17 November 2017

SA LABOUR GUIDE

CASE LAW UPDATES

Presented by Günther H. Williams

GHW

EMPLOYEE RELATIONS AND LABOUR LAW CONSULTING

NO. 9 SUMMERTIDE COMPLEX – 62-64 CORAL ROAD – BLOUBERGSTRAND – 7441 - CELL: 079 808 5704 / 072 509 0909
GHWIRCONSULT@GMAIL.COM

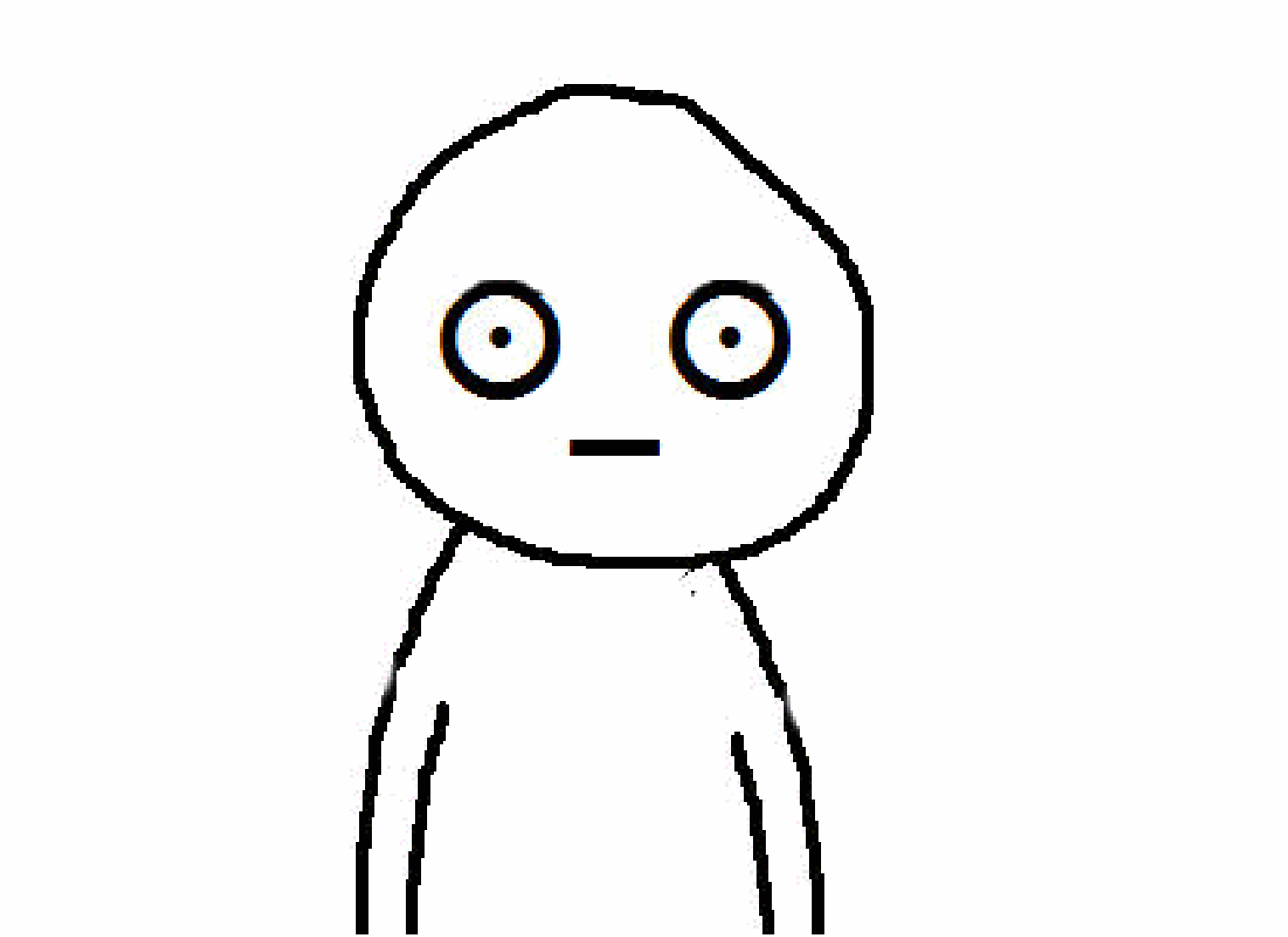
Introduction | Meet the Presenter

Günther H. Williams
Admitted Attorney and Industrial Relations Expert
Sole proprietor at **GHW Consulting**
079 808 5704
ghwirconsult@gmail.com

CASE LINE-UP

- *Prince v Minister of Justice and Constitutional Development and Others* [2017] ZAWCHC 30
- *Pharmaco Distributors (PTY) LTD v Weideman LAC* (2017) ZALCJHB 258
- *National Union of Metal Workers of South Africa (NUMSA) obo Motloba v Johnson Controls Automotive SA (Pty) Ltd and Others* [2017] 5 BLLR 483 (LAC)
- *Imvula Quality Protection and Others v University of South Africa* (J435/17) [2017] ZALCJHB 310 (31 August 2017)
- *Bawsi Agricultural Workers Union of South Africa obo Hansen/Standard Bank of South Africa Ltd* (2017) 26 CCMA
- *Enforce Security Group v Mwelase & others* (2017) 38 ILJ 1041 (LAC)
- *Nogcantsi v Mnquma Local Municipality & others* (2017) 38 ILJ 595 (LAC)
- *Consol Glass v National Bargaining Council for the Chemical Industries and Others* (JA5/15) [2017] ZALAC 12
- *South African Breweries (Pty) Ltd v Louw* [2017] ZALAC 63 (24 October 2017)
- *Ncane v Lyster NO and Others* (2017) 38 ILJ 907 (LAC)
- *Uber South Africa Technological Services (Pty) Ltd/ NUPSAW and SATAWU obo Tsepo Morekure & Others* CCMA
- *Swartland Investments (Pty) Ltd v National Union of Mineworkers Labour Court Case No. p28/2017*

WEEDING OUT HIGH EMPLOYEES



WEEDING OUT HIGH EMPLOYEES

Prince v Minister of Justice and Constitutional Development and Others [2017] ZAWCHC 30

- Parts of the Drugs and Drug Trafficking Act, No 140 of 1992 and the Medicines and Related Substances Control Act, No 101 of 1965 declared inconsistent with the Constitution to the extent that they encroach upon private use and consumption of cannabis for personal purposes. Declaration of invalidity suspended for two years to allow Parliament to correct the defects in the legislation.

- If the personal use of cannabis is legalised, it is likely that employees who previously feared the legal consequences of partaking may now do so. This may lead to an increasing focus on cannabis use and its impact on the workplace.

Prince v Minister of Justice and Constitutional Development and Others [2017] ZAWCHC 30

- Tests for weed: urine, hair, blood analysis – Complicated and time consuming.

- Must comply with s7 of the Employment Equity Act, No 55 of 1998 - Test must be permitted or required by law, or must be justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

- Any employer wishing to institute random testing for cannabis would have to ensure that the testing is voluntary, confidential and not motivated by victimisation or unfair discrimination.

- Physical and mental impairment of the employee to do his/her job and/or risk to other employees – Observation test.

"DO THE MEDICAL TEST OR YOUR FIRED."

Pharmaco Distributors (PTY) LTD v Weideman LAC (2017) ZALCJHB 258

- Contract of employment contained a clause which provided that employee had to undergo medical testing whenever the employer deemed it to be necessary.
- Provision inconsistent with sec 7(1) of the EEA, which prohibits medical testing of employees unless certain conditions are met.
- Employee's consent is not one of exceptions in sec 7(1).
- Direct causal connection between the employee's disorder and the dismissal
- Dismissal automatically unfair

SHOP STEWARDS: "A LICENCE TO CONFRONT"?

National Union of Metal Workers of South Africa (NUMSA) obo Motloba v Johnson Controls Automotive SA (Pty) Ltd and Others [2017] 5 BLLR 483 (LAC)

- SS disagreed with the payroll administrator on management's interpretation of a provision in the MIBCO collective agreement regulating how employees on night shift were to be paid for work performed on a public holiday.

- SS said aggressively: "Don't lie to my people that I agreed to how they would be paid" and he moved his finger in the direction of the payroll administrator.

- Service centre supervisor thought the employee was going to hit her.

- SS dismissed on the grounds of physical and verbal assault, serious disrespect and threatening and/or intimidating behaviour towards the payroll administrator

National Union of Metal Workers of South Africa (NUMSA) obo Motloba v Johnson Controls Automotive SA (Pty) Ltd and Others [2017] 5 BLLR 483 (LAC)

"[48] The principle formulated in the considerable body of authority both in the Labour Court and in this Court is that a shop steward should fearlessly pursue the interest of his/her constituency and ought to be protected against any form of victimisation for doing so. However, this is no licence to resort to defiance and needless confrontation. A shop steward remains an employee, from whom his employer is entitled to expect conduct that is appropriate to that relationship. The fact that the bargaining meetings often degenerate does not mean that one should jettison the principle that, as in the workplace also, at the negotiations table the employer and the employee should treat each other with the respect they both deserve. Assaults and threats thereof are not conducive to harmony or to productive negotiation. It is unacceptable to hold that when one acts in a representative capacity "anything goes"." (footnotes omitted)

WHAT CONSTITUTES THE TRANSFER OF BUSINESS AS GOING CONCERN FOR THE PURPOSES OF SECTION 197?

Refresher:

South African Municipal Workers Union and Others v Rand Airport Management Company (Pty) Ltd and Others (JA9/03) [2004] ZALAC 17 (3 December 2004)

- Outsourcing of a service may constitute a transfer of a business "as a going concern"

- Gardening and security functions of Rand Airport fell within the definition of "services" and such services could be transferred "as a going concern"

Imvula Quality Protection and Others v University of South Africa (J435/17) [2017] ZALCJHB 310 (31 August 2017)

- While the definition of 'business' does include a service, it is the business supplying the service that is capable of being transferred, not the service itself.

Imvula Quality Protection and Others v University of South Africa (J435/17) [2017] ZALCJHB 310 (31 August 2017)

"[5] The Constitutional Court has considered the provisions of s 197 on at least four occasions. While the judgments have not always been unanimous, the principles to be applied are well-established. First, it is clear that for s 197 to be triggered, three discrete requirements must simultaneously be met. These are a transfer, of the whole or part of a business (defined to include a 'service'), as a going concern. A transfer is defined to mean 'the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern. A 'business' is defined in s 197(1) (a) to include a 'service'. This does not mean that the latter should be viewed as a discrete entity; on the contrary, what is capable of being transferred is the business that supplies the service and not the service itself. Whether there is a transfer as a going concern remains to be determined by the approach formulated in *NEHAWU where Ngcobo J said the following: …*

Imvula Quality Protection and Others v University of South Africa (J435/17) [2017] ZALCJHB 310 (31 August 2017)

[5] …In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that these factors are not exhaustive and that none of them is decisive individually.

Imvula Quality Protection and Others v University of South Africa (J435/17) [2017] ZALCJHB 310 (31 August 2017)

Section 197 will thus be triggered when the following three requirements are simultaneously met:

- A transfer - a 'transfer' is defined in s197(1) to mean "the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.
- A transfer of a business - a 'business' includes a service, and importantly, the Labour Court held that it is the business supplying the service that is capable of being transferred not the service itself.
- The business is transferred as a going concern - whether there is a transfer as a going concern, the court held, is determined by a number of factors including whether the new employer takes over workers, whether assets (tangible and intangible) are transferred and whether the new employer carries on the same business.

Imvula Quality Protection and Others v University of South Africa (J435/17) [2017] ZALCJHB 310 (31 August 2017)

- The Court did not follow the Labour Appeal Court (LAC) decision in Rand Airport and distinguished that decision on the basis that the CC has developed the law to hold that it is the business rendering the service that must transfer for s197 to apply.

THE PITFALLS OF RESIGNATION

Refresher:

- *African National Congress v Municipal Manager, George Local Municipality and others* [2010] 3 BLLR 221 (SCA)

"[11] … A resignation must be effective immediately or from a specified date. Being a unilateral act, it does not need to be accepted by the intended recipient to be so effective." (footnotes omitted)

- *Lottering and others v Stellenbosch Municipality* (2010) 31 ILJ 2923 (LC)

"It follows then that the resignation letters of 6 November constituted unilateral exercises of the power to terminate requiring no acceptance and permitting no withdrawal without consent" – P16

Bawsi Agricultural Workers Union of South Africa obo Hansen/Standard Bank of South Africa Ltd (2017) 26 CCMA

- Employer initiated disciplinary proceedings against Employee. Employee resigned with immediate effect. Employer refused to accept immediate notice and demanded that Employee work notice period, which the Employee did. Employee subjected to and found not guilty in disciplinary hearing. Employee wanted to retract resignation but the Employer rejected retraction.

- Once the resignation has been tendered the employee's employment will terminate. Should the employee wish to retract their resignation the employer will have to consent.

AUTOMATIC TERMINATION CLAUSES

Enforce Security Group v Mwelase & others (2017) 38 ILJ 1041 (LAC)

"[23] The factual matrix in this case supports the view that the employees' contracts of employment were fixed-term contracts where the end of the fixed term was defined by the completion of a specified task or project, that is, the termination of the Boardwalk contract. The continued existence of these contracts depended on the continued existence of the contract between the appellant and Boardwalk. The employees were employed specifically for the contract between the appellant and Boardwalk. The termination of that contract is a legitimate event that would by agreement, give rise to automatic termination of the employment contracts.

Enforce Security Group v Mwelase & others (2017) 38 ILJ 1041 (LAC)

"[23] …. It is Boardwalk that cancelled the contract and not the appellant. There was no direct or indirect act by the appellant to cancel the contracts. There is no evidence to suggest that cancellation by Boardwalk was a device to rid the appellant of the employees. Neither is there evidence to suggest that it was a clandestine move by the appellant to dismiss the individual employees. On the facts of this case the cancellation of the service contract by Boardwalk is the proximate cause for the termination of the employees' contracts of employment."

"[41] In my view, it does not necessarily follow that in all cases an automatic termination clause based on an event contained in a fixed term contract of employment will be visited with invalidity. It would be necessary to determine whether in the circumstances of a particular case the clause was intended to circumvent the fair dismissal obligations imposed on the employer by the LRA and the Constitution."

Enforce Security Group v Mwelase & others (2017) 38 ILJ 1041 (LAC)

Relevant considerations in determining validity of automatic termination clause:

- The precise wording of the automatic termination clause and the context of the entire agreement.
- The relationship between the fixed-term event and the purpose of the contract with the client.
- Whether it is left to the client of the contractor or TES to choose and pick who is to render the services under the service agreement.
- Whether the clause is used to unfairly target a particular employee by either the client or the employer.
- Whether the event is based on proper economic and commercial considerations.

Nogcantsi v Mnquma Local Municipality & others (2017) 38 ILJ 595 (LAC)

- Employee's contract contained a 'resolutive condition' to the effect that his appointment was subject to a vetting and screening process that was being conducted and that –

  > "… should the revealed outcomes become negative your contract will be automatically terminated."

- Employer informed by previous employer that the employee had been dismissed for serious criminal offences.

Nogcantsi v Mnquma Local Municipality & others (2017) 38 ILJ 595 (LAC)

‘’[32] The act referred to in Barnard (and Mampeule) must also be understood as a ‘deliberate’ or ‘intentional’ act. The employer (or the third party) in performing the act that results in the termination, must, at least, have directed its will to causing a dismissal. The latter consequence must have been the object of its act.

[33] So, on the objective facts, in the light of the decision in Barnard and the dictum in Mampeule, there was no dismissal — since the automatic termination was not caused by any decision or act of the municipality or SAPS, which had as its objective the termination of the appellant’s employment contract. The appellant bore the onus to prove a dismissal on a balance of probabilities, and failed to discharge that burden.”

Nogcantsi v Mnquma Local Municipality & others (2017) 38 ILJ 595 (LAC)

[42] Significantly, the appellant freely and voluntarily agreed to a vetting and to an automatic termination, if the vetting yielded a negative result. This was material to the appellant's suitability for the position he was employed in. As was pointed out earlier, the result was patently and objectively negative of and concerning the appellant's suitability, which resulted in the automatic termination of the employment contract. The termination was not triggered by an act of which the aim and object (whether primary or secondary) was to end the employment relationship. Further, the condition in the agreement was not impermissible in terms of the LRA.

I'M ENTITLED TO ASK YOU QUESTIONS...

Consol Glass v National Bargaining Council for the Chemical Industries and Others (JA5/15) [2017] ZALAC 12

- The failure of a commissioner to allow a party to cross-examine a witness may constitute a reviewable irregularity and may result in the award being set aside.

"[36] As already alluded to, the commissioner restricted Mr Nziana right to cross-examine Mr Magatikele. At the commencement of Mr Magatikele's cross-examination the commissioner advised Mr Nziana as follows:

'Commissioner: Please understand, if there is anything that this witness has said, that is untrue or that is incorrect those will be the questions that you put to him. Do you follow?

Mr Nziana: Okay.'

Mr Nziana asked one or two question and thereafter the commissioner began questioning Mr Nziana on issues pertaining to his case. At some stage, during this interrogation, the record reflects the following: ...

Consol Glass v National Bargaining Council for the Chemical Industries and Others (JA5/15) [2017] ZALAC 12

"36] …'Mr Nziana: I was treated unfairly.
Commissioner: In which way?
Mr Nziana: Well, I can mention many things. But….[intervenes]
Commissioner: Well, I am going to give you that opportunity to do so now. Thank you sir [Mr Magatikele]. You are excused…'
Thereafter Mr Nziana's evidence-in-chief commenced. Further on during his testimony the following is recorded:
'Commissioner: what comment have you got to what was said by the previous witness? The general manager?
Mr Nziana: He said a couple of things. I had questions lined up for him. Basically to basically question him so that you understand what was happening. Because I got, I had a lot of questions. As you can see.
Commissioner: I see.
The commissioner took this issue no further and did not take the trouble to recall Mr Magatikele, at least for purposes of allowing Mr Nziana to cross-examine him."

Consol Glass v National Bargaining Council for the Chemical Industries and Others (JA5/15) [2017] ZALAC 12

"[41] The denial of a right to cross-examine a witness goes to the root of a fair hearing and the resultant award stands to be reviewed and set aside. The normal remedy under these circumstances would be to refer the matter to the Bargaining Council for arbitration *de novo* before a commissioner other than the second respondent. However, on the facts of this case, it shall serve no purpose to do so because, as it shall be demonstrated below that notwithstanding the fact that Nziana was not given a fair hearing, Consol did not prove the fairness of the dismissal."

BUSINESS RESTRUCTURING: EMPLOYER DUTIES I.R.O. DISLOCATED EMPLOYEE

South African Breweries (Pty) Ltd v Louw [2017] ZALAC 63 (24 October 2017)

- An employer who seeks to avoid the dismissal of a dislocated employee and who invites the dislocated employee to compete for one or more new posts, does not act unfairly. In a corporate restructuring, requiring an employee to compete for a post is not a method of selecting for dismissal; rather it is a legitimate method of seeking to avoid the need to dismiss a dislocated employee. A competitive process to seek to avoid retrenchment is not unfair.

South African Breweries (Pty) Ltd v Louw [2017] ZALAC 63 (24 October 2017)

"[21] In this matter, what has been inappropriately labelled as the "selection criteria" is the inclusion of past performance ratings in the assessment process for the competitive process to select an incumbent for the new job of area manager, George. This is not a method to select who, from the ranks of the occupants of potentially redundant posts, is to be dismissed and is not what section 189(2)(b) is concerned to regulate. The fact, as illustrated in this matter, that a dislocated employee, who applies for a new post and fails, and by reason thereof remains at risk of dismissal if other opportunities do not exist does not convert the assessment criteria for competition for that post into selection criteria for dismissal, notwithstanding that broadly speaking it is possible to perceive the assessment process for the new post as part of a long, logical, causal chain ultimately ending in a dismissal. Accordingly, in our view, it is contrived to allege that the taking into account of performance ratings in a process of recruitment for a post is the utilisation of an unfair method of selecting for dismissal as contemplated by sections 189(2)(b) and 189(7)."

South African Breweries (Pty) Ltd v Louw [2017] ZALAC 63 (24 October 2017)

"[22] An employer, who seeks to avoid dismissals of a dislocated employee, and who invites the dislocated employee to compete for one or more of the new posts therefore does not act unfairly, still less transgresses sections 189(2) (b) or 189(7). The filling of posts after a restructuring in this manner cannot be faulted. Being required to compete for such a post is not a method of selecting for dismissal; rather it is a legitimate method of seeking to avoid the need to dismiss a dislocated employee."

ASSESSING THE FAIRNESS OF PROMOTION DECISIONS

Ncane v Lyster NO and Others (2017) 38 ILJ 907 (LAC)

"[25] When it comes to evaluating the suitability of a candidate for promotion, good labour relations expect an employer to act fairly but it also acknowledges that this is not a mechanical process and that there is a justifiable element of subjectivity or discretion involved. It is for this reason that the discretion of an arbitrator to interfere with an employer's substantive decision to promote a certain person is limited and an arbitrator may only interfere where the decision is irrational, grossly unreasonable or mala fides. See on this Goliath v Medscheme (supra).

[26] But where an employer provides that certain rules apply as regards the decision to promote or to recommend a candidate for promotion, eg. as in this case, the candidate who scores the most points must be recommended by the panel, good labour relations requires an employer to be held to this. A failure to comply with the rules may result in substantive unfairness."

Ncane v Lyster NO & others (2017) 38 ILJ 907 (LAC)

["27] In the case where another person has been promoted to the post then the unsuccessful candidate must show that this is unfair. And as WallisAJ (as he then was) said in Ndlovu v Commissioner for Conciliation, Mediation and Arbitration and Others:

'That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer is rational it seems to me that no question of unfairness arises.'

EMPLOYEE OR INDEPENDENT CONTRACTOR

Uber South Africa Technological Services (Pty) Ltd / NUPSAW and SATAWU obo Tsepo Morekure & Others CCMA

- In addition to the control test, the organizational test, the economic dependence test and the dominant impression test, The Code of Good Practice: Who is an employee? introduces a new comprehensive test, the "reality of the relationship" test.

"[41] Although not stated in so many words, the Code introduces a new comprehensive test, which includes as factors the past tests. This is the "reality of the relationship" test. This requires that, despite the form of the contract, a person deciding whether someone is an employee or an independent contractor must consider the real relationship between the parties. Item 52 states: "Courts, tribunals and officials must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering all relevant factors that emerge from an examination of the realities of the parties' relationship.""

Uber South Africa Technological Services (Pty) Ltd / NUPSAW and SATAWU obo Tsepo Morekure & Others CCMA

Factual analysis:

- Drivers render personal services.
- The relationship is indefinite as long as the driver complies with requirements.
- Drivers are subject to the control of Uber.
- If the driver does not meet the required standards, the driver is effectively dismissed.
- Drivers are economically dependent on the ability to drive for Uber.

Ruling:

The CCMA has jurisdiction to determine the dismissal disputes referred by Uber drivers as they are employees of Uber SA for the purposes of the Labour Relations Act 66 of 1195 as amended.

STRIKE ONLY WHEN THE EMPLOYER KNOWS WHAT'S COMING, WHEN IT'S COMING.

Swartland Investments (Pty) Ltd // National Union of Mineworkers Labour Court Case No. p28/2017

"[12] In section 64(1)(b) the legislature grants employers 48 hours to prepare and take the necessary steps to protect itself from the adverse effects of the planned strike. Although the commencement of the 48 hours is not prescribed, its purpose requires that the notice should be given in a manner that will let the employer know that the strike will commence at least 48 hours from the time the notice is delivered. An employer's working hours have to be taken into account and each case will be determined on its merits. The Respondents were aware of the Applicant's working hours. They deliberately sent the strike notice just before midnight on a Saturday knowing that it would be read the following Monday. When an employer is given notice of a strike, the employees bring to the employer's attention the fact that they are going to embark on a strike on a particular date and time. That can be achieved when the employer is able to have access to the notice.

Swartland Investments (Pty) Ltd // National Union of Mineworkers Labour Court Case No. p28/2017

"[12] … If the Respondents' argument that they did not have to consider the Applicant's working hours when giving the notice can be accepted , a union could deliver a strike notice at 18H00 on a Friday via fax, to an employer who does not work on weekends, and closes at 17H00 on Fridays. The Respondent's argument would make it possible for employees to embark on protected strikes without employers' prior knowledge thus defeating the purpose of section 64(1)(b)…

[13] By sending the strike notice to the Applicant at about midnight on Saturday, for a strike that was due to commence on Tuesday, knowing that the notice would be read on Monday, the Respondent failed to afford the Applicant the 48 hours' notice envisaged in section 64(1)(b). The failure renders the strike action based on both the refusal to bargain and organisational rights unprotected.

- Rule nisi confirmed: Strike unprotected. Interdict awarded.

THANK YOU