



\* Case Law Update

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**A review of recent decisions of the Labour Court, Labour Appeal  
Court and CCMA**



# MEC Department of Finance, Eastern Cape v De Milander

- The main issue was whether De Milander had been dismissed – section 186(1)(b) of the LRA
- De Milander had to prove that she had had a reasonable expectation of renewal of her contract
- This entailed answering two questions: first, had she actually expected her contract to be renewed and second, if so, was that subjective expectation reasonable?
- De Milander failed the first leg of the test. She had been transferred to a permanent post, which had been advertised soon after her transfer
- This must have given De Milander food for thought. When the post had been advertised for a full time appointment, she could not have expected her fixed-term contract to be renewed
- Even in the absence of testimony from the officials concerned, De Milander's claim that she had been promised a new contract was at odds with correspondence between the parties De Milander had failed to satisfy the first part of the test: that she had actually believed that her contract would be extended



# Dyasi v Ondestepoort Biological Products Limited & Others

- A tussle between Minister of Agriculture, Forestry and Fisheries and the board of the company over whether its managing director should be suspended and disciplined
- The company is a parastatal. The State is the majority shareholder
- The Minister has the power to appoint the MD but the board must manage the company's day to day affairs
- The board decided to suspend Dyasi pending disciplinary proceedings. The Minister instructed the board to lift the suspension and drop the proceedings but the board refused to do so
- Dyasi was accused of sleeping with a female colleague, discussing other colleagues with her and interfering with her remuneration report which formed the basis of a collective agreement with the trade unions
- Dyasi approached the Court on an urgent basis for, *inter alia*, an order uplifting the suspension and stopping the disciplinary proceedings



# Dyasi v Ondestepoort Biological Products Limited & Others

- The urgent application was postponed and Dyasi was dismissed
- When the Court reconvened it was still necessary to establish whether the disciplinary proceedings had been lawful
- While the Minister had the power to appoint the MD, it did not follow that this entailed suspending and disciplining him. Matters of discipline were a managerial prerogative
- The MD was employed by the company and the board accordingly had the authority to decide whether to institute disciplinary action against him and whether to recommend to the Minister that he be dismissed
- The charges against the MD were serious and called for disciplinary action. The board was obliged by the PFMA to take effective disciplinary measures to deal with misconduct of this nature
- The board not only had the authority to institute disciplinary proceedings against Dyasi but was obliged to do so in these circumstances



# NEHAWU & Others v Van der Bijl Park Society for the Aged

- The Society retrenched a number of NEHAWU members in an outsourcing operation and the union referred a dispute to the CCMA and a certificate was issued confirming that the dispute remained unresolved
- The union instructed an attorney and a statement of claim was delivered, however it was outside the ninety day time limit by some three months
- The union applied for condonation claiming that the delay was due to lengthy internal processes the union had to follow before approval could be obtained to instruct attorneys
- The union had three months to deal with the matter. When it finally instructed an attorney it took a further eighty-seven days to file the statement of claim and the attorneys had not explained their ‘tardiness’ and accordingly it had to be assumed that the delay had been caused by the union alone



# NEHAWU & Others v Van der Bijl Park Society for the Aged

- The Court accepted that NEHAWU was a large and complex organisation but this cut both ways
- In the fifteen years since the LRA, the union had enough time to adapt its internal procedures so as to comply with the ninety day time period
- The union also failed to prove that it had reasonable prospects of success – the Society had undertaken to request the service provider to employ as many of the affected employees as possible, and all of them but the applicants had been transferred or had accepted the agreed severance package
- The application for condonation was refused



# National Union of Mine Workers & Others v Revan Civil Engineering Contractors and Others

- A group of three companies of which Revan formed a part decided to retrench employees owing to a decline in tenders. A labour consultant representing the company sent the union three separate notices in terms of section 189(3)
- The companies contemplated retrenching thirty workers. After a month of consulting thirty-nine more names were added to the list
- All the workers were selected on two basis: the first was an assessment of the need to continue operating certain equipment and the second was LIFO
- The union referred an alleged unfair dismissal dispute to the Labour Court
- At the start of the trial the companies conceded that for the purposes of the retrenchment they should have been treated as one employer and that section 189A applied
- The companies contended that if section 189A applied then the Court lacked jurisdiction to pronounce on the procedural fairness of the retrenchments
- The union argued that since section 189A applied the Court could and should declare the retrenchment notices unlawful and invalid, which would have the result that the retrenched workers would effectively be reinstated from the date of their notices of dismissal



# National Union of Mine Workers & Others v Revan Civil Engineering Contractors and Others

- The Court rejected the union's argument. Termination notices may be declared invalid only on an interim basis, pending compliance with the provisions of section 189A and the Union was seeking permanent relief
- An order declaring the retrenchment notice unlawful could not be granted where, as in this case, it is sought at the commencement of trial proceedings. Then the order must be final
- In relation to the employers' argument the Court held that if employers could avoid an inquiry into procedural fairness by admitting that a retrenchment fell within the scope of section 189A it would mean that employers could evade their obligations to comply with section 189 only to concede that section 189A was applicable and then to challenge the Court's jurisdiction to consider procedural fairness
- The union had not been given an opportunity to appoint the facilitator because the employers had chosen to conduct their consultations as if section 189A did not apply. Section 189A contains important procedural safeguards and the employers' evasion of those safeguards was sufficient in itself to render the retrenchments procedurally unfair



# National Union of Mine Workers & Others v Revan Civil Engineering Contractors and Others

- Adding the names of thirty-nine employees to the retrenchment list without any consultation having taken place in respect of them was in itself unfair
- In relation to substantive fairness the Court held that in terms of both sections 189(7) and 189A(19) employers must select employees for retrenchment according to criteria that are agreed on, or are fair and objective
- The employers had conceded that there was no agreement on selection criteria and the issue was therefore whether the method of selection was fair and objective
- While retaining necessary skills is a valid consideration, the workers had been assessed according to their supervisors' views on whether they could perform the work concerned. Apart from the fact that separate selection exercises had been performed within each company, rather than across them, the criteria used were not objective
- The dismissal of all the employees was accordingly substantively unfair and the Court ordered the companies to reinstate those employees who would not have been selected had fair selection criteria been applied and to compensate the equivalent of six months' wages those who would in any event have been selected



# Rainbow Farms (Pty) Ltd v CCMA [2011] 5 BLLR 451 (LAC)

- Employee was dismissed for unauthorised removal of company property
- He was caught attempting to leave the premises with a litre of milk. The milk had been issued to the employee free of charge to drink while on duty, however employees were prohibited from removing 'free issue' items from the premises
- The CCMA ruled that the dismissal was unfair because it had not been proved that the employee was aware of the rule prohibiting removal of 'free issue' milk. The Labour Court dismissed the company's review application on the ground that the employee was not guilty of the charge of unauthorised removal of milk because he had not yet left the premises when he was apprehended and that a lesser sanction than dismissal would have been more appropriate
- During the arbitration proceedings the employee's main contention was that the rule prohibiting removal of company property did not cover 'free issue' milk. The arbitrator had accepted that the employee was unaware of the rule because he had not attempted to conceal the bottle of milk when he left the premises



# Rainbow Farms (Pty) Ltd v CCMA [2011] 5 BLLR 451 (LAC)

- The LAC found that:
  - the finding on review that the employee could not be guilty of ‘unauthorised removal of company property’ was incorrect. It was common cause at the arbitration that the employee had attempted to remove the milk from the premises
- The removal of the milk from the kitchen with the intention of carrying it off the property was in itself sufficient ground to sustain a charge of unauthorised removal of company property
- While there was no merit to the company’s argument that there was no difference between the offences of removal or attempted removal and being in unauthorised possession of property, the proper test for distinguishing between completed and uncompleted acts of appropriation is whether the owner has lost possession and the appropriator acquired possession – this occurred when the employee removed the milk from the kitchen
- The Court a quo’s finding that the active removal had not been completed was accordingly wrong
- In relation to the employee’s contention, raised for the first time in argument in review, that dismissal was not the appropriate sanction, the Court noted that while parties to motion proceedings are required to properly identify issues to enable the other parties to reply, fresh legal arguments may be raised even if not specifically mentioned, provided that they arise from the facts alleged



# Rainbow Farms (Pty) Ltd v CCMA [2011] 5 BLLR 451 (LAC)

- The employee was required to raise the issue of an alternative sanction in his answering papers because the company's founding papers raised only the point relating to the alleged insufficiency of the evidence to justify the arbitrator's finding. Since the company had clearly been prejudiced by being deprived of the opportunity to deal with that point in reply, the Court a quo had further erred by considering argument on that issue
- The arbitrator himself rejected the employee's evidence that there were exceptions to the rule against removing 'free issue' milk from the premises
- The fact that the employee had openly displayed the milk when he reached the security gate could be seen, not only as indicative of his belief that he was entitled to remove the milk, but also as a brazen act of defiance
- When all the evidence was taken into account, the inescapable conclusion was that the employee had contravened a rule of which he was fully aware, and that he had been dishonest
- The arbitrator's conclusion that dismissal was unfair, was accordingly, not a conclusion a reasonable commissioner could have reached



# Mangope v SA Football Association [2011] 4 BLLR 391 (LC)

- Mangope and SAFA concluded a three year fixed-term contract, subject to a three month probationary period
- After three months the probationary period was extended for a further month because Mangope had been off sick for some time and at the end of that month the contract was terminated
- Mangope claimed that the termination was unlawful because he had been given no indication that his performance was lacking and because SAFA breached its obligation to treat him fairly, Mangope sought compensation equal to the remuneration he would have received for the balance of the contract
- SAFA contended that Mangope's performance had been poor and alleged that the matter could not be resolved on motion proceedings because of numerous disputes of fact
- The Court noted that it is generally inappropriate to pursue by way of motion proceedings matters in which there are genuine and material disputes of fact, however not every dispute of fact requires applications to be referred for oral evidence



# Mangope v SA Football Association [2011] 4 BLLR 391 (LC)

- In labour matters especially the Court must adopt a robust approach when assessing alleged disputes of fact
- The Court found that the disputes of fact emanated largely from SAFA's side and that many arose from a misunderstanding of the cause of action and the issues
- The action had been instituted in terms of the common law and the facts are of narrow compass
- Nothing turned on the reasons why the probation period was extended. The sole issue was whether SAFA had complied with the terms of the agreement before terminating it
- The contract expressly provided that should Mangope's performance be found lacking during the probationary period he would be advised and counseled
- Remedies for employees can be found either in the common law or in the LRA. The LRA has not affected the remedies available to employees under the law of contract – under the common law the unlawful breach or repudiation of an employment contract entitles the employee to challenge the breach, or to accept it and sue for damages
- The contract expressly stipulated that before termination on the ground of performance SAFA would follow certain procedures akin to those set out in the code of good practice. On the evidence it was plain that SAFA failed to follow those procedure and all that SAFA did was to forward certain complaints about Mangope's performance to him
- SAFA had not availed itself of the opportunity to reply to Mangope's affidavit concerning mitigation of damages
- Mangope was awarded R1 777 000.00 (One million seven hundred and seventy seven thousand rand) as damages



# Stander v Education Labour Relations Council & Others [2011] 4 BLLR 411 (LC)

- Stander taught for thirty years and was dismissed for slapping a seventeen year old pupil. Stander claimed he had been provoked to a degree that rendered his action involuntary
- At a disciplinary hearing (two years after the incident) Stander was found guilty of assault with intent to do grievous bodily harm. His dismissal was upheld by the arbitrator
- The Court noted that the arbitrating commissioner had relied on a judgment of the Industrial Court in which it was held that if, after investigation, an employer mistrusts an employee, the employment relationship may be terminated
- The Court found that the commissioner had not considered whether the dismissal was fair but had rather accepted that the employer had a *bona fide* belief that the employee should be dismissed. As a result the commissioner had failed to enquire into whether Stander had intended to assault the learner and had ignored psychiatric evidence, admitted by consent, which indicated the contrary
- The commissioner had also inexplicably found, without supporting evidence, that Stander might repeat a similar offence
- The award was set aside and remitted to the council to be heard by another commissioner



# Sardel Group Trading (Pty) Ltd t/a Romatex Home Textiles v Petersen & Others [2011] 2 BLLR 211 (LC)

- Employee, a maintenance fitter, refused to perform maintenance work during annual shutdown unless the company paid him more than his normal rate of pay
- He was dismissed for refusing to obey a lawful instruction
- A commissioner found that compelling employees to work during the annual shutdown breached the provisions of the BCEA and the main agreement of the Bargaining Council
- The Court noted that the BCEA and the collective agreement both prohibit requiring or permitting employees to work 'during any period of annual leave'
- In terms of his employment contract the employee was entitled to twenty days annual leave. The commissioner had erroneously equated the company's annual shutdown with annual leave
- The employee had always worked during annual shutdowns and was allowed to take his annual leave at any other time of the year
- The award was reviewable on that basis and since the reason for the dismissal was fair it followed that the dismissal must be fair



## Mahlamu v CCMA & Others [2011] 4 BLLR 381 (LC)

- The company employed Mahlamu as a security guard. His employment contract stipulated that it would expire automatically on termination of the contract between the company and its client or if the client no longer required Mahlamu's service 'for whatever reason'
- When the client cancelled the security contract the company informed Mahlamu that his services were no longer required because it had no alternative position for him
- Mahlamu referred an alleged unfair dismissal dispute to the CCMA
- A commissioner found that since the client no longer required Mahlamu's services, the employment contract between Mahlamu and the company had terminated automatically and that Mahlamu had accordingly failed to prove that he had been dismissed
- Contending that the commissioner made a material error of law, Mahlamu approached the Labour Court on review

# \* Mahlamu v CCMA & Others [2011] 4 BLLR 381 (LC)

- Labour Court
  - Judges had adopted different views on the legal consequences of contracts of service the duration of which are linked to the happening of some external event. However in dealing with that issue in *SA Post Office Limited v Mampeule* [2010] 10 BLLR 1052 (LAC) the Labour Appeal Court had endorsed the view that parties may not contract out of the fairness requirements of the LRA and that in such cases the employer must still prove that the termination clause was fairly triggered
- The import of the commissioner's award was that the applicant's security of employment was entirely dependant on the will or whim of the client. The client could at any time, and for any reason, simply state that the employee's services were no longer required and, that done, the contract would terminate automatically and by operation of law, leaving the employee with no remedy



## Mahlamu v CCMA & Others [2011] 4 BLLR 381 (LC)

- The LRA gives every employee the right not to be unfairly dismissed. Section 5 prohibits preventing employees from exercising rights conferred on employees, except by contractual provisions permitted by the LRA
- Accordingly the question was whether contracts of the type concluded between Mahlamu and the employer were permitted by the LRA
- A contractual device that purports to render the termination of a contract of employment as something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of section 188 of the LRA, is the very mischief that section 5 of the Act prohibits
- Secondly, the contractual term to this effect does not fall within the exclusion in section 5 (4) because contracting out of the right not to be unfairly dismissed is not permitted by the Act
- This reasoning did not apply to contracts where termination is set by the occurrence of a particular event. In such cases there is no conversion of a right not to be unfairly dismissed into a contractual right. However, where the event is, for example, a defined act of misconduct or incapacity, or, as in the present instance, a decision by a third party that has the consequence of termination of employment, the fair dismissal provisions of the LRA are flouted
- Accordingly the Court held that the commissioner had committed a reviewable error of law and the arbitration award was set aside



# SAFA v Ramabulana N.O. & Another [2011] 3 BLLR 291 (LC)

- Employee employed on a fixed term contract as SAFA's head of security, subject to a specific term that the contract would incorporate SAFA's disciplinary code
- Employee called to the CEO's office and informed that criminal charges of theft against him were being investigated, employee claimed that he knew nothing of the charges – the CEO offered him the choice of resigning or facing criminal prosecution. The employee declined to resign and his probationary period was extended by one month
- During the extended probationary period the employee was arrested in full view of crowds in a soccer stadium. After the employee was released on bail and resumed work his contract was terminated
- At arbitration proceedings SAFA claimed that the employee had been dismissed for 'incompatibility' because of the negative effect his arrest would have made on FIFA before the World Cup
- The commissioner rejected that claim and found that the employee should not have been dismissed before his performance had properly been assessed and without having been given an opportunity to explain the circumstances of his arrest
- The Court held that the commissioner properly applied the provisions of the LRA and the code of good practice and that the dismissal was based on nothing more than a suspicion. The fact that the employee was still on probation was not licence for treating him unfairly. SAFA had laboured under the misapprehension that FIFA would somehow endorse the dismissal



# City of Cape Town v SALGBC & Others [2011] 5 BLLR 504 (LC)

- Employee dismissed for gross dishonesty after discovery that, nine years earlier, she had presented a fake Namibian driver's licence to the South African authorities for conversion
- Arbitrator found that employee had indeed obtained licence by fraud, that the Municipality was entitled to discipline her but ruled that dismissal was too harsh a penalty because the fraud was not committed in the workplace and did not relate to the employee's duties and because the Municipality had not considered whether a lesser sanction might be appropriate and further because the offense had been committed nine years earlier
- The Municipality contended that the finding on sanction was reasonable as the employee had persisted with a false defense, had properly been found guilty of gross dishonesty and had held a senior position which demanded 'impeccable' honesty



# City of Cape Town v SALGBC & Others [2011] 5 BLLR 504 (LC)

- Labour Court :
  - when it comes to deciding on appropriateness of a sanction, it is not the function of arbitrators to merely rubber stamp employers' decisions
  - however, arbitrators are not called to decide afresh what should be done
  - the issue was whether the commissioner had arrived at a reasonable decision on sanction
  - the question was whether the dishonest conduct of the employee impacted on the relationship with her employer
  - mutual trust is an essential element of the employment relationship. Courts have generally held that dishonest conduct destroys the employment relationship even if the employees concerned have long service and clean disciplinary records
  - the employee had been grossly dishonest and committed a criminal offence – she deceived the State and had persisted with her false claims during the investigation, the disciplinary hearing and under oath during the arbitration
  - the employer (as an organ of State) was entitled to require the utmost trust in its employees, especially one entrusted with public funds as the employee had been
  - The employee had shown no remorse. The fact that the fraud had been perpetrated a long period before did not serve as a mitigating factor because the employee had continued to benefit from her fraud
  - The award was set aside and the employee's dismissal ruled fair



# Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre [2011] 5 BLLR 462 (LC)

- Applicant, who had been HIV positive for some eighteen years, appointed as Manager of the employer's equestrian centre on a three month contract, subject to renewal
- During pre-employment interview applicant disclosed that he was in good health, that his only debt was a bond over removable property and that he was married
- In response to further questioning applicant disclosed that his marriage was a civil sex union with another male and the employer's General Manager indicated that it had no problem with the applicant's sexual orientation because it already employed a 'same sex' couple in senior positions
- A week after the applicant's employment he and others were asked to complete a 'personal particulars' form requesting that he list allergies and chronic medications taken by him. Applicant disclosed that he was HIV positive and was taking antiretroviral drugs
- The day after he handed in his form the applicant was told that he had been dismissed and was ordered off the premises by a security officer acting on the instructions of the Homeowners' Association
- Two days later applicant received a letter informing him he had been dismissed for not telling the truth about his health at a pre-employment interview. The letter of termination recorded the reason for dismissal as 'fraudulent misrepresentations'
- During his forceable removal from the premises a security guard referred to the applicant as a 'moffie' and a 'vagrant'



# Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre [2011] 5 BLLR 462 (LC)

- Applicant referred an automatically unfair dismissal dispute
- Respondent conceded that when knowledge of the applicant's medical condition came to the attention of senior management the decision was taken to dismiss the applicant because of two incidents that had occurred since his appointment which it claimed indicated that his HIV status would adversely affect his work. Respondent further contended that the applicant had abruptly terminated an interview at which he would have been given an opportunity to state his case by running away and accusing the respondent of victimising him
- Labour Court:
  - since HIV infection not expressly mentioned in LRA as prohibited ground, applicant had to prove it was an arbitrary ground akin to specifically mentioned grounds
    - HIV infection is expressly listed as a prohibited ground in Employment Equity Act, requiring employer to prove that discrimination on that ground was fair
      - EEA and Code of Good Practice confer on HIV positive persons the right to privacy
      - With regard to the automatically unfair dismissal claim, applicant was required to make out a *prima facie* case that he had been discriminated against and company then had to show that the discrimination was fair because it related to an inherent requirement of the job



# Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre [2011] 5 BLLR 462 (LC)

- Labour Court:
  - discrimination claim – company had claimed that employee was dismissed for a number of reasons relating to his conduct and not because he was HIV positive. Accordingly it was necessary to establish the true reason for dismissal and in this regard the company's claim of dismissal for dishonesty had never been tested in a disciplinary hearing and could be discounted for that reason alone
  - also noteworthy that company requested personal particulars from applicant only after two other employees had commenced employment. Request plainly aimed at extracting admissions of HIV status from the employees concerned. The inquiry constituted unfair discrimination in itself
  - it was clear from the evidence that the General Manager had been shocked, not by the applicant's condition but rather by the fact that he had learned that the company had unknowingly employed an HIV positive employee
    - The employee's evidence that he was fit enough to perform the demanding duties associated with his job had gone unchallenged



## Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre [2011] 5 BLLR 462 (LC)

- The company's suspicion that he was gravely ill was the product of prejudice which in itself was discriminatory and belied the true reason for the dismissal which was the employee's HIV positive status rather than alleged concerns about his 'general state of health'
- The true reason for the dismissal was the company's aversion to the employee's positive HIV status
- The company's defense (to both claims) that the dismissal was justified by an inherent requirement of the job, apparently based on the applicant's acknowledgement that he was allergic to penicillin, confused inherent requirements with other requirements – the absence of a penicillin allergy was not mentioned in the applicant's job specifications and had not been mentioned in the letter of dismissal and the company accordingly had failed to prove that the applicant's allergy to penicillin was an inherent requirement of the job
- The applicant was not legally obliged to disclose his HIV status, the mere expectation that he should have done so violated his dignity and privacy
- Dual claims are competent, a claim for both automatically unfair dismissal and unfair discrimination
- The Court ordered compensation equivalent to twelve months' remuneration for the automatically unfair dismissal and the unfair discrimination claim was dismissed with no order as to costs



# MEC for Education, Gauteng v Mjijima & Others (2011) 32 ILJ 604 (LC)

- Employee applied for post of Deputy Director-General in the Gauteng Department of Education whilst on suspension by the National Department of Arts & Culture and awaiting disciplinary proceedings into allegations of misconduct
- At interview employee was specifically asked whether she had 'any skeletons in the closet' and she replied that she did not
- Employee entered into employment contract with the Department. At about same time employee reached settlement agreement with the National Department of Arts & Culture in terms of which she resigned and all charges against her were withdrawn
- Some months after commencing employment Department became aware of circumstances surrounding termination of employee's deployment with the DAC, Department regarded her lack of disclosure of suspension and pending disciplinary hearing to be of a serious nature and claimed that had it been aware of the facts at the time it would not have appointed her
- In addition, the Department considered the employee's failure to disclose material information to be a gross failure by the employee to comply with the standards of trust, honesty and candour required of prospective employees, particularly at the senior level of Deputy Director-General



# MEC for Education, Gauteng v Mjijima & Others (2011) 32 ILJ 604 (LC)

- During pre-dismissal arbitration proceedings the arbitrator found, relying on the criminal law presumption of innocent until proven guilty, that there had been no duty on the employee to disclose that she was on suspension
- On review the Labour Court held:
  - primary ground of review relied on by the Department was a process related attack – that the arbitrator failed to apply his mind properly to the true issues and to all the evidence before him, thus committing a gross irregularity
  - the outcome of the arbitration proceedings was not relevant and the Court was not called upon to make any assessment whether the outcome was one that fell within a band of decisions which a reasonable commissioner could make on the available material
  - the arbitrator was manifestly wrong when he relied in the context of proceedings pertaining to fair administrative action on the presumption that ‘a person remains innocent until proven guilty’. The arbitrator appeared incorrectly to have understood that the issue to be determined by him was whether the employee was in fact guilty or not of the disciplinary charges brought against her by the DAC



## MEC for Education, Gauteng v Mgiijima & Others (2011) 32 ILJ 604 (LC)

- however the crucial issue before the arbitrator was the employee's non-disclosure at the time of her interview and during the subsequent period leading to the signing of her contract of the fact that she was on suspension and facing serious disciplinary charges
- post for which employee applied was a senior post and one that clearly required unimpeachable honesty and integrity on the part of its incumbent. Employee's failure to disclose material information in response to an express invitation to do so deprived the department of the opportunity to make an informed decision as to the effect, if any, of the suspension and pending charges on the contemplated employment relationship
- The arbitrator, in the exercise of his functions, failed to apply his mind properly to the issues before him and in doing so had acted other than as a reasonable decision maker would



# National Union of Mine Workers & Others v CCMA & Others (2011) 32 ILJ 956 (LC)

- Employees employed by mine as rock drill operator and rock drill assistant, seen leaving an area where ‘scratching’ had taken place – someone had attempted to break into a diamondiferous fissure and, although no direct evidence implicating the employees in the act, the mine had held them responsible
- Diamond theft had always been a problem for the mine and its code contained the dismissible offence of ‘unauthorised breaking and searching of fissure and / or aiding and abetting diamond theft’
- Evidence relied upon by mine was the fact that a hammer, pinch bar and shovel were found at the scene. No indication that anyone other than the employees worked in that area and if anyone else had been there, their headlamps would have been seen. Employees would have had ample time to complete drilling of the holes allotted to them and to engage in the ‘scratching’
- Employees charged in terms of the disciplinary code and the offence ‘aiding and abetting diamond theft’. Mine contended that this was a broad term for the specific offence in the disciplinary code (unauthorised breaking and searching of fissure and / or aiding and abetting diamond theft) but nature of charge at all times clear to employees and union
- Employees called to separate disciplinary hearings but hearings chaired by the same person. Employees found guilty and dismissed
- Employees referred alleged unfair dismissal disputes to the CCMA and dismissals were upheld



## National Union of Mine Workers & Others v CCMA & Others (2011) 32 ILJ 956 (LC)

- Employees approached the Labour Court on review. Matter remitted to the CCMA for adjudication before another commissioner. Commissioner found dismissals substantively fair but procedurally unfair in respect of one employee and awarded the one employee an amount equivalent to one months' salary as compensation
- Union approached the Labour Court to review and set aside that arbitration award
- Employees argued that commissioner erred in that he applied disciplinary code that was not applicable to the parties, that he found them guilty of 'unauthorised breaking and searching of fissure and / or aiding and abetting diamond theft' whereas in fact they were charged with 'aiding and abetting diamond theft', that the circumstantial evidence relied on by the commissioner did not justify his finding and that he did not apply his mind correctly to the amount of compensation awarded for the procedural unfairness
- Labour Court:
  - evidence before commissioner established that the applicable disciplinary code was tendered by the mine, the document tendered by the employees was incomplete and the commissioner had not reached an unreasonable conclusion in this regard



# National Union of Mine Workers & Others v CCMA & Others (2011) 32 ILJ 956 (LC)

- With regard to the wording of the charge – the Court affirmed the commissioner’s view that ‘unintelligent and poorly worded charges’ were a common feature of disciplinary proceedings and that one had to enquire into the substance of the matter to determine if this resulted in unfairness. The commissioner concluded that the wording did not result in unfairness as the parties were at all times clear as to the nature of the allegation against the employees and the activity they were accused of. The commissioner’s reasoning could not be faulted
- The commissioner did rely largely on circumstantial evidence to reach his conclusion on the substantive fairness but he drew his conclusions after a careful analysis of the evidence. Commissioner found that the witnesses for the mine were, for the most part, consistent in their version whereas the employee who testified, was contradictory and evasive. The second employee elected not to testify and, weighing the two versions, the commissioner found that the probabilities favoured the version of the mine. The commissioner’s finding was justified based on the evidence before him
- Labour Court:
  - in relation to the amount of compensation for procedural unfairness, commissioner did find that it was unfair that the same chairperson presided over both disciplinary hearing, but in awarding compensation he took into account that the dismissal was substantively fair, that the employee (in respect of whom procedural fairness was found) did not testify and that there was no indication that the enquiry was in any other manner unfair, the Court did not believe that the award was unreasonable or that no other commissioner would have made the same award, the award was soundly reasoned and could not be reviewed



# Kievits Kroon Country Estate (Pty) Ltd v CCMA & Others (2011) 32 ILJ 923 (LC)

- During January 2007 employee began having visions and sought the assistance of a traditional healer. Healer instructed employee to undergo training to become a traditional healer herself so as to appease her ancestors. Employee began training and the employer accommodated her
- In May 2007 employee sought permission to take a month's unpaid leave from 6 June to 8 June 2007 to attend a ritual ceremony, submitted a certificate from traditional healer verifying that she suffered from 'perminitions of ancestors' and needed to attend the ceremony failing which she may collapse at work
- Employer did not accept the certificate as valid and refused the request for leave. Compromise offer of one week's unpaid leave was rejected by employee and employee absented herself for the entire period
- Upon her return employee charged with various counts of misconduct including being absent without a valid reason for more than three days. Employee was dismissed following a disciplinary hearing and referred an alleged unfair dismissal dispute to the CCMA
- At arbitration commissioner took into account that employee advised employer of her whereabouts during her absence, had submitted supporting document from her traditional healer and had called the Human Resources Manager to ensure that she had received the documents. Arbitrator found she acted reasonably given her belief that her life was in danger if she did not attend the initiation ceremony
- Arbitrator of the view that circumstances were beyond the employee's control and that the employer failed to appreciate that she had a 'calling' awarded that employee be reinstated



# Kievits Kroon Country Estate (Pty) Ltd v CCMA & Others (2011) 32 ILJ 923 (LC)

- Labour Court:
  - employer contended that commissioner failed to apply his mind to the facts, made incorrect findings on the evidence such as concluding that the employee might have died if she did not attend the ceremony, made findings not supported by the law and rendered an award that was not justifiable in relation to the reasons given for it
  - the case shows what happens when ‘cultures clash in the workplace’. On the one hand the employer was concerned with making money and on the other the employee had visions and believed that her ancestors were calling her to become a sangoma. The employer did not regard a ‘calling’ to be a sangoma to be an illness. The employee believed that if she did not heed the calling to become a sangoma, she would become ill
  - on analysis, most of the charges of the employee were unfair – primary question before commissioner was whether the employee was justifiably absent from work for more than three days. In assessing the fairness of dismissal for absenteeism several factors are taken into account, including a reasonable explanation for the absence, and the commissioner found that the employee had a valid and persuasive reason for her absence
  - based on the evidence the Court was satisfied that the Commissioner’s decision was justifiable and that the employee’s explanation for breaching the rules on grounds of her cultural belief was justified. Court agreed that the employee was faced with a difficult choice (heed the calling of her ancestors or obey the rules of her employer)
  - The review application was dismissed, no order as to costs



## Dolo v CCMA & Others (2011) 32 ILJ 905 (LC)

- Employee employed by the casino as a table supervisor, became involved with a married man who was accused of defrauding his employer (a mining company)
- Boyfriend produced false invoices for payment by employer and paid monies so derived into employee's bank account, employee signed first invoice with full knowledge that she had not provided the services and accepted payment of that amount, thereafter she merely served as a conduit for payments purportedly because boyfriend did not want his wife to find out about the payments
- Criminal proceedings against the boyfriend and the employee were instituted. The employee made a section 204 statement. Arising from this her employer dismissed her for misconduct on the basis that it had lost trust in her and had 'financial doubt' about her due to her involvement in these fraudulent transactions. Also charged with bringing the company's name into disrepute
- Employee referred alleged unfair dismissal dispute to the CCMA. Commissioner found that although employee aware that boyfriend engaged in unlawful activity her conduct did not affect the casino directly. Commissioner ordered the casino to re-employ the employee in a position that did not involve her working with cash even if such a position was a demotion. There was no award of back pay and the employee was also given a final written warning valid for twelve months



## Dolo v CCMA & Others (2011) 32 ILJ 905 (LC)

- Casino accepted the award and offered the employee a position as a receptionist. Employee declined and elected to review the award. Employee contended that commissioner erred in finding her dismissal was fair because she had not been found guilty of any misconduct and submitted that her section 204 statement ought not to have been taken into account. Employee also raised procedural complaints – witnesses had not been sworn in and commissioner erred in not placing her back in her original position
- Review application launched in August 2007. Record reconstructed but only filed in November 2009 and then only because the employer's attorneys launched a rule 11 application to have the review application dismissed. Court declined to grant the rule 11 application to dismiss the review because employee eventually complied and provided record
- Labour Court:
  - actions outside the workplace could be subject to discipline in certain circumstances. Determination of whether conduct outside workplace could be subjected to disciplinary action was a multifaceted factual enquiry. Court confirmed commissioner's finding that employee's integrity had been tarnished by her involvement in the fraudulent transactions and that her trustworthiness was in doubt. Casino's concern about her being in a position where she handled money was justified. Review application rejected on this ground



## Dolo v CCMA & Others (2011) 32 ILJ 905 (LC)

- Court rejected employee's argument that her section 204 statement was not admissible and confirmed that employee had admitted in that statement that she had participated in criminal activity. Court confirmed commissioner's finding that employee's argument that she was unaware of the nature of her boyfriend's activities was unreasonable
- Court rejected the submission that the commissioner did not consider the fact that the casino suffered no loss and found that the commissioner had considered it but had balanced it against the fact that the casino had a right to take pre-emptive action to avoid risk and loss it might suffer if the employee remained in her position
- Court did not consider the alleged procedural defects to be material



# CEPPWAWU v NBCCI & Others [2011] 2 BLLR 137 (LAC)

- Appellant employees dismissed for intimidating 'scab' workers during a strike. All dismissed employees admitted that their images appeared on video footage viewed during the disciplinary hearings
- Company revoked the dismissal of one of the employees and acquitted those who did not appear on the video footage
- Arbitrator upheld the dismissals of all the employees, save one who was ruled unfairly dismissed because she could not be clearly identified on the video footage. Commissioner found further that employer could not be criticised for dismissing only those employees who had positively been identified
- On review the union persisted only with the issue that the dismissals were selective and unfair and the Labour Court dismissed this issue
- LAC:
  - in principle it is unfair to select only some employees for discipline when others have committed the same misconduct. However in cases of mass misconduct there is nothing wrong with disciplining only those employees the employer is able to identify



# CEPPWAWU v NBCCI & Others [2011] 2 BLLR 137 (LAC)

- LAC:
  - to deny employers this right would be to require them to dismiss all employees engaged in collective action, whether or not their individual guilt was proved
  - employers can only be accused of applying selective discipline if, having evidence against the number of individual employees, they are arbitrarily select only a few to face disciplinary action
  - in cases of collective misconduct employers are entitled to proceed only against those employees whose guilt they can prove
  - where a number of employees are dismissed for collective misconduct, an incorrect decision to acquit a guilty employee can only be unfair if the decision flows from some discriminatory management policy
  - the commissioner had properly found that the employer had dismissed all employees against whom there was sufficient evidence of misconduct and that there was no evidence to prove that the employer had acted arbitrarily
  - the commissioner's conclusion was supported by his reasons, the evidence and the law and was accordingly not open to review



## J H Adams v DCD-Dorbyl Marine (Pty) Ltd – C928/2009 (unreported)

- Adams dismissed for operational requirements, alleged dismissal automatically unfair – reason was a transfer or a reason related to a transfer
- Following a merger Adams was transferred to the employ of the company in terms of section 197. Conditions attached to approval of merger included that twenty eight ‘white collar’ employees would be retrenched in the twelve months following the merger and Adams was a ‘white collar employee’
- On 28 April 2009 company issued a notice to all employees informing them that ‘blue collar’ workers would not face retrenchment but that twenty eight employees from the service department ‘could be’ retrenched. On 11 May 2009 the company issued a notice in terms of section 189(3) to affected employees and this notice referred to the ruling of the Competition Commission
- The proposed selection criteria were stipulated as ‘position and skill’, company viewed Adams’ position as redundant (buyer) due to the restructuring of the buying department consequent to the merger



## J H Adams v DCD-Dorbyl Marine (Pty) Ltd – C928/2009 (unreported)

- On 14 May 2009 Adams was provided with an ‘exit pack containing UIF form, pension release form and a letter dated 15 May 2009 confirming he would be ‘released of his duties with immediate effect’. Adams was ill and not at work on Friday 15 and Monday 18 May 2009. On 19 May 2009 he was invited to a meeting which took place on 22 May 2009 – at this meeting Adams was given a copy of the staff communique dated 21 May 2009 dealing largely with applications for voluntary severance packages
- Adams received an undated letter from the company’s General Manager headed ‘termination of employment in accordance with section 189’ and informing him that his employment would be terminated with effect from 29 May 2009
- Labour Court:
  - what was the real reason for the dismissal?
  - the company contends that but for the transfer Adams would still have been retrenched by Globe (transferor)
  - the company’s evidence was that the transferor would not have survived financially and that it would have continued with its restructuring had the merger not preceded



## J H Adams v DCD-Dorbyl Marine (Pty) Ltd – C928/2009 (unreported)

- “I cannot find that the transfer was the main, dominant, proximate or most likely cause for the dismissal. The merger did lead to duplication and rationalisation, and may well have been the cause of some dismissals. However, the evidence that the position of buyer at Globe ... was in any event in jeopardy, could not seriously be disputed in fact the merger was seen as a lifeline in circumstances where Globe was in dire straits financially and was about to embark on a large scale retrenchment
- As to procedural fairness, procedure that the company followed falls far short of the requirements of section 189
- There was no proper attempt to engage with Adams in an attempt to avoid his dismissal or to seek alternatives, the selection criteria were neither agreed nor objective and he had no opportunity to provide input, dismissal procedurally unfair and company ordered to pay Adams compensation equivalent to twelve months’ remuneration.



# Value Logistics Limited v Basson, the National Bargaining Council for the Road Freight Industry and McEwann N.O. (case no. C1025/09)

- Question – when can an employee be held to be constructively dismissed and when can an employer be said to have made continued employment ‘intolerable’?
- Basson was employed by the company as its Regional Human Manager for the coastal regions (Western Cape, Eastern Cape and Kwa-Zulu Natal), at time of dismissal he reported directly to the company’s senior HR Manager (Sibisi)
- Basson not coping with workload, e.g. he was required to hire forty drivers between the period 29 January and 6 February 2009 and found this impossible to do, April 2009 the company removed the Kwa-Zulu Natal coastal region from his responsibilities
- Basson still failed to meet his required deliverables and company addressed his poor performance with him informally, no formal performance counselling sessions culminating in a written record were held, conflict ensued between Basson and Sibisi
- 13 May 2009 an unprotected strike commenced at company’s Cape Town premises, Sibisi flew to Cape Town to assist Basson and all company employees were required to work long and difficult hours during the strike, following the strike Basson was booked off work for medical reasons for a period of eleven days – the medical certificate stipulated ‘exhaustion, stress’, Basson did not contact Sibisi to do a telephonic hand over of urgent work and denied there was any obligation on him to do so and further contended that due to his stress and exhaustion he was unable to do so



# Value Logistics Limited v Basson, the National Bargaining Council for the Road Freight Industry and McEwann N.O. (case no. C1025/09)

- On Monday 18 May 2009 a colleague made several attempts to contact Basson telephonically and finally managed to speak to his wife who informed her that he had gone to the family farm outside Robertson to rest and the cellphone reception was 'patchy and intermittent'
- Colleague sent Basson an sms text message requiring that he contact her urgently, Basson received the message at approximately 15h30 and he telephoned the colleague at 17h00, arrangements were made for Basson's office to be opened and for documentation to be couriered to Johannesburg so that another person could attend to his work
- Basson returned to work on 25 May 2009. He was informed by his colleague that she had been overseeing his work and was in possession of his paperwork. Basson was required to consult a doctor before returning to work to ensure that he was fit to resume duties and he remained off work until 1 June 2009
- On his return to work Basson was handed a letter setting out implications and consequences of his failure to conduct a telephonic handover, matter were unresolved or unattended and this caused stress and embarrassment to the company



# Value Logistics Limited v Basson, the National Bargaining Council for the Road Freight Industry and McEwann N.O. (case no. C1025/09)

- One of Basson's duties was to provide Sibisi with monthly reports and it was alleged that Basson was consistently late and such reports as were submitted were inaccurate and / or incomplete
- On 12 July 2009 Sibisi telephonically addressed Basson's poor performance with him, on 15 July 2009 Sibisi again telephoned Basson. According to Basson Sibisi was shouting and screaming at him and called him a 'stupid idiot', Sibisi denied calling him a 'stupid idiot' or swearing at him
- On 15 July 2009 Basson handed in a letter of resignation effective 31 August 2009. His letter recorded that his resignation was 'due to continuous unfair and extreme pressure' which allegedly caused his health to deteriorate and also had a negative impact on his personal and family life
- Basson referred an alleged unfair dismissal dispute to the CCMA, commissioner found that Basson was constructively dismissed due to 'oppressive and unreasonable work environment' created by the company which left Basson with 'no alternative' other than to resign and awarded Basson compensation equivalent to five months' remuneration
- The test for constructive dismissal does not require that the employee had no choice but to resign, but only that the employer should have made continued employment intolerable (*Strategic Liquor Services v Muvumbi N.O. & Others*)



# Value Logistics Limited v Basson, the National Bargaining Council for the Road Freight Industry and McEwann N.O. (case no. C1025/09)

- The requirements for constructive dismissal are that the employee terminated the employment contract, that continued employment had become intolerable and the employer must have made continued employment intolerable
- In *Murray v Minister of Defence* the SCA held that “even if the employer is responsible, it may not be to blame. There are many things that an employer may fairly and reasonably do that make an employee’s position intolerable. More is needed – the employer must be culpably responsible in some way for the intolerable conditions : the conduct must have lacked reasonable and proper cause”
- The company contended that the award is reviewable on various grounds, most pertinent review ground is that the commissioner failed to consider the common cause evidence that Basson sought to withdraw his resignation and notwithstanding this (which clearly indicated that the employment relationship was not intolerable) the commissioner concluded that Basson was constructively dismissed as he ‘had no option but to resign’
- The company contended that the commissioner’s conclusion in the face of such evidence is not a conclusion that a reasonable commissioner would have reached



# Value Logistics Limited v Basson, the National Bargaining Council for the Road Freight Industry and McEwann N.O. (case no. C1025/09)

- The Court noted that in his evidence Basson said that he ‘maybe reacted just a little bit too quickly’ when he resigned. His further evidence included that he was ‘willing to sit around a table and talk’ and these are not sentiments of a person whose continued employment had been made intolerable
- The Court concluded that the award is not one that a reasonable commissioner could have reached. The award was reviewed and set aside and substituted with an order that Basson was not dismissed



# NUM and Maloma v Samancor Ltd, NEIBC and Stemmett N.O. – SCA case no. 625/2010 – 25 May 2011

- Maloma was employed by the company as a furnace operator in August 1996, on 20 March 2006 he was arrested on suspicion of robbery, charges subsequently withdrawn and he returned to work
- On 20 May 2006 he was again arrested on the same charge and detained for 140 days until he was released on bail, meanwhile on 30 May 2006, ten days after the second arrest the company terminated his employment
- A letter informing him of his dismissal was sent to the police station where he was being retained but he did not receive it, there was no hearing before the termination but a 'post-dismissal hearing' was held after his release and the company did not reverse the earlier dismissal
- Maloma referred an alleged unfair dismissal dispute to the Bargaining Council, the arbitrator found that the termination was both substantively and procedurally unfair and issued an award requiring Maloma's reinstatement with effect from 2 November 2006 (the date of the post-dismissal hearing)
- The company approached the Labour Court to review and set aside the award, the alleged review grounds were that the arbitrator committed a gross irregularity, exceeded his powers, misconducted himself and that the award was irrational and not justified by the evidence



# NUM and Maloma v Samancor Ltd, NEIBC and Stemmett N.O. – SCA case no. 625/2010 – 25 May 2011

- The Labour Court dismissed the review application and the company appealed to the LAC
- The LAC set aside the arbitration award and substituted it with an order declaring that the dismissals have been substantively fair but procedurally unfair and awarded Maloma compensation equivalent to six month's remuneration
- Maloma assisted by his union appealed to the SCA
- SCA – an appeal does not lie against an arbitration award, even if the reviewing Court believes the award to be wrong there are limited grounds upon which it is entitled to interfere
- Section 145 of the LRA permits the Labour Court to set aside an award for one or other defect – none of which are now applicable, but it was recognised in *Sidumo*, adopting what was held in *Carephone* that an award may also be set aside if it is one that 'a reasonable decision-maker could not reach' and it was on that basis that Samancor sought to have the award set aside
- SCA – the question that was before the Labour Court and the Labour Appeal Court was whether the award in this case was so defective as to fall within the category of one that 'a reasonable decision-maker could not reach'



# NUM and Maloma v Samancor Ltd, NEIBC and Stemmett N.O. – SCA case no. 625/2010 – 25 May 2011

- SCA
  - the Labour Court answered the question as follows: “the Commissioner’s award is well reasoned. He dealt with all the issues that arose in the matter. It can therefore not be said that the Commissioner committed any reviewable irregularity. His decision is one that a reasonable decision-maker would have made. His award is lawful, reasonable and procedurally fair. He had decided the issue on the basis of his own sense of fairness. It is reasonable and meets the constitutional requirement that an administrative action must be reasonable.”
  - the LAC did not appreciate the limited nature of the question before the Labour Court and hence the limited nature of the question on appeal
  - nowhere in the LAC’s reasons is there any express finding that the award was one that no reasonable decision-maker could make nor does it appear by implication
  - the LAC found that there was an error and went on to find that the question as to whether the dismissal in the circumstances of the present dispute ‘is substantively fair depends on the facts of the case’ and proceeded to consider the facts



# NUM and Maloma v Samancor Ltd, NEIBC and Stemmett N.O. – SCA case no. 625/2010 – 25 May 2011

- that approach to the matter would have been appropriate if the arbitrator’s award had been under appeal but not where it is being subjected to review
- SCA – there was some debate as to the correct categorisation of dismissal on the one hand ‘conduct or capacity’ or on the other the ‘employer’s operational requirements’
  - Samancor contended it dismissed Maloma for incapacity, arbitrator described it as a ‘no fault’ dismissal based on the principle of impossibility of performance
  - arbitrator concluded however that in truth Maloma had been dismissed for absenteeism which is a disciplinary offence and cannot be treated as ‘an operational incapacity’, the Labour Court was of the same view and said that Maloma had ‘a valid reason for his absence’
  - the LAC on the other hand said that ‘incapacity’ might include imprisonment, however per Nugent JA “I do not see that the difference of opinion on the correct categorisation of the dismissal plays any material role in this case.”
  - in making an assessment whether it was fair in the circumstances for the employer to exercise an election to terminate, the fact that the employee is not a fault is clearly a consideration that might and should properly be brought to account



# NUM and Maloma v Samancor Ltd, NEIBC and Stemmett N.O. – SCA case no. 625/2010 – 25 May 2011

- the fact that Maloma was not at fault was not the sole reason for the arbitrator's decision, he took into account that there was 'no evidence that [Mr Maloma] was occupying such a key position that necessitated his dismissal after ten days of absence', the arbitrator further added that he had not been persuaded that the employment relationship had become intolerable and in those circumstances "I cannot see that the error he made was material to the outcome"[per Nugent JA]
- "I have no doubt that [the Commissioner's] was not so unreasonable and that it could not have been reached by a reasonable decision-maker. In those circumstances there were no grounds for the order of the Labour Court to be set aside".

\* Thank you