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LABOUR LAW UPDATE

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

Constitutional Court

NUMSA obo Khanyile Nganezi and others v Dunlop Mixing and Technical Services (Pty) Ltd and others (Derivative misconduct)

The matter has its genesis in the events which occurred in August/September 2012 where a protected strike was marred by violence from its inception. Ultimately all striking employees were dismissed.

The arbitrator in the unfair dismissal dispute distinguished between three categories of the dismissed striking employees:

(i) those that were positively identified as committing violence during the strike;

(ii) those employees who were identified as being present when violence took place but who did not physically participate; and

(iii) those employees that were not positively and individually identified as being present when violence was being committed.

The dismissals of groups (i) and (ii) were found to be fair, whereas the dismissal of group (iii) was held to be substantively fair by the arbitrator, and their reinstatement was ordered. The litigation history in the Labour Court,

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Labour Appeal Court, and the Constitutional Court hence concerned only the third category of dismissed employees.

In seeking to have the dismissals declared fair, Dunlop relied on the derivative misconduct argument, and more particularly, that there had been a duty of good faith or a fiduciary duty on such employees to advise Dunlop who the perpetrators of the strike violence were. That, in the absence of such information being provided, the employees were either part of the violence and/or they associated themselves with the strike misconduct.

The CC ultimately held that the dismissal of the third category of employee was indeed unfair. In reaching such a conclusion, at paragraph 75 of its judgment, the CC held that "*the reciprocal duty of good faith should not, as a matter of law, be taken to imply the imposition of a unilateral fiduciary duty of disclosure on employees. In determining whether, as a matter of fact, a unilateral fiduciary duty to disclose information on the misconduct of co-employees forms part of the contractual employment relationship, caution must be taken not to use this form of indirect and separate misconduct as a means to easier dismissal rather than initially investigating the participation of individual employees in the primary misconduct. A failure to appreciate that there are many ways, direct and indirect, for employees to participate in and associate with the primary misconduct increases this risk. Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the misconduct. Presence at the scene will not necessarily be required. Even prior or subsequent knowledge of the violence and the necessary intention in relation to association with the misconduct will still be sufficient*".

The CC held further, at paragraph 78 that "*Dunlop's reciprocal duty of good faith required, at the very least, that employees' safety should have been guaranteed before expecting them to come forward and disclose information or exonerate themselves*". The CC held that this had not sufficiently been done.

As such, whilst the CC has narrowed down the use of the derivative misconduct doctrine, it remains available to employers subject to the guidance provided by the Court.

LONG v SOUTH AFRICAN BREWERIES (PTY) LTD AND OTHERS *(Misconduct)*

The applicant was dismissed by the respondent after it was established that the respondent's vehicle fleet in the region, had fallen into disrepair. The applicant was in charge of the region. Many vehicles were not roadworthy and others unlicensed due to fraudulent activities. The applicant was suspended on full pay whilst investigations were conducted. The applicant was subsequently dismissed followed by him referring two disputes to the CCMA: one relating to his suspension and the other to his dismissal.

One Commissioner found that the applicant's suspension was unfair and awarded him compensation and the other Commissioner found that fleet maintenance did not fall within the applicant's responsibilities, declared the dismissal unfair, and ordered his retrospective reinstatement.

The Labour Court set aside both awards on review, holding that there was no requirement that an employee must be allowed to make representation before a precautionary suspension and that the suspension period was reasonable. Regarding the dismissal, the Court held that the Commissioner simply regurgitated evidence without assessing and drawing conclusions and without deductive reasoning. Had the Commissioner done so, so the Court found, the Commissioner would have found that the applicant was guilty of dereliction of duty.

The Constitutional Court refused leave to appeal against the findings of the Labour Court in respect of both the suspension and the dismissal holding that the law does not require a hearing before precautionary suspension and that the respondent had a valid reason to dismiss the applicant.

Labour Appeal Court

LEGAL AID SOUTH AFRICA v MAYISELA AND OTHERS *(Insubordination)*

The respondent employee was dismissed after being found guilty of a list of charges of misconduct. The CCMA Commissioner ruled the dismissal procedurally and substantively fair but the award was set aside on review and remitted back to the CCMA. A second CCMA Commissioner similarly found the dismissal fair. The second round at the Labour Court however found the dismissal unfair insofar as the employee had been found guilty incorrectly on six of the nine charges.

The matter then proceeded to the Labour Appeal Court where it was held that the LC erred in exonerating the employee from the charges: the employee refused to attend meetings called by his superiors to discuss his performance and rendered himself guilty of insubordination and insolence in the process. The LAC noted that the Commissioner found that the uncooperative and defiant attitude of the employee had concluded with a personal attack on the integrity of his superior, which amounted to an accusation that she was racist. The LC held that unfounded allegations of racism have a deleterious effect on workplace relationships and are demeaning, insulting and amounts to an attack on the accused person's dignity. The appeal was upheld.

AUTOZONE v DISPUTE RESOLUTION CENTRE OF MOTOR INDUSTRY AND OTHERS *(Dishonesty)*

The respondent employee was instructed to appoint casual labour to clean up waste and he recruited three casual labourers to do so. The employee was asked to draw R150 from petty cash to pay the three casual workers; the employee however drew R180, yet still paid the casuals R50 each and kept the balance. The employee claimed that he retained the balance as the casuals had not completed their work. The employee was dismissed for gross dishonesty.

When confronted, the employee claimed that he decided to pay the casuals R60 each. The Arbitrator upheld the dismissal but the Labour Court set the award aside on the sole ground that no evidence was led to prove that the trust relationship had been destroyed and reinstated the employee. The Labour Appeal Court held that the Labour Court erred in this regard: no evidence of a breakdown of trust need be led in cases where an employee's misconduct discloses dishonesty and deceit – that the restoration of the employment relationship would be intolerable in such circumstances may be assumed. The appeal was upheld.

***SOUTH AFRICAN RUGBY UNION v WATSON AND* OTHERS** *(Insolence)*

The respondent employee was dismissed for using grossly offensive language at a training camp for referees and bringing the appellant's name into disrepute. The dismissal was upheld by the Arbitrator after an enquiry conducted under section 188A of the LRA. On review, the Labour Court altered the sanction to a final written warning and reinstated the employee.

The LAC noted that the court a *quo* agreed with the Arbitrator's finding that the employee's language and conduct was grossly inappropriate, unprofessional, unbecoming and offensive, however, relying on the appellant's disciplinary code, the LC held that progressive discipline should have been followed and that the Arbitrator's finding was unreasonable.

The Labour Appeal Court held that the LC had conflated the concepts of appeal and review. The employee contended that the appellant should have dealt with his case as one of incompatibility, not misconduct, and that the Arbitrator failed to assess the case as such. The evidence however indicated that several referees had complained of the employee's conduct. Even if the Commissioner had made some errors of fact or law, none were so serious as to detract from the reasonableness of his findings. The appeal was upheld.

Labour Court

CHEP SOUTH AFRICA (PTY) LTD v SHARDLOW NO AND OTHERS *(TES)*

The respondent employees were employed by a company (C-Force) to repair pallets for the benefit of the applicant. The pallets are then supplied in their refurbished condition to the clients of CHEP. The employees referred a dispute to the CCMA claiming that C-Force was a TES and that they had been deemed to be employees of CHEP by virtue of section 198A of the LRA. The Commissioner ruled that C-Force was a TES and that the employees were deemed employees of CHEP.

CHEP contended on review that C-Force was not a TES but a service provider. The Labour Court held that the test applicable on review was whether the award was right or wrong rather than whether it was reasonable. In terms of the TES, the Commissioner was required to determine whether C-Force provided CHEP with “other persons” to perform work for CHEP; that those persons were remunerated by C-Force; and that C-Force provided those persons labour to CHEP for reward. On this analysis, C-Force could not be said to be a TES. The employment relationship between C-Force and CHEP was also not covered by a second legal fiction created by section 198. The Court noted that C-Force was not providing CHEP with other employees but rather provided a product. C-Force received no reward for supplying workers to CHEP but was pursuing its own business for profit. There was no indication that the relationship between C-Force and CHEP was subterfuge designed to evade section 198A.

The relationship accordingly fell outside the scope of section 198. C-Force was declared not to be a TES.

SINGHALA v ERNST AND YOUNG INCORPORATED AND ANOTHER *(LC Jurisdiction)*

The applicant applied for a position as a trainee accountant with the respondent and cited his father, Atul Gupta, as a reference. The applicant was appointed on a two-year fixed-term contract set to expire at the end of December 2019.

After one of the respondent's clients asked that the applicant be removed from an audit because of possible conflict of interest, the respondent noted that his name appeared on one of the many leaked emails concerning Gupta owned firms. The respondent subsequently asked the applicant if he was prepared to leave amicably, which discussions led to a stalemate.

The applicant was given a notice of retrenchment and was dismissed on 22 August 2017, after which he launched an urgent application declaring his dismissal unlawful, discriminatory and automatically unfair and sought reinstatement. The respondent contended that the Court lacked jurisdiction to entertain the matter.

The Labour Court observed that unlawful dismissals are covered by section 187(1) of the LRA which creates a category of automatically unfair dismissal. These were the grounds the applicant relied upon. The Court disagreed with the judgment in *Solidarity and others v SABC* to the extent that it suggested section 157(2) of the LRA creates room for challenges to unlawful dismissals in the LC. Dismissed employees must pursue remedies under the LRA. The Court accordingly lacked jurisdiction to entertain the application.

SN v SKY SERVICES (PTY) LTD *(Automatically unfair dismissal)*

The applicant was employed as a picker/packer in 2009. His job was highly physical in that it involved, amongst others, operating a forklift, loading and offloading cargo, and manually packing and unpacking pallets. The applicant underwent a medical assessment and was declared medically unfit. He was accordingly dismissed for incapacity. The applicant contended that his dismissal was unfair because the reason was based on his HIV status. The

responded contended *in limine* that the court lacked jurisdiction because he was dismissed for incapacity.

Although the applicant proved that he was HIV positive, he failed to prove that anybody in management was aware of this condition. The applicant conceded that he initially refused to undergo the medical assessment as he viewed his condition, private. The applicant was declared medically unfit for work and the reason for his dismissal was therefore incapacity. The Court accordingly lacked jurisdiction to hear the matter and the dispute was referred for to the CCMA.

KGWEDI v BIDVEST PROTEA COIN (PTY) LTD *(Settlement Agreement)*

The applicant was employed as a security guard by the respondent and after failing a polygraph test, signed a retrenchment agreement. The applicant later claimed that he had done so under duress and that the document was not properly explained to him. The applicant referred an unfair dismissal dispute to the Labour Court. The Court held that settlement agreements must be interpreted according to the principles of contract law. The applicant was not an unsophisticated person and had signed the document and initialled each page. The Court noted that the applicant had not claimed that the termination agreement was unlawful before referring the dispute. It was found that the applicant failed to prove that the agreement was concluded under duress and the fairness of his dismissal, therefore, did not arise. The application was dismissed.

PANSEGROUW v RENDEALS FOUR CONSULTING (PTY) LTD *(Retrenchment)*

After the applicant was retrenched by the respondent he instituted a claim under the BCEA for notice and leave pay, salary increases he had foregone and contractual vehicle expenses. The respondent contended that the claims for notice and leave pay had been compromised by a settlement agreement

concluded in the CCMA and that the Labour Court lacked jurisdiction to entertain the claim for salary increases.

The LC held that a party relying on a special plea of *res judicata* is required to prove the requirements of such defence. The respondent had not pleaded that the same dispute had been referred to the CCMA. The plea of *res judicata* accordingly failed. The Court however held that the applicant had waived his right to pursue statutory payments in respect of his claim for notice and leave pay. The claim had accordingly been compromised. The claim for unpaid salary increases was a claim for contractual damages, over which the court has jurisdiction. The Court ruled accordingly.

ANGLOGOLD ASHANTI LTD t/a ANGLOGOLD ASHANTI AND OTHERS v AMCU *(Secondary Strike)*

The matter concerned an application by 10 mining companies to interdict a secondary strike called by AMCU in support of its dispute with Sibanye, which had led to a four month primary strike. The Labour Court accepted that AMCU complied with all the requirements of section 68 of the LRA. The matter turned solely on whether the proposed secondary strike was reasonable when measured against its purpose. The Court accepted that all the applicant companies would suffer considerable loss if the secondary strike went ahead and that the national economy would also be damaged. However, the critical issue was whether the applicant companies could apply pressure on Sibanye to give in to AMCU's demands. The Court found that none could do so, either individually or through its membership of the Mineral's Council. The proposed secondary strike was declared unprotected.

Other Dispute Resolution Forums

CHEMICAL, ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS' UNION OBO STUURMAN AND OTHERS v WHITCHER *(Dishonesty)*

The applicant employees were dismissed for gross dishonesty for presenting fraudulent medical certificates after they had been away from work without permission. The applicants claimed that the respondent applied discipline inconsistently and subjected them to double jeopardy because the sick leave payments made to them had been deducted from their salaries.

The respondent claimed that some employees admitted to buying the false certificates, the remainder gave contradictory explanations for how they obtained them and that the recovery of payment of sick leave was monies paid in error. One of the employees had not been disciplined because she owned up and agreed to testify against the others.

The Commissioner held that the certificates submitted by the employees were mere hearsay because the doctor who issued them had not testified. That one of the culprits had not been dismissed because she owned up and testified against them in their disciplinary proceedings did not amount to inconsistency. The recovery of payment of sick leave the employees had been paid did not render the subsequent disciplinary proceedings subject to double jeopardy. The dishonesty of the employees had destroyed the trust relationship. The dismissals were upheld.

REDDI v UNIVERSITY OF KWAZULU-NATAL *(Racism)*

The applicant employee was dismissed for using racially offensive and derogatory language towards a colleague. She argued that her dismissal was not in accordance with the employer's disciplinary code and that the sanction was too harsh. It was held that the fact that the applicant was black made no difference, and that her comment was aimed at demeaning the dignity of the complainant as a white person. The dismissal was held to be fair.

MAKHANYA v ST GOBAIN *(Racism)*

The applicant accused a foreman during a counselling session for his team that he ruled with an iron fist and remarked "you think it is the time when

Boers were in charge". The applicant was dismissed for making racist remarks. The applicant denied that the comment was racist. The Commissioner held that the term "Boer" has a pejorative connotation similar to the word "k*****" as both are designed to cement racial stereotyping of the kind discouraged by the courts. The consequences of the applicant's actions were aggravated by the position he held and had rendered the employment relationship intolerable. Dismissal was found to be fair.

SOLIDARITY OBO ZUZANE v PERISHABLE PRODUCT EXPORT CONTROL BOARD *(FTC's)*

The applicant had been employed by the respondent on successive fixed-term contracts for four years. He claimed that he was entitled to be permanently employed in accordance with section 198B(5) of the LRA. The respondent claimed that it employed permanent staff only for continuous operations and temporary staff, of which the applicant was one, only during peak season and that the employee lacked skills required of permanent employees.

The respondent's business depended on harvested fruit. That the employee accumulated leave during these periods was irrelevant to the issue because he was entitled to leave for periods worked. The Commissioner found that the employee's work was of a seasonal nature and that there was justifiable reason for employing him on fixed-term contracts. The referral was dismissed.

DYERS v WESTERN CAPE NATURE CONSERVATION BOARD *(Dismissal in absentia)*

The applicant was dismissed after being found guilty on a range of charges after a disciplinary hearing was held in her absence. She claimed that the respondent failed to take into account her mental state at relevant times and that her dismissal was procedurally unfair as she was ill at the time the disciplinary hearing was held. The respondent declined to postpone the disciplinary hearing because it was not persuaded that the applicant was

incapable of attending the hearing and that it had not been made aware of the employee's medical condition.

The Commissioner noted that the applicant's evidence was supported by her doctor. The respondent had been informed by a number of sources that the applicant was mentally disturbed and the respondent's own psychiatrist had detected signs of bipolar disorder. The Commissioner was not persuaded that the applicant had intentionally challenged management's authority, as the respondent claimed. The Commissioner found that management had sufficient information to know that something was amiss with the applicant's mental state and was in no position to question the authenticity of the medical certificate. Furthermore, the respondent requested a report on the applicant's medical condition on the day after the hearing, which confirmed that she had exhibited symptoms of paranoia for several months. The least that should have been done was to stand the matter down or suspend the outcome of the hearing until her condition was established by a company appointed doctor. The dismissal was ruled both substantively and procedurally unfair and was reinstated.

NUMSA obo KWANINI v VOLKSWAGEN SOUTH AFRICA (PTY) LTD *(Absenteeism)*

The applicant employee was dismissed for unauthorised absence from work for seven days. He had submitted sick notes for the full period which the respondent rejected. The employee failed to attend his disciplinary hearing but claimed that his dismissal had been substantively and procedurally unfair.

The Commissioner noted that the employee had a poor disciplinary record and had been warned twice about his attendance and was cautioned that his sick notes will not be accepted unless they were substantiated by the doctor. In absence of a supporting affidavit from the doctor, the sick notes could not be admitted as evidence at arbitration as they were hearsay. The employee had an abysmal attendance record and was already on a final warning for absenteeism. The respondent was in the circumstances entitled to assume

that the employee was abusing his sick leave and to treat his further absence as unauthorised. The dismissal was found to be fair.

ABANQOBI WORKERS UNION OBO MEMBERS v IR VOIGHTS (PTY) LTD *(Organisational Rights)*

The applicant union claimed organisational rights from the respondent, which operated five farms in KZN and performed contract work for various agricultural businesses. The company declined to grant organisational rights because the union's membership consisted of only 18% of the total workforce of the five farms, which formed a single workplace. The Commissioner found that as difficult as it may be for unions to organise in the agricultural sector, granting organisational rights to a union with such insignificant membership might lead to proliferation of unions in the workplace because other minority unions might be encouraged to apply. The union was accordingly not entitled to organisational rights.

AUGUST v POPS LIQUOR STOP (PTY) LTD *(Discrimination)*

After the applicant had been suspended, she referred a dispute to the CCMA claiming that she had been unfairly discriminated against because the owner had used foul language and referred to her and her colleagues as "bitches". The owner admitted to swearing on occasion and claimed that the reference to "bitches" was meant as a joke.

The Commissioner noted that the applicant was unable to specify the ground on which she based her claim. A claimant in an unfair discrimination claim must still specify the ground relied upon. The use of bad language did not constitute discrimination. The applicant did not show that she was treated differently from other employees nor had she proved that her dignity had been impaired. The employee had accordingly failed to prove that she was unfairly discriminated against and the application was dismissed.

NATIONAL CONSTRUCTION BUILDING AND ALLIED WORKERS UNION OBO SHARDRACK AND OTHERS v SOLID DOORS (PTY) LTD *(Organisational Rights)*

The applicant union sought organisational rights in terms of section 12, 13, 14, 15 and 16 of the LRA. The company refused to grant organisational rights because it regarded the union as insufficiently representative in the company as a whole. The union claimed that it was entitled to organisational rights because it obtained majority status in one of the company's factories.

The Commissioner ruled that the respondent's workplace consisted of all its manufacturing and distribution centres and the union acquired only 12,8% membership in the total workforce. A verification exercise indicated that the union acquired 41% membership in one of the plants. The Commissioner found that since it had acquired 41% membership in one of the manufacturing plants in which there was no union representation, the union was entitled to rights in terms of 12, 13 and 15 of the LRA.

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