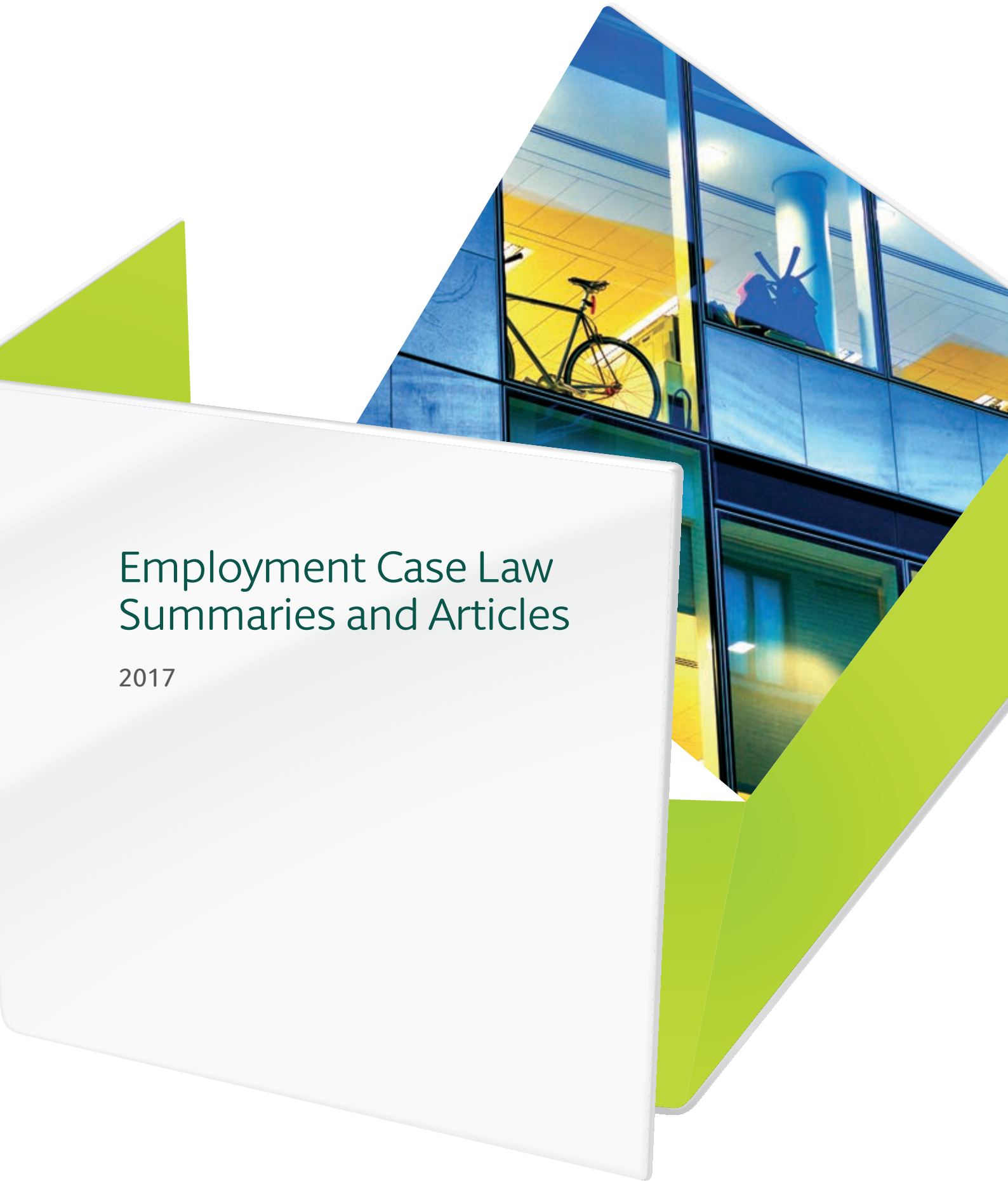

# Employment Case Law Summaries and Articles

2017

Hogan Lovells

# Introduction

We present some highlights of cases of practical relevance that came through our courts during 2017.

Before proceeding on any course of action, please take advice from one of the employment attorneys at Hogan Lovells.

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# How the City of Johannesburg fell from the fireman's pole

Bekker CJ, Mohamed CJ and Zondo JP long observed that "racist conduct requires a very firm and unapologetic response from the courts, particularly the highest courts.

Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaningfully towards *the eradication of racism and its tendencies*." my emphasis).

The decision reviewed in this article is that of *Biggar v City of Johannesburg (Emergency Management Services)* (2017) 38 ILJ 1806 (LC). This is yet another case, which should make us realise just how fragile our societal cohesion actually is, despite political advancements of the negotiated settlement of 20-odd years ago.

The offensive facts need to be recounted from the Labour Court judgment:

The applicant, Victor Biggar, was employed by the City of Johannesburg: Emergency Management Services as a Fire Fighter Emergency Medical Technician. Biggar was employed in 2000 and was stationed at the Brixton Fire Station. Originally from Durban, he relocated with his wife and three children and they resided in the apartments provided by the City at the Brixton Station.

Biggar was the first black fireman to be appointed at the Station and to stay at the apartments. All other apartments were occupied by his white colleagues. Let us pause on this fact – these "firsts" should have been a celebratory moment for the City and Biggar personally as other firsts such as among many others, the first black president of the Business Chamber, and our first black Chief Justice have been celebrated as moments of pride for us as a nation. But, as the plasters of our society keep peeling off as we have witnessed in the recent past, our rainbow nation may have been an illusion.

The evidence in the Labour Court showed that the Biggar family were subjected to racism as soon as they took occupation of their apartment. The children were not allowed to swim in the communal pool or play soccer and were subjected to various forms of racial abuse by Biggar's colleagues' children. His son was called "k*r" and his wife a "bitch". In fact, the testimony at trial was that the word "k*r" was uttered without thinking at Brixton.

That a fellow South African would be subjected to such crass indignity after 1994 should be an affront to us all.

On 12 June 2012, Biggar resigned.

The complaint before the Labour Court was that of unfair discrimination in the workplace and related to events which spanned 2000 and 2008. The alleged perpetrators of racism were: Messrs Andrew Pretorius, Gerhard Badenhorst and Tony Venter. Venter was stationed, and resided at the Turffontein Fire Station. He is related to Pretorius and Badenhorst.

Biggar's immediate supervisor was the Brixton Station Commander, Mr T Gqiba. Biggar alleged that Gqiba failed to deal with the racism allegations. In December 2006, the Biggar family was involved in a racial fight with the Pretorius and Badenhorst families. On 2 January 2007, Biggar requested the Executive Head of EMS, Dr Gule to transfer him out of the Brixton Station.

On 5 January 2007 Gqiba convened a meeting with Biggar, Pretorius and Badenhorst. On 10 January another fight ensued. This time between Biggar (including his sons) and Venter/Pretorius outside the residential premises. Biggar went on to stab Venter who sustained serious injuries. Biggar and his sons were subsequently criminally charged. On 9 October 2007, Biggar was charged by the City for the assault. Found guilty on 23 May 2008, Biggar was issued with a final written warning and a recommendation that he be transferred to another Station. Venter and Pretorius were not subjected to a disciplinary hearing for the same incident. The pattern of abuse by some white residents towards the applicant's family and other black residents in the complex (it seems from the judgment that with the passage of time more black employees took up residence at the complex) continued during Gqiba's tenure.

Biggar testified that he felt belittled and humiliated. Despite complaining to Mr Clark, his supervisor at one time, the harassment continued. At some point, Biggar also sought the intervention of Mr Tembe, the Director of Operations, who did reprimand Biggar's white colleagues and told them to teach their children not to use the word "k*r". However, nothing changed after that intervention. Instead, the white colleagues

launched a petition seeking to have Biggar removed from Brixton.

What is also offensive, and should be an eye opener for anyone who believes that as a nation we have transcended the legacy of apartheid and colonisation is that, Biggar's colleagues' children - presumably born after 1994 - would even know the vile term: k*r.

At the 2 December 2006 year-end function Biggar's wife was assaulted by Venter and his sister, who happened to be Badenhorst's wife. Biggar's spouse fled to the Fire Station as the applicant was on duty at the time. He escorted her back to their apartment. On the way, they were confronted by Venter who directed more racist insults and threats at them. On 3 December, the Biggar family were having a braai when Pretorius drew a gun on his son, his wife intervened and a verbal exchange of insults ensued. Biggar was again called "k*r" and threatened that "*vanaand julle is dood*" [tonight you die]. These incidents were reported to Gqiba who then instructed the standby supervisor, Mr Malan, to attend to the complaints or call the police. On 5 January 2007, Gqiba called the applicant, Pretorius and Badenhorst to a meeting in order to resolve the dispute. The applicant suggested that the matter be referred to Mr Coby, the next line manager but Gqiba refused.

On 10 January 2007, Biggar was off sick when he was alerted to an altercation between Venter and his son. When he then saw Venter, Pretorius, Badenhorst coming in his direction he armed himself with a kitchen knife. Venter assaulted the applicant with a sjambok. In self-defence, Biggar stabbed Venter.

Biggar was later charged with fighting with colleagues and of bringing the reputation of his employer into disrepute. Again, surprisingly, his colleagues were never charged. Biggar also referred in evidence to another 2005 incident when Pretorius and another white colleague, were involved in a fight but no disciplinary action was taken against them. Biggar was found guilty of assault and issued with a warning in March 2008.

In February 2008, shortly before the enquiry began, Biggar referred a complaint to the Human Rights Commission about the abusive treatment he and his family suffered at the hands of his colleagues. Nothing transpired. On 6 March 2008, the applicant referred a dispute to the South African Local Government Bargaining Council. He complained of unfair discrimination arising from the racist harassment by his fellow employees, which the employer had failed to eliminate.

During cross-examination at trial, Biggar was adamant that he reported the racial harassment incidents to his superiors although not in the form of a formal grievance. He testified he had also reported the matter to the Human Rights Commission and the media. He denied he was a racist and a "troublemaker". Terminology reminiscent of a bygone era is used under cross-examination.

The applicant's witnesses confirmed that racism was rife at Brixton. Mr Manyobe, who had resigned in 2008, confirmed that blacks were subjected to racial harassment at Brixton. He reported the fighting incidents to Gule as Gqiba failed to attend to the complaints. "Whites were controlling Brixton", Manyobe testified. Mr Matobako, the respondent's Divisional Chief, joined the respondent in 1991. He was elected as a shop steward in 1993, a position he held until 2008. He testified that "blacks were not welcome at Brixton" and were called "k*rs". This was consistent with Biggar's testimony. According to Matobako, management delayed addressing the employee complaints in order to frustrate them.

In the face of this evidence, and the serious allegations, it would have been expected that the City of Johannesburg would rebut. Instead, it closed its case without leading any evidence. The City contended that Pretorius and Venter were not called as witnesses as they had "moved on with their lives" and it did not want to upset the prevailing racial harmony at the Brixton Station.

On the facts, Nkutha-Nkontwana AJ (as she was at the time) correctly concluded that the respondent was aware of the racism at Brixton but failed to take the steps necessary to eliminate it, as is its obligation under the Employment Equity Act, 1998.

In the seminal judgment of the Constitutional Court, *South African Revenue Service v CCMA and Others* (2017) 1 BLLR 8 (CC), (a case led by Hogan Lovells' partners Lavery Modise and Jean Ewang), the Chief

Justice, writing for a unanimous bench, said the following on racism:

"[7] *Calling an African a 'k*r' thirteen years deep into our constitutional democracy, as happened here, does in itself make a compelling case for all of us to begin to engage in an earnest and ongoing dialogue* in pursuit of strategies for a lasting solution to the bane of our peaceful co-existence that racism has continued to be. *The duty to eradicate racism and its tendencies has become all the more apparent, essential and urgent now.* For this reason, nothing that threatens to take us back to our racist past should be glossed over, accommodated or excused. *An outrage to racism should not be condescendingly branded as irrational or emotional. This is so not only because the word k*r is "an inescapably racial slur which is disparaging, derogatory and contemptuous", but also because African people have over the years been addressed as k*rs.* **This seems to suggest that very little attitudinal or mind-set change has taken place since the dawn of our democracy.**

[8] *South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations.* After all racism was the very foundation and essence of the apartheid system. *But this would have to be approached with maturity and great wisdom,* obviously without playing down the horrendous nature of the slur. *For, the most counter-productive approach to its highly sensitive, emotive and hurtful effects would be an equally emotional and retaliatory reaction.* But why is it that racism is still so openly practised by some despite its obviously unconstitutional and illegal character? *How can racism persist notwithstanding so much profession of support for or commitment to the values enshrined in our progressive Constitution* and so many active pro-Constitution non-governmental organisations?

[10] *Another factor that could undermine the possibility to address racism squarely would be a tendency to shift attention from racism to technicalities, even where unmitigated racism is unavoidably central to the dispute or engagement.* The tendency is, according to my experience, to begin by unreservedly acknowledging the gravity and repugnance of racism which is immediately followed by a de-emphasis and over-technicalisation of its effect in the particular setting. *At times a firm response attracts a patronising caution against being emotional and an authoritative appeal for rationality or thoughtfulness* that is made out to be sorely missing.

[11] *That in my view is a nuanced way of insensitively insinuating that targets of racism lack understanding and that they tend to overreact. That mitigating approach would create a comfort zone for racism practitioners or apologists and is the most effective enabling environment or fertile ground for racism and its tendencies…* That somewhat exculpatory or sympathetic attitude would, in my view, ensure that racism or any gross injustice similarly handled, becomes openly normalised again. Those who should help to eradicate racism or gross injustice could, with that approach, become its unintending, unconscious or indifferent helpers.

[12] **The Constitution is the conscience of the nation.** And the courts are its guardians or custodians. On their shoulders rests the very important responsibility of holding our constitutional democracy together and giving hope to all our people that their constitutional aspirations will be realised. *To this end, when there is litigation about racial supremacy-related issues, it behoves our courts to embrace that judgement call as dispassionately as the judicial affirmation or oath of office enjoins them to and unflinchingly bring an impartial mind to bear on those issues…."* (my emphasis)

In Biggar, Nkutha-Nkontwana AJ found that the respondent trivialised the use of derogative words like "k*r" and "bitch" by its white employees and their families and expected Biggar to just move on with his life. Although not all the racial incidents were work related and primarily involved the families of the fire-fighters, they took place at the respondent's premises and in turn contaminated the work environment in a manner that compromised safety and job performance. These matters directly impacted the workplace.

The Magistrate of the Newlands Regional Court, who presided over the attempted murder trial against Biggar commented starkly after acquitting Biggar:

"Before I stand down, *I am shocked* … I am a tax payer in this city. My taxes are used to pay your salaries. You

live in accommodation provided by my tax money. *Is this the way municipal officials public officials act? It is shocking. You are a disgrace if this is the thing that goes on, you are a disgrace to your profession. The fire department in this city has long history and a long tradition. It is one of the first fire departments in the world.* This sort of thing destroys the reputation. It smudges the good work done by others. You do not have a right to behave in such a manner on the Council property. All three of you the accused and the witnesses…you should really look into your heads and then see how to remedy the situation.

I just want to ask one thing. *If this is the way you behave when you are not in uniform, how are you going to behave when your life is in danger and you have to rely on your colleague? Who is going to save Mr Biggar's life if he is trapped in a burning room? Will Mr Pretorius risk his life on the basis of this evidence? I do not think so and vice versa. It is an untenable situation.* You cannot work like this. You have to solve this thing and have to do it amicably…." (my emphasis).

The City had a legal duty to prevent discriminatory practices in the workplace. The evidence revealed that even though Gqiba took some steps to deal with the applicant's complaint, the City persistently denied that there was racial harassment at Brixton and failed to investigate properly the serious allegations and concerns Biggar raised.

An indictment against the City of Johannesburg is the Labour Court finding that it did not deal with the allegations of racial harassment in a decisive manner that would have reflected a clear intention on its part to eliminate discrimination in the workplace. What is most disconcerting is that this is the City of Johannesburg - the largest metropolitan local Council post-democracy - lead at the time by anti-apartheid activists of the yesteryear.

Section 50(2)(a) of the EEA, grants the Labour Court wide powers to may make "any appropriate order that is just and equitable in the circumstances, including…payment of compensation by the employer to that employee". Bigger was granted 12-months compensation for unfair discrimination and, rightfully, also awarded his legal costs. In my view, the Labour Court should have also directed the City to take steps to prevent unfair discrimination in future, as it is empowered to do under ss2(c). This would also have been in line with authority of higher courts.

The unanimous bench in SARS calls for active citizenry to protect our aspirations for a non-racial society and asks: "Are we perhaps too soft on racism and the use of the word k*r in particular? Should it not be of great concern that k*r is the embodiment of racial supremacy and hatred all wrapped up in one? *My observation is that very serious racial incidents hardly ever trigger a fittingly firm and sustained disapproving response. Even in those rare instances where some revulsion is expressed in the public domain, it is but momentary and soon fizzles out".*

The rainbow nation cannot be the dream of an iconic generation of anti-apartheid freedom fighters – it must remain a real societal aspiration for a better South Africa for "black" and "white" alike, with a recognition of the injustices of the past and its effects on modern society. The attitude by the City that Pretorius and Venter had "moved on with their lives" is a failure to understand the legacy of racist apartheid in its current workplace.

The recent re-opening of the inquest into the untimely death of anti-apartheid activist Ahmed Timol at the instance of his family must, if nothing else, bear testimony to the reality of our contemporary society – people cannot simply "move on with their lives."

The impact of apartheid is real and requires firm handling across all avenues of society. There cannot, and never will be an apology for the expectation of a transformed society, as expressed in our Constitution.

**By Imraan Mahomed, Partner**

# Temporary employment services - new ruling

The Labour Appeal Court has set aside the judgment of Brassey AJ in the matter of *Assign Services and NUMSA* on 10 July 2017.

The case dealt with the relationship that has been created by the amendments to the LRA in respect of Temporary Employment Service (TES) providers and their clients. Brassey AJ set aside Commissioner Osman's arbitration award in which he found that the client of Assign was deemed to be the "sole employer" of the placed employees, on the basis that Commissioner Osman had committed a material error of law.

On appeal to the LAC, the full bench specifically dealt with the interpretation of section 198A(3)(b)(i) and the deeming provision. The LAC has now held that the Labour Court had misdirected itself in its interpretation of section 198A(3)(b) and dismissed Assign's review application.

The LAC holds the view that a placed worker for the purposes of the LRA is deemed to be the employee of the client and the client deemed to be the employer of the worker. Furthermore, a worker in this situation is, subject to the provisions of section 198B, employed by the client of the TES on an indefinite basis. Accordingly the sole employer interpretation is in agreement with the main thrust of the amendments to section 198 and section 198A. The dual or parallel employer interpretation is therefore not in line with the context of section 198A and the purpose of the amendments.

The sole employer interpretation does not in the court's view ban TESs, but merely regulates the TESs by restricting the TESs to "genuine temporary employment arrangements in line with the purpose of the amendments to the LRA". Accordingly the TES remains the employer of the placed employee until the employee is deemed to be the employee of the client. The TES will further be responsible for its statutory obligations regarding the placed workers for as long as the deeming provision has not taken effect.

In conclusion, the court has held that there is no provision in the amendments to the LRA that the TES and the client become joint employers on the expiration of the three month period. Ultimately the purpose of the deeming provision is not to transfer the contract of employment between the TES and the placed worker to the client, but to create a statutory employment relationship between the client and the placed worker.

Considering the impact of this case, there is no doubt that this matter will be referred to the Constitutional Court.

**By Imraan Mohamed, Partner and Hedda Schensema, Partner**

# The end of an era

## Is labour broking in the South African Workplace at the tail end (in relation to employees who earn below the current threshold of ZAR205 433.30)?

This article summarises the current legal position and the likely road forward, following the Labour Appeal Court decision of 11 July 2017 in *NUMSA v Assign Services and Others*.

Labour broking being the triangular relationship created by a Temporary Employment Service (TES), an employee rendering services and the client of the TES. Hogan Lovells has written extensively and commented on this unique relationship on various media platforms since late 2014 into 2015. The concept of labour broking has been with us for many years. COSATU made its position clear in the run up to the negations to the 2014 amendments of the Labour Relations Act (the LRA) – its position being that labour broking is "akin to slavery" and it must be "banned". It was always a hot political potato with strong views advocated by both sides of the divide.

The legal controversy stirred up in early 2015 with the promulgation of TES amendments to the LRA centred around who becomes the employer of the placed worker after three months of employment. The amendment provides that after three months the client was "deemed" the employer. This is obviously not an academic issue and has serious practical business consequences.

The Appeal Court has concluded that the client after three months becomes the only employer of the placed worker. The employment is on an indefinite basis on the same terms and conditions to other employees who perform the same or similar work.

Two lines of thought developed – essentially being this:

- After three months there is a "sole employer". The TES falls away and the only employer is the client.
- After three months there are "dual employers". The TES is the contractual employer (being the employer who contractually secured the services of the placed worker in the first instance) and the client is the other, but only for the purpose of LRA protections.

The "dual employer" argument in 2015 found favour with Brassey AJ in the Labour Court. However, the full bench of the Appeal Court rejected this argument. Does

this signal the end of labour broking and the demise of labour brokers as advocated by organised labour? The signal from the Appeal Court, in our view, is yes. But, because of the significance of this judgment, Assign Services is most likely to appeal to the Constitutional Court.

An appeal will have the effect of staying the LAC judgment. From the time of the lodging of the appeal until the finalisation of the appeal, the law would remain as articulated by Brassey AJ in the 2015 Labour Court judgment.

The Appeal Court placed significant emphasis on the definition in section 198A on the term "temporary service". The emphasis according to the Appeal Court is on the "nature of the (temporary) service" as opposed to the person who renders the service to the client. This is likely to become contested ground in the Constitutional Court as interestingly, the court does not interpret the words in section 198A that give rise to the controversy being: "deemed to be the employee of that client". The court simply deals with the consequences of being the "deemed" employer.

Significantly, the court finds that the joint and several liability provisions were inserted "to discourage the TESs from being further involved in the administrative arrangements regarding employees placed with a client for a period in excess of three months". This is telling – as this line of reasoning, is essentially in our view a ban on labour broking, if nothing else after a three month period (even though the court expressly indicates to the contrary). This line of reasoning begs the constitutional argument of whether such restriction in time is justifiable. This issue will need to be further examined by the Constitutional Court if not in the Assign matter (as this was not the basis of appeal) – perhaps in another case in time.

The Appeal Court in support of its conclusion that the TES falls out the picture after three months says: "The purpose of these protections in the context of s198A is to ensure that the deemed employees are fully integrated into the enterprise as employees of the client… It would make no sense to retain the TES in the employment equation for an indefinite period if the client has assumed all the responsibilities that the TES had before the expiration of the three-month period. The TES would be the employer only in theory and an unwarranted 'middle man' adding no value to the employment relationship."

So, the employment relationship between the placed worker and the client arises by operation of law, independent of the terms of the contract between the placed worker and the TES. This is significant for businesses that have TES staff in excess of three months.

The "middle man" creates complications in the relationship and the judgment of the Labour Appeal Court now tightens the noose around the businesses of TES operators unless there is reprieve from the Constitutional Court.

The early winds, which were not blowing in favour of labour brokers just before the amendments of 2014, have just gained fresh momentum.

While many employers have long restructured their relationships with TES employers, for those employers who have not done so, it is important to review the implications of the LAC judgment going forward. This is a watershed moment for organised labour, no doubt.

**By Imraan Mahomed, Partner**

This article summarises the current legal position and the likely road forward, following the Labour Appeal Court decision of 11 July 2017 in *NUMSA v Assign Services and Others*.

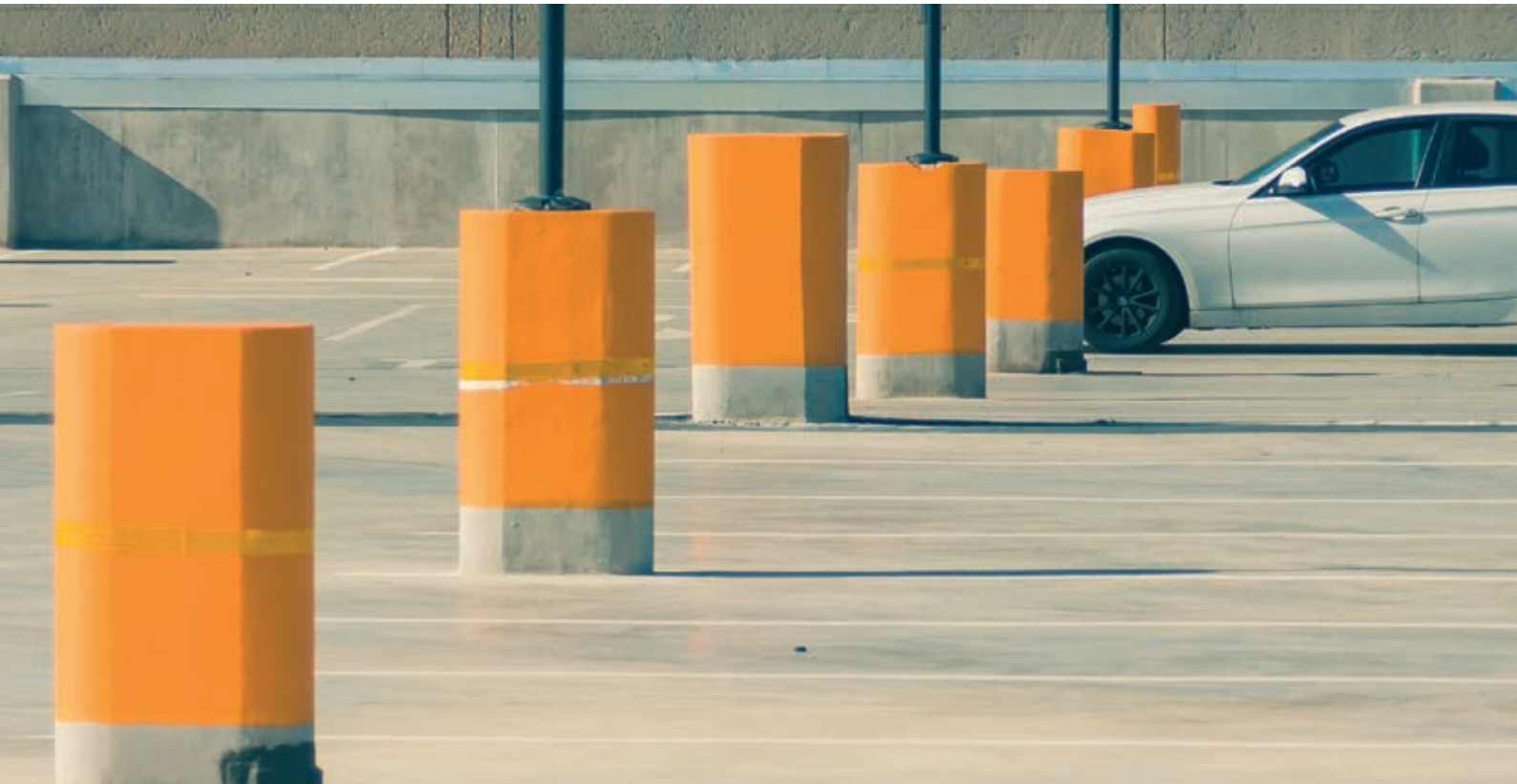
# Derogatory... Racist, or simply a racial descriptor?

In a previous edition of our newsletter, we featured the very important Constitutional Court judgment in *SARS v Kruger & Others* where the court upheld the dismissal of Mr Kruger as being fair where he referred to his superior by the K-word.

We represented SARS in the Constitutional Court where it was held that "his abusive and derogatory language was directed at his superior and his fellow African workers and he impugned their thinking or intellectual capacity, demonstrating the worst kind of contempt, racism and insubordination...it bore repetition that the use of the word 'k...r' is the worst of all racial vitriols a white person can ever direct at an African in this country. To suggest that it is necessary for the employer to explain how that extremely abusive language could possibly break the trust relationship and render the employment relationship intolerable, betrays insensitivity or at best desperation of the highest order. Where such injurious disregard for human dignity and racial hatred is spewed by an employee against his colleagues in a workplace that ordinarily renders the relationship between the employee and the employer intolerable.... His was a demonstration of the worst kind of contempt, racism, and insubordination." The court concluded that reinstatement was not possible. This was in late 2016.

In February this year, the LAC in *SAEWA obo Bester v Rustenburg Platinum Mine and Another* had an opportunity to consider whether the use of the words "swart man" by a certain Mr Bester to describe the owner of a vehicle, which was parked in the parking bay next to his, was derogatory.

In brief, the facts were as follows: Mr Bester was allocated a parking bay. About two weeks later, another vehicle similar to his, parked in the parking bay adjacent to his. Although he could still access his parking bay, it had however become extremely difficult to manoeuvre and he feared scratching or causing a dent to the car parking next to his. His repeated attempts to get the Chief Safety Officer, Mr Ben Sedumedi, to intervene were unsuccessful. Ultimately, on 24 April 2013, he walked into Mr Sedumedi's office – there was a dispute over what transpired – and "in a loud and aggressive manner" said "*verwyder daardie swart man se voertuig*". Three witnesses, Mr Sedumedi included, testified that Mr Bester had stormed into a meeting that was underway. Mr Bester was subsequently charged with insubordination and making racial remarks by using the words "*swart man*".



He was dismissed and subsequently referred a dispute to the CCMA. The CCMA found in his favour and ordered his retrospective reinstatement. This decision was overturned on review. The matter eventually came before the LAC.

The LAC established that the term "black man" is neutral on the face of it and would require context to acquire a pejorative meaning. The issue for determination was whether the use of a racial descriptor, "black man", to identify the owner of the vehicle parked next to his parking bay was derogatory in circumstances where the name, rank and division of the owner of the other vehicle was unknown to him.

The LAC held that an objective test, not subjective test as used by the Labour Court, must be employed to determine whether the use of a term is racist, that is, whether "in the opinion of a reasonable person possessed of all the facts, Bester's use of the words *'swart man*' in the context was derogatory and racist?" This is a matter for evidence. The court held that had those who were present when the words "*swart man*" was used had the true state of Mr Bester's knowledge, they would not have viewed it in the context as offensive. The court reiterated that "race descriptors such as 'black man' are neutral and only by locating them in a 'pejorative' context that their use should be condemned as racist". Accordingly, the decision of the Labour Court was set aside.

The apparent distinction between the *Kruger and Bester* is that in *Kruger*, an undoubtedly derogatory word with vile historical context was used, whereas in Bester, a racial descriptor was utilised to identify an unknown African male without it would appear *Bester* displaying any form of racist conduct.

There is a warning to be sound; racial descriptors (black, Indian, coloured, white) must be considered within context and may not necessarily amount to racism. This decision goes once again to demonstrate the importance in leading evidence at arbitration with a proper appreciation of the applicable legal test at play and establishing racism on the facts where the employer seeks to discipline on such basis. This case is not a license to simply reference people by their race in the workplace.

**By Phetheni Nkuna , Senior Associate**

# In times of union rivalry

SAFTU recently launched itself under the name South African Federation of Trade Unions and enters into the fray on the heels of four other existing union federations. This is not going to settle the workplace; on the contrary, it is going to stir things up.

Regrettably, SAFTU does not launch itself in a growing economy that calls for more trade unions. It is on the opposite spectrum that SAFTU is born. It is born, in very uncertain economic times and where the economic outlook is bleak and gloomy.

So, where does SAFTU as a start-up federation with an already large number of trade unions affiliated to it gain new membership? This is so where its philosophy is the same as that of COSATU, perhaps its greatest rival: "one industry, one union"? It will seem that poaching members from other unions is the only way to keep membership numbers up.

Many seasoned ER/HR practitioners in unionised environments will bear testimony to the fact that in recent times there has been an increase in intra-union rivalry. SAFTU's entry into the fray is only going to move intra-union rivalry to outright competing union rivalry. With this comes the question of the conduct of union representatives across the workplace.

Sometime ago, I overhead a recently appointed shop steward in Northern Natal say to his colleague: "It's great to be a shoppie, management can't touch you." Is this true?

This misnomer runs deep in my experience and has its origins in the old "anything goes" principle of the late 80s, which was derived from the old Industrial Court. The Industrial Court in Harvestime Corporation held that: "(A)n employee, when he approaches or negotiates with a senior official or management, in his capacity as shop steward, does so on virtually an equal level with such senior official or management and the ordinary rules applicable to the normal employer-employee relationship are then somewhat relaxed." But does this give a shop steward carte blanche to behaviour in an unbridled fashion in the workplace?

There is obviously a balance to strike between the right of the shop steward to exercise his/her functions as the representative of the union and the right of the employer to discipline shop stewards when exercising their duties as shop stewards for acts of misconduct.

Our courts hold the view 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 by his/her employer. This accords with our constitutional dispensation and can hardly be faulted. However, it is important that a shop steward bear in mind that this is no licence to resort to defiance and needless confrontation. After all, 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, at the negotiation 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.

In conclusion, it is accordingly unacceptable to hold the view that when one acts in a representative capacity "anything goes" as it simply "does not" neither in deep Northern Natal nor the rest of the country.

**By Imraan Mahomed, Partner**

# For how long can an employee enforce an arbitration award?

We looked at this question in our article *How long can a CCMA arbitration award be enforced against an employer.* Since then the Constitutional Court has considered the question of the prescription of arbitration awards not once but twice.

The first being the judgment on appeal in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* (which we reviewed at the stage of the Labour Appeal Court). This judgment was handed down in December 2016 and the second waS in early March 2017 in *Mogaila v Coca Cola Fortune (Pty) Limited.*

Some basics first: This saga arises from the vexed question of whether an arbitration award three years after its issue may be considered non-enforceable on the basis of the legal principle of prescription. There were conflicting judgments of the Labour Court on the point with the LAC settling the point in Metrobus – this was the decision we covered in the previous article.

Regrettably, the judgments of the Constitutional Court in both Metrobus and Mogaila neither produce a clear answer on the application of the principle. You will see why as you read further. But, first let us look at the facts:

In Mogaila the facts briefly were this: Mogaila was employed as a stock controller and dismissed for assault. Aggrieved, she referred an unfair dismissal dispute to the CCMA. The CCMA found the dismissal procedurally fair, but substantively unfair. Coca Cola was to reinstate Mogaila. Mogaila applied for the certification of the arbitration award in terms of section 143(3) of the LRA. When she reported to work, she was informed that Coca Cola intended taking the arbitration award on review. She was not to report for work. The Labour Court in time dismissed the review application. A petition to the LAC was also dismissed. Subsequent to the leave to appeal being refused, Mogaila once again reported to work. Upon her arrival, she was informed that since the arbitration award constituted a "debt" for purposes of the Prescription Act, the award could no longer be enforced by her as it prescribed. Prescription set in three years after the issue of the award. Sound familiar?

Let us recap the facts in Metrobus: Myathaza was employed as a bus driver. After his dismissal he referred a claim to the relevant bargaining council. The arbitrator found the dismissal unfair and ordered reinstatement. Myathaza reported for duty and was informed that Metrobus intended to have the award reviewed. While the review application was pending Myathaza applied to have the award made an order of court. Metrobus opposed the application and also argued that the arbitration award had in any event prescribed. Sound familiar?

The facts in both Metrobus and Mogaila are indeed not novel. On the contrary all seasoned HR/ER practitioners have seen these facts play out in their own workplaces. So you would agree - a clear answer from the courts on this important question is important. Regrettably, this is not the case as the clear response of the LAC in Metrobus that an arbitration award constituted a "debt" for purposes of the Prescription Act was not upheld on appeal to the Constitutional Court.

Now, hold onto your seats as we try to simplify the judgment(s) of the Constitutional Court in Myathaza: The court delivered three judgments. The judgments provide a basis both for and against the application of prescription to arbitration awards. So, let us review the judgment as it is the first main judgment of the Constitutional Court on this subject and will be relied upon in future.

The first judgment held that the Prescription Act was incompatible with the LRA. The result was that Myathaza's arbitration award had not prescribed. The first judgment also held that even if the Prescription Act were to apply, Myathaza's reinstatement award could not prescribe because it did not constitute a "debt" for purposes of the Prescription Act.

The third judgment concurred with the first judgment that an arbitration award did not constitute a "debt" for purposes of the Prescription Act. The third judgment also concurred with the first judgment that the Prescription Act was not applicable to LRA matters. The third judgment, however, did not follow the second judgment that the referral of a dismissal dispute to the CCMA interrupted prescription since prescription could only be interrupted by the service of legal process as specifically contemplated in section 15 of the Prescription Act.

The second judgment held that the Prescription Act was not inconsistent with the LRA, but instead complimentary to it, and found that the provisions of the two pieces of legislation were capable of complementing each other. The second judgment further held, contrary to the third judgment, that commencing proceedings in the CCMA interrupted prescription in accordance with section 15 of the Prescription Act.

In determining whether a claim for unfair dismissal constituted a "debt" for the purpose of the Prescription Act, the second judgment held that a dismissal claim sought to enforce three possible kinds of legal obligations, namely reinstatement, re-employment and compensation. These legal obligations ultimately constituted a "debt". The second judgment reasoned that since the service of process initiating the CCMA dispute resolution process interrupted prescription, prescription remained interrupted until the finalisation of the entire review application process (inclusive of appeals). The second judgment, like the first and third judgments found that Myathaza's arbitration award had not prescribed. The LAC judgment was ultimately overturned.

Phew - if you made it thus far this is the most simplified analysis of the judgment.

In short and on a serious note, there is regrettably no clear authority in Metrobus. So, it was hoped that the Constitutional Court would in Mogaila provide better clarity following Metrobus. To avoid you going through the analysis we set out above (relative to Mogaila), in short – sadly the court did not provide the requisite clarity.

The end point is that the question of the application of prescription remains open to further argument as is currently the case in the Labour Court. We have, for instance, since judgment in the Constitutional Court had three matters come before the Labour Court on the question of prescription of the particular awards. The current situation is not satisfactory and hopefully in time there will be better clarity on this matter.

**By Imraan Mahomed, Partner and Londeka Dulaze, Associate**

# Are private dispute resolution agreements really binding?

Parties often contract out of the CCMA or Labour Court as the forum that considers their dispute and opt for private arbitration. But, are these agreements really enforceable?

This question again recently came before the LAC in *SAFPU and Others v Free State Stars Football Club (Pty) Ltd*. The LAC was called upon to decide whether or not the employees were obliged to abide by the private dispute resolution process set out in their contracts of employment.

The LAC confirmed the established principle that the discretion of the courts to refuse arbitration may only be exercised when a "very strong case" is made out and that "there should be compelling reasons" to do so.

The employees were professional football players who had entered into fixed-term contracts of employment. Their services were terminated for operational requirements. The employees lodged a claim in the Labour Court to which their employer raised a point *in limine* and sought an order that the claim be referred to private arbitration before the Dispute Resolution Centre (DRC). The court upheld the *in limine* point and ordered that the employees refer the dispute to the DRC. The court found that the employees failed to show that they would personally face difficulties at arbitration proceedings and secondly, that any special circumstances for refusing arbitration existed. The employees appealed the decision to the LAC.

The LAC found that the Labour Court misdirected itself and that there were in fact exceptional circumstances that existed, which justified that the employees ought not be bound by the private dispute resolution clause. In summary, some of the factors considered were the following:

- The employees had a good claim for payment of the balance of their agreed remuneration on the papers already filed in court.
- A minimum of evidence would be required in the consideration of the dispute on a review of the papers already filed in court.
- The DRC was more onerous for the employees as they would have to pay fees unlike in the Labour Court.
- Importantly, the employees would have the benefit of a speedy dispute resolution mechanism of the LRA in the Labour Court.

So, a private disputes clause in an employment contract does not automatically preclude anemployee from approaching the CCMA or Labour Court. The employee would, however, need to show that special circumstances justify a departure from the agreed process.

This issue often arises in practice and the question of exceptional circumstances is fact dependent. Employers faced with such issue should take legal advice prior to filing responding papers in court as the issue is a legal one, which relates to persuading the Labour Court to exercise a discretion in enforcing the agreed terms of contract. The approach in the CCMA in the absence of pleadings, is obviously slightly different in approach.

**By Imraan Mahomed, Partner and Neil Barrett, Associate**

# Can a dismissed employee be defamed in CCMA arbitration proceedings?

## Does an employee who alleges that he was defamed by statements made during his disciplinary/CCMA process have a legal claim for defamation?

Towards the latter part of 2016, the Eastern Cape High Court in *Clover SA (Pty) Limited & Another v Sintwa [2016] 12 BLLR (HC)* was called upon to determine whether statements made during an arbitration in which a witness had wrongfully and unlawfully alleged that Sintwa committed fraud amounted to defamation.

In brief the facts were the following:

- Sintwa was employed by Clover as a team leader tasked inter alia with conducting checks on machines and products in order to ensure that the products passed the QA standards. To that end, it was incumbent on Sintwa to certify on the relevant form that the necessary checks had been completed.
- In December 2009, Sintwa was charged with misconduct and subsequently dismissed, the allegations being that he "acted fraudulently by co-signing the DOR (daily operator report) claiming that a certain test which is not performed on the machine had indeed been performed on the TBA 8 machine". (sic) There was no dispute that Sintwa signed the relevant form.
- Dissatisfied with his dismissal, like many before (and many to follow) Sintwa referred a dismissal dispute to the CCMA.
- A production manager testified at arbitration that it had come to his attention that Sintwa co-singed the DOR sheet.The manager alleged that Sintwa committed fraud by his gross negligence.
- The CCMA Commissioner found that Clover had not substantiated the claim of fraud but instead concluded that Sintwa had indeed been guilty of negligence. Sintwa's dismissal was on this basis found to have been substantively unfair.
- Subsequent to the issue of the CCMA award, Sintwa approached the High Court and sued Clover for defamation contending that the production manager during the arbitration wrongfully and unlawfully alleged that he committed fraud when this was not the case.
- Sintwa sued for damages of ZAR100 000.

These facts are not novel. But, does Sintwa have a valid claim for defamation? Clover was obviously implicated by virtue of the principle of vicarious liability. The High Court found that Clover was indeed liable to pay Sintwa ZAR100 000 in damages on the basis that the statement implicating Sintwa as having committed fraud had been irrelevant and unconnected to the arbitration proceedings. Clover was found to have exceeded the bounds of qualified privilege another legal principle which establishes a defence to a claim of this nature. The judgment of the High Court was of surprise to us so we followed the decision of the appeal court (cited above) with great interest.

We were pleased to note that the appeal was successful and the appeal court dismissed the damages claim. The judgment on appeal is technical. In short, the appeal court confirmed that, where there is no malice and that the statements are relevant to the matter at hand and supported by reasonable grounds, a defence is established against a claim of defamation. The appeal court found that the reason Sintwa was dismissed was based on the allegations of fraudulent misconduct. Accordingly, the version of the production manager must indeed have been self-evidently relevant. Without such version the CCMA arbitrator would have been oblivious to the reason for Sintwa's dismissal and would thus not been able to assess the validity of such reason for dismissal.

The short point is that only relevant issues that are connected to the facts must be placed before the arbitrator. Witnesses who are on a frolic of their own and show malice may open themselves and their employers to a claim for defamation.

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