verb 'retire' in the context of the present case. Firstly, it is that it clearly says 'retire' means leaving your job and ceasing to work. Secondly, it uses the language and tense used in s187(2)(b) when it says 'especially because one has reached' a particular 'age'.

meaning of the noun 'retirement': it is the point at which someone stops working or the period in their life when they stop working

40. One of the meanings that the *Cambridge International Dictionary of English* gives for the verb 'retire' is 'to (cause to) leave your job or stop working because of old age or ill-health'. It gives two sentences that are apposite to the present case. The one sentence is: 'He is due to retire as the Chief Executive next year'. The other is: 'If an employer retires an unwanted employee, they dismiss that person'. The same dictionary gives the following as the meaning of retirement:

'Retirement is the point at which someone stops working or the period in their life when they stop working'.

when an employer dismisses an employee, because the employee has reached the retirement age, the employer retires the employee; when an employee terminates his contract of employment, when he has reached a retirement age, the employee is also said to retire

41. When an employer dismisses an employee, because the employee has reached the retirement age, it can also be said that he or she retires the employee. When an employee terminates his or her contract of employment based on age, when he or she has reached the retirement age, he or she can also be said to retire. We can say with confidence that, when one talks about the concept of reaching an agreed retirement age, one is talking about a point at which it has been agreed that an employee will retire or will be retired or must leave his or her job and cease working.

summary – when an employee reaches an agreed retirement age: (i) it is a point at which it has been agreed that the employee will retire, or (ii) will be retired – both entail that the employee leaves his job and ceases working

42. Going back to the meaning of the verb 'reach', in the context of reaching a certain age, the word means arriving at a certain age or coming to a certain age where the employee will leave her job and cease to work. Given the meaning of the two verbs, 'reach' and 'retire' in s187(2)(b), the phrase '... if the employee has reached the normal or agreed retirement age ...' refers to an employee ceasing to work or leaving his or her job on grounds of age when he or she arrives at or comes to a certain age that has been agreed upon as the year for the employee to leave work. 'Agreed retirement age' is the agreed point at which retirement will happen. It is an agreement about a common point at which employees will retire or will be retired. The term 'agreed retirement age' means that the parties have agreed that a certain age is the age when employees will retire or will be retired.

when an employer and employee agree upon a retirement age, the purpose is that, when the employee reaches such age, he will retire (i e must leave his job and cease working)

43. Another important consideration is the purpose of fixing, or prescribing, or agreeing upon a retirement age. What do the parties intend in fixing or agreeing upon a retirement age? When an employer and an employee agree upon a retirement age, for example, 65 years of age, the purpose is that, when the employee reaches age 65, he or she will retire. It would serve no purpose for a collective agreement, or any agreement, to fix a retirement age applicable to a certain employer or group of employers and their employees if the employers are free to retire their employees then if they like, or to retire them at any other time thereafter as they please. Such agreed retirement age would, in due course, become superfluous or redundant. Imagine an employer who decides unilaterally that the agreed retirement age does not suit him and, therefore, never retires his or her employees when they reach the agreed retirement age but always retires them two years after the agreed retirement age.

44. If the agreed retirement age is 60 years but the employer is free to retire his employees who are subject to that agreed retirement age at 63, then, if he ends up normally retiring his employees at 63, then age 63 will become the normal retirement age as contemplated in s187(2)(b).

an employee cannot be subject to both an agreed-upon retirement age and a normal retirement age

45. What Zondo CJ just described immediately above could happen if the third judgment's interpretation were to be the law. The difficulty with the state of affairs that such interpretation creates is this: s187(2)(b) refers to both a 'normal' and an 'agreed' 'retirement age'. The 'or' between the words 'normal' and 'agreed' in s187(2)(b) is disjunctive. The section contemplates that in an establishment there will either be a normal retirement age or an agreed retirement age for employees and that the same employees cannot be subject to both an agreed retirement age and a normal retirement age. A normal retirement age applies where there is no agreed retirement age. To subject employees to both a normal and an agreed retirement age at the same time is the effect of both the judgment (second judgment) by Van Zyl AJ, and the judgment (third judgment) of Rogers J.

once an employee is subject to an agreed retirement age, a normal retirement age does not apply; likewise, if an employee is subject to a normal retirement age, there cannot be any agreed-upon retirement age

46. Once an employee is subject to an agreed retirement age, a normal retirement age does not apply. Similarly, if an employee is subject to a normal retirement age because he or she has not agreed to any retirement age, there is no agreed retirement age applicable to him or her. Therefore, an employee cannot be subjected to both at the same time. In Zondo CJ's view, the interpretation adopted by the third judgment was not what was contemplated by the section.
47. The second judgment's interpretation could also result in employees being subjected to both an agreed retirement age and a normal retirement age at the same time. The second judgment was to the effect that, where there is an agreed retirement age, an employer is free to dismiss an employee (for retirement purposes) when the employee reaches that age, for example, on his or her birthday or to dismiss him or her within a reasonable time after that date.

comment re second judgment: not clear how long a delay must before an election is made within a reasonable time – if a year later amounts to a reasonable period, then an employer, who was subject to an agreed-upon retirement age, could also be subject to a normal retirement age of a year later, if a norm is developed in this regard

48. Zondo CJ said it was not clear how long the delay would have to be before the delay could be said to be unreasonable. However, if a year later were to fall within the reasonable period, then an employer, whose employees were subject to an agreed retirement age of 60, could also, of course, be subject to a normal retirement age of 61 if the employer developed a norm to retire his employees at 61, despite the existence of an agreed retirement age of 60 in the organisation.

further comment on the second judgment: if a large number of employees are bound by a collective agreement that provides for a specific retirement age and every one of them was free to disregard the agreed-upon retirement age and choose an age of their choice to retire, this would render the retirement age in the collective agreement redundant

49. Furthermore, imagine an industry where there are about 200 employers all of whom are bound by a collective agreement which provides that the retirement age is 65 years. If every one of the 200 employers were free to disregard the agreed retirement age and choose an age of their choice as the age at which they would retire their employees

and still be able to invoke the protection of s187(2)(b), that would render the agreed retirement age in the collective agreement redundant.

50. If trade unions in an industry or sector concluded a collective agreement with a provision for an agreed retirement age of, for example, 65 years of age, and employers simply ignored age 65 for the purposes of the retirement of their employees and they retired employees at any age of their choice between 65 and, for example, 75, trade unions would be up in arms against those employers for ignoring a collective agreement.

comment on the third judgment: effectively meant that it would be permitted for an employer, which is a party to an agreement on a retirement age, to disregard such agreed retirement age and behave as if it had not agreed to a retirement age – it further meant that an employer, or group of employers, in an industry that has an agreed retirement age was permitted to ignore such age and simply retire the employees at any age beyond the agreed-upon retirement age

51. The third judgment's interpretation of s187(2)(b) effectively meant that it would be in order for employers, who were party to agreements on retirement ages, to disregard the agreed retirement age and behave as if they were in an industry that had no agreed retirement age.
52. Zondo CJ could see neither sense nor logic in an employer or group of employers in an industry having an agreed retirement age for employees if every employer would be allowed to ignore the agreed retirement age and simply retire their employees at any age beyond the particular agreed retirement age. The interpretation adopted by the third judgment had this effect.
53. Prior to reaching an agreed retirement age, an employee could not be dismissed on the ground of age. If he or she were dismissed on such a ground, the dismissal would constitute an automatically unfair dismissal in terms of s187(1)(f) of the LRA. It would also constitute unfair discrimination on the basis of age and a violation of s6(1) of the EEA where the EEA applied.
54. If there was an agreed retirement age and the employer dismissed the employee upon the latter reaching the agreed retirement age, s187(2)(b) of the LRA applies and the dismissal is fair.

there is no obligation on the employer to afford the employee procedural fairness because the parties had agreed that the employee's contract of employment would be terminated upon him reaching the agreed/normal retirement age

55. There is also no obligation on the employer to afford the employee procedural fairness in such a case because the parties agreed that the employee's contract of employment would be terminated upon him or her reaching the agreed retirement age. The employer's decision in such a case does not adversely affect any of the employee's rights because the employee had previously agreed that, when he or she reached that age, the employer could dismiss him or her. Under the *Solidarity* case below, Zondo CJ also dealt with the statutory basis for this proposition.

approach adopted in Waco is open to abuse

56. The approach adopted in *Waco* was that an employee, who reached the agreed retirement age but continued to work as usual beyond the agreed retirement age, could still be dismissed by the employer on the basis that the employee had reached the agreed retirement age and such dismissal would be fair.
57. On that approach, the employer could dismiss the employee a few days or a few weeks or months or even some years after the employee reached the agreed retirement age and rely on s187(2)(b) to defend the fairness of the dismissal.

58. In *Waco*, at paragraph [26], the labour court held that, in a case where an employer dismissed an employee after he or she has passed the agreed retirement age, there was no duty on the part of the employer to hear the employee. This finding in *Waco*, at paragraph [33], meant that, except for the obligation to give a contractual notice of the termination of the contract of employment, the employer had no obligation to follow a fair procedure before dismissing an employee on such a ground in such circumstances.

employer may dismiss the employee for another reason, but rely on the fact that the employee had reached the agreed retirement age to justify his dismissal; the employer, in a retrenchment scenario, could try and avoid paying severance pay by indicating that the reason for the dismissal is that the employee had reached the retirement age, but the true reason is the operational requirements of the employer; also, if an employer could not prove guilt of misconduct, or did not want to go through the 'trouble' of a disciplinary process, it would be able to justify the dismissal on the basis that the employee had reached the retirement age

59. Zondo CJ then dealt with the *Waco* approach to the substantive fairness of a dismissal where the employer dismisses an employee beyond the agreed retirement age on the ground that the employee has reached the agreed retirement age. The *Waco* approach is open to abuse because the employer may dismiss the employee for another reason but rely on the fact that the employee 'has reached' the agreed retirement age to justify the dismissal. For example, there could be a lawful or protected strike in which workers who have worked beyond the agreed retirement age participate and the employer may dismiss those employees and say it is because they have reached the agreed retirement age when it is in fact dismissing them for their role in the strike. If there were many such employees and they were dismissed more or less at the same time, it could be that a court could be persuaded that the reason for their dismissal was their role in the strike and not that they had reached the agreed retirement age. However, if they were dismissed some time after the strike, it could be difficult to show that the reason for the dismissal was their role in the strike even though, in truth, the reason for their dismissal was their role in the strike.
60. Another scenario in which the *Waco* approach would be open to abuse by an employer relates to retrenchment. Section 41(2) of the BCEA places an obligation on an employer who retrenches (i.e. dismisses for its operational requirements) an employee to pay such employee severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer unless the employer has been exempted from this obligation.
61. Section 41(2) of the BCEA reads:
- 'An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.'
62. This means that, for example, if an employee has been with the same employer for, for example, 24 years, the severance pay would be equal to remuneration for 24 weeks, which is six months' remuneration. If the employer had reason to retrench workers, it would first dismiss those who had gone beyond the agreed retirement age and say the reason for the dismissal was that the employees concerned had reached the normal or agreed retirement age and they were not being retrenched. The employer would know that, if it gave this reason as the reason for the dismissal and say that the workers were not being retrenched, it would not be obliged to pay severance pay to them. The employer would know that, if it said that those employees were being retrenched, it would be obliged to pay severance pay. Such employees were likely to have served the employer for many years and the amounts of severance pay payable to them if they were retrenched after many years of service could be huge.

63. Another way in which an employer could abuse the interpretation of s187(2)(b) adopted by *Waco* and by the third judgment was this. If an employer suspected that an employee, who had reached the normal or agreed retirement age (as interpreted by *Waco* and the third judgment), of having committed misconduct but either could not prove it in a disciplinary hearing or did not want to go through the 'trouble' of a disciplinary process, it would be able to just dismiss or retire such employee and say the reason was that the employee had reached the normal or agreed retirement age and not that the employee was dismissed for misconduct. The employer would know that, if it gave the reason that the employee had reached the normal or agreed retirement age, it would be protected by s187(2)(b) which would be unlikely to result in a legal challenge, whereas, if it said that the reason for dismissal was misconduct, that could be challenged in arbitration.
64. What also exacerbates the situation is that the playing fields are significantly uneven. An example of this unequal bargaining power is that the employer could hold onto the employee for as long as necessary subject to the employee's willingness to continue working. However, for the employee, the employment could be terminated on a week's or a month's notice. An employee in such a situation of vulnerability would not be able to plan his or her future or finances properly because, on the approach of the second and third judgments, it was the prerogative of the employer to unilaterally decide when the employee had to stop working after he or she had reached his or her normal or agreed retirement age birthday. So, while in this situation, it could be said that either party could terminate the contract of employment on a week's or a month's notice. In truth and reality this is a power that would mostly be exercised by the employer and not the employee. This meant that an interpretation of s187(2)(b), that allowed the employer to rely on this provision as a defence when it dismissed an employee after the employee had reached the normal or agreed retirement age, rendered such category of employees vulnerable to abuse by the employer.
65. The second and third judgments rejected this point on the basis that, if it were suspected that the reason for dismissal given by the employer was not the true reason, what the true reason was would be determined by the court or an arbitrator, as the case may be, when the fairness of the dismissal was challenged. Zondo CJ's difficulty with that criticism was this. Imagine that one or two employees, who had worked beyond their agreed retirement birthday, played a prominent role in organising a protected (lawful) and very effective strike against the employer. After the strike ended, the employer dismissed them or retired them on the ground that they had reached the normal or agreed retirement age. In such a case, how were employees going to prove that the reason the employer gave for the dismissal of the employees concerned was not the true reason?
66. If you accused the employer of actually dismissing them for their role in organising a very effective strike against him, the employer would say:
- 'But the strike they organised was a protected strike and I know that I cannot dismiss them for that. I am telling you that, in terms of the law, once they have worked beyond their retirement age birthday, I may dismiss them on the ground that they have reached the agreed retirement age at any time. It is up to me when I do it.'
67. If the employer said this, it would be almost impossible for anybody to prove that the true reason for the dismissal of the employees was not the one advanced by the employer. So, the employer would be able to abuse the interpretation adopted by the second and third judgments and get away with it.

s187(2)(b) must be interpreted restrictively because it is a provision that limits the right not to be unfairly discriminated against on the basis of age, as entrenched in s9(3) and s9(4) of the Constitution – s9(5) of the Constitution provides that such discrimination

is unfair, unless it is established that it's fair – this means that it *prima facie* constitutes unfair discrimination

68. The interpretation of s187(2)(b), that allows the employer to choose its own time when to dismiss an employee who has reached the agreed retirement age, should be avoided because it is open to abuse by employers. In any event, s187(2)(b) must be interpreted restrictively because it is a provision that limits the right not to be unfairly discriminated against on the ground of age as entrenched in s9(3) and (4) of the Constitution.
69. Section 9(5) provides that such discrimination is unfair unless it is established that it is fair. That means that it *prima facie* constitutes unfair discrimination.
70. The *Waco* interpretation places employees, who work beyond the agreed retirement age, in a vulnerable position. It weakens the position of workers more than it is already weakened. It places the employer in an unduly strong position in relation to workers in such circumstances.

comment on the second judgment: appears to be based, to a large extent, on principles of common law favouring the employer, rather than adopting an approach that seeks to take into account the interests of both the employers and employees as directed by the constitutional court in NEHAWU

71. The approach adopted in the second judgment did not focus on the correct interpretation of s187(2)(b) but rather on whether the employer could be said to have waived his right to dismiss the employee when he did not dismiss him (i.e. the employee) at the time he reached his normal or agreed retirement age. The approach of the second judgment appeared to be based, to a large extent, on principles of common law that favour the employer rather than adopt an approach that seeks to take into account the interests of both employers and employees.
72. The second judgment failed to give effect to the balance which the constitutional court directed, in *NEHAWU (supra)*, should be struck in interpreting the LRA to give effect to the concept of fair labour practices.
73. In *NEHAWU*, the constitutional court had this to say, which Zondo CJ found important when considering the meaning of s187(2)(b):

‘[T]he focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.’

comment on the third judgment: suffers from the same failure as set out above in respect of the second judgment

74. The third judgment also suffered from the same failure as the second judgment in this regard.
75. Another interpretation of s187(2)(b) must be sought if there is one that would not strain the language of the section.
76. The *Waco* interpretation was based on interpreting the phrase ‘has reached the normal or agreed retirement age...’ in s187(2)(b) to be wide enough to include the dismissal of an employee long after the employee had gone beyond the agreed retirement age. In other words, on that interpretation, even after a year or two, or even three years, since the employee had reached the agreed retirement age, the employer would be entitled

to justify the dismissal with reference to the fact that the employee had reached the agreed retirement age and, therefore, could still be dismissed and, in terms of s187(2)(b), the dismissal would be fair.

correct interpretation of s187(2)(b): an employee must retire on the day on which he or she reaches the agreed/normal retirement age – this interpretation gives effect to the spirit, purport and objects of the Bill of Rights: there is no room for the employer to abuse the s187(2)(b) defence; the employee would also be able to plan his or life properly, knowing exactly when he or she would retire

77. Another interpretation of the phrase 'has reached the normal retirement or agreed retirement age' is that this phrase refers to a situation where an employee reaches or has just reached the agreed retirement age but not one who has worked beyond the day when he or she reached the agreed retirement age. That means that the employee must retire on the day on which he or she reaches the agreed retirement age. In terms of this interpretation, the dismissal which s187(2)(b) says is fair is a dismissal based on age that is effected on the day when the employee reaches the retirement age. It is in respect of such a dismissal that an employer may use s187(2)(b) as a shield or as protection against a claim for an automatically unfair dismissal.
78. That, in Zondo CJ's view, was the correct interpretation of s187(2)(b) because it heeds the injunction of s39(2) of the Constitution.
79. The construction of s187(2)(b) adopted in this judgment gives effect to the spirit, purport and objects of the Bill of Rights. It is consistent with the right to human dignity and promotes the right to fair labour practice as enshrined in our Constitution. It limits the situations in which discrimination on grounds of age is permitted – which is *prima facie* unfair discrimination – to the absolute minimum.
80. The *Waco* interpretation expanded the category of employees on whom this discrimination on grounds of age was visited. The interpretation that *Waco* gave to s187(2)(b) is not consistent with the fundamental values of our Constitution and is not to be preferred. It allows for the abuse of s187(2)(b) of the LRA.
81. In this regard, Zondo CJ emphasised that in *Waco* the labour court did not heed the injunction in s39(2) concerning the interpretation of legislation. In part, this could well have been because our Constitution was relatively new at the time. It was less than two years old.
82. The interpretation adopted in the present judgment limits the period when an employer may dismiss an employee on grounds of age. There is also no room for the employer to abuse the s187(2)(b) defence or protection. It is only available on the day that the employee reaches the agreed retirement age and on no other day. This will not cause any unfairness to employers because an employer will be able to keep an eye on when each employee will reach the agreed retirement age and prepare for that eventuality in good time. The employee would also be able to plan his or her life properly knowing exactly when he or she would retire.
83. The employer has to give the employee notice of the termination of the contract of employment or notice pay in lieu of notice when the contract of employment will not be coming to an end by the effluxion of time or by the operation of law.

a new contract of employment would govern the period after the agreed/normal retirement age

84. Obviously, it is up to the employer and the employee to change the agreed retirement age or to conclude a new contract of employment that would govern the period after the agreed retirement age. The conclusion reached above rendered it unnecessary to decide the question whether or not an employer, who allowed an employee who has reached an agreed retirement age to continue working as usual beyond the agreed

retirement age, waived the right to rely on s187(2)(b) of the LRA to dismiss the employee.

the s187(2)(b) defence is not available to an employer who allows the employee to work beyond the agreed retirement age and dismisses the employee thereafter, on the ground that the employee had reached such age

85. The position is simply that the defence or protection of s187(2)(b) is only available to an employer who dismisses the employee on the latter reaching the agreed retirement age. That happens if the dismissal is effected on the day the employee turns 60 years of age, if the normal or agreed retirement age is 60 years. It is not available to an employer who allows the employee to work beyond the agreed retirement age and dismisses the employee thereafter on the ground that the employee has reached the agreed retirement age. However, if the contract of employment or a collective agreement, that makes provision for the normal or agreed retirement age, provides that the employee will retire or will be retired on the last day of the month in which the employee reached the normal or agreed retirement age, that would not offend the interpretation of s187(2)(b) adopted in the present judgment.

if a contract of employment or collective agreement makes provision for the normal or agreed retirement age and provides, further, that the employee will retire, or be retired, on the last day of the month on which the employee reached the normal or agreed retirement age, this is not contrary to the interpretation of s187(2)(b) adopted in the first judgment

86. The result of the above was that the s187(2)(b) protection or defence upon which the respondent relied to justify Mr Landman's dismissal was no longer available to the respondent when it dismissed Mr Landman nine months after he had reached the agreed retirement age. This, therefore, meant that Mr Landman's dismissal was not protected by s187(2)(b) and there was no other justification advanced for his dismissal, other than age. There was no complaint that, because of age, Mr Landman could no longer perform his duties satisfactorily. Accordingly, the dismissal constituted unfair discrimination and was a violation of s6(1) of the EEA. This also meant that the dismissal was automatically unfair as contemplated in s187(1)(f) of the LRA. Therefore, the appeal against the decision that the dismissal was fair had to succeed.

first judgment conclusion as to the *Landman* case: (i) 9 months after Mr Landman had reached the agreed-upon retirement age, the employer could not rely on the s187(2)(b) defence when he dismissed him; (ii) the dismissal constituted unfair discrimination on the basis of age and was a violation of s6(1) of the EEA; (iii) the dismissal was automatically unfair ito s187(1)(f) of the LRA; (iv) appeal against the decision had to succeed

the *Solidarity* case

in the constitutional court

87. Solidarity applied to the constitutional court for leave to appeal against the decision of the labour appeal court and the judgment and order of the labour court.

jurisdiction and leave to appeal

88. For the reasons given in the *Landman* case above, the constitutional court had jurisdiction and leave to appeal should be granted.

the appeal

as in the *Landman* case, the dismissals in the *Solidarity* case were not effected on the days on which the employees reached the normal retirement age, but were effected after such dates – therefore, held that the dismissals had been automatically unfair

89. For the reasons given in the *Landman* case above, in support of the conclusion that Mr Landman's dismissal had been automatically unfair, Zondo CJ concluded, in the *Solidarity* matter, too, that the dismissals of the individual applicants had been automatically unfair. This was because, as in the *Landman* case, the dismissals of the individual applicants in the *Solidarity* matter were not effected on the days on which they reached the normal retirement age but were effected after such dates. Zondo CJ said this mindful of the fact that, in the *Landman* case, there was an agreed retirement age between the parties, whereas, in the *Solidarity* matter, the agreement between the parties had effectively been that the normal retirement age, specified in the rules of the Alexander Forbes retirement fund, was the normal retirement age applicable to the individual applicants.

in *Landman*, there was an agreed retirement age between the parties; in *Solidarity*, the agreement between the parties was to the effect that the normal retirement age, specified in the rules of the Alexander Forbes Retirement Fund, was the normal retirement age

90. The reasoning Zondo CJ adopted in the discussion of the *Landman* case applied with equal force to a case such as the *Solidarity* matter where there was a normal retirement age and not an agreed retirement age. However, in the *Solidarity* matter, there was a further ground on the basis of which Zondo CJ also concluded that the dismissals of the individual applicants were automatically unfair.

the reasoning that Zondo CJ applied in *Landman* was equally applicable in *Solidarity* – however, in *Solidarity* there was a further ground upon which Zondo CJ concluded that the dismissals of the individual employees were automatically unfair

91. The applicants also contended that, in continuing to work for the respondent beyond the dates on which they reached the normal retirement age, they did so with the consent of the respondent. They further submitted that, in those circumstances, they were entitled to work until age 67. They submitted that, once the respondent had allowed them to work beyond the normal retirement age of 60, the respondent had no right to retire them against their will before they reached age 67. In this regard, they relied on the conduct of the respondent, as well as clause 9.19.1(b)(i) and (ii) of the SITA employment conditions. Clause 9.19.1(b)(i) and (ii) read:

'9.19.1(b) Alexander Forbes Retirement Fund

- (i) The normal retirement age of the fund is the last day of the month in which a member reaches the age of 60.
- (ii) Subject to the consent of the SITA, a member who has reached his normal retirement date and normal retirement age of 60 or 65, whichever is applicable, may remain in service and retire at a date not later than the last day of the month in which the member attains the age of 67.'

clause 9.19.1(b) of the SITA employment conditions: with the consent of the SITA, a member, who has reached his normal retirement age of 60 or 65, whichever is applicable, may remain in service and retire at a date no later than the last day of the month in which he reaches the age of 67 – this is the additional feature in *Solidarity*: the employees alleged that they worked beyond the normal retirement age with the

consent of the employer, thus they were entitled to work until the age of 67 and the employer had no right to retire them against their will before they reached the age of 67

92. Clause 9.19.1(b)(i) of the SITA employment conditions simply specifies that the normal retirement age is 60 years of age but a member's last day at work is not necessarily the day on which the member concerned turns 60. It provides that the member's last day is the last day of the month in which he or she turns 60. This, therefore, means that, unless an employee's sixtieth birthday is on the last day of the month, the employee's last day at work will not be his or her sixtieth birthday.

to the SITA conditions of employment: employee's last day at work is not the date on which he reaches the retirement age, but the last day of the month in which he reaches such age

93. Clause 9.19.1(b)(ii) provides for an exception to the general rule in clause 9.19.1(b)(i), that a member retires on the last day of the month in which he or she turns 60 years of age. The exception for which clause 9.19.1(b)(ii) provides is that, with the consent of the respondent, despite a member having reached his or her retirement age and the last day of the month in which he or she turns 60 years of age, he or she may remain in the respondent's service 'and retire at a date not later than the last day of the month in which the member attains the age of 67...'.
94. What clause 9.19.1(b)(ii) means is that, provided there is the employer's consent, a member may remain in the employer's service 'and retire not later than the last day of the month in which the member attains the age of 67'.

clause 9.19.1(b)(ii) creates not an employer's right to retire an employee between the ages of 60/65 and 67 – rather, it creates the right of an employee to retire during this period: the employee should give notice of his retirement in the same way the employer would have to give the employee notice of the termination of the contract of employment

95. The right that clause 9.19.1(b)(ii) creates is not an employer's right to retire an employee at any time between the last day of the month in which the employee reaches 60 years of age and age 67. The right that the provision creates is that of the employee. I say this because the provision says '...a member ... may remain in service and retire at a date not later than...'.
96. The provision does not say: '...the SITA may...'. That right only vests in the employee once the respondent has consented to the employee continuing in the respondent's employment beyond the retirement age of 60 years. It is the employee's right to retire any time between the last day of the month in which he or she turned 60 and age 65. The employee should obviously have to give notice of his retirement in the same way that the employer would have to give the employee notice of termination of the contract of employment.
97. That it was with the consent of the respondent that the individual applicants had continued working for the respondent beyond the last day of the months in which they respectively turned 60 years of age was put to Mr Moeketsi Hlabanelo under cross-examination. He conceded that it was with the consent of the respondent that the individual applicants had worked beyond the last day of the months in which they respectively turned 60 and had, thus, reached their agreed retirement age.

once the individual employees had continued to work for the employer, with his consent, beyond the normal retirement age of 60/65, they had the right to work until they turned 67 years of age, unless the employer dismissed them on any other ground recognised in law, such as misconduct

98. Once one accepted, as one was bound to do after Mr Hlabanelo's concession, that it was with the respondent's consent that the individual applicants had remained in the

respondent's employment beyond the last day of the month in which each individual applicant had turned 60, the next question was whether that had had any impact or effect on whether the respondent could dismiss any individual applicant on grounds of age between the last day of the month in which they turned 60 and the date when they reached age 67. The short answer was that, once the individual applicants had continued to work for the respondent beyond the normal retirement age of 60, and had done so with the consent of the respondent, they had had a right to work until they turned 67 years of age, unless the respondent dismissed them on any ground recognised in law, such as serious misconduct, incapacity or the employer's operational requirements.

99. On behalf of the applicants it was also argued that, in order for the respondent to dismiss the individual applicants before they reached age 67, it was necessary that an agreement be reached between the parties on a new retirement age and then the respondent could dismiss them when they reached such retirement age. As there was no such agreement in this case, it was not necessary to decide this point.

Zondo CJ's conclusion: respondent had no right to dismiss the employees before the age of 67 – dismissals were automatically unfair, based on age, and s187(2)(b) defence was not available to the employer

100. In Zondo CJ's view, clause 9.19.1(b)(ii) meant that, once the SITA or respondent had given its consent for the individual applicants to remain in its employ beyond the retirement age, the individual applicants had had a right to work until age 67. The respondent had had no right to dismiss them before they reached age 67. For that reason, too, the dismissals were automatically unfair because the dismissals were based on age. Section 187(2)(b) was not available to the respondent to use as a shield.

no obligation to comply with a fair procedure, other than giving a contractual or statutory notice of termination

101. The applicants also contended that the respondent had been obliged to have observed procedural fairness in dismissing them but had failed to do so. This raised the question whether the statute places an obligation on an employer to observe procedural fairness in cases of automatically unfair dismissals, or where the reason for dismissal is one prohibited by s5 of the LRA, or is a reason listed in s187(1) of the LRA.
102. Earlier on Zondo CJ referred to the fact that one of the issues that arose in *Waco* was whether an employer, who contemplated dismissing on grounds of age an employee who had worked beyond the normal or agreed retirement age, was obliged to follow a fair procedure. Zondo CJ pointed out earlier that in *Waco* he had held that, in such a case there was no obligation on the employer to comply with a fair procedure other than giving a contractual or statutory notice of termination. He said this on the basis that an employer could dismiss an employee on the grounds of age even long after the employee had reached the normal or agreed retirement age and still enjoy the s187(2)(b) protection.
103. On the approach Zondo J took in this judgment, as opposed to the one he took in *Waco*, he was of the view that, if an employer wanted to dismiss, on the ground of age, an employee who had continued to work beyond the agreed retirement age, that dismissal could not be said to be fair by reason of s187(2)(b) but could only be said to be fair if, by reason of age, the employee was no longer able to do his or her work as required. So, the employer would have to prove this.
104. As far as procedural fairness was concerned, Zondo CJ said that it applied in such a case. This was, of course, not the position he had taken in *Waco*. In *Waco*, he took the view that an employer could dismiss an employee on the ground of age at any time after the employee had reached and gone beyond the agreed retirement age and the s187(2)(b) shield or protection would always be available to the employer. Zondo CJ also held that procedural fairness did not apply in such a case. The basis for this was

that the dismissal could not be substantively unfair because, if it were based on age as agreed between the employer and employee, there was nothing to inquire into. That dismissal would have happened as agreed. The time from when the dismissal could be effected was also agreed.

105. Zondo CJ's view, in *Waco*, was that, where the reason for an employee's dismissal was that he or she had reached the normal or agreed retirement age, there was nothing on which the employee needed to be heard. However, he need not have looked that far to find a reason for that view because the statute has the answer. To make the point he needed to make, it was important to quote s185 of the LRA.

106. Section 185 reads:

'185 Right not to be unfairly dismissed or subjected to unfair labour practice

Every employee has the right not to be

(a) unfairly dismissed; and

(b) subjected to unfair labour practice.'

107. Section 185 creates two rights for an employee. The first is the right not to be unfairly dismissed. The second is the right not to be subjected to unfair labour practice. It is to be noted that in s185 there is no reference to substantive fairness and procedural fairness. There is simply a right not to be unfairly dismissed and a right not to be subjected to an unfair labour practice.

108. Section 187 relates to automatically unfair dismissals and s188 relates to non-automatically unfair dismissals – in other words, another category of dismissals.

s187 of the LRA, dealing with automatically unfair dismissals: no provision indicating that a failure by the employer to afford an employee an opportunity to be heard renders the dismissal automatically unfair – a dismissal becomes automatically unfair on the basis of a substantive reason and not the failure by the employer to follow a fair procedure (because an employer is not supposed to dismiss an employee on any of the grounds listed in s187(1))

109. It will be seen from s187 that the statute provides reasons that render a dismissal automatically unfair. It will also be noted under s187 that there is no provision to the effect that a failure by the employer to afford an employee an opportunity to be heard renders a dismissal automatically unfair. Therefore, a dismissal only becomes automatically unfair on the basis of a substantive reason and not on the basis of a failure by the employer to follow a fair procedure. That, in Zondo CJ's view, is because an employer is not supposed to dismiss an employee on any of the grounds listed in s187(1) except within the four corners of s187.

110. If the employer gets the age of the employee wrong, or gets the normal retirement age wrong, or wrongly thinks that the employee has agreed to a retirement age, the employee will challenge that dismissal in the labour court. If the employer fails to show that s187(2)(a) or (b) applies, the dismissal will be automatically unfair. However, when proceeding to unfair dismissals, other than automatically unfair dismissals in s188, it will be found that, unlike in the case of automatically unfair dismissals in s187, the statute provides two reasons which will render a dismissal unfair. The first one is substantive. The second one is procedural. The effect of s188, read with s187, is that a dismissal cannot be rendered automatically unfair simply because a fair procedure was not followed by the employer, but a dismissal that is not automatically unfair will be unfair on either a substantive ground only, or on a procedural ground only, or on both substantive and procedural grounds.

111. The opening part of s188 expressly excludes an automatically unfair dismissal when the section places upon the employer the burden to prove that the dismissal was effected in accordance with a fair procedure. Therefore, it can be said with confidence that the unfair dismissal regime or dispensation that the LRA created does not require that an employer proves that an automatically unfair dismissal was effected in accordance with a fair procedure. That requirement only applies to the other dismissals dealt with under s188. In Zondo CJ's view, that is the law as it presently stands.
112. The constitutionality of the LRA's exclusion of the requirement of a fair procedure in respect of automatically unfair dismissals was not challenged in the present case. It is, therefore, not necessary to express a view on its constitutionality. Therefore, it seems that, rightly or wrongly, the LRA does not impose on an employer the duty to comply with a fair procedure where a dismissal is for a reason that would ordinarily render the dismissal automatically unfair.

Van Zyl AJ (second judgment)

113. The issue raised for determination in both *Landman* and *Solidarity* is the effect on the contractual relationship between an employer and employee when the employee, who has elected not to retire upon reaching the normal or agreed retirement age, is permitted by the employer to work beyond the determined retirement age.

question raised in *Landman* and *Solidarity*: what was the result of the failure by the employer to terminate the employee's employment when he reached the retirement age? Did the employer lose the protection of s187(2)(b) as suggested in the first judgment? Could the employer terminate the employment relationship at any time thereafter, as suggested in the third judgment?

114. Put differently, the question raised on the facts of the two matters was what (in the absence of the parties having reached agreement with regard thereto) was the result of a failure by the employer to terminate the employee's employment when the latter reached retirement age? Did the employer without more lose the protection of s187(2)(b) of the LRA as suggested in the first judgment, or could the employer terminate the employment relationship at any time thereafter as suggested in the third judgment?

agreed with the finding in the first judgment, that *Waco* and *Landman* were incorrectly decided, to the extent that they held, without qualification, that the employer could terminate the employment relationship at any time after the employee reached the retirement age

115. Van Zyl AJ agreed with the finding in the first judgment that the decisions of the labour court in *Waco* and that of the labour appeal court in *Landman* were not correct, to the extent that they held, without qualification, that the employer could terminate the employment relationship at any time after the employee reached retirement age.
116. Van Zyl AJ's intention was to show that the suggestion was inconsistent with accepted contractual principles. However, he found himself in disagreement with the first judgment in three respects:
- 116.1 firstly, the reasoning employed in arriving at the aforementioned conclusion;
- 116.2 secondly, and more fundamentally, he did not agree that there was an obligation on the employer to terminate the employment relationship when the employee reached the determined or agreed retirement age; and
- 116.3 thirdly, he found on the facts of the two matters before them that the appeals had to be dismissed.

117. Insofar as the third judgment was concerned, Van Zyl AJ disagreed with the reasoning as being inconsistent with the nature of the right which flows from the manner in which the legislature has chosen to deal with the termination by an employer of the employment relationship upon the employee having reached the determined retirement age.
118. The nature of the relationship between an employer and employee is contractual (Van Jaarsveld, 'Labour Law' in *LAWSA* 3 ed (2017), vol 24(1), at paragraph 98, and Grogan *Workplace Law* 12 ed (Juta & Co Ltd, Cape Town 2017), at 31).
119. As is the case with any other contractual relationship, the employment contract may be terminated by agreement (*Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) (*Van Streepen*), at 588I-J). This may be achieved by an express term in the contract, or tacitly by an unexpressed provision of the contract
- 'which derives from the common intention of the parties as inferred by the court from the express terms of the contract and the surrounding circumstances' (*Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A), at 531).
120. The retirement clauses in both *Landman* and *Solidarity* provide for the termination of the contractual relationship between the employer and the employee by agreement.

effect of retirement clauses in both *Landman* and *Solidarity* is that the contract of employment terminates by the effluxion of time, upon the employee reaching the normal or agreed retirement age – the contract terminates automatically

121. The effect of the retirement clauses in both *Landman* and *Solidarity* is that the contract of employment terminates by the effluxion of time upon the employee reaching the normal or agreed retirement age. Not unlike any other form of contract, if the parties agree upon a definite time for the expiration of the employment contract, the contract terminates automatically. However, it is important to note that this consensual form of termination of the contract must be distinguished from the unilateral exercise by one party of the right to terminate the agreement. Such a right may accrue by operation of law, most commonly on the ground that the other party to the contract is guilty of material misrepresentation or that he or she wrongfully repudiated or breached a material term of the contract.
122. As emphasised in *Van Streepen (supra)*, at 588H-J, these are two different forms of terminating a contract that denote two very different juristic concepts:
- 'In the law of contract "cancellation" is a well-known term which covers both cancellation by agreement between the parties (or consensual cancellation, to use the phrase adopted by counsel in argument) and cancellation by one party on the ground that the other party has wrongfully repudiated or breached a material term of the contract (see Christie, *The Law of Contract in South Africa* at 431, 520 and the cases there cited; Prof Louise Tager in (1976) 92 *SALJ* at 430-1). These two forms of cancellation denote very different juristic concepts. The first-mentioned form, consensual cancellation, is a contract whereby another contract is terminated. The second-mentioned form, cancellation on repudiation or breach, involves the unilateral exercise by one party of the right to rescind the contract, this right having accrued to him by reason of the other party's repudiation or material breach.'
123. It is in the context of the contractual nature of the relationship between the employer and employee and the principles applicable thereto that s187(2)(b) of the LRA must be given meaning. The issue raised is essentially one of interpretation, and its focus is, from an employer's perspective, on the manner in which the employment relationship terminates when the employee has reached the normal or agreed retirement age.

124. The labour appeal court, in *Landman*, found that s187(2)(b) affords an employer the right to terminate the employment relationship on the basis of age when the employee has reached retirement age and that the focus of the section is not on restricting the exercise of that right to a particular point in time, namely, when the employer has reached the normal or agreed retirement age, but, rather, that the employee has reached or passed that age before the right may be exercised.

approach adopted in *Landman*: focus is not so much on when the employee reached the retirement date, but rather that the employee has already reached such normal/agreed retirement age – any time thereafter the s187(2)(b) defence is available to the employer

125. The labour appeal court reasoned as follows:

‘Section 187(2)(b) does not prescribe a timeframe within which the dismissal should take place, provided it is after the employer has reached his or her agreed or normal retirement date. Properly construed, section 187(2)(b) affords an employer the right to fairly dismiss an employee based on age at any time after the employee has reached his or her agreed or normal retirement age. This right accrues to both the employee and the employer immediately after the employee’s retirement date and can be exercised at any time after this date. The focus is not so much on when the employee reached his or her retirement date, but rather that the employee has already reached or passed the normal or agreed retirement age’ (*Landman (supra)*, at paragraph 15).

second judgment: agreed with the aforesaid approach, provided that the exercise of the right must be within a reasonable time after the employee has reached the retirement age, and not ‘at any time thereafter’, as stated in *Landman*

126. With the qualification that the exercise of the right must be within a reasonable time after the employee has reached retirement age, and not ‘at any time [there]after’ as the labour appeal court found, Van Zyl AJ agreed with that interpretation. It was consistent with the accepted approach to statutory interpretation.

Natal Joint Municipal Pension Fund v Endumeni Municipality (SCA) approach to be applied in interpreting s187(2)(b) of the LRA

127. What the proper approach to the interpretation of a statute or any other document is, was dealt with by the supreme court of appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*), at paragraph [18], and received the approval of the constitutional court (see *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC), at paragraph [28] (see also *Municipal Employees Pension Fund v Natal Joint Pension Fund* [2017] ZACC 43; 2018 (2) BCLR 157 (2018) 39 ILJ 311 (CC)).
128. Aptly described by the constitutional court as a ‘unitary exercise’, in *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) (*University of Johannesburg*), at paragraphs [65] to [67], it is the process of attributing meaning to the words used in the legislation by giving consideration to the:

‘nature of the document, ... 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 undermine the apparent purpose of the document. ... 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.’

129. This approach accords with the second of the two approaches mentioned by Schreiner JA, in *Jaga v Dönges NO; Bhana v Dönges NO* 1950 (4) SA 653 (A) (*Jaga*), at 662G–663A, namely, that, from the outset, one considers the context and the language together, and not the one after the other.
130. Of further importance, particularly in the context of the present matter, is the point emphasised by Schreiner JA, in *Jaga*, that:

‘the context as here used is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the [subject] matter of the statute, its apparent scope and purpose, and, within limits, its background.’

interpretation of s187(2)(b) in *Landman*: consistent with the ordinary grammatical meaning of the words used therein – the verb ‘reached’ means the employee must have reached the required retirement age: it does not carry the implication of not having gone beyond that age

131. The interpretation given to s187(2)(b) by the labour appeal court in *Landman* is consistent with the ordinary grammatical meaning of the words used therein. The verb ‘reached’ simply means that the employee must have attained the required retirement age. It does not carry the implication of not having gone beyond that age. The section simply provides that, for the dismissal to be fair, the employee must have attained (‘reached’) retirement age. It does not confine the fairness of the dismissal to the date when the employee ‘reaches’ retirement age.
132. The context in which s187(2)(b) must be interpreted is provided by two things, namely, the fact that s187(2)(b) forms part of Chapter VIII of the LRA, which deals with ‘Unfair Dismissal and Unfair Labour Practice’, and that it provides a defence to what would otherwise have constituted an automatically unfair dismissal as envisaged in s187(1)(f).
133. Section 187(1)(f) provides that:

‘(1) A dismissal is automatically unfair if ... the reason for the dismissal is –

...

- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.’

134. The subject matter of s187(1)(f), read with subsection (2)(b), is the right of the individual to equal treatment. Section 187(1)(f) gives effect to the constitutionally entrenched right in s9 of the Bill of Rights.

135. Section 9 is headed ‘Equality’ and reads:

‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
 - (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
 - (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'
136. Section 187(2)(b), on the other hand, places a limitation on that right as envisaged in s36 of the Bill of Rights.
137. Section 36 is headed 'Limitation of rights' and reads as follows:
- '(1) 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, including –
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
 - (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

neither *Waco* nor *Landman* provide an adequate explanation for the finding that the employment contract is deemed to continue after the employee has reached the normal or agreed retirement age

138. Neither the judgment in *Waco* nor that of the labour appeal court in *Landman* provides an adequate explanation for finding that the employment contract does not automatically terminate when the employee has reached the normal or agreed retirement age.
139. In *Waco*, the reasoning seems to proceed from the premise that, because the employment contract expires by effluxion of time and there is consequently no dismissal when an employee's contract of employment terminates by virtue of having attained the normal or agreed retirement age, a 'dismissal' in s187(2)(b) can only have been intended to apply to those instances where the employee's services were subsequently terminated after they were permitted to work beyond the normal or agreed retirement age.
140. In *Landman*, the labour appeal court, on the other hand, found that what the LRA contemplates is that, where the employee continues to work uninterruptedly after attaining retirement age, the employment relationship and the contract continue:
- '[in] other words, for purposes of a dismissal in terms of s187(2)(b), the employment contract does not terminate by the effluxion of time when the employee reaches his or her retirement age but is deemed to continue.'

141. It is not clear why the employment contract is said to be 'deemed' to continue.

reason why the employment relationship does not terminate immediately when the employee has reached the retirement age, and that the employer's right to terminate the employment relationship thereafter continues, is founded on the fact that the legislature considers the termination of the employee's employment by reaching the normal or agreed-upon retirement age to constitute a dismissal – contract does not automatically come to an end when such event occurs

142. On a reading of s187(2)(b), the reason why the employment relationship does not terminate immediately when the employee has reached retirement age, and that the employer's right to terminate the employment relationship may therefore continue, lies in the fact that the legislature considers the termination of the employee's employment, by virtue of the employee having attained the normal or agreed retirement age, to constitute a dismissal.

143. Section 187(2)(b), in other words, brings about a statutory change to the legal consequences that would otherwise normally flow from an employee reaching retirement age where the agreed retirement age is seen as an event, the occurrence of which will automatically bring the contract to an end.

144. Section 187(2)(b) alters the legal position by providing for a departure from the automatic termination of the employment relationship when an employee reaches the contractually agreed retirement age. It does that by considering the termination of the employment contract by reason of the employee having reached retirement age to be a dismissal as envisaged in Chapter VIII of the LRA, as opposed to it being the automatic consequence of what is otherwise nothing more than an express term of the contract between the parties that determines the maximum duration of the employment relationship.

a dismissal is a positive unilateral act by the employer, taken with the intention of terminating the employment relationship between the parties to an employment contract – from the employer's perspective, dismissal requires the employer to make a decision to terminate the employment relationship, based on the employee's age; therefore, unless an employer makes a decision to retire the employee, the employment contract does not automatically end

145. Because it is regarded as a dismissal by the legislature, s187(2)(b) must be read with s186(1)(a) of the LRA. A dismissal in terms of the latter section is the termination of the employee's contract with or without notice. A dismissal is accordingly a positive, unilateral act by the employer taken with the intention of terminating the employment relationship between the parties to a contract of employment. Read in the context of Chapter VIII as a whole, the effect of s187(2)(b) is therefore that, notwithstanding what the employer and employee may mutually have agreed to in their contract of employment, the termination of the employment contract by reason of the employee having reached the normal or agreed retirement age is, from the employer's perspective, a dismissal that requires the employer to make a decision to terminate the employment relationship based on the employee's age. That being so, it must logically follow that unless an employer takes a decision to retire the employee, the employment contract does not automatically end.

employer acquires the right to fairly terminate the employment relationship when employee has reached the normal/agreed retirement age; it is a right that accrues to the employer by operation of law; when the employee reaches retirement age, the employer is faced with a choice, namely, to elect to terminate the employment contract (to s187(2)(b)) or allow the employment relationship to continue

146. The legal effect of s187(2)(b), on the interpretation given to it in the present judgment, is that the employer acquires the right to fairly terminate the employment relationship when the employee has reached the normal or agreed retirement age. It is a right that

accrues to the employer by operation of law. Accordingly, at the point in time when the employee reaches retirement age, the employer is faced with a choice, namely, to elect either to terminate the employment contract as envisaged in s187(2)(b), or to allow the employment relationship to continue.

principle of election finds application: Segal – (i) he can either elect to take advantage of the event, or elect not to do so; (ii) election must be made within a reasonable time; once election is made, he is bound by the election and cannot afterwards change his mind

147. As in any other contractual relationship where a state of affairs comes into existence in which one party to a binding contract becomes entitled, either under the terms of the contract, or by the general application of the law, to exercise a right, and has to decide whether or not to do so, the principle of election finds application. The decision of the party concerned, being a matter of a choice between two alternatives inconsistent with one another, in law constitutes an election.
148. As explained in *Segal v Mazzur* 1920 CPD 635 (*Segal*), at 644-645, the principle of election postulates a situation where a contracting party:

'has a choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but once he has made his election he is bound by that election and cannot afterwards change his mind' (this passage was referred to with approval by the appellate court in *Du Plessis NNO v Rolfes Ltd* 1997 (2) SA 354 (A), at 364G–365A; see also *Septoo v City of Johannesburg* [2017] ZALAC 85; (2018) 39 ILJ 580 (LAC), at paragraph 19.)

149. In *Potgieter v Van der Merwe* 1949 (1) SA 361 (AD) (*Potgieter*), at 372, Centlivres JA quoted, with approval, the following passage from F Pollock *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* 8 ed (Stevens and Sons, London 1911), at 629:

'The contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that the right of [rescission] is waived.'

150. What is important to emphasise from the quoted passages is the fact that the election must be made within a reasonable time. The failure to exercise the right in s187(2)(b) within a reasonable time is evidence, and may be conclusive evidence, of an election not to terminate the employment contract (*Mahabeer v Sharma* NO 1985 (3) SA 729 (A) (*Mahabeer*), at 736D-I, and *Cook v Morrison* [2019] ZASCA 8; 2019 (5) SA 51 (SCA), at paragraph [30]).

Landman overlooked the requirement that the election must be made within a reasonable time – most probably arises from the fact that it incorrectly considered waiver being applicable as opposed to principles of election

151. That the election must be made within a reasonable time is an aspect which the labour appeal court, in *Landman*, seems to have overlooked. The reason for the court not to have dealt therewith lies in all likelihood in the fact that it failed to consider the legal consequences arising from the nature of the right that accrues to the employer in terms of s187(2)(b), with the result that it dealt with the issue purely as one of a waiver as opposed to a situation where the employer is entitled to an election between two alternative rights which are inconsistent with each other.
152. Although election involves the waiver of a right, and while election and waiver are said to be species of the same general legal concept that involves the abandonment of a right and may have the same requisites and may produce the same results, they are

legal acts which arise in different situations. They have their own nuances and the distinction is best maintained (the principle is sometimes conveniently referred to as the principle of waiver by election; see *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electing Corporation* [2020] UKPC 23 (*Delta Petroleum*), at paragraph [18]).

153. The right to terminate the employment contract by reason of age is conferred on the employer by s187(2)(b). It is, therefore, a right conferred by law and it matters not that it is in a statutory context and that it impacts on the contractual relationship between parties. That being so, the decision to exercise that right by terminating the employment relationship rests with the employer (as the issue was not raised and therefore not addressed, Van Zyl AJ left the question open whether the employer might have to comply with the employee's right to a procedurally fair dismissal in terms of s188(1)(b) of the LRA when making the decision). It does not require the agreement of the employee concerned and is consequently a unilateral act.
154. In this context, the choice with which the employer is presented by s187(2)(b), when an employee reaches the normal or agreed retirement age, is best described as an election as opposed to the waiver of a right conferred by operation of law (the bilateral nature of waiver in a purely contractual context is not without controversy and Van Zyl AJ expressed no views with regard thereto; see Christie RH and Bradfield GB, *Christie's The Law of Contract in South Africa*, 8 ed (LexisNexis, Durban 2022), at 533 and AJ Kerr *The Principles of the Law of Contract* 6 ed (LexisNexis, Durban 2002), at 469-93).
155. Waiver by election, or simply 'election', applies in the narrow situation in which there is a choice between two rights or powers:

'When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate.' (*Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) (*Bekazaku*), at 542E; see also Christie and Bradfield *id* at 563-4)

election is whether or not a contract 'lives or dies'

156. The election is made unilaterally and arises where, in a contractual context such as in the present matters, there is a choice as to whether or not the contract 'lives or dies' (*Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, at paragraph [66]).
157. Although election typically arises when the parties to a contract have to know where they stand, it is a concept which may find application in more than one context. The source of the right or power is, therefore, not relevant and the principle of election is not confined to remedies arising in a contractual context as the third judgment seems to suggest.
158. The result of an election is that, once the election has been made, it is final and binding and, if the party having the election chose to terminate the contract, it can only be revived by an agreement that requires a fresh meeting and concurrence of the minds of the parties to restore the *status quo ante* (situation that existed before) (*Desai v Mohamed* 1976 (2) SA 209 (N), at 713; see also *United Bioscope Cafes Ltd v Mosely Buildings Ltd* 1924 AD 60, at 67; *Thomas v Henry* 1985 (3) SA 889 (A), at 896E; *Bekazaku* above, at 542E-J; and *Sewpersadh v Dookie* [2009] ZASCA 78; 2009 (6) SA 611 (SCA), at paragraph [16]).

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