"The Fly in the Ointment" or Simply a "Born-Again Shop Steward" Defending Workers' Rights to Fair Representation? The Case of *Msunduzi Municipality v Hoskins* 2017 38 ILJ 582 (LAC) in Retrospect

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Abstract

At a distance, the decision by the Labour Appeal Court in *Msunduzi Municipality v Hoskins* 2017 38 ILJ 582 (LAC) appears to be a typical case of dismissal for gross insubordination. However, upon closer examination *Msunduzi* brings to the forefront the conflict of interest between a senior employee's responsibilities as a HR manager and his controversial role in representing fellow employees who faced disciplinary charges at the municipality. Compared to the senior managers in the antecedent cases of *Keshwar v SANCA* 1991 12 ILJ 816 (IC) and *IMATU v Rustenburg TLC* 1999 20 ILJ 377 (LC), in the case at hand the managerial employee was no longer a member of a trade union. The hybrid role performed by Hoskins created tensions within management ranks and turned into a migraine for the newly appointed acting municipal manager. To cut to the chase, as an HR manager Hoskins was figuratively and literally "the fly in the ointment". His "forward approach" as a "born-again shop steward" went beyond *chutzpah*. Therefore, the Labour Appeal Court cannot be faulted for upholding Hoskins' dismissal. *Msunduzi* compels intense engagement with the all-encompassing duty of mutual trust and confidence, the breakdown of the trust relationship, the intolerability of a continued employment relationship, "non-reinstatable conditions" as embodied in section 193(2)(a)-(d) of the Labour Relations Act 66 of 1995 and the effect of post-dismissal misconduct on the availability of reinstatement. Also arising are discrete questions concerning insubordination and insolence, conflict of interest and incompatibility.

Keywords

Insubordination; insolence; mutual trust and confidence; intolerability of continued employment; incompatibility; breakdown of trust.

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1 Introduction

In *Msunduzi Municipality v Hoskins*[1] the Labour Appeal Court (LAC) had an opportunity to consider the dismissal of a Human Resources (HR) Support Service Manager for gross insubordination after defying the municipal manager's instruction to discontinue representing his fellow employees in disciplinary proceedings against his employer. The factual context of *Msunduzi* was highly unusual, in that the aberrant HR manager had long ceased to be a member of a trade union while going up the ranks at the municipality. Hoskins' so-called "forward approach" as a "born-again shop steward" defending employees' rights to fair representation has depressingly familiar resonances with problems relating to shop stewards exceeding the bounds of acceptable conduct.[2] The trilogy of decisions emanating from the case highlights focal issues regarding the all-embracing duty of mutual trust and confidence, the breakdown of the trust relationship, and the intolerability of a continued employment relationship. The rupture of the employer-employee relationship calls for a sustained appraisal of the overlap between practicability and intolerability against the backdrop of "non-reinstatable conditions" specified in terms of section 193(2) of the Labour Relations Act 66 of 1995 (LRA), coupled with the factor of the effect of post-dismissal misconduct on the accessibility of reinstatement. In addition, the factual matrix in *Msunduzi* brings incompatibility into sharp focus.

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1 *Msunduzi Municipality v Hoskins* 2017 38 ILJ 582 (LAC) (hereafter *Msunduzi* case).

2 See generally, *FAWU v Harvestime Corporation (Pty) Ltd* 1989 10 ILJ 497 (IC); *Mondi Paper Co Ltd v PPWAWU* 1994 15 ILJ 778 (LAC); *Adcock Ingram Critical Care v CCMA* 2001 22 ILJ 1799 (LAC); *CEPPAWU v Glass & Aluminium* 2002 5 BLLR 399 (LAC); *Kroukam v SA Airlink* 2005 26 ILJ 2153 (LAC); *NUM obo Sekgoeng and Impala Platinum Ltd* 2006 27 ILJ 2187 (CCMA); *NUM v Black Mountain Mining (Pty) Ltd* 2010 3 BLLR 281 (LC); *SAMWU v Ethewini Municipality* 2017 38 ILJ 158 (LAC) (hereafter *Ethekweni Municipality I* case); *SAMWU v Ethekweni Municipality* 2019 1 BLLR 46 (LAC) (hereafter *Ethekweni Municipality II case*); *NUMSA obo Motloba v Johnson Control Automotive SA (Pty) Ltd* 2017 5 BLLR 483 (LAC); *NEHAWU obo Skhosana v Department of Health: Gauteng* (JS903/15) [2018] ZALCJHB 201 (24 May 2018). Also see Grogan *Dismissal, Discrimination and Unfair Labour Practices* 52; Rheeder 2011 https://www.polity.org.za/print-version/how-to-deal-with-shop-stewards-or-union-misconduct-2011-08-10.

2 The facts, the decisions and the issues

The appellant (*Msunduzi* Municipality) employed the respondent (Mr. Hoskins) as a HR Manager. He was responsible for employment-related issues, including advising on disciplinary matters. At some stage Hoskins was a member of various trade unions while ascending the ranks in the municipality. In that capacity he assisted co-employees in internal disciplinary hearings against the municipality. Despite no longer being a member of a trade union, a shop steward or a trade union official and his being instead a part of management, Hoskins continued to advise and represent fellow employees in disciplinary proceedings. To rub salt into the wounds, Hoskins bragged about his accomplishments in disciplinary inquiries against his employer and co-managers. The dual role performed by the HR manager became a source of tension in management ranks as it was considered a conflict of interest between his responsibilities as a manager and his role in representing other employees. As a result, other managers were not inclined to discuss issues openly in meetings in his presence, being apprehensive that whatever they deliberated upon would be used against them.[3] In a nutshell, Hoskins was figuratively and literally "the fly in the ointment".

It came as no surprise that the conduct of the wayward HR manager presented a headache for the newly appointed municipal manager. The chronology in this case is illustrative of the predicament created by him. The municipal manager wrote a letter instructing Hoskins to recuse himself from and cease to represent colleagues in internal disciplinary hearings instituted by the municipality and arbitrations at the bargaining council.[4] Rather than complying, the HR manager objected in an abrasive fashion. He caused consternation by placing on a public notice board and sharing a letter meant for the municipal manager with a number of employees. In that defiant letter he put the municipal manager on terms by daring the latter to take any action against him. He continued as usual to represent employees in disciplinary proceedings.[5] In a subsequent letter the municipal manager raised concern about Hoskins' belligerent, defiant and insolent posture despite the clear instructions given to him. He also drew his attention to the grim reality that he was persisting in handling at least five disciplinary and arbitration proceedings in motion despite having been given clear instruction to cease doing so. The respondent HR manager demonstrated his disdain for his superior by not even bothering to furnish a written reply. Undeterred by the

3 *Msunduzi* para 8.
4 *Msunduzi* para 9.
5 *Msunduzi* paras 10.

repeated instructions to the contrary, he proceeded to represent a fellow employee at a disciplinary hearing.

Charges of gross insubordination, gross insolence and gross misconduct were preferred against Hoskins.[6] All eight charges pertaining to gross insubordination concerned a manifest challenge to the authority of the municipality manager demonstrated by a persistent refusal to stop representing co-employees in disciplinary inquiries. The counts of gross misconduct centered on a failure to act in good faith, not acting in the best interest of the municipality, and bringing the municipality into disrepute. There was also a charge of gross insolence related to Hoskins being rude, disrespectful, sarcastic, abusive, insulting and provocative to the municipal manager. The outcome of the internal disciplinary hearing was a finding of guilty on all charges and the imposition of the sanction of dismissal.

Dissatisfied with his dismissal, Hoskins lodged an unfair dismissal dispute at the South African Local Government Bargaining Council (SALGBC). To cut to the chase, the employee did not prevail at the arbitration. Put briefly, the arbitrator found the employee guilty of most of the charges and acquitted him of two charges. The first charge related to not acting in good faith or in a diligent manner. The second charge concerned bringing the municipality into disrepute when it was discovered by the bargaining council that he could not represent an employee since he was not a member of a trade union. It should be noted that Hoskins later joined the trade union and was allowed to represent the employee in those proceedings.[7]

On the balance of the evidence tendered, the arbitrator found that Hoskins had displayed a bitter and antagonistic attitude toward the municipal manager. A practical consideration in favour of finding the irredeemable collapse of the working relationship between the municipal manager and the HR manager rested on the latter's continuous and blatant acts of insubordination,[8] conduct Hoskins characterised as his "forward approach".[9] This, of course, brings us to the testimony of the municipal manager that the return of Hoskins would undermine the entire spirit of the organisation.

> His actions were at war with the administration and showed no remorse. His own peers felt a level of distrust and dishonesty on his part and were unable to work with him … . The respondent at the disciplinary hearing continued to be abusive and rude and at some stage mentioned that "*we will see how long you last*" referring to the municipal manager lasting in his position. He also believes that the respondent was part of the attempts to have him removed as

6 *Msunduzi* para 11.
7 *Msunduzi* para 37.
8 *Msunduzi* para 12.
9 *Msunduzi* para 16.

> the municipal manager. He confirmed that it would be impossible to work with the respondent. He made every effort to accommodate the respondent even after the commencement of the disciplinary hearing, but he refused to correct his conduct.[10]

Finding that the dismissal was substantively fair, the arbitrator ordered Hoskins to pay the wasted costs of arbitration because his confrontational approach which he characterised as a "forward approach" was deliberate and calculated. It not only undermined the ethics and harmony of the workplace but crucially the administration and functionality of the municipality. More to the point, he was unrepentant. Even after the inception of the disciplinary proceedings, there were last-ditch attempts at settlement which the respondent spurned.[11]

At the Labour Court (LC), the employee achieved a significant measure of success. The crux of Hoskins' review proceedings was that the decision reached by the arbitrator was a decision that a reasonable decision-maker could not reach.[12] In totality, he challenged the arbitrator's finding that he was guilty of the specified charges, the finding that his dismissal was both procedurally and substantively fair, the sanction of dismissal and the adverse award of the costs of the arbitration.[13]

Although the LC sustained a guilty finding for gross insubordination and insolence, it felt, however, that the employee deserved a second chance, albeit with a serious sanction short of dismissal. In this regard it contemplated either a final written warning or punitive suspension.[14] In short, the LC found the arbitrator's award to be reviewable and ordered retrospective reinstatement only for six months.

Not accepting the ruling of the court *a quo*, the municipality launched an appeal. Accordingly, the primary issue on appeal was whether the LC had misdirected itself in finding that the sanction of dismissal was a decision that a reasonable arbitrator could not reach.[15] On appeal the municipality succeeded in having the decision of the court at first instance overturned and the decision of the arbitrator restored. Writing for a unanimous court, Tlaletsi JA agreed with the arbitrator that the respondent's conduct amounted to challenging the authority of the municipal manager.[16] Simply

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10 *Msunduzi* para 14.
11 *Msunduzi* para 17.
12 See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 28 ILJ 2007 (CC) para [110] (hereafter *Sidumo* case). Also see generally Myburgh 2010 *ILJ* 1 and Myburgh 2013 *ILJ* 27; Fergus 2010 *ILJ* 1556, Fergus 2013 *ILJ* 2486 and Fergus 2014 *ILJ* 47.
13 *Msunduzi* para 20.
14 *Msunduzi* para 18.
15 *Msunduzi* para 23.
16 *Msunduzi* para 26.

put, the arbitrator's decision was justified by the material placed on record. The employee was unremorseful. More importantly, there was a complete breakdown in the employment relationship between the protagonists, rendering the prospects of continued employment intolerable.[17] In sum, the arbitrator's award fell within the band of reasonable outcomes and met the standard set by *Sidumo*.[18]

In a case such as this it was not open to the court *a quo* to consider whether the sanction was harsh and impose a sanction that in its opinion was lenient. It was also a misdirection for the LC to conclude that the arbitrator should have found that the respondent deserved a second chance without specifying any reason why a second chance would be appropriate in the circumstances. The salient aspects of the case were found to be illustrative:

> … the respondent was given an opportunity to reflect on his conduct. He instead proceeded to do precisely what he was warned not to do. He would have continued to do so even if given a further chance as he was not open to any persuasion.[19]

Consequently, premised on the sparse reasons advanced by the court *a quo*, its decision fell to be set aside.

3 Commentary / evaluation

The task of analysing the LAC decision begins with a critical understanding of the all-encompassing duty of mutual trust and confidence. It has been postulated that the duty of mutual trust and confidence is a term "of wide application ... capable of addressing many of the issues which may give rise to conflict between employer and employee".[20]

3.1 Mutual trust and confidence

Mutual trust and confidence is a big tent that accommodates a lot of variables that define the employer-employee relationship. In its operational context, the implied duty not to act in a manner calculated or likely to destroy mutual trust and confidence in a relationship serves to ensure that the spirit and purport of the Constitution, in particular the constitutional right to fair labour practices, are observed, respected and fulfilled.[21] The reciprocal duty of mutual trust and confidence articulated by Lord Nicholls in *Malik v Bank*

17 *Msunduzi* para 29.

18 *Sidumo* paras 78-79. Also see *Fidelity Cash Management Service v CCMA* 2008 3 BLLR 197 (LAC) paras 94-95.

19 *Msunduzi* para 30.

20 Brodie *Contract of Employment* 65; Dukes 2009 *Edin LR* 153.

21 See for example, *Fedlife Assurance Ltd v Wolfaardt* 2002 1 SA 49 (SCA). See generally Cohen 2009 *ILJ* 2271 and Cohen 2012 *Acta Juridica* 94-95; Louw 2018 PELJ 1-25.

of Credit and Commerce International SA[22] endorsed by judicial practitioners of labour law[23] and scholars[24] imposes obligations on the parties to the employment relation not to conduct themselves in a manner that will consequently lead to the irreversible destruction of the trust relationship.

3.2 Insubordination and insolence

Although insubordination and insolence share a similar lineage, they are certainly distinct and separate. Grogan explains insolence as a repudiation by an employee of the employee's duty to show respect and insubordination as a refusal to obey the employer's instructions.[25] In other words, the two are related in that insolence has more to do with the attitude the employee exhibits towards the employer while insubordination is grounded on the refusal to act in line with the employer's instruction or mandate.

Sight should also not be lost of the distinction between insubordination and gross insubordination. It is settled law that an employee is guilty of insubordination if the employee concerned wilfully refuses to comply with a lawful and reasonable instruction issued by the employer.[26] It is also trite that insubordination is gross if it is persistent and deliberate, in which context a sanction of dismissal would normally be fair.[27] This brings us to the case of *Ethekweni Municipality I*. There the shop stewards were charged and dismissed for gross insubordination. They had locked the gate to the depot preventing the entry of certain contractors and were insolent, provocative and intimidatory towards their manager.[28] They refused to open the gate after being instructed to do so. Hence the disciplinary enquiry found them both guilty. The LAC found that it was apparent from their conduct that they laboured under a serious misconception that being in the position of

22 *Malik v Bank of Credit and Commerce International SA* 1998 AC 20. *Malik and Mahmud v Bank of Credit and Commerce International SA* [1997] UKHL 23.

23 See for example *Murray v Minister of Defence* 2008 29 ILJ 1369 (SCA) para 5.

24 See generally Brodie 1996 *ILJ (UK)* 121, Brodie 1998 *ILJ (UK)* 79, Brodie 1999 *OJLS* 83 and Brodie 2001 *ILJ (UK)* 84; Brooks 2001 *U Tas LR* 29; Bosch 2006 *ILJ* 28, 50; Raligilia 2004 *South African Journal of Labour Relations* 71; Raligilia and Bokaba 2021 *Obiter* 714. Also see Sutherland "Regulating Dismissals" 242, 252-260; Murray "Conceptualizing the Employer as Fiduciary" 346.

25 Grogan *Dismissal* 285; Teffo 2016 *Contemporary Labour Law* 45-50.

26 *CWIU v SA Polymer Holdings (Pty) Ltd* 1996 8 BLLR 978 (LAC) para 12.

27 *Ethekweni Municipality II* para [9]; *Motor Industry Staff Association v Silverton Spraypainters and Panelbeaters* 2013 34 ILJ 1440 (LAC) para [31]; *Environserve Waste Management (Pty) Ltd v CCMA* (P99/14) [2016] ZALCPE 23 (15 November 2016) para [14] (hereafter *Environserve* case).

28 *Ethekweni Municipality I* para 4.

shop stewards gave them the power to bully management as they pleased with impunity.[29] It held that:

> They deliberately and maliciously defied a lawful and reasonable instruction given to them by the manager, who was authorised to give such instruction to them. In the circumstances, the court held that the findings of the arbitrator that the employees committed insubordination by refusing to comply with the manager's lawful and reasonable instruction was a reasonable finding and their dismissal was therefore justified.[30]

Insolence is equated with impudence, cheekiness, disrespect or rudeness.[31] Even though an employee can be both insolent and insubordinate at the same time, he or she can be insolent without necessarily being insubordinate.[32] A mere insolence may be translated into insubordination where there is *prima facie* evidence that the party is challenging the lawful authority of the employer.[33] The short point is that a mere act of insolence should not constitute insubordination as the two differ fundamentally in their characteristics.

Returning to the case under consideration, there is no escaping the fact that the conduct of Hoskins as an HR manager cum "born-again shop steward" involved a unique and extreme case of gross insubordination and insolence. To recap: Hoskins not only defied the municipal manager's instruction to stop representing fellow employees at internal and arbitration proceedings against the municipality but dared the latter to take any action against him. The municipal manager cannot be faulted for responding as firmly as the circumstances warranted. The line manager was in a precarious position on account of serious direct assault, as well as calculated and insidious efforts launched by the delinquent HR manager to corrode his authority.[34]

3.3 Conflict of interest and problematic representation of employees in disciplinary and arbitration proceedings

Hoskins' problematic representation of fellow employees in disciplinary hearings instituted by his employer constituted an acute form of conflict of interest that can hardly be overstated.[35] It bears repeating that Hoskins was not an ordinary employee but one who was supposed to perform

29 *Ethekweni Municipality I* para 27.
30 *Ethekweni Municipality I* para 29.
31 *CCAWUSA v Wooltru Ltd t/a Woolworths (Randburg*) 1989 10 ILJ 311 (IC) (hereafter *Wooltru* case) 314-315A-B. See also *Environserve* para [14]; *Sibanda v Pretorius* (JR2637/16) [2019] ZALCJHB 84 (4 April 2019*)* para 25.
32 *Wooltru* 315D-E.
33 *Supreme Poultry (Pty) Ltd v Mokgethi* (JR1345/14) [2018] ZALCJHB 325 (13 September 2018) para [16].
34 *Msunduzi* para 14.
35 *Msunduzi* paras 8-9.

management functions and act in the best interest of the Council. Fellow managers were hesitant to share certain information fearing that he might maliciously use it against them. Significantly, the functionality of the operation of the employer's business was imperilled.[36] Looking at the employee's conduct as a whole and its cumulative impact, judged reasonably and sensibly, it was such that the employer could not be expected to keep up with it.

3.4 Breakdown of trust relationship

The authorities stand for the proposition that the employer-employee relationship is anchored on trust.[37] Hence, labour law places a premium on honesty.[38] As a result, a corrosion of trust inevitably leads to a collapse of the employer and employee relationship.[39] It bears restating that an employee's conduct destructive of the trust relationship renders dismissal "a sensible operational response to risk management".[40] The hallmarks of sustained conduct incompatible with the duty of mutual trust and confidence can easily be garnered from circumstances leading to the termination of the HR manager in *Msunduzi*. As already mentioned, Hoskins repeatedly disregarded the municipal manager's instructions to stop representing fellow employees in disciplinary proceedings. Rather, Hoskins put his line manager on terms, daring him take any action against him. Even after his termination, at arbitration the employee was unapologetic. With respect, it is incomprehensible that the LC could conclude that the substratum of the employment relationship had not been obliterated when Hoskins had demonstrated a marked disregard for authority and was resolute in his refusal to desist from representing employees in disciplinary proceedings instituted by the municipality. The matter was further aggravated by his being an HR manager. It has been affirmed that business risk is "predominantly based on the trustworthiness of company employees and

36 *Msunduzi* para 18.

37 For a sampling of seminal cases: *Central New Agency v CAWUSA* 1991 12 ILJ 340 (LAC) 344F-I; *Sappi Novoboard (Pty) Ltd v Bolleurs* 1998 19 ILJ 784 (LAC) para [7]; *CSIR v Fijen* 1996 6 BLLR 685 (AD) 691; *Shoprite Checkers (Pty) Ltd v CCMA* 2008 9 BLLR 838 (LAC).

38 See generally *CEPPAWU v Lonmin Precious Metals Refinery* 2011 32 ILJ 2782 (CC); *Department of Home Affairs v Ndlovu* 2014 35 ILJ 3340 (LAC); *Toyota SA Motors (Pty) Ltd v CCMA* 2016 37 ILJ 313 (CC); *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero* 2017 38 ILJ 881 (LAC).

39 *Masetlha v President of the RSA* 2008 1 SA 566 (CC) para 102 (hereafter *Masetlha* case). For analysis, see Okpaluba and Maloka 2021 *Speculum Juris* 148; Tshoose and Letjeku 2020 *SA Merc LJ* 156; Rycroft 2013 *ILJ* 2271; Newaj 2016 *THRHR* 429.

40 *De Beers Consolidated Mines Ltd v CCMA* 2000 9 BLLR 995 (LAC) para 22 (hereafter *De Beers* case).

that the accumulation of individual breaches of trust has significant economic repercussions".[41] In sum, the egregious conduct of the HR manager cum "born-again shop steward" warrants an inference that the trust relationship has been destroyed. Equally, the prospects of the restoration of an employment relationship were patently slim.

3.5 Incompatibility

Although the employer had framed the substantive aspects of the conduct of the recalcitrant HR manager as gross insubordination and insolence, in pith and substance it "was seized with incompatibility in the workplace".[42] It must be stressed that Hoskins' behaviour resembles that encountered in standard cases of incompatibility. It is pertinent, then, to examine *Msunduzi* through the prism of incompatibility.

The starting point for consideration is to note that incompatibility is neither identified in section 188 as one of three main reasons upon which the employer can dismiss an employee for a fair reason nor referred to in section 187 of the LRA as a ground for automatic unfair dismissal. Suffice it to say that a wiser approach is to categorise incompatibility as a stand-alone fair reason for dismissal,[43] since it is now firmly entrenched in the South African labour law lexicon.[44]

A particularly clear statement about the contours of incompatibility emerges from the judgement of Murphy AJA in *Zeda Car Leasing*:

> Incompatibility, involves the inability on the part of an employee to work in harmony either within the corporate culture of the business or with fellow employees. There has been some difference of opinion in the past about whether incompatibility is an operational requirements or an incapacity issue. The prevailing view is that incompatibility is a species of incapacity because it impacts on work performance. If an employee is unable to maintain an appropriate standard of relationship with his or her peers, subordinates and superiors, as reasonably required by the employer, such failure or inability may constitute a substantively fair reason for dismissal. Procedural fairness in cases dealing with incompatibility requires the employer to inform the employee of the conduct allegedly causing the disharmony, to identify the relationship affected by it and to propose remedial action to remove the incompatibility. The employee should be given a reasonable opportunity to consider the allegations and proposed action, to reply thereto and if appropriate to remove the cause for disharmony. The employer must then establish whether the employee is responsible for or has contributed

41 *Miyambo v CCMA* 2010 10 BLLR 1017 (LAC) para 13.
42 *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk* 2020 41 ILJ 1360 (LAC) para 38 (hereafter *Zeda Car Leasing* case).
43 For a nuanced exposition, see Okpaluba and Maloka 2021 *SA Merc LJ* 238.
44 Van Jaarsveld 2007 *SA Merc LJ* 204.

> substantially to irresolvable disharmony to the extent that the relationship of trust and confidence can no longer be maintained.[45]

The fundamental features of *Msunduzi* neatly dovetail with incompatibility as a species of misconduct,[46] with incapacity,[47] and as a ground for dismissal for operational requirements.[48] What is undoubtedly apparent from the case at hand is that the HR manager caused disharmony and his relations with colleagues and the municipal manager were strained. The disruptive conduct hampered service delivery and created a breakdown in the administration and functionality of the municipality.[49] Hoskins' defiance of authority was manifest.[50] It was abundantly clear that he was not going to stop representing employees at workplace disciplinary inquiries and arbitration proceedings against the employer. In sum, the employer could have fairly terminated the services of its delinquent HR manager on the grounds of incompatibility.

3.6 Intolerability of ongoing employment relationship

Msunduzi also invites consideration of intolerability of the continued employment in the context of reinstatement.[51] The first relates to intolerability as one of the "non-reinstatable conditions"[52] in terms of section 193(2) of the LRA. The second concerns whether post-dismissal misconduct can constitute intolerability. As already touched upon, Hoskins's penchant for a "forward approach" went beyond *chutzpah*.[53] Moreover, the

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45 *Zeda Car Leasing* para [39]. See also *Wright v St Mary's Hospital* 1992 13 ILJ 987 (IC); *SA Quilt Manufacturers (Pty) Ltd v Radebe* 1994 15 ILJ 115 (LAC) 124; *Jardine v Tongaat Hulett Sugar Ltd* 2002 23 ILJ 547 (LC).

46 See e.g. *Vitale v Transdeco GTHMH (Pty) Ltd* (JR1061/06) [2007] ZALC 138 (16 November 2007); *Watson v SARU* (C672/2015) [2017] ZALCJHB 264 (30 June 2017).

47 See generally, incompatibility treated as a ground for dismissal incapacity: *Nathan v The Reclamation Group (Pty) Ltd* 2002 23 ILJ 588 (LC); *Saxonburg Estate (Pty) Ltd v CCMA* (C873/2005) [2007] ZALC 197 (1 January 2007); *Mgijima v MEC, Department of Education, Gauteng* (JR1894/2011) [2014] ZALCJHB 414 (27 October 2014); *Edcon Ltd v Padayachee* (J331/16) [2018] ZALCJHB 307 (20 September 2018).

48 *Zeda Car Leasing* paras 38-40.

49 *Msunduzi* para 18.

50 In this respect Hoskins' defiance is analogous to the contumacy exhibited by the contemnor in the controversial cases of *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma* 2021 5 SA 327 (CC) and *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma* 2021 5 BCLR 542 (CC).

51 See Rycroft 2013 *ILJ* 2271; Le Roux 2008 *Obiter* 69.

52 *Mediterranean Textile Mills (Pty) Ltd v SACTWU* 2012 2 BLLR 142 (LAC) para 28.

53 According to the *Merriam-Webster Dictionary*, "*chutzpah*" broadly denotes audaciousness, audacity, brashness, brazenness, cheekiness, crust, effrontery, gall, nerve, pertness etc. It derives from the Hebrew word *ḥuṣpāh*, meaning "insolence",

errant HR manager and "born-again shop steward" was unregretful. There was an irreversible collapse of the trust relationship foreclosing the prospects of continued employment. Despite the palpable aggravating features of Hoskins' situation, it will be remembered that the LC felt that he deserved a second chance given his age and the dire prospects of his securing alternative employment in a fragile labour market.

Our jurisprudence[54] has repeatedly affirmed the principle that where the trust in the employer-employee relationship has been severed, reinstatement or re-employment is not feasible. *Woolworths (Pty) Ltd v CCMA*[55] is the most recent addition to the burgeoning jurisprudence[56] addressing the extent to which the twin aspects of the irremediable breach of trust and intolerability render the prospect of the restoration of the employment relationship impractical.[57] The case turned on what Davis JA described in simple terms as an answer to a straightforward question: "When does attendance at a rugby match trigger a dismissal from employment?" Prior to his dismissal, the employee was employed at the Humansdorp store as an end-day controller. On 9 June 2018 the employee informed one of the managers that he had taken ill and that he would not be attending work on that day. It later transpired that on the very day that the employee claimed to be ill, he and his father had embarked on a one hour journey from Jeffreys Bay, where he resided, to Port Elizabeth to attend a rugby game. Ironically, "had he left his home and attended to his employment responsibilities, the trip would have taken 20 minutes".[58] The employee was subsequently charged with gross misconduct in that he had "breached company policies and procedures when he abused authorised leave in the form of sick leave."[59]

The arbitrator found that the employee had not concealed the fact that he had attended a rugby match. Also, there was no evidence that he had

"cheek" or "audacity". See *Merriam-Webster Date Unknown https://www.merriam-webster.com/dictionary/chutzpah.*

54 *De Beers* paras [9] and [24]; *Toyota SA Motors v Radebe* 2000 21 ILJ 340 (LAC) paras [15-16] (hereafter *Radebe* case); *ABSA Bank Ltd v Naidu* 2015 36 ILJ 602 (LAC) para 52.

55 *Woolworths (Pty) Ltd v CCMA* 2022 3 BLLR 296 (LAC) (hereafter *Woolworths* case).

56 See e.g. *Masetlha*; *Moyane v Ramaphosa* 2019 1 All SA 718 (G); *Moyo v Old Mutual Ltd* 2019 ZAGPJHC 229 and *Old Mutual Ltd v Moyo* 2020 41 ILJ 1985 (GJ); *FNB v Language* 2013 ILJ 3103 (LAC).

57 *Maepe v CCMA* 2008 29 ILJ 2189 (LAC) and *Booysen v Safety and Security Sectoral Bargaining Council* 2021 7 BLLR 659 (LAC) are principal authorities on the intersection between the practicability of the order of reinstatement and the intolerability of the employment relationship.

58 *Woolworths* para 1.

59 *Woolworths* para 3.

previously been given a written or final warning. A weighty factor for the arbitrator was that the employer had not charged the employee for dishonesty and thus the employment relationship had not yet broken down.[60] The arbitrator, therefore, ruled that the dismissal was substantively unfair and ordered retrospective reinstatement. The LC upheld the arbitrator's award because the employer had failed to tender admissible evidence proving the dishonesty as well as the absence of a policy that required the employee to report for duty when his condition had improved.[61]

The LAC reversed the decision of the court of first instance and ruled that:

> … manifestly, the employee acted dishonestly in absenting himself from work on the basis that he was too ill to perform his duties but then travelled for at least an hour to support his local rugby team, knowing full well that he would be paid for the day.[62]

A critical consideration here was the fact that the employee admitted that his conduct was dishonest. In the circumstances, the relationship of trust was broken beyond repair as a result of the employee's initial unreliability and subsequent dishonest conduct. Accordingly, dismissal was clearly the appropriate sanction. This is reflected in the reasoning of Davis JA:

> This lenient approach to dishonesty cannot be countenanced. The employee held a relatively senior position within the organisation of the appellant at Humansdorp. He was palpably dishonest, even on his own version. He expected to get away with the enjoyment of attendance at a rugby match on the basis of claiming sick leave and then enjoying the benefits thereof. This is dishonest conduct of a kind which clearly negatively impairs upon a relationship of trust between an employer and employee.[63]

Hendricks v Overstrand Municipality[64] is another instructive case with an uncanny resemblance to *Msunduzi*. The appellant in *Hendricks*, a Chief Law Enforcement and Security Officer was found guilty of misconduct at an internal disciplinary hearing. The most serious aspect of the misconduct was the element of dishonesty associated with his having signed off on representations prepared on his behalf, which he knew were untrue and by which he intended to have his speeding fines quashed in order to benefit financially. The presiding officer imposed a sanction of a final written warning valid for 12 months on the first charge relating to aggressive behaviour to a fellow employee. A sanction of suspension without pay,

60 *Woolworths* para 5.
61 *Woolworths* para 6.
62 *Woolworths* para 11.
63 *Woolworths* para 13.
64 *Hendricks v Overstrand Municipality* 2015 36 ILJ 163 (LAC) (hereafter *Hendricks* case).

coupled with a final written warning valid for 12 months, was imposed in respect of the second charge pertaining to dishonesty, including fraudulent misrepresentation.

Aggrieved by the sanction imposed, the municipality approached the LC in terms of section 158(1)(h) of the LRA to review and set aside the determination of the presiding officer on the ground that it was irrational and unreasonable. Before the LC and LAC, the appellant argued that the chairperson of the internal hearing applied his mind to all the evidence. The appellant buttressed his contention that the presiding officer made his decision within the boundaries of reasonableness by alluding to his clean disciplinary record and length of service as well as the harmonious relationship with colleagues as evidence that the trust relationship had not irreparably broken down to render continued employment intolerable.[65]

The rub of the first respondent's contention in the review proceedings to set aside the sanction was that the appellant's dishonest and fraudulent misbehaviour was "committed with deliberate intent and involved the instructing of subordinates to participate in the commission thereof."[66] More than demonstrating a lax or deficient moral code as a senior employee tasked with overall responsibility for law enforcement, the appellant's conduct also involved the flagrant abuse of authority. By focussing on the prevalence of the practice of quashing fines, the chairperson failed to appreciate that the appellant as the person responsible for eradicating the practice was expected to lead by example and not to lend legitimacy to it. The first respondent pointed out that the problem of imposing a sanction short of dismissal in the case of the appellants was that it would create an impression of laxity among subordinate employees. To articulate it in another way, the lenient sanction imposed by the chairperson conveyed a troubling message: "If the senior employee responsible for maintaining law and order in the organisation is treated too leniently for dishonest misconduct, junior employees could argue on the basis of consistency that they are entitled to expect equal if not greater leniency."[67]

The LC reviewed and set aside the decision of the presiding officer and replaced it with one of dismissal in the light of the fact the appellant's misconduct had led to the destruction of the trust relationship with his employer, a state entity charged with serving ratepayers. In the same breath, the LAC noted the presiding officer's failure to attach significant weight to the appellant's demonstrated lack of credibility in his testimony, which further brought his integrity into question. If one takes into

65 *Msunduzi* para 22.
66 *Hendricks* para 25.
67 *Hendricks* para 36.

consideration the appellant's position, the fact that the misconduct involved dishonesty and the active involvement of his subordinates, the only logical and plausible inference is that the requisite degree of trust inherent in the employment relationship had been irretrievably damaged. Accordingly, the presiding officer's determination did not constitute a decision that fell within the range of decisions that a reasonable decision-maker could have made, given the evidentiary material presented to him. In coming to this conclusion, Murphy AJA approved of a passage from Steenkamp J's judgement in the court below where the learned judge had observed:

> Given the seriousness of the misconduct and the position of the employee as chief of law enforcement, the sanction imposed by the chairperson was irrational and unreasonable. He clearly did not apply his mind to the factors outlined above. The mitigating factors that he took into account do not remove the operational need of the municipality to ensure that senior officials in those positions are exemplary in their conduct and can be trusted by the municipality and by the public. There is also a constitutional obligation on the municipality imposed by section 152 of the Constitution to provide accountable government for local communities; to ensure the provision of services to those communities; and to promote a safe and healthy environment. If the employee were to remain in the employ of the municipality, it would be failing in its duties to its ratepayers.[68]

It is submitted that the conclusion reached by the LC and the LAC to the effect that dismissal was the only appropriate sanction was not only unassailable but was consonant with established authorities. It is now trite that the gravity of dishonesty, irrespective of whether it be categorised as gross or minor, depends not only, even primarily, on the act of dishonesty itself but on the way it adversely impacts on the employer's business.

In a similar vein, the employee in the *Department of Finance and Economic Development, Gauteng v Mosome*[69] was charged with insubordination by a departmental disciplinary enquiry for "displaying gross insubordinate behaviour towards [her supervisor] by using unacceptable language that demonstrated disrespect by saying to her supervisor that she must be stupid, she must stop calling her at home, (when she was contacted while she was supposed to be on duty), also telling her supervisor that she does not deserve the post she holds."[70] The arbitrator found that her dismissal was substantially unfair but would not order reinstatement because the employment relationship between her and the employers had irretrievably broken down with no prospects of reconciliation. Therefore, the arbitrator awarded her seven months' pay as compensation. The LC set aside the award and remitted the matter to allow further evidence as to why the

68 *Hendricks* para 54.

69 *Department of Finance and Economic Development, Gauteng v Mosome* (JA1/2013) [2014] ZALAC 46 (19 September 2014) (hereafter *Mosome* case).

70 *Mosome* para 6.

dismissed employee should or should not be reinstated in accordance with section 193(2) of the LRA. The second arbitrator appreciated that the only issue before her was to determine whether after having been found guilty of insubordination by the first arbitrator the employee was unfairly dismissed or whether she ought to have been reinstated or re-employed in terms of section 193(2) of the LRA. Further, the second arbitrator appreciated that in terms of section 193(2)*(b)* of the LRA, an exception to the primary remedy of reinstatement or re-employment in the case of a dismissal provided, where pursuant to section 193(2)*(b)* "the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable".[71] Having applied her mind to the totality of the evidence, the second arbitrator found that the appellant had conclusively established that the employment relationship between the parties had irretrievably broken down to such an extent that the employment relationship could not be resuscitated. Hence a continued employment relationship would be intolerable.[72] The LAC upheld the second arbitrator's finding that the derogatory, insulting, contemptuous and disrespectful behaviour on the part of the employee towards her supervisor struck at the core of the employment relationship, such that reinstatement of the first respondent would be intolerable because the employment relationship had irretrievably broken down, not only with her supervisor, but also with the head of her department.[73] Since the employee's insubordination "affected the heart of the employment relationship", the second arbitrator rationally and properly exercised her discretion under section 193(2) not to reinstate her but to compensate the employee.[74]

It was normally prudent for an employer who relied on irreversible damage to the employment relationship to justify a dismissal to lead evidence in that regard[75] unless the conclusion that the relationship had broken down could be inferred from the nature of the misconduct and/or the circumstances of the dismissal.[76] The fact that the employer had not lead evidence as to the breakdown of the trust relationship did not mean that the conduct of the employee regardless of its seriousness or dishonesty could not be visited with dismissal without any evidence as to the impact of that misconduct.[77]

71 *Mosome* para 9.
72 *Mosome* paras 23-24.
73 *Mosome* paras 25-29.
74 *Mosome* paras 33-34.
75 *Drs Dietrich, Voigt & Mia t/a Pathcare v Bennett* 2019 40 ILJ 1506 (LAC).
76 *Kock v CCMA* 2019 40 ILJ 1625 (LC).
77 *Woolworths (Pty) Ltd v Mabija* 2016 5 BLLR 454 (LAC) para 21.

3.7 The repercussions of post-dismissal conduct on the availability of *reinstatement*

One troubling aspect of Hoskins' transgressions was that he persisted in his role as a "born-again shop steward" even after his dismissal, while his matter was at arbitration. It will be recalled that when it came to attention that he could not represent an employee at arbitration, since he was not a member of a trade union, Hoskins quickly joined the trade union. Thereafter, he continued to represent the employee in those proceedings. The question that arises is: to what extent does Hoskins' post-dismissal defiance serve as an additional factor rendering continued employment intolerable? It is submitted that Hoskins' post-dismissal misconduct constituted aggravating intolerability.

The case of *Sibiya v CCMA*[78] is authority for saying that misconduct after the dismissal of an employee can equally contribute to the intolerability of an employment relationship. In this case, the employer charged the employee for the consequential acts he did not commit and, instead, proceeded to prove the commission of the consequential acts for which he was not charged.[79] Neither did it help the employer to hide behind the notion that it did not have to be as meticulous as in a criminal court in framing the charge. The charges were very clear, but the evidence failed to support the allegations therein contained. The court thus found the dismissal to have been substantially unfair. Hence the default remedy would have been reinstatement, but that was not to be because of the post-dismissal misconduct of the applicant, which was characterised by ill-conceived and strident attacks on the integrity and honesty of senior managers. Using his agent, the applicant made serious allegations against the employer. These were the circumstances surrounding the dismissal which made a continued employment relationship intolerable. It was not reasonably practicable for the employer to reinstate or re-employ the applicant.[80]

4 Conclusion

The case of *Msunduzi* is illustrative of a correlation between employee transgressions causing the irrevocable breakdown of trust and the intolerability at the workplace on the one hand, and the interface between the practicability requirement in making the order of reinstatement on the other. Quite apart from the gross disobedience and insolence with consequential irreversible loss of trust and confidence, the intolerability of

78 *Sibiya v CCMA* 2015 10 BLLR 1060 (LC) (hereafter *Sibiya* case). Also see *Radebe* paras 16 and 26.
79 *Sibiya* para 25.
80 *Sibiya* paras 19, 22, 25 and 28-29.

ongoing employment was amplified by the employee's lack of contrition and refusal to reform despite being accorded an opportunity to reflect on his conduct. The complete breakdown of trust and incompatibility is shown by the fact that his conduct was at odds with the administration. His own peers felt a level of mistrust and duplicity on his part and were unable to work with him. In our respectful opinion, this is a clear indication that continued employment had been rendered insufferable.

Another strand to the decision is that it clarified the parameters of an employee's right to fair representation at workplace disciplinary hearings. As the LAC aptly put it, the employee who is charged with misconduct can legitimately complain that he/she is denied representation by a representative of his/her choice. In short, Hoskins' role as a staunch proponent of workers' right to representation was misconceived.

Msunduzi also illuminates the link between post-dismissal misconduct and intolerability. The crisp question, so far as it relates to reinstatement, is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party. As already mentioned, Hoskins was given an opportunity to reflect on his conduct. He instead proceeded to do precisely what he was warned not to do. He would have continued to do so even if given a further chance as he was not open to any persuasion. It is submitted that the employee's ongoing post-dismissal misconduct provided a sound basis to conclude that the relationship of trust and confidence was irreparably damaged or destroyed. Accordingly, post-dismissal conduct is a relevant and even important consideration when assessing the practicability of reinstatement.

Bibliography

Literature

Bosch 2006 *ILJ*
Bosch C "The Implied Term of Trust and Confidence in South African Labour Law" 2006 *ILJ* 28-47

Brodie *Contract of Employment*
Brodie D *The Contract of Employment* (Thomson Edinburgh 2008)

Brodie 1996 *ILJ (UK)*
Brodie D "The Heart of the Matter: Mutual Trust and Confidence" 1996 *ILJ (UK)* 121-136

Brodie 1998 *ILJ (UK)*
Brodie D "Beyond Exchange: The New Contract of Employment" 1998 *ILJ (UK)* 79-102

Brodie 1999 *OJLS*
Brodie D "Fair Deal at Work" 1999 *OJLS* 83-98

Brodie 2001 *ILJ (UK)*
Brodie D "Mutual Trust and the Values of the Employment Contract" 2001 *ILJ (UK)* 84-100

Brooks 2001 *U Tas LR*
Brooks B "The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence" 2001 *U Tas LR* 29-41

Cohen 2009 *ILJ*
Cohen T "Implying Fairness into the Employment Contract" 2009 *ILJ* 2271-2295

Cohen 2012 *Acta Juridica*
Cohen T "The Relational Contract of Employment" 2012 *Acta Juridica* 84-101

Dukes 2009 *Edin LR*
Dukes R "Douglas Brodie, *'The Contract of Employment'*: Review" 2009 *Edin LR* 153-154

Fergus 2010 *ILJ*
Fergus E "The Distinction Between Appeals and Reviews: Defining the Limits of the Labour Court's Powers of Review" 2010 *ILJ* 1556-1575

Fergus 2013 *ILJ*
Fergus E "The Reasonable Employer's Resolve" 2013 *ILJ* 2486-2498

Fergus 2014 *ILJ*
Fergus E "Reviewing an Appeal: A Response to Judge Murphy and the SCA" 2014 *ILJ* 47-78

Grogan *Dismissal*
Grogan J *Dismissal* 3rd ed (Juta Cape Town 2017)

Grogan *Dismissal, Discrimination and Unfair Labour Practices*
Grogan J *Dismissal, Discrimination and Unfair Labour Practices* (Juta Cape Town 2007)

Le Roux 2008 *Obiter*
Le Roux R "Reinstatement: When Does a Continuing Employment Relationship Become Intolerable?" 2008 *Obiter* 69-76

Louw 2018 *PELJ*
Louw AM "The Common Law is… Not What It Used to Be': Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment (Part 1)" 2018 *PELJ* 1-25

Murray "Conceptualizing the Employer as Fiduciary"
Murray J "Conceptualizing the Employer as Fiduciary: Mission impossible?" in Bogg A *et al* (eds) *Autonomy of Labour Law* (Bloomsbury London 2015) ch 14

Myburgh 2010 *ILJ*
Myburgh A "Determining and Reviewing Sanctions After *Sidumo*" 2010 *ILJ* 1-20

Myburgh 2013 *ILJ*
Myburgh A "The LAC's Latest Trilogy of Review Judgements: Is the *Sidumo* Test in Decline?" 2013 *ILJ* 1-29

Newaj 2016 *THRHR*
Newaj K "The Impact of Dishonesty on Employment: *Edcon*, Prior and Beyond" 2016 *THRHR* 429-442

Okpaluba and Maloka 2021 *SA Merc LJ*
Okpaluba C and Maloka TC "Incompatibility as a Ground for Dismissal in Contemporary South African Law of Unfair Dismissal: A Review of *Zeda Car Leasing* and Other Recent Cases" 2021 *SA Merc LJ* 238-259

Okpaluba and Maloka 2021 *Speculum Juris*
Okpaluba C and Maloka TC "The Breakdown of the Trust Relationship and Intolerability in the Context of Reinstatement in the Modern Law of Unfair Dismissal" 2021 *Speculum Juris* 140-168

Raligilia 2014 *South African Journal of Labour Relations*
Raligilia KH "A Reflection on the Duty of Mutual Trust and Confidence: Off-Duty Misconduct in the Case of *Biggar v City of Johannesburg* Revisited" 2014 *South African Journal of Labour Relations* 70-77

Raligilia and Bokaba 2021 *Obiter*
Raligilia KH and Bokaba KM "Breach of the Implied Duty to Preserve Mutual Trust and Confidence: A Case Study of *Moyo v Old Mutual Limited* (22791) [2019]' 2021 *Obiter* 714-719

Rycroft 2013 *ILJ*
Rycroft A "The Intolerable Employment Relationship" 2013 *ILJ* 2271-2287

Sutherland "Regulating Dismissals"
Sutherland CE "Regulating Dismissals: The Impact of Unfair Dismissal Legislation on the Common Law Contract of Employment" in Arup C *et al* (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationship* (Federation Press Sydney 2006) 242-260

Teffo 2016 *Contemporary Labour Law*
Teffo M "Insolence and Insubordination: The Courts' Views on Employees Gone Rogue" 2016 *Contemporary Labour Law* 45-50

Tshoose and Letjeku 2020 *SA Merc LJ*
Tshoose CI and Letjeku R "The Breakdown of Trust Relationship Between Employer and Employee as a Ground for Dismissal: Interpreting the Labour Appeal Court's Decision in *Autozone*" 2020 *SA Merc LJ* 156-174

Van Jaarsveld 2007 *SA Merc LJ*
Van Jaarsveld M "An Employee's Contractual Obligation to Promote Harmonious Relationships in the Workplace: When are the Stakes too High? Some Pointers from the Judiciary" 2007 *SA Merc LJ* 204-216

Case law

ABSA Bank Ltd v Naidu 2015 36 ILJ 602 (LAC)

Adcock Ingram Critical Care v CCMA 2001 22 ILJ 1799 (LAC)

Booysen v Safety and Security Sectoral Bargaining Council 2021 7 BLLR 659 (LAC)

CEPPAWU v Glass & Aluminium 2002 5 BLLR 399 (LAC)

CEPPAWU v Lonmin Precious Metals Refinery 2011 32 ILJ 2782 (CC)

Central New Agency v CAWUSA 1991 12 ILJ 340 (LAC)

CCAWUSA v Wooltru Ltd t/a Woolworths (Randburg) 1989 10 ILJ 311 (IC)

CWIU v SA Polymer Holdings (Pty) Ltd 1996 8 BLLR 978 (LAC)

CSIR v Fijen 1996 6 BLLR 685 (AD)

De Beers Consolidated Mines v CCMA 2000 9 BLLR 995 (LAC)

Department of Finance and Economic Development, Gauteng v Mosome (JA1/2013) [2014] ZALAC 46 (19 September 2014)

Department of Home Affairs v Ndlovu 2014 35 ILJ 3340 (LAC)

Drs Dietrich, Voigt & Mia t/a Pathcare v Bennett 2019 40 ILJ 1506 (LAC)

Kock v CCMA 2019 40 ILJ 1625 (LC)

Edcon Limited v Padayachee (J331/16) [2018] ZALCJHB 307 (20 September 2018)

Environserve Waste Management (Pty) Ltd v CCMA (P99/14) [2016] ZALCPE 23 (15 November 2016)

FAWU v Harvestime Corporation (Pty) Ltd 1989 10 ILJ 497 (IC)

Fedlife Assurance Ltd v Wolfaardt 2002 1 SA 49 (SCA)

Fidelity Cash Management Service v CCMA 2008 3 BLLR 197 (LAC)

FNB v Language 2013 ILJ 3103 (LAC)

G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero 2017 38 ILJ 881 (LAC)

Hendricks v Overstrand Municipality 2015 36 ILJ 163 (LAC)

IMATU v Rustenburg TLC 1999 20 ILJ 377 (LC)

Jardine v Tongaat Hulett Sugar Ltd 2002 23 *ILJ* 547 (LC)

Keshwar v SANCA 1991 12 ILJ 816 (IC)

Kock v CCMA 2019 40 ILJ 1625 (LC)

Kroukam v SA Airlink 2005 26 ILJ 2153 (LAC)

Maepe v CCMA 2008 29 ILJ 2189 (LAC)

Malik v Bank of Credit and Commerce International SA 1998 AC 20

Malik and Mahmud v Bank of Credit and Commerce International SA [1997] UKHL 23

Masetlha v President of the RSA 2008 1 SA 566 (CC)

Mediterranean Textile Mills (Pty) Ltd v SACTWU 2012 2 BLLR 142 (LAC)

Mgijima v MEC, Department of Education, Gauteng (JR1894/2011) [2014] ZALCJHB 414 (27 October 2014)

Miyambo v CCMA 2010 10 BLLR 1017 (LAC)

Mondi Paper Co Ltd v PPWAWU 1994 15 ILJ 778 (LAC)

Motor Industry Staff Association v Silverton Spraypainters and Panelbeaters 2013 34 ILJ 1440 (LAC)

Moyane v Ramaphosa 2019 1 All SA 718 (G)

Moyo v Old Mutual Limited (22791/2019) [2019] ZAGPJHC 229 (30 July 2019)

Msunduzi Municipality v Hoskins 2017 38 ILJ 582 (LAC)

Murray v Minister of Defence 2008 29 ILJ 1369 (SCA)

Nathan v The Reclamation Group (Pty) Ltd 2002 23 ILJ 588 (LC)

NEHAWU obo Skhosana v Department of Health: Gauteng (JS903/15) [2018] ZALCJHB 201 (24 May 2018)

NUM v Black Mountain Mining (Pty) Ltd 2010 3 BLLR 281 (LC)

NUM obo Sekgoeng and Impala Platinum Ltd 2006 27 ILJ 2187 (CCMA)

NUMSA obo Motloba v Johnson Control Automotive SA (Pty) Ltd 2017 5 BLLR 483 (LAC)

Old Mutual Ltd v Moyo 2020 41 ILJ 1985 (GJ)

SA Quilt Manufacturers (Pty) Ltd v Radebe 1994 15 ILJ 115 (LAC)

SAMWU v Ethewini Municipality 2017 38 ILJ 158 (LAC)

SAMWU v Ethekweni Municipality 2019 1 BLLR 46 (LAC)

Sappi Novoboard (Pty) Ltd v Bolleurs 1998 19 ILJ 784 (LAC)

Saxonburg Estate (Pty) Ltd v CCMA (C873/2005) [2007] ZALC 197 (1 January 2007)

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, Including Organs of State v Zuma 2021 5 SA 327 (CC)

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, Including Organs of State v Zuma 2021 5 BCLR 542 (CC)

Shoprite Checkers (Pty) Ltd v CCMA 2008 9 BLLR 838 (LAC)

Sibanda v Pretorius (JR2637/16) [2019] ZALCJHB 84 (4 April 2019)

Sidumo v Rustenburg Platinum Mines Ltd 2007 28 ILJ 2007 (CC)

Supreme Poultry (Pty) Ltd v Mokgethi (JR1345/14) [2018] ZALCJHB 325 (13 September 2018)

Toyota SA Motors (Pty) Ltd v CCMA 2016 37 ILJ 313 (CC)

Toyota SA Motors v Radebe 2000 21 ILJ 340 (LAC)

Vitale v Transdeco GTHMH (Pty) Ltd (JR1061/06) [2007] ZALC 138 (16 November 2007)

Watson v SARU (C672/2015) [2017] ZALCJHB 264 (30 June 2017)

Woolworths (Pty) Ltd v CCMA 2022 3 BLLR 296 (LAC)

Woolworths (Pty) Ltd v Mabija 2016 5 BLLR 454 (LAC)

Wright v St Mary's Hospital 1992 13 ILJ 987 (IC)

Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk 2020 41 ILJ 1360 (LAC)

Legislation

Constitution of the Republic of South Africa, 1996

Labour Relations Act 66 of 1995

Internet sources

Merriam-Webster Date Unknown https://www.merriam-webster.com/dictionary/chutzpah
Merriam-Webster Date Unknown *Chutzpah* https://www.merriam-webster.com/dictionary/chutzpah accessed 6 November 2021

Rheeder 2011 https://www.polity.org.za/print-version/how-to-deal-with-shop-stewards-or-union-misconduct-2011-08-10
Rheeder J 2011 *How to Deal with Shop Steward Misconduct* https://www.polity.org.za/print-version/how-to-deal-with-shop-stewards-or-union-misconduct-2011-08-10 accessed 15 November 2021

List of Abbreviations

Edin LR	Edinburgh Law Review
HR	Human Resources
ILJ	Industrial Law Journal (South Africa)
ILJ (UK)	Industrial Law Journal (United Kingdom)
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
OJLS	Oxford Journal of Legal Studies
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
U Tas LR	University of Tasmania Law Review