SA Labour Guide - Labour Law Update

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Contents

Collective Bargaining and Industrial Action Accord and Draft Code

The Nedlac *Accord on Collective Bargaining and Industrial Action* and a *Draft Code of Good Practice: Collective Bargaining, Industrial Action and Picketing* have recently been made public. Whilst the Code is merely a draft at this stage, this newsflash summarises what is contained in these important documents and what their significance may be.

Firstly, a general comment on what's *not* in the Accord and draft Code in its current form: much had been made in various reports in recent times of measures that may be included to regulate and possibly curtail industrial action, such as the incorporation of provisions requiring **strike ballots** and the use of compulsory **arbitration** to resolve protracted disputes. Neither of these measures appear with any significance – *clause 19* of the draft Code merely restates the existing legal position on ballots without taking it any further, namely that the LRA does not require the conduct of a ballot as a requirement for a protected strike or lockout, with s67(7) stating explicitly that the failure to conduct a ballot may not give rise to any litigation that will affect the legality and the protected status of the industrial action. Whilst unions and employer organisations are obliged in s95(5)(p) to provide in their constitutions for a secret ballot before calling a strike or lockout, the Code (see *clause 19(3)*) emphasises that the failure to do so does not invalidate the protected status of the strike or lockout.

The draft Code in its current form does not in any way provide for the use of compulsory arbitration to resolve protracted disputes.

Accord

1. Who is bound by it?

Parties to the Accord include trade union federations (eg Cosatu) and employer organisations represented at Nedlac, Government, agencies such as the CCMA and other private sector organisations and institutions. We are uncertain at this stage whether unions such as Numsa and Amcu have signed the Accord.

2. What is its status?

It will be interesting to see whether our Courts regard the Accord as a collective agreement as defined in s213 of the LRA. If so, this potentially brings into play s65(1)(a) which prohibits industrial action if that would be in breach of a collective agreement. It remains to be seen whether a union party to the Accord, having committed to 'peaceful strike action', may be in breach of that collective agreement in the event of a strike occurring that is not 'peaceful', thereby rendering any such industrial action unprotected in terms of s65(1)(a). Against this interpretation is the fact that the wording of this section only precludes strikes if the '*issue in dispute*' giving rise to the industrial action (eg wages) is provided for in a collective agreement, rather than the parties' conduct in pursuing the industrial action.

S65(1)(a) aside, an alleged breach of the Accord is likely to be used in any court proceedings (eg interdicts) relating to the protected status of any industrial action, claims for damages, or the fairness of any dismissals for participating in any such action.

3. What does it say?

Broadly speaking the Accord provides for a commitment to act lawfully and peacefully and to bargain in good faith during industrial action. As such, a lot of what is contained in the Accord is a restatement of what the law is anyway relating to protected / unprotected strikes, and conduct during industrial action. But in various ways in does go further. For example, *clause 8.4* places an onus on unions to make 'public statements' (oral / written?) during a strike calling on their members to act in a law abiding and peaceful manner.

Some of the Accord's provisions are going to be difficult to interpret and apply. For example, parties undertake in terms of *clause 8.9* to "refrain from acting in a manner that makes any conflict worse". Does a spurious wage offer from either side 'make conflict worse'? And is this then a breach of the collective agreement?

Clause 9 appears to be the heart of the Accord. *Clause 9.1* requires parties to-

> *"take all necessary measures to prevent violence, intimidation and damage to property and, if it does occur, to take all the steps necessary to discourage such conduct and to comply with a court order interdicting the violence, intimidation or damage to property."*

Again there may be problems in applying these provisions: for example, eg if an employer's attempt to employ replacement labour during a strike could lead to violence, should it now not do so in terms of this clause?

Clauses 10,11 and 12 deal with the role of Public Order Policing, private security companies and the CCMA / bargainings councils, during strikes, lockouts, pickets and protest action.

Draft Code

Again we emphasise that the Code is merely a draft at this stage. It is divided into various Parts, dealing with –

- Collective bargaining (Part B);
- Workplace democracy and dialogue (Part C);
- Industrial action: strikes and lockouts (Part D); and
- Picketing (Part E).

The Code aims to be a practical guide to collective bargaining. It is wordy and lengthy (35 pages), and much of it simply restates what the law is anyway. A more concise, tighter Code may have been more workable. Whilst it does make some useful contributions, as seen from the outline below, it is disappointing that it did not go further. *Clause 4.4* for example merely recognises there is no statutory or constitutional duty to bargain - we think it could have stated that notwithstanding this, a failure/refusal to bargain in good faith may be taken into account in assessing 'fault' in any manifestations of the conflict that subsequently arise.

Whilst there is much good stuff in the Code, it is silent on outlining what the consequences would be of not following the stated guidelines. The consequences of not complying with the Dismissal Code are clear – any subsequent dismissal is likely to be procedurally and / or substantively unfair with a resultant order for reinstatement or compensation. But where does a breach of this Code take us? As with a breach of the Accord, the answer will probably lie in providing ammunition for any litigation related to the protected status of any industrial action, damages arising therefrom, or the fairness of any dismissals for participating in any such action.

1. Collective bargaining – Part B

Part B provides detailed guidelines on –

- good faith bargaining (*clause 7*);
- training and support for negotiators (*clause 8*);
- preparing for negotiations (*clause 9*);
- how to submit demands and responses (*clause 10*);
- how to start negotiations (*clause 11*);
- the use of facilitators (*clause 12*);
- disclosure of information (*clause 13*);

The principles of good faith bargaining set out in *clause 7* are perhaps the key clause in the Code. These include a commitment to –

- disclose relevant information;
- written demands and responses;
- no new demands during negotiations;
- no unilateral action prior to deadlock;
- rational and courteous behaviour;
- attend agreed meetings timeously;
- secure mandates and not change negotiators;
- being prepared to modify demands;
- provide appropriate facilities;
- present demands / responses accurately;
- respect parties' rights to communicate with their constituency;
- not bypass the union and deal directly with members, before deadlock;
- consider escalating negotiations to a higher level to avoid deadlock;
- being open to continue negotiations after a dispute has been declared.

Whilst not specifically listed under clause 7, other principles of good faith bargaining appear throughout the Code. For example:

- *Clause 9(5)* requires parties to inform other parties in writing of names of appointed negotiators;
- *Clause 10(2)* spells out what should be included in parties' opening written submissions prior to negotiations commencing.

Having detailed all these good faith bargaining principles, the Code is lacking in spelling out what the consequences would be of a failure to adhere to them, as already highlighted.

2. Workplace democracy and dialogue – Part C

Part C aims to develop a culture of mutual respect and trust between those managing an organisation and those working for it, through consultation in the decision making process. In that sense, it has similar aims to the largely unused workplace forums envisaged by chapter V of the LRA, and it remains to be seen whether these objectives are any more successful. It is intended that any such initiatives should not undermine collective bargaining arrangements, and guidelines are provided in *clause 15(2)* on how they should co-exist.

3. Industrial action: strikes and lockouts – Part D

Part D spends much time outlining what the law is on the right to strike and recourse to lockout. It is interesting that the Code introduces the notion of a 'peaceful' strike or lockout, described in *clause 3(1)(d)* as one free of intimidation and violence. This then surfaces elsewhere in the Code, for example in *clause 22.2*, which requires a protected *and* peaceful strike to exist before an employer's obligations not to discontinue basic amenities for striking employees living on the employer's premises, arise. It will be interesting to see what the Courts make of a strike they deem to be protected but not peaceful.

Along the same lines, *clause 23(1)* provides for the establishment of a 'peace and stability' committee comprising representatives of the union, management, any private security company involved, the SAP, and any facilitator appointed, with the aim of regulating and monitoring conduct during the industrial action. The Code does not cover how this would co-exist with the negotiating forum in place that would be dealing with the issues in dispute that gave rise to the industrial action.

As already stated, *clause 19* on ballots is disappointing - it creates no added pressure to hold strike ballots and reaffirms that a failure to comply with a union's constitution in respect of a strike ballot will not invalidate the protected status of a strike. The Code doesn't even contain the need for a ballot under the principles of good faith bargaining. We think it could also have said that a failure to hold a ballot in terms of a union's constitution, will be taken into account in deciding the fairness of parties' subsequent actions in dealing with manifestations of the conflict.

Clause 20 & *clause 21* contain useful guidelines on the content of strike notices and who may strike. It is however puzzling that the freedom of association principles requiring employees to respect other employees' rights to choose whether to strike or not, the right to freedom of movement in and out of premises, and the employer's right to continue to maintain production, are only stated in *clause 22.4* & *clause 22.5* in relation to employees residing on the employer's premises.

4. Picketing – Part E

Part E is to a large extent a rework of the existing Picketing Code which presumably will fall away. There are some interesting variations from the existing Code – for example, clause *32(4)(b)* will now prevent picketers from 'inciting violence, wearing masks and having any dangerous weapons or objects in their possession.' Far more attention is also given to the role of the SAP (*clause 33*) and the role of private security (*clause 34*).

Overall conclusions

Overall, we think the Accord and draft Code do make a useful contribution to promoting orderly collective bargaining and industrial action. But they spend too much time restating what the law is, and re-emphasising parties' obligations to comply with what the law is anyway. They are in our view too long, but short of remedies and penalties to rectify breaches that will inevitably occur.

Whilst there are no obvious sanctions for non compliance built into the documents, they are likely to be used extensively by litigants in court proceedings dealing with the aftermath of industrial action in the form of disputes over strike dismissals, claims for damages to plant and equipment, and other similar actions. The Accord and Code (once finalised) are likely to be extensively referred to by our labour courts in developing a coherent jurisprudence around issues relating to collective bargaining and industrial action. That, it seems, may be the real price parties may pay for non compliance.

Our courts have already indicated in recent judgments, even under the current law, that they may be prepared to declare a protected strike as unprotected, due to levels of violence and other unlawful action associated with the strike. The Accord and Code may provide much more space for our courts to develop a jurisprudence that requires future strikes to be both protected ***and*** peaceful in order to attract the safeguards provided by the LRA.

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THE EMPLOYMENT CONTRACT

KalipaMtati v KPMG Services (Pty) Ltd J2277/16; 18 October 2016 (LC)

Principle:
Where an employee resigns from the employ of his employer and does so voluntarily and with immediate effect, the employer may not discipline that employee after the resignation has taken effect. The employer loses the right to discipline the employee, also with immediate effect.

Facts:
An employee was accused of conduct related to a conflict of interest, including failing to disclose to the employer her directorship in several companies which were in competition with the employer. The employee terminated her employment by resigning. This case was complicated by the fact that she submitted two letters of resignation to the employer. The first was submitted on 5 September after the employer informed her that it was conducting an investigation into the allegations against her, and stated "*Please accept this letter as a notice of my resignation*." The understanding of the employee was that the notice period would run from 5 September 2016 to 4 October 2016.

The second letter was submitted after the employer indicated to the employee that it would be commencing with the disciplinary proceedings against her. The second letter was dated 14 September 2016, and the relevant part reads as follows:

> "*It is with deep regret that I must inform you I am resigning from my employment ……with immediate effect.*"

At the disciplinary hearing on 30 September 2016, the employee raised the preliminary point concerning the jurisdiction of the chairperson of the disciplinary hearing to discipline her in light of her resignation. It was indicated to the chairperson that should she persist with the disciplinary hearing, the employee would institute an urgent application to interdict her. After the chairperson ruled that she had jurisdiction and that she would be proceeding with the hearing, the employee left the hearing. The chairperson then proceeded with the hearing in the absence of the employee. At the end of the hearing the chairperson found the employee guilty and imposed the sanction of summary dismissal.

The employee brought an urgent application asking the Labour Court to interdict the employer from proceeding with the disciplinary hearing after her resignation. Even though the hearing had been completed by the time the matter came before the Court, it was prepared to consider the matter.

The Labour Court said that there are **two perspectives**: The one is where the resignation is with immediate effect and the other is where the resignation is with an undertaking to serve the notice period. The Court accepted the basic principle that the fact that an employee has given notice to terminate the employment contract does not take away the power of the employer to discipline him or her whilst serving the notice period. In other words if an employee is serving notice he or she is still an employee and subject to the authority of the employer in so far as the employment relationship is concerned. Similarly, all the obligations that arise from the contract are

still binding on the employer during the notice period and this includes the duty to pay the salary of the employee.

If an employer takes disciplinary action against the employee and dismisses him or her before the end of the notice period, the employment relationship would be terminated. In those circumstances the termination will not be due to the resignation of the employee but rather the dismissal for misconduct.

Turning to the facts of the case, the Court said the employee was entitled to terminate the contract by resigning with immediate effect in the middle of the notice period, despite having already resigned on notice. The first resignation on notice, the Court said, had no bearing on the right of the employee to subsequently terminate the contract unilaterally before the end of that period. The LC concluded that the second letter of resignation changed the status of the employee from that of being an employee, in the ordinary sense of the word, to that of being an ex-employee. This meant that the employee's (second) termination of the employment contract with immediate effect took away the right of the employer to proceed with the disciplinary hearing against her.

This judgment looks like authority for employees to resign with immediate effect to insulate themselves from disciplinary action. Can this be correct? We think not.

Let's start with the legal requirements in the BCEA. Section 37 requires notice of specified time periods depending on the length of service. In addition, most contracts of employment have specific notice periods. Although there is no penalty in the BCEA for an employee who just walks off the job or who gives notice with a period shorter than required, an employee remains an employee until the end of the specified or agreed notice period – unless this is waived by the employer.

We accept that many employers will waive their rights to avoid the obligation to remunerate but there will be cases where for important policy and practical reasons, the employer is willing to continue remuneration during the notice period so that it can conduct a disciplinary hearing which results in a record that becomes part of the institutional memory and official record. This could be important for a number of reasons.

While resignation is a unilateral act which does not depend on acceptance by the employer, that act is a separate consideration from the date of termination. Unless the employer waives the notice period, the contract does not terminate on the date the notice is given but when the notice period expires. That notice period is fixed by the BCEA or the contract of employment. The fact that the employee resigns with immediate effect does not necessarily result in termination on the date of resignation. Our view is that in those circumstances the door for a disciplinary hearing remains open during the contractual notice period.

Extract from the judgment:
(Molahlehi J)
[13] The broad principle governing the issue of the power of an employer to discipline an employee who had resigned from his or her employ, is set out in the minority judgment in *Toyota SA v The Commission for Conciliation Mediation and Arbitration and others* (2016) 37 ILJ 313 (CC), the case which the applicant relied on in support of her case. The majority in that case dismissed the application for leave to appeal which means that they never

considered the merits of the application. It is the minority judgment of Zondo J that dealt with the merits of the application and in this regard held that:

> *"[142] Another context of resignation is the normal resignation. Where an employee resigns from the employ of his employer and does so voluntarily, the employer may not discipline that employee after the resignation has taken effect. That is because, once the resignation has taken effect, the employee is no longer an employee of that employer and that employer does not have jurisdiction over the employee anymore. Indeed, even the CCMA or the relevant bargaining council would have no jurisdiction to entertain a referral of a "dismissal" dispute in such a case because there would be no dismissal as envisaged in section 186of the LRA. Therefore, if an employee who has validly resigned later refers an alleged unfair dismissal dispute to arbitration under the LRA and it is found that the employee had validly resigned and had not been dismissed, reinstatement would be incompetent."*

[14] In summary the principle to discern from the above is that an employer has no authority or the power to discipline an employee who resigns from his or her employment once the resignation takes effect. In other words where the resignation is with immediate effect, the employer loses the right to discipline the employee, also with immediate effect.

[15] The issue of resignation by an employee and its consequences to the power of the employer to discipline can be looked at from two perspectives. The one perspective is where the resignation is with immediate effect and the other is where the resignation is with an undertaking to serve the notice period. The consequences of resignation on notice is summarized by Cheadle AJ, as he then was, in the *Lottering* matter as follows:

> *"[14] In an indefinite contract, either party may terminate the contract on notice. A resignation in this context is simply the termination by the employee on notice. There does not have to be a specific provision to that effect, it is an inherent feature of an indefinite contract and if there is no agreed notice, the notice must be reasonable (provided that it is not less than the minimum notice prescribed in section 37 of the BCEA). If the contract is for a fixed term, the contract may only be terminated on notice if there is a specific provision permitting termination on notice during the contractual period – it is not an inherent feature of this kind of contract and accordingly requires specific stipulation.*
>
> *[15] The common law rules relating to termination on notice by an employee can be summarised as follows:*
>
> *15.1 Notice of termination must be unequivocal – Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1985 4 SA 809 (SCA) at 830E.*
>
> *15.2 Once communicated, a notice of termination cannot be withdrawn unless agreed – Rustenberg Town Council v Minister of Labour1942 TPD 220 and Du Toit v Sasko (Pty) Ltd (1999) 20 ILJ 1253 (LC).*
>
> *15.3 Termination on notice is a unilateral act – it does not require acceptance by the employer – Wallis Labour and Employment Law para 33 at 5-10. This rule is disputed by the applicants in so far as it applies to notice not in compliance with the contract. The rule is accordingly dealt with more fully below.*
>
> *15.4 Subject to the waiver of the notice period and the possible summary termination of the contract by the employer during the period of notice, the contract does not terminate on the date the notice is given but when the notice period expires – SALSTAFF obo Bezuidenhout v Metrorail [2001] 9 BALR 926 (AMSA) at para [6].*

> *15.5 If the employee having given notice does not work the notice, the employer is not obliged to pay the employee on the principle of no work no pay;*
>
> *15.6 If notice is given late (or short), that notice is in breach of contract entitling the employer to either hold the employee to what is left of the the contract or to cancel it summarily and sue for damages – SA Music Rights Organisation v Mphatsoe[2009] 7 BLLR 696; and Nationwide Airlines (Pty) Ltd v Roediger& Another (2006) 27 ILJ 1469 (W).*
>
> *15.7 If notice is given late (or short) and the employer elects to hold the employee to the contract, the contract terminates when the full period of notice expires. In other words if a month's notice is required on or before the first day of the month, notice given on the second day of the month will mean that the contract ends at the end of next month. – Honono v Willowvale Bantu School Board & Another 1961(4) SA 408 (A) at 414H – 415A. Since this articulation of the rule is contentious and its application was placed in dispute by the applicants, it too is dealt with more fully below."*

.....

[19] The basic principle, as I understand it, is that the fact that an employee has given notice to terminate the employment contract does not take away the power of the employer to discipline him or her whilst serving the notice period. In other words if an employee is serving notice he or she is still subject to the authority and the power of the employer in as far as the employment relationship is concerned. Similarly, all the obligations that arise from the contract are still binding the employer during the notice period and this includes the duty to pay the salary of the employee.

.....

[22] There is no requirement in law that an employee who resigns on notice, which is then accepted by the employer, cannot resign with immediate effect during the notice period. In other words an employee who issues notice of intention to resign is not barred from resigning thereafter before the expiry of the notice period. In other words an employee in such a situation, need not seek the consent of the employer neither does he or she need to withdraw the initial resignation before doing so.

[23] In my view, the second letter of resignation of the applicant changed the status of the employee from that of being an employee, in the ordinary sense of the word, to that of being the erstwhile employee of the respondent. This means that the termination of the employment contract with immediate effect took away the right of the first respondent to proceed with the disciplinary hearing against her.....

'NON STANDARD' EMPLOYMENT

***Enforce Security Group v Mwelase Fikile & Others* (DA24/15) [2017] ZALAC 9 (25 January 2017)**

Principle:

The definition of dismissal requires that there must be an act by the employer that terminates the contract. Where the end of the fixed term is defined by the completion of a specified event, such as the cancellation of a service contract, this is the proximate cause for the automatic termination of the employees' contracts of employment and does not constitute a dismissal.

Facts:
The appellant is a private security services provider and provided security officers to its various clients contracted to it, including Boardwalk Inkwazi Shopping Centre (Boardwalk), Richards Bay. In terms of the contracts of employment with the employees, the period of employment commenced on a specified date. Clause 3.2 of the contracts provides that:

> *'The period of the employment would endure until the termination of the contract which currently exists between BOARD WALK or its successors (hereinafter referred to as the CLIENT) and the COMPANY.*
>
> 3.2.1 *The Employee agrees that he/she fully understands that the Company's contract with the Client might be terminated by the Client at any time and for any cause or might terminate through [e]ffluxion of time and that in consequence hereof the nature of the Employee's employment with the company and its duration is totally dependent upon the duration of the Company's contract with the Client/s and that the Employee's contract of employment shall automatically terminate. Such termination shall not be construed as a retrenchment but a completion of contract…'*

On 30 September 2011, Boardwalk gave notice of termination of its contract with the security company with effect from 31 October 2011. As a result of the termination notice the security company held meetings on 3 & 4 October 2011 with the shop stewards from NASUWU and SATAWU which were the trade unions representing employees at the workplace. The employer offered the affected employees alternative employment in Durban, but this was rejected by the unions.

All the employees were then handed letters notifying them of the cancellation of the contract by Boardwalk Inkwazi Shopping Centre, offering them alternative employment in Durban, and that their contracts of employment would terminate on 31 October 2011 if they did not take up the offer of alternative employment.

Dissatisfied with their dismissal, the employees referred an unfair dismissal dispute to the CCMA. The commissioner concluded that the client's termination of the agreement with the security company led to the automatic termination of the employees' employment contracts and therefore the employees were not entitled to any form of compensation. Their unfair dismissal application was accordingly dismissed.

On review at the Labour Court (***Mwelase and Others v Enforce Security Group and Others* (D358/12) [2015] ZALCD 46 (31 July 2015)**) it was held that any contractual provision that infringes on the rights conferred by the LRA or Constitution is not valid, and even though an employee might be deemed to have waived his or her rights, such waiver is not valid or enforceable. By finding that the cancellation of the contract between Boardwalk and the employer led to the automatic termination of the employees' contracts of employment, the LC held that the commissioner committed a material error of law by failing to apply his mind to the relevant provisions of the LRA, namely, sections 5(2)(b), 5(4) and 185. The LC found that there was an obligation on the employer to have embarked on a retrenchment

exercise. Regarding alternative offers of employment, the LC held that Durban and Richards Bay are too far apart to commute daily.

At the LAC the employer's appeal was upheld and the LC's decision set aside. The LAC stressed that dismissal only occurs when an employer's own act terminates the contract, and said where employees have agreed that there will be automatic termination if a third party withdraws from the contract, there is no dismissal. The LAC's reasoning was that the definition of dismissal requires that there must be an act by the employer that terminates the contract. Where the end of the fixed term is defined by the completion of a specified event, such as the cancellation of a service contract, this is the proximate cause for the automatic termination of the employees' contracts of employment and does not constitute a dismissal. Enforce was therefore not obliged to retrench the employees.

Extract from the judgment:
(Tlaletsi DJP)

[18] It is clear from the wording of s186 (1) above that there are specifically defined instances that bring about the termination of employment which would be regarded as dismissal. This means therefore that an employment contract can be terminated in a number of ways which do not constitute a dismissal as defined in s 186(1) of the LRA. One such instance would be a fixed –term employment contract entered into for a specific period or upon the happening of a particular event. An event that comes to mind would include a conclusion of a project or the cancellation or expiry of a contract between an employer and a third party. Once the event agreed to between an employer and its employee takes place or materializes, there would ordinarily be no dismissal. It has been the position in common law that the expiry of the fixed term-contract of employment does not constitute termination of the contract by any of the parties. It constituted an automatic termination of the contract by operation of law and not a dismissal

….....

[21] The definition of dismissal requires that there must be an act by the employer that terminates the contract. This is made clear by the legislature's employment of the words "*an employer has terminated a contract of employment with or without notice*". 'That encompasses the ordinary situation of the employer giving notice under the contract of employment and a summary dismissal'. In *National Union of Leather Workers v Barnard NO and Another* this Court had the following to say about 186(1)(a):

> *"The key issue in the interpretation of the phrase 'an employer has terminated the contract with or without notice' is whether the employer has engaged in an act which brings the contract of employment to an end in a manner recognised as valid by the law".*

In *SA Post Office v Mampeule* this Court remarked:

> *"…The subsection defines 'dismissal 'as follows:…an employer has terminated 'a contract of employment with or without notice…' I am in agreement with the court a quo that 'dismissal 'means any act by an employer which results, directly or indirectly, in the termination of an employment contract…*"

[22] The evaluation of the evidence by the court *a quo* turned primarily on whether the automatic termination clause contained in the employees' contracts of employment offends against s5 of the LRA. An evaluation of the nature of the contracts of

employment and the meaning and implication of its terms were not considered. The court a quo seems to have moved from the premise that since the commissioner found that the nature of the employment contracts were "indefinite contracts" of employment *'and that such a finding has not been assailed on review*' it should stand. A finding that the employment contracts were "indefinite contracts" is an erroneous finding by the commissioner. Such a finding constitutes an error of law and cannot stand despite it not being challenged. As pointed out already, the test is whether the finding is a correct one and not strictly whether it falls within a bend of reasonable decisions.

[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. 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.

[24] The fact that the appellant had an option to retrench the employees or could have considered other options instead of relying on the automatic termination clause cannot be used to negate the clear terms agreed to by the parties. Put differently, one cannot simply use the considerations of the fairness or otherwise of a dismissal to determine whether an employee has been dismissed.

***AMCU and Others v Piet Wes Civils CC and Another* (J2834/16, J2845/16) [2017] ZALCJHB 7 (13 January 2017)**

Principle:
There is a dismissal when a service provider terminates the contracts of employment because the client has terminated its contract with the service provider. To interpret termination on a 'specified event' to include the cancellation of the contract by the client goes beyond the intention of the legislature.

Facts:
This was an urgent application in terms of s 189A(13) of the LRA. The employees were members of AMCU and employed by the respondents, Piet Wes Civils CC and Waterkloof Skoonmaakdienste CC respectively. They alleged they had been dismissed for operational requirements, that it was a large scale retrenchment contemplated by s 189A of the LRA, and that there was no consultation. They sought reinstatement pending a proper consultation process in terms of s 189A(13).

Both respondent employers provided services to Exxaro coal mine as contractors. They entered into various contracts with Exxaro to perform certain tasks. Exxaro terminated their contracts on one month's notice. The employers then terminated the employees' contracts as a direct result of losing the Exxaro contracts. The employers said that the workers were not dismissed for operational requirements or at all. They

were employed on fixed term contracts, the contracts expired, and their contracts of employment terminated by operation of law.

The LC granted the interdict, ordering the reinstatement of the employees pending retrenchment consultations. The LC held that there is a dismissal when a service provider terminates the contracts of employment because the client has terminated its contract with the service provider, and to interpret termination on a 'specified event' to include the cancellation of the contract by the client goes beyond the intention of the legislature. The LC said the onus is on the employer to prove that there was a justifiable reason for fixing the term of the contract and that the term was agreed. But in this case it was not a genuine fixed term contract contemplated by s 198B(4)(d). Therefore, it was in contravention of s 198B(3) and therefore deemed to be of indefinite duration. The LC held that the clause on which the employers relied was against public policy.

Extract from the judgment:
(Steenkamp J)
[13] The onus is on the employer to prove that there was a justifiable reason for fixing the term of the contract and that the term was agreed.

[14] It is common cause that the clause quoted above is contained in the employment contracts. But, argued Mr *Cook*, it is not a genuine fixed term contract contemplated by subsection 4(d); therefore, it is in contravention of subsection 3 and therefore deemed to be of indefinite duration. The clause on which the respondents rely, he argued, is against public policy and *pro non scripto.*

[15] In neither employer's case was the nature of the work for which it employed the employees "of a limited or definite duration" as contemplated by s 198B(3)(a). Instead, it was linked to the employer being supplied with work by "his clients", i.e. Exxaro. Have the employers demonstrated that that was a "justifiable reason" for a fixed term contract as contemplated by s 198B(3)(b)? If the employers discharge that onus, the contracts will justifiably be seen as being for a fixed term and the employers' defence should succeed; but if not, the employment of the employees will be deemed to be of a fixed duration in terms of subsection 5 and the employers would have to consult over any contemplated dismissals for operational requirements.

[16] One of the "justifiable reasons" contemplated by subsection (4)(d) is an instance where the employees are employed to work exclusively on a specific project that has "a limited or defined duration". But that was not the case here. Exxaro simply terminated its contracts with the two employers on notice; there is no indication on the papers that a specific project had come to an end. The employers have not demonstrated a justifiable reason for fixed term contracts in that regard. An example of a real justifiable reason in terms of this subsection would have been, for example, where Exxaro had contracted the respondents to clean up a specific mine, or to do so within a specified time. This is not such an example.

[17] In a matter decided before the enactment of s 198B, *Fidelity Supercare Cleaning (Pty) Ltd v Busakwe NO*, the Court found in a review application that the commissioner's interpretation of a similar clause in an employment contract was not unreasonable and that the employee was entitled to severance pay. The employment contract provided for the situation where the employer loses the contract on which the employee was employed – much the same as the case here. The employer argued that, where there is a cancellation of a service contract, the employment contract automatically terminates on the date of termination of the applicant's service agreement with the client. The arbitrator found that the employee was not employed on a fixed term contract. In the context of that contract, he did

not accept the employer's argument that the applicant's contract was for a fixed term, or that it would mean that once the employer's client cancels a contract or terminates it, the employees' contracts should or would automatically terminate "by operation of law". And Bhoola J found that the award was not unreasonable. I agree.

[18] More recently, shortly after s 198B came into operation, the Court came to a similar conclusion in a case involving the same company. The Court, with reference to *Sindane v Prestige Cleaning Services* and *Mahlamu v CCMA,* expressed the view (albeit *obiter*) that 'event' in s 198B(1)(a) does not include termination of a contract by a client of the employer. And with reference to s 198B, the Court continued:

> *'Given the expressions about the decisions by this court in Mampeule, Nape and Mahlamu, supra, the view expressed in Twoline Trading above cannot be correct. A contractual provision that provides for the automatic termination of the employment contract at the behest of a third party or external circumstances beyond the rights conferred to the employee in our labour laws undermines an employee's rights to fair labour practices [and] is disallowed by labour market policies. It is contrary to public policy, unconstitutional and unenforceable (Grogan "The Broker's Dilemma" 2010 Employment Law 6). This view is clear from all the decisions referred to above, and it is apparent from these that labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. The freedom to contract cannot extend itself beyond the rights conferred in the constitution, as for instance, against slavery.'*

[19] On the facts of the case before me, I hold a similar view. The contract was not intended to be for a fixed duration, or to terminate on the occurrence of a specified event or the completion of a specified task or project as contemplated by s 198B(1). And to place the construction of a 'specified event' on the cancellation of the Exxaro contract would, in my view, go beyond the intention of the legislature. The very purpose of the enactment of s 198B was to provide security of employment, except in circumstances where a fixed term contract is clearly justified, such as seasonal work or employment to carry out a specific task or to do so within a specified period. To make the workers' employment contingent upon the whims of a third party that can simply terminate the contract between it and the employer on notice, does not fit that purpose. The employers have not, in my view, discharged the onus of showing that there was a justifiable reason to employ the workers on a fixed term contract for more than three months, as contemplated by s 198B(3)(b). The employment contracts were either of an unlimited duration or must be deemed to be of an indefinite duration as contemplated by s 198B(5).

S.197 TRANSFERS

Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofong Local Municipality (CCT214/15) [2016] ZACC 37 (1 November 2016)

Principle:
The definition of "business" in section 197(1) of the LRA includes a service. This means that it is the business that supplies the service, and not the service itself, that must be transferred.

Facts:
In this case a municipality, responsible for the provision of services to its residents, allowed its electricity services to fall into disrepair. In 2011 the municipal manager entered into an Electricity Management Contract (EMC) with a private company

(Rural) to operate and manage the municipal electricity distribution network for a period of 25 years, after which the obligation to supply electricity to residents would revert to the Municipality. In terms of the EMC 16 employees were transferred under section 197 of the LRA by the Municipality to Rural.

Rural started its performance under the provisions of the EMC on 1 September 2011. It expanded the workforce to 127 employees and incurred significant expenditure on the purchase of network materials, specialised vehicles, the compiling and recording of details of the Municipality's electrical distribution infrastructure, the mapping of townships within the Municipality's geographical area, and software systems in relation to the provision of the electrical services. It also purchased immovable property for offices and staff accommodation. This all cost in the region of R96 million.

In August 2013 the Municipality informed Rural that it considered the EMC to be null and void because the then municipal manager did not have the requisite authority to conclude the EMC with Rural. The latter disputed this and contended that this conduct amounted to a repudiation of the Municipality's obligations under the EMC, entitling it to cancel the agreement. This contractual dispute is still pending in the Free State High Court.

Despite the pending action in the High Court, Rural provided the Municipality with information about the identities of the 127 employees, their employment contracts and organisational structure in the beginning of October 2014. It also handed over what it termed the "possession of the Network and the Capital Assets". It proposed an agreement of the transfer of the 127 employees under section 197 of the LRA to the Municipality, which the Municipality refused to accept.

Rural then sought relief in the Labour Court for an order declaring that there had been a transfer of business as a going concern by it to the Municipality and that the employment contracts of the 127 employees should accordingly be transferred to the Municipality. The Labour Court granted the relief, but the Labour Appeal Court overturned that decision on the basis that Rural had failed to discharge the *onus of* showing, on the probabilities, that a transfer of a business as a going concern had taken place and that the very business conducted by Rural had been transferred back to the Municipality. The test was whether the Municipality would have been able to continue business seamlessly after the 'transfer', it being common cause that certain components of Rural's business that supplied electricity services were <u>not</u> handed back to the Municipality.

When the matter was referred to the Constitutional Court the Municipality argued that the business was not transferred to it as a 'going concern'. At best it received an obligation to provide electricity to the residents but it never received Rural's computers, systems, stationery, vehicles, equipment etc. It also did not receive their debtor's book or an inventory of Rural's business. So it was argued that Rural was not transferred as a going concern.

Rural on the other hand argued that the business comprised the infrastructure for the provision of electricity services and the employees dedicated to that business. Handing over of peripheral assets such as software, vehicles and stationery were not essential for the transaction to constitute one in terms of section 197 of the LRA.

The EMC agreement did not contemplate that such assets would ever transfer to the Municipality as part of the business.

The Constitutional Court had to decide whether a transfer of a fully functional business in its expanded form was necessary for it to fall within s 197. The Court was clear that one business could not try to transfer the obligation to take over all employees to the new owner under the guise of s 197, but nevertheless retain for itself the means it used to conduct the business. The Court said while the protection of employees is the primary concern of s 197, employees are also protected by the retrenchment provisions in section 189. The choice in this case was which employer should be responsible for the workers affected by the change in circumstance.
The Constitutional Court accepted that for a transfer of a business as a going concern to occur, not all the assets of the business have to be transferred and that it depends on the nature of the business. But in this case the assets that Rural did not transfer back to the Municipality were essential to the profitability and operation of the business. Without these crucial assets, the Municipality could not have carried on the business without major difficulties. Applying what it called the "factual application of a flexible test", the Court concluded that there had been no transfer of the business to the Municipality as a going concern.

Extract from the judgment:
(Froneman J)
[27] This Court has, in *NEHAWU*, *Aviation Union* and *City Power*, consistently formulated the approach to be followed in determining whether there has been a transfer of business as a going concern under section 197.

[28] *NEHAWU* was decided before the amendment that included a "service" in the definition of "business" was applicable, but regarded the amendment as a clarification of the conclusion it reached. Ngcobo J formulated the approach as follows:

> *"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 this list of factors is not exhaustive and that none of them is decisive individually."*

.....
[30] Importantly, and helpfully, Jafta J in the minority judgment also dealt with the inclusion of service in the definition of a business in section 197(1):

> *"Although the definition of business in section 197(1) includes a service, it must be emphasised that what is capable of being transferred is the business that supplies the service and not the service itself."*

[31] *City Power* too accepted and built on the foundations of *NEHAWU* and *Aviation Union*. It is important to note that *City Power* did not find that the mere termination of a service contract triggered the application of section 197 of the LRA. It followed the approach in *NEHAWU* and *Aviation Union* and determined the question on the facts:

> *"On the present facts, there is no dispute that City Power took over the full business 'as is', with all of the complex network infrastructure, assets, know how, and technology required to install and operate the prepaid electricity*

> *system with the clear intention of maintaining uninterrupted electricity services to Alexandra Township. The project continued after termination of the service level agreements and completion of the handover process. The business is identifiable and it is discrete. Ultimately a business of providing a system of prepaid electricity to residents of Alexandra continued, save that it was now conducted by a different entity."*

.....

[37] Rural submitted that it expanded the business and made it more profitable. The Municipality, by contrast, complains that certain necessary assets were not transferred. I agree that for a transfer of a business as a going concern to occur, not all the assets of the business have to be transferred and that it depends on the nature of the business and essentiality or otherwise of particular assets for a particular business. That factual application of a flexible test has long been at the heart of our going-concern business transfer jurisprudence. The onus rested on Rural to set out what work the more than hundred additional employees it employed were involved in and what means were provided to them to do that work. It is common cause that certain equipment was not transferred to the Municipality, but it appears improbable that at least some of the newly employed employees did not need and use that equipment in order to do their work. Without the transfer of the means to do the work they did as part of Rural's business, there could be no transfer of the business to the Municipality as a going concern. The assets that Rural did not transfer back to the Municipality were essential to the profitability and operation of the business. Without these crucial assets, the Municipality could not have carried on the business without any major difficulties.....

DISMISSAL - MISCONDUCT

***Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JA73/15) [2017] ZALAC 4 (10 January 2017)**

Principle:

Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, there are certain acts of misconduct, particularly gross dishonesty, which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal.

Facts:

An employee, a senior shop steward, was dismissed after a disciplinary enquiry which found him guilty of dishonesty in that he procured a false statement of costs from his child's school in order for the company to pay more than it should. The shop stewards received the bursary applications from the employees and checked them to ensure their correctness before submitting them to the committee for approval. The employee, being a senior shop steward at Bidserv, collected the bursary applications from other employees and was familiar with the procedures and internal workings.

At the CCMA the commissioner placed emphasis on the fact that there was no evidence to support the differential treatment between the employee and the other two employees. The commissioner found that the employee was not afforded an opportunity to present evidence in mitigation of the sanction during his internal enquiry. He was of the view that the employee's 15 years of service and his clean disciplinary record militated against his dismissal. He held that no evidence was led to prove that the employment relationship had been irreparably damaged by the submission of the impugned quotation. All that the employee had to do was to

reduce the amount payable in respect of the quotation as it did with other employees. But the commissioner remarked that the employee did not approach the CCMA with clean hands. He ordered that he be reinstated but limited his retrospective pay to three months' salary to mark his displeasure at the conduct he "deemed inappropriate with respect to the whole saga of procuring the quotation."

On review at the Labour Court it was held that the commissioner's award passed the test of falling within the band of reasonable decisions that could be reached in the circumstances of this case.

On appeal at the LAC it was held that the probabilities were that the employee knowingly submitted a false quotation in the hope of claiming more for his child's uniform from the appellant. Further it was held that the commissioner ought not to have embarked on the question of inconsistency in the application of discipline without having first determined the underlying reason for the dismissal and that he did not provide any basis for his finding that the other two employees had been dishonest.

The LAC held that it was incomprehensible that the commissioner concluded that the substratum of the employment relationship had not been destroyed when he had not determined whether the employee committed a dishonest act and its impact on the relationship of trust. The misconduct committed by the employee was of a serious nature and that his length of service foundered in the face of the weight of authority by the Courts. The appeal was therefore upheld with costs and the shop steward's dismissal confirmed.

Extract from the judgment:
(Phatshoane AJA)

[33] As already alluded to, the commissioner held that no evidence was led to prove that the employment relationship had been irreparably damaged by the submission of the impugned quotation. He was of the view that Ramapuputla's 15 years of service and his clean disciplinary record militated against his dismissal. In *Toyota SA Motors (Pty) Ltd v Radebe and Others*, this Court pronounced:

> *'[15].....Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty. It appears to me that the commissioner did not appreciate this fundamental point.*
>
> *[16] I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.'*

[34] Recently in *Woolworths (Pty) Ltd v Mabija and Others,* this Court held:

'[21] The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonesty, cannot be visited with a dismissal without any evidence as to the impact of the misconduct. In some cases, the more outstandingly bad conduct of an employee would warrant an inference that trust relationship has been destroyed. It is, however, always better if such evidence is led by people who are in a position to testify to such break down. Even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others in order to determine whether the sanction of dismissal was fair..'

[35] Regard being had to the analysis set out above it is incomprehensible that the commissioner could conclude that the substratum of the employment relationship had not been destroyed when he had not determined whether Ramapuputla committed a dishonest act and its impact on the trust relationship. There is no question that the misconduct committed by Mr Ramapuputla is of a very serious nature. His length of service founders in the face of the weight of authority and facts referred to in the preceding paragraphs. The fact that he was a shop steward who had to be exemplary to other employees aggravates his misconduct. He also did not show any contrition. On this conspectus, his dismissal was justified.

EMPLOYMENT EQUITY

Solidarity and Others v Department of Correctional Services and Others (CCT 78/15) [2016] ZACC 18 (15 July 2016)

Principles:

1. Black candidates, whether they are African, Coloured or Indian people, are also subject to the *Barnard* principle (ie promotion may be refused to white people who are already over-represented in that occupational level). Both men and women are also subject to that principle.
2. Targets in employment equity plans will not constitute quotas where there is provision for deviations from the targets of the plan.
3. The basis used in setting the numerical goals or targets in employment equity plans must be the one authorised by the statute. A wrong basis will lead to wrong targets.

Facts:

The Department of Correctional Service's 2010 EE Plan set certain numerical targets to be attained within the five year period of the plan, in order to achieve employment equity in the Department's workforce. The numerical targets in the 2010 EE Plan were based on national mid-year population estimates for 2005, issued by Statistics South Africa.

In 2011 the Department advertised certain posts in the Western Cape. The individual applicants in this case applied for appointment to some of the posts. Most of the individual applicants were recommended for appointment by the respective interview panels but most were denied appointment. In the case of males, the basis for this decision was that they were Coloured persons and Coloured persons were already overrepresented in the relevant occupational levels. In the case of women,

the basis was that women were also already overrepresented in the relevant occupational levels. This meant that appointing these applicants to the positions for which they had applied would not be in accordance with the 2010 EE Plan.

The applicants referred unfair labour practice disputes to the CCMA for conciliation in terms of the LRA. The basis of the disputes was that the Department's refusal to appoint the individual applicants on the ground that they belonged to a race or gender that was already overrepresented on the relevant occupational levels constituted unfair discrimination and, therefore, an unfair labour practice. The applicants also attacked the 2010 EE Plan as non-compliant with the EE Act and as invalid. The conciliation process was unsuccessful. The dispute was then referred to the Labour Court for adjudication as an unfair labour practice dispute.

The Labour Court in ***Solidarity & Others v Dept. of Correctional Services & Others (C 368/2012, C968/2012) [2013] ZALCCT 38 (18 October 2013)*** concluded that the 2010 EE Plan did not comply with the EE Act. The Court held that section 42 of the EE Act meant that both the regional and national demographics had to be taken into account in determining numerical targets. The LC did not order that the applicants should be appointed or promoted to the positions for which they had applied, but ordered the Department to take immediate steps to ensure that both national and regional demographics were taken into account when setting equity targets at all occupational levels of its workforce.

On appeal in ***Solidarity and Others v Department of Correctional Services and Others (CA23/13) [2015] ZALAC 6 (10 April 2015)***, the LAC concluded that the deviations from the 2010 EE Plan made the numerical targets flexible, and that they were not quotas. It said that, if rationally implemented, the deviations ensured that the plan was not implemented in a rigid fashion. The LAC found that the 2010 EE Plan complied with the EE Act and the Constitution, and dismissed the appeal.

On appeal, the Constitutional Court overturned the LAC decision and found that the 2010 EE Plan did not comply with the EE Act and the Constitution. In coming to this conclusion, the Court made three distinct findings:

Firstly, the CC held that Black candidates, whether they are African, Coloured or Indian people, are also subject to the principle in the *Barnard* case (namely that promotion may be refused to White people who are already over-represented in that occupational level). Both men and women are subject to that principle. This has to be so, the Court said, because the transformation of the workplace entails that the workforce of an employer should be broadly representative of the people of South Africa.

Secondly, the CC held that targets in employment equity plans will not constitute quotas where there is provision for deviations from the targets of the plan. Allowing deviations for scarce skills and other exceptions provides flexibility.

Thirdly, the CC held that the basis used in setting the numerical goals or targets in employment equity plans must be one authorised by statute. A wrong basis will lead to wrong targets. In failing to use the demographic profile of both the national and regional economically active population to set the numerical targets, the Department

had acted in breach of its obligation in terms of section 42(1)(a) of the EEA and, thus, unlawfully.

What makes the CC decision interesting is that it was determined to bring resolution to the historical dispute. Unlike the Labour Court which made a general order, the CC ordered that those applicants who had applied for appointment to posts that currently remained vacant, must be appointed to those posts and be paid remuneration and benefits attached to those posts. Those applicants who had applied for appointment to posts that were currently filled, must be paid the remuneration and benefits attached to those posts.

Extract from the judgment:
(Zondo J)

[39] In my view the application of the *Barnard* principle is not limited to White candidates. Black candidates, whether they are African people, Coloured people or Indian people are also subject to the *Barnard* principle. Indeed, both men and women are also subject to that principle. This has to be so because the transformation of the workplace entails, in my view, that the workforce of an employer should be broadly representative of the people of South Africa. A workplace or workforce that is broadly representative of the people of South Africa cannot be achieved with an exclusively segmented workforce. For example, a workforce that consists of only White and Indian managers and, thus, excludes Coloured people and African people or a senior management that consists of African people and Coloured people only and excludes White people and Indian people or a senior management that has men only and excludes women. If, therefore, it is accepted that the workforce that is required to be achieved is one that is inclusive of all these racial groups and both genders, the next question is whether there is a level of representation that each group must achieve or whether it is sufficient if each group has a presence in all levels no matter how insignificant their presence may be. In my view, the level of representation of each group must broadly accord with its level of representation among the people of South Africa.

….....

[48] The EE Act, like all legislation, must be construed consistently with the Constitution. Properly interpreted the EE Act seeks to achieve a constitutional objective that every workforce or workplace should be broadly representative of the people of South Africa. The result is that all the groups that fall under "Black" must be equitably represented within all occupational levels of the workforce of a designated employer. It will not be enough to have one group or two groups only and to exclude another group or other groups on the basis that the high presence of one or two makes up for the absence or insignificant presence of another group or of the other groups. Therefore, a designated employer is entitled, as a matter of law, to deny an African or Coloured person or Indian person appointment to a certain occupational level on the basis that African people, Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in that level. On the basis of the same principle an employer is entitled to refuse to appoint a man or woman to a post at a particular level on the basis that men or women, as the case may be, are already overrepresented or adequately represented at that occupational level. However, that is if the determination that the group is already adequately represented or overrepresented has a proper basis. Whether or not in this case there was a proper basis for that determination will be dealt with later.

.....

[50] In *Barnard* this Court, although not defining a quota exhaustively, held that one of the distinctions between a quota and a numerical target is that a quota is rigid whereas a numerical target is flexible. Therefore, for the applicants to show that the numerical targets constituted quotas, they need to first show that they were rigid. The applicants submitted that the targets were rigid and were applied rigidly. The 2010 EE Plan made provision for

deviation from the Plan and, therefore, for deviation from the targets in certain circumstances. These include cases where a candidate whose appointment would not advance the achievement of the targets of the 2010 EE Plan but could, nevertheless, be appointed if he or she had scarce skills or where the operational requirements of the Department were such that a deviation from the targets was justified or was warranted.

[51] The applicants acknowledged that the 2010 EE Plan made provision for deviations from the targets set by the Plan. They submitted that the provision for deviations in the limited circumstances in which deviations were permitted could not save the targets from being held to be quotas. In support of their contention, the applicants pointed out that only the Commissioner could authorise a deviation, that the 2010 EE Plan provided that managers who did not ensure compliance with it would be sanctioned. They contended that no provision was made in the Plan for deviations to be invoked by the candidates who were aggrieved.

[52] Once it is accepted that the 2010 EE Plan contained a provision for deviations from the targets of the Plan, then, in my view the targets cannot be said to be rigid, particularly where it cannot be said that the situations in which deviations are permitted are situations that do not occur in reality. The evidence given at the trial on behalf of the Department revealed, for example, that scarce skills included cases of candidates who are doctors and those who are social workers. A Department such as the Department of Correctional Services must have a need for many social workers. Deviations could be made in regard to, among others, posts for social workers and doctors.

.....

[77] Going back to section 42(a), it seems to me that, if a designated employer uses a wrong basis to determine the level of representation of suitably qualified people from and amongst the different designated groups, the numerical goals or targets that it may set for itself to achieve within a given period would be wrong. It is of fundamental importance that the basis used in setting the numerical goals or targets be the one authorised by the statute. A wrong basis will lead to wrong targets. In the present case the Department only used the national demographic profile to determine the level of representation of the different designated groups. At the time the law was that it was obliged to use the demographic profile of both the national and regional economically active population. It did not also take into account the demographic profile of the regional economically active population as it was obliged to in terms of section 42(a).

[78] In failing to use the demographic profile of both the national and regional economically active population to set the numerical targets, the Department acted in breach of its obligation in terms of section 42(a) and, thus, unlawfully. It had no power to disregard the requirement of also taking into account the demographic profile of the regional economically active population provided for in section 42(a). The Department sought to justify its conduct in this regard on the basis that it is a national Department. The problem with this is that section 42(a) did not exclude national Departments from its application. Accordingly, the fact that it is a national Department in terms of section 1 of the Public Service Act did not exempt it from complying with the requirements of section 42(a).

[79] The effect of the above conclusion is that, when the Department refused to appoint the Coloured and female individual applicants on the basis that they belonged to groups that were already overrepresented within the occupational levels to which they wanted to be appointed, the overrepresentation of those groups had been determined on a wrong benchmark. Whether the groups would still have been overrepresented or not had the correct benchmark been used, we do not know. However, the fact of the matter is that the Department acted in breach of its obligations under section 42(a) as that provision stood before it was amended.