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ATTORNEYS

CASE LAW UPDATE

Herewith a brief update with regards to judgments and awards handed down and now reported:

1.

FOOD AND ALLIED WORKERS' UNION OBO GAOSHUBELWE v PIEMAN'S PANTRY (PTY) LTD

Dismissal (Remedies-Prescription) – The appellant employees were dismissed for partaking in an alleged unprotected strike. The appellant union, on behalf of its members, referred the matter to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The dispute remained unresolved and the union referred it for arbitration. The CCMA ruled that it did not have jurisdiction to arbitrate because the dismissal related to participation of an unprotected strike. The union had sought a review to set aside the ruling of the CCMA. This application was dismissed by the Labour Court ("LC").

Three years after the issue of the non-resolution certificate, the union referred the dispute to the LC for adjudication in terms of section 191(5)(b) of the Labour Relations Act ("LRA"). Pieman's filed a defence in which it contended, amongst others, that the claim for reinstatement in terms of the LRA had prescribed. The union responded that the Prescription Act did not apply to

25 Fourth Avenue
Newton Park
Port Elizabeth
6045

PO Box 12124
Centrahil
6006

Reg no: 95/07272/21
e-mail: pa@vanzylsinc.com
www.vanzylsinc.com

Tel: 041 363 3677
Cell: 082 651 5583 / 079 895 6
Fax: 086 731 9195

such claims alternatively that the referral of the dispute to the CCMA interrupted the running of prescription. The LC held that the Prescription Act does apply to claims under the LRA. The union had taken the decision on appeal to the Labour Appeal Court which dismissed the appeal.

The main issues were whether the Prescription Act applies to litigation under the LRA and whether the unfair dismissal claim instituted by the union against Pieman's under the LRA had prescribed. A majority of seven judges held that the Prescription Act and the LRA are compatible. The Constitutional Court concluded that although prescription against the appellants began to run on 1 August 2001, its running of prescription was interrupted when the matter was referred to the CCMA and continued to be interrupted until the LC dismissed the application in December 2001. Accordingly, when the matter was referred to the LC in March 2005 the claim had not yet prescribed. The appeal was upheld.

2.

WARD v SOUTH AFRICAN REVENUE SERVICES

Dismissal (Racism) – The Applicant was dismissed for comparing the actions of a colleague to that of a monkey when the complainant arrived late for a meeting. The Applicant claimed that it was part of her culture to compare other people to animals in a friendly manner and that she had not apologised as it would then be perceived that she was guilty of racism.

The Commissioner noted that the Applicant's defence was that she was unaware that comparing a black person to a monkey was racist. The test for determining whether a comment is racist is objective. Everyone in the vicinity was shocked by the comment made by the Applicant.

The dismissal was held to be fair.

RUSTENBURG PLATINUM MINE v SOUTH AFRICAN EQUITY WORKERS ASSOCIATION OBO BESTER AND OTHERS

Dismissal (Racism) – The Respondent was dismissed for insubordination and for making a racist remark by referring to a colleague as a 'swart man'. The remark was made after the employee complained of a large vehicle which was parked next to his parking bay. The employer claimed that the employee barged into a meeting and told the official that he must "verwyder daardie swart man se voertuig" (remove that black man's vehicle). The employee claimed that the person to whom he was talking to accused him of not wanting to park beside a black man. The employee was dismissed.

The CCMA found that the employee had used the term 'swart man' only to identify the owner of the motor vehicle and was reinstated. On review the Labour Court could find no conceivable reason for the employee to have referred to the race of the person of whom he was complaining and that he uttered the remark in an aggressive and belligerent manner. The use of the term "swart man" was found derogatory and racist and warranted a dismissal.

The Labour Appeal Court held that the test to determine whether the use of a race descriptor was derogatory was objective and had to be examined in the context it was uttered i.e. whether a reasonable person would have found it so. The LAC found that the LC erred by setting aside the Commissioner's findings.

The Constitutional Court noted that the parties had agreed that the use of the term "swart man" is not per se racist but that the context would determine whether it was used in a derogatory manner. The test is whether the reasonable, objective informed person on hearing the words would perceive them as derogatory. The employee initially denied using the words but acknowledged that such language would result in dismissal. Four witnesses confirmed that the employee had used the words and that they considered

them inappropriate. Viewed in context, the use of the term “swart man” was racially charged and hence derogatory.

On the issue of sanction, the employer had issued a memorandum warning against this practice a short while before the incident and had warned that it would attract the sanction of dismissal on the first occasion. The Courts have similarly taken a strict line on the issue of racial utterances. The employee showed no remorse and instead attacked all witnesses who testified. The apex Court as such held that dismissal was the appropriate sanction.

4.

MOABI v ORGANISATION UNDOING TAX ABUSE (OUTA)

Dismissal (Racism) – The Applicant was dismissed for failing to submit a report and for uttering a racist comment. The Applicant claimed that she was unfairly dismissed because she had ultimately submitted the report and denied making the comments.

The test in determining negligence is objective in that the employee’s conduct is compared to that of a hypothetical employee in the same circumstances. The failure by the Applicant to properly and faithfully carry out her duties as an analyst were critical to the Respondent’s business and had adversely affected its credibility in the eyes of the community. The Applicant had done nothing for a period of five months and her excuse that she was not responsible for failing to deliver was found to be wholly unacceptable by the Commissioner.

The Commissioner further held that the Applicant’s statement that she would ‘not take instructions from white people’ showed that she could not be trusted. The dismissal was upheld.

5.

DAGANE v SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL AND OTHERS

Dismissal (Racism) – The Applicant, a police officer, had posted a racist comment on the Facebook page of Julius Malema as follows; *"F*ck the white racist sh*t. We must introduce black apartheid. Whites will have no room in our hearts and minds. Viva Malema. When Black Messiah dies (NM), we'll teach whites some lesson. We'll commit a genocide on them. I hate whites."* The comment was picked up by a newspaper and a parliamentary portfolio committee called for investigation. The Applicant was charged for using hate speech and subsequently dismissed. The dismissal was upheld by the arbitrator.

On review, the Labour Court held that there was no merit to the Applicant's claim that the arbitrator acted unreasonably. The Court held further that the Applicant was guilty of very serious misconduct as he had unfairly and openly discriminated against whites by making blatantly racist remarks and threatened their safety and security. The Applicant showed no remorse and had made serious accusations against the SAPS, the Council and the arbitrator, accusing them of corruption, fraud and fabricating evidence. The application was dismissed with costs.

6.

MEYER v ONELOGIX (PTY) LTD

Dismissal (Racism) – The Applicant was dismissed after sending a WhatsApp message to his fleet controller depicting a young white boy holding a cigar and a can of beer with the caption "Growing up in the 80's before all you pussies took over – may as well die young". The Applicant denied having intended to send the message to the (black) fleet controller. The Commissioner noted that the Applicant received a Final Written Warning for using the k-word with reference to another incident. Racism should not be

easily inferred and it was found that the message contained no reference to apartheid but only suggested that children born in the 1980's were tougher than the present generation. While the fleet manager's reaction was understandable, the test for whether the message was racist is objective. The Commissioner could not find anything racist about the message and accepted that the Applicant sent it to the fleet manager by mistake. The Applicant received compensation equal to 10 months' salary.

7.

PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA OBO O'KELLY v SOUTH AFRICAN REVENUE SERVICE

Dismissal (Racism) – The applicant referred an unfair dismissal dispute after being dismissed for sending an image on WhatsApp of a monkey accompanied by the message "*Ek wonder wat gaan die 'volk' vandag brand?*" ("I wonder what the 'people' are going to burn today"). This message was sent soon after striking workers had burnt down the Bloemfontein City Hall. The Applicant claimed that she had sent the picture by mistake. The Commissioner found that in its context the message clearly referred to the strikers, who were all black people. The Applicant's dismissal was upheld.

8.

MALAMELA v SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL AND OTHERS

Dismissal (Insubordination) – The employee, who was employed as an Informal Housing Officer by the Nelson Mandela Metropolitan Municipality, was dismissed for insubordination for deliberately refusing to move from the sub-directorate of Informal Settlements to the Development and Support sub-directorate. Both posts fell within the same Directorate and located in the same building. The employee did not report to the new sub directorate for three days after which she had taken sick leave. The Appellant claimed that

she did not follow the instruction because a councillor undertook to deal with the matter. The Appellant's dismissal was upheld by the Arbitrator.

Dissatisfied with the award, the employee sought to set it aside on review. The Labour Court set aside the award and found that the dismissal of the employee was substantively unfair in that the arbitrator had erred by disregarding the involvement of the Councillor when there was evidence that Councillors frequently intervene in such matters. The LC ordered that the employee be reinstated with effect from date of the order.

The Labour Appeal Court noted that a contract of employment must be interpreted subject to the constitutional right to fair labour practices and the legislation giving effect to that right. Respect and obedience are implied duties of the employment contract. Insubordination involves a deliberate, persistent and serious challenge to the employer's authority. The cross appeal was directed at the LC finding that the Appellant had not been grossly insubordinate. The employee on her own version stated there had been a serious breakdown of trust which had compromised service delivery. Authority to transfer the Appellant lay with the executive director of the division not with the portfolio councillor. The arbitrator's award was reasonable. The appeal was dismissed and the cross-appeal upheld.

9.

COUNTY FAIR FOODS (EPPING), A DIVISION OF ASTRAL OPERATIONS LTD v FOOF ALLIED WORKERS' UNION AND OTHERS

Dismissal (Strike) – The Respondent employees demanded to see the managing director after discretionary bonuses were not paid due to difficult trading conditions. When this request was refused, the employees staged a sit-in. They were informed that they were on an unlawful strike and were given a verbal ultimatum, followed by a written ultimatum. Many of the strikers returned to work and a final ultimatum was issued to those who did not. Those who responded were issued with final written warnings and returned back to

work. The Appellant then issued a lockout notice to the remainder of the employees after which they too indicated that they would return back to work. On their return, the employees were summoned to attend a disciplinary hearing and were dismissed. The Labour Court ruled that the penalty of dismissal was too harsh and the dismissed workers were reinstated with six months back pay. The employer contended on appeal that the workers were guilty of a serious misconduct and had lied in the disciplinary proceedings which further damaged the employment relationship.

The Labour Appeal Court disagreed with the Labour Court's findings. The workers had been given three ultimatums which clearly warned them of the consequences of non-compliance. The employees had timed their strike to coincide with the peak year end production season and the strike was not a response to any unjustified conduct by their employer. The dismissed employees had blatantly defied their employer's authority and had no regard for the impact of their action on the employer. Their appeal was upheld and the Labour Court's order replaced with an order that the employees' dismissal was fair.

10.

MTO FORESTRY (PTY) LTD AND OTHERS v CHEMICAL, ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS UNION

Dismissal (Strike) – The respondent union issued a strike notice and served it on MTO after failing to reach an agreement on wages. MTO had withdrawn from the council by that time and pointed out to the union that the strike would be unprotected because there was no dispute between it and the union. A subsequent meeting was held and shop stewards were informed that if the workers embarked on a strike, the bus service between their homes and work would be cancelled and their clock cards deactivated. The shop stewards undertook not to embark on the strike and put up notices calling upon all union members to continue working. The following morning, when workers' arrived at the workplace, they found the turnstiles locked. The securities were

immediately instructed to give the workers access, but they remained outside. An ultimatum was issued by MTO that should workers not return to work, they would be locked out and disciplinary action will be taken against them. A second ultimatum was issued and the union sought to persuade the workers to resume work but to no avail. An interim order was obtained declaring the strike unprotected. After the interim order was confirmed the workers were called to a disciplinary hearing and 178 employees who had embarked on an unprotected strike were dismissed. The Labour Court ruled that the dismissals were procedurally and substantively unfair.

The Labour Appeal Court held that there was no basis for the LC to have found the dismissals procedurally unfair. The LAC rejected the argument that the strike was in response to an unlawful lockout: there had been no lockout; the gates were temporarily closed by mistake which had been explained to the workers. Nothing prevented the workers from entering the factory after the mistake had been explained.

The appeal was upheld.

11.

UMLAW v SA INSTITUTE OF CHARTERED ACCOUNTANTS

Dismissal (Sexual harassment) – The Applicant was dismissed after kissing, hugging and fondling a female colleague in the lift. The Applicant admitted that his conduct had been inappropriate but claimed that he did not know his conduct was unwanted and claimed that the dismissal was unfair. The Commissioner found that the common cause facts were enough to prove that the Applicant had sexually harassed the complainant.

The Applicant also challenged the procedure followed in the disciplinary enquiry as the presiding officer had allowed both parties to be legally represented. It was held that the Applicant had not been prejudiced by this ruling apart from having incurred legal costs.

The dismissal was warranted and the application dismissed.

12.

BAKKER v CCMA AND OTHERS

Dismissal (Constructive) – The applicant referred a constructive dismissal dispute to the CCMA following her resignation and claimed that the Bank had set unreasonable targets and as a result she received poor performance ratings. The Commissioner found that the Applicant had failed to prove that the employer made the working environment intolerable and that she simply resented the imposition of targets and rejected offers of assistance.

The Labour Court held that there were no grounds for interfering with the Commissioner's findings. The introduction of targets did not constitute a change to the applicant's terms of employment and that the method of assessment she complained of was the same for all employees. The Applicant had lodged several grievances prior to her resignation and the bank had taken all reasonable steps to address them even though there was no substance to her complaints. The Applicant's resignation was premature and unreasonable and did not constitute a constructive dismissal. The application was dismissed.

13.

MBAMBO v BARLOWORLD LOGISTICS (PTY) LTD

Dismissal (Constructive) – The Applicant referred three separate disputes to the CCMA alleging unfair dismissal, automatically unfair dismissal and unfair discrimination. The Applicant claimed that he was consistently victimised, harassed and side-lined, which led to him resigning in frustration as he was in an emotional state and on medication. The Applicant attempted to withdraw his resignation two working days later but the Respondent refused to accept the retraction.

The Respondent contended that the Applicant resigned voluntarily and that they had no obligation to accept the resignation. The Commissioner found that the grounds the Applicant had advanced to support his case were mutually destructive. He claimed in one breath that his resignation was ill-considered because of his emotional state and in the next that he had resigned because of intolerable working conditions. Most of the Applicant's complaints related to operational issues and it appeared that the Applicant thought his decisions had to be followed even if his superiors took different views. It could not be said that the Respondent rendered the working environment intolerable. The claim of unfair discrimination failed on the same ground. It was held that the Applicant had resigned simply because he was unhappy and the application was dismissed.

14.

MAYEKI v AFRICAN BANK LTD

Dismissal (Conditions) – The Applicant was employed as a Sales Consultant by the Respondent at the time of his dismissal. The Applicant was required to obtain a qualification prescribed by the Financial Services Board for the position he held. Within the six years of his employ and having tried twice to pass the necessary examination, the Applicant failed. The Applicant was invited to apply for a job that did not require the qualification but failed to do so and was subsequently dismissed.

The Applicant claimed that he did not know that he was required to have the necessary qualification, however, this was contradicted by the fact he had sat for the examinations. The Applicant had furthermore not suggested any alternative post in which he could work without the said qualification and his dismissal was accordingly held to be substantively fair.

15.

PHALADI v INTERACTIVE SECURITY CONSULTANTS CC

Dismissal (Fixed term contract) – The Applicant was employed on a one month fixed – term contract but remained in the Respondent's employ for three days after the termination date. The Commissioner noted that the Applicant's contract of employment contained a clause that he was subject to a three month probationary period, which exceeded the period of the contract. The Applicant's contract was terminated before the expiry of his probationary period and this was found to constitute dismissal. The Commissioner had therefore jurisdiction to entertain the matter and a ruling was accordingly made.

16.

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNON OBO NTANTA v MAYIBUYE TRANSPORT CO-OPERATION

Dismissal (FTC/Age) – The Applicant was employed as a cleaner on fixed term contracts, the latest one being terminated prematurely. The Applicant claimed that he had been unfairly dismissed. The Respondent contended that it had established when the final contract was renewed, the Applicant had already reached retirement age and was receiving pension. The Commissioner noted that fixed term contracts are binding and can only be escaped if there is a material breach committed by the employee. Reaching retirement age is not a valid ground for termination of the contract unless such provision is stipulated therein. The premature termination of the contract was found to constitute a dismissal and was found to be unfair. The Applicant was reinstated.

17.

INQUBELAPHAMBILI TRADE UNION OBO MOKGATLA v CLYRONIX (PTY) LTD T/A LENTES & MARCOS

Dismissal (Non-renewal of FTC) – The Applicant was employed on a 12 month fixed-term contract as a logistics manager. The Respondent declined to renew the contract and the Applicant claimed that he had been unfairly dismissed. The issues to be decided were whether the employee had been dismissed and whether such dismissal had been procedurally and/or substantively unfair.

The Commissioner noted that neither party was aware of section 198B of the LRA which provided that an employee employed longer than 3 months becomes the employer's permanent employee, unless there is justifiable reason for the extension. The employee had thus become a permanent employee by virtue of the provision and the termination of his employment therefore constituted a dismissal. The employee was reinstated with retrospective effect.

18.

AMCU AND OTHERS v ROYAL BAFOKENG PLATINUM LTD AND OTHERS

Dismissal (Operational requirements) – The members of the Appellant union were issued with retrenchment notices. It was common cause that neither the employees nor the union had been consulted before the decision to retrench its members was made. The employer had earlier concluded a collective agreement which had been extended to non-parties, with two other unions NUM and UASA in terms of which the employer would only consult those unions regarding dismissals for operational requirements. AMCU approached the Labour Court under section 189 (13) of the LRA but agreed to withdraw the application pending the application to have sections 189(1) and 23(1)(d) declared unconstitutional. The Labour Court dismissed the constitutional

challenge. AMCU now contended that, interpreted in the manner in which it had been in the Labour Court, section 189(1) was unconstitutional because it precluded minority unions from representing their members in pre-retrenchment consultations. The LAC held that section 189(1) served a rational purpose and was supported by the principle of majoritarianism, which means that the will of the majority prevails over that minority. Unless that principle was accepted in the context of pre-retrenchment consultations, chaos and industrial strife would ensue. The appeal was dismissed.

19.

NUMSA AND OTHERS v ANGLO GOLD ASHANTI LTD AND OTHERS

Dismissal (Operational requirements) – The Respondent employer retrenched several employees who were members of various trade unions and the Applicant union, NUMSA. Prior to this the employer had consulted with recognised unions in terms of section 189A of the LRA. At the time, NUMSA was not amongst the recognised trade unions except for having being granted stop order facilities. NUMSA demanded to be included in the consultation process and launched an urgent application directing the employer to allow it to participate. The court noted that NUMSA was a minority union and that the employer had consulted recognised unions as well as non-unionised employees and was under no obligation either in terms of the LRA or any collective agreement to consult NUMSA. The application was dismissed.

20.

AMCU OBO MASANGO v ANDRU MINING (PTY) LTD

Dismissal (Incitement) – The Applicant employee was dismissed for sending a WhatsApp message to the Respondent's employees and to members of the public stating that the Respondent was intending to dismiss its employees and was to offer employment to persons from Middleburg. The Applicant was found guilty of incitement and accordingly dismissed.

The Commissioner noted that the employee had previously been warned about sending messages that might aggravate the community. She was aware of the sensitivity of the relationship between the community and the Respondent. The message had urged the community to stand together and was followed by a workplace stoppage which had taken place on the same day. This amounted to incitement with serious consequences for the relationship between the Respondent and its workforce.

The dismissal was upheld.

21.

MADWARA v FOOD AND ALLIED WORKERS UNION

Discrimination (Unequal Pay) - The Applicant was employed as a Recruitment Official and organiser by the Respondent Trade Union on a fixed-term contract. The applicant claimed that he was discriminated against because a colleague performing the same work earned twice the amount he did, only because he possessed a driver's license. The Commissioner noted the case of *Pioneer Foods (Pty) Ltd v Workers Against Regression and others [2016] 9 BLLR 942 (LC)* where the Court defined arbitrary grounds as those that are based on attributes and characteristics which have the potential to impair the human dignity of persons as human beings. It was common cause that there was a difference in pay between the employee and the colleague however the employer contended that such discrimination was fair. The Code of Good Practice on Equal Pay allowed for different remuneration to be paid, if employees are subject to the same performance evaluation system, which was the case. The Applicant failed to prove that he was the victim of unfair discrimination and the application was dismissed.

22.

ASSIGN SERVICES (PTY) LTD v NUMSA AND OTHERS

Temporary employment services (Deeming provision) – The Applicant was a registered temporary employment service in the business of recruiting, supplying and managing employees placed with clients. Krost, one of the clients, employed about 90 permanent staff and the remainder were supplied by the applicant in numbers required by projects. Section 198A of the LRA which came into operation on 1 January 2015 regulates "temporary service" employment which is limited to a period not exceeding three months. Section 198A (3)(b) provides a deeming provision stating that an employee not performing a temporary service for a client is deemed to be an indefinitely employed employee of that client and the client is deemed to be the employer.

On 1 August 2015 the Applicant placed 22 workers with Krost and these workers were employed on a full time basis in excess of three consecutive months. The Applicant was of the view that the consequence of the deeming provision was that the placed workers remained their employees for all purposes but were also deemed to be Krost's employees for purposes of the LRA. The Applicant termed this the "dual employer" interpretation.

NUMSA disagreed and was of the view that Krost became the only employer of the placed workers when section 198A(3)(b) was triggered. NUMSA termed this the sole employer interpretation.

The matter proceeded through the CCMA to the apex Court, the Constitutional Court. The CC held that legislation must be interpreted textually, contextually and purposively and that the purpose of section 198A must be aligned with section 23 of the Constitution. The CC held that employees are deemed employees of a TES client only if they are not performing a temporary service. Once triggered, section 198A(3)(b) becomes the operative clause determining the identity of the employer of the placed

employees. To prevent the client from avoiding the operation of the deeming provision, a termination of the deemed employees will constitute a dismissal.

The CC noted that the amendments were a response to widespread calls to ban labour broking. The amendment did not ban labour broking instead it aimed at offering greater protection for the TES employees earning below a specified income. The contractual relationship between the client and the placed employee does not come into existence through agreement, but rather the employee is automatically employed on the same terms and conditions as the client's permanent employees.

The CC held further that having two employers does not offer greater protection to deemed employees, as argued by Assign. The sole employer interpretation offered employees certainty and security of employment. When section 198A (3)(b) is interpreted in its context, it supports the sole employer interpretation and is in line with the purpose of the amendments.

The appeal was dismissed with cost.

23.

SOUTH AFRICAN COMMERCIAL, CATERING AND ALLIED WORKERS UNION v SPAR KZN DC

Deemed employees (Treatment) – The Applicant referred a dispute to the CCMA alleging that the Respondent is treating its members, who are the Respondent's part-time employees, less favourably than the full-time employees. The Respondent concluded a collective agreement in 2001 in terms of which casual workers would be converted to permanent part-time employees over a period of time and a further agreement that all part-time employees would become full-time employees who by 2020 would earn the same salary as permanent employees.

In 2015 a wage agreement was concluded setting different rates of pay for part-time, flexi-time and full-time employees. In 2017 the permanent flexi-time employees were granted a higher increase percentage than permanent employees.

The Court held that unlike the Employment Equity Act ("EEA") which governs equal pay claims, section 198A of the LRA provides only that part time employees must be treated "on the whole' not less favourably than full-time employees. This does not mean they must be treated equally. The Applicant could accordingly not claim equal rates of pay and benefits under its LRA-referral. The relief the Applicant was seeking should have been pursued in terms of the EEA.

24.

HOTEL, LIQUOR, CATERING COMMERCIAL & ALLIED WORKERS UNION OF SOUTH AFRICA OBO MEMBERS v PREMIER FMCG LTD NTHUTHUZELO AND ANOTHER

Unfair Labour Practice (Benefits) – The Applicants were involved in a protected strike which lasted for approximately three (3) months. The strike came to an end with the conclusion of a wage agreement. At a later stage the Applicants did not receive their normal annual incentive bonus, which was a bonus based upon the discretion of the Respondent. The Applicants claimed that this amounted to an unfair labour practice. The Commissioner noted that these incentive bonuses were paid to all other employees except the Applicants.

The issue to be decided was whether the Respondent exercised its discretion fairly and in particular whether the Respondent's conduct in not paying the discretionary bonus to the Applicants was fair. The Commissioner found that although the strike had caused the Respondent loss, the employees nonetheless contributed to profits subsequently made to recover the loss. The manner in which the Respondent conducted and exercised its discretion was

unfair. The Respondent was ordered to pay each Applicant employee his or her full bonus.

25.

MASHISHI v MDLADLA AND OTHERS

Practice and procedure (Review) – After receiving an award upholding his dismissal in July 2006 the Applicant employee filed an application for review of the award more than five years out of time. In seeking condonation, the Applicant claimed that he had referred the matter to several attorneys, none of whom had taken up the case. When eventually the applicant found an attorney willing to take up the case another seven months had elapsed before the review was filed.

The Court noted that condonation is not there merely for asking. A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the Court that condonation should be granted. The Court is required to exercise discretion, having regard for the explanation for the delay, prospects of success and prejudice to the parties should condonation be granted or not.

The delay in this case was excessive and the applicant's explanation weak. Condonation was accordingly refused. The Court referred to an article where a High Court judge suggested that there is an ethical obligation on Counsel to ensure that only genuine and arguable cases are brought to Court. There was no reason why the same should apply to attorneys and others with right of appearance in the Labour Court, who should also be subject to the possible penalties of orders of costs *de bonis propriis* or denying them their right to claim a fee. The present case was a hopeless case and the Applicant's attorneys should have advised him accordingly. Although questions of costs did not arise as the matter was unopposed, the Court warned practitioners that pursuing hopeless cases would attract consequences.

26.

ARAMEX SOUTH AFRICA (PTY) LTD v SOUTH AFRICAN TRANSPORT AND ALLIED WORKERD UNION AND ANOTHER

Bargaining Council (Demarcation) – The issue in dispute was whether Aramex's warehousing division falls within the registered scope of the Respondent bargaining council, as defined in its certificate of registration. The Respondents' case was that the Warehousing Division and the Applicant's vehicles were on the road transporting goods and that this was sufficient proof of the fact that the applicant fell within its jurisdiction. The Applicant contended that it was not rewarded for the transportation of goods; it merely transported client's goods that were in storage. The Applicant claimed that its nature of business was for the storage of goods, not cartage.

The question was whether the dedicated transport division could be said to be subsidiary to the main function of the Applicants' business. The Commissioner held that the Applicant's own evidence indicated that it was so, and held that the business fell within the scope of the Respondent bargaining council.

27.

LIPHOKO v MIPRINT CONSULTING (PTY) LTD

Practice and Procedure (Jurisdiction) – The Respondent contended that the CCMA lacked jurisdiction because the Applicant's contract of employment stipulated that any disputes arising from it will be referred to private arbitration. The Applicant contended that if it were so, the Respondent should bear the costs for private arbitration, failing which the matter should be heard by the CCMA. The only issue between the parties was who was to pay for the private arbitration. The Commissioner held that a ruling on who should pay the arbitration fee would usurp the authority of the private arbitrator.

The application was dismissed for want of jurisdiction.

28.

CHITSINDE v SOL PLAATJIE UNIVERSITY

Discrimination (Arbitrary grounds) – The Applicant was employed at the National Institute of Higher Education (NIHE) and was dismissed for operational requirements. The newly established Sol Plaatjie University offered former employees of NIHE preference to apply for posts. The Applicant applied unsuccessfully for two posts. A dispute was referred by the Applicant's union to the CCMA alleging that he had been discriminated against. The Applicant claimed that he was discriminated against on an arbitrary ground because he was the only candidate made to write a test during the interview process. The university argued that the Applicant had been asked to set out in writing how he saw his role in the position to give him a further opportunity because of his poor showing at the interview.

Where unfair discrimination is alleged on an arbitrary ground, the complainant must prove that the conduct complained of amounted to discrimination and if so that it was irrational and unfair. The Applicant's credibility was held to be compromised because he raised allegations of victimisation and bias for the first time when he testified. The Court held further that the Applicant had been treated more favourably than the other candidates in that he was asked to supplement his oral interview in writing. The Applicant accordingly failed to discharge the onus of proving that he had been unfairly discriminated against.

The application was dismissed with costs.

29.

NUMSA OBO TINYIKO v FRESHMARK (PTY) LTD

Jurisdiction (Organisational Rights) – The Applicant trade union sought organisational rights from the Respondent, a subsidiary of Shoprite Checkers. NUMSA had referred a dispute regarding dismissal of one of its members to which the Respondent contended that NUMSA lacked *locus standi* to

represent the employee. A Commissioner agreed that NUMSA's constitution was only confined to the metal and engineering industry and dismissed the application.

NUMSA simultaneously filed a review application of that ruling and for its rescission as well as an application for condonation for rescission which was 22 weeks late. The review application was subsequently withdrawn. It was found that NUMSA had failed to show good cause for the late filing of the rescission application. The delay was due to gross negligence on the part of the union. The Commissioner ruled that NUMSA should have persisted with the review because the CCMA lacked jurisdiction to entertain the rescission application or the application for condonation while the original ruling still stood. The application was dismissed.

30.

POLICE AND PRISONS CIVIL RIGHTS UNION V SOUTH AFRICAN CORRECTIONAL SERVICES WORKERS' UNION AND OTHERS

Practice and Procedure (Organisational Rights) – After forming as a breakaway from the appellant union ("POPCRU"), the first respondent, a minority union ("SACOSWU") was granted certain organisational rights by the respondent employer. POPCRU sought to prevent SACOSWU from obtaining a foothold in the Department of Correctional Services ("DCS"). It contended that its threshold agreement with the DCS in terms of section 18 of the LRA prohibits the latter from bargaining with and entering into a collective agreement granting organisational rights to SACOSWU. SACOSWU argued that section 18 LRA merely authorises employers and majority unions to establish a threshold for the automatic acquisition of organisational rights. When the matter reached the Constitutional Court, it was found that the threshold agreement on which the matter turned had been repealed. All Justices agreed that this rendered the appeal moot. Two Justices would have refused the appeal on this ground alone but seven justices felt that it was in

the interests of justice to grant leave to appeal to consider the relationship between sections 18 and 20 of the LRA.

The CC held that properly interpreted, section 18 cannot be interpreted in a manner that deprives the right of minority unions of basic organisational rights and the right to bargain for them. The DCS had accordingly not breached the threshold agreement by conferring rights of entry to the workplace on SACOSWU. POPCRU was granted leave to appeal but its appeal was dismissed.

_____*January 2019*