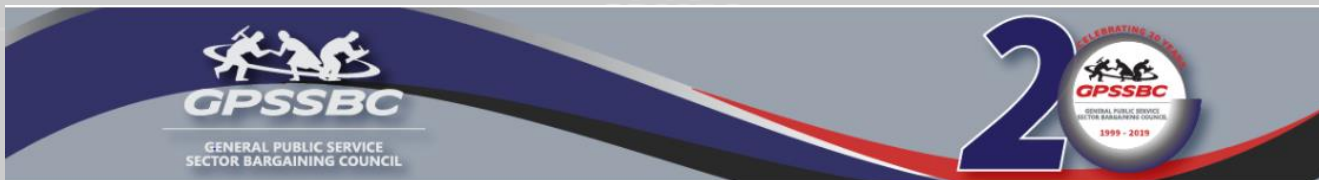


WELCOME TO THE GPSSBC CASE LAWS SEMINAR

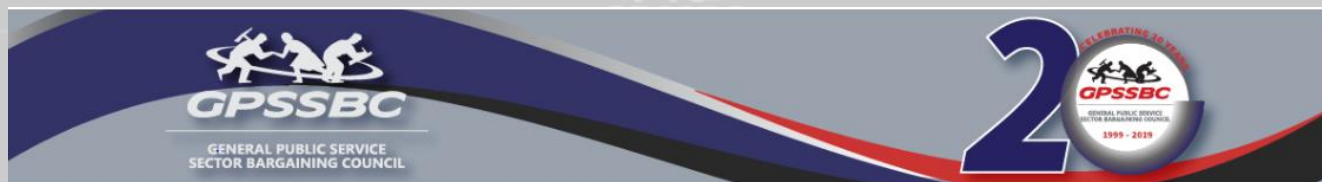
TWO DECADES OF PROMOTING SOCIAL JUSTICE IN THE WORKPLACE



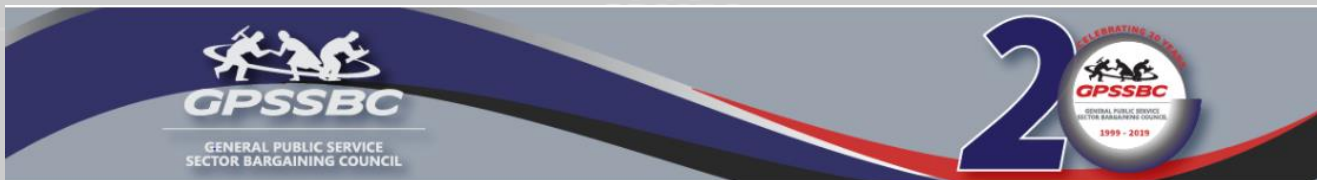
GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

20TH ANNIVERSARY CASE LAW SEMINAR 2019

Two decades of promoting social justice in the workplace



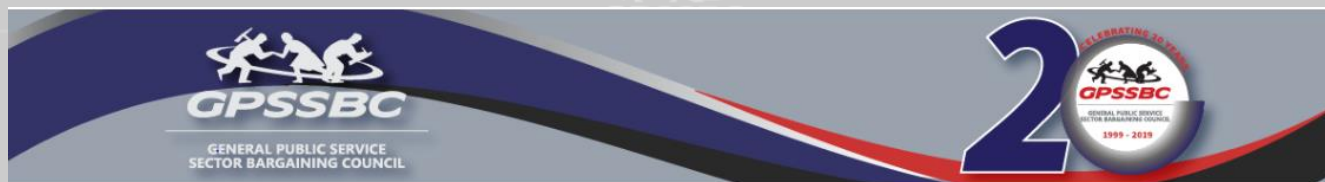
SECTION 1: MEMBERS INPUT



Introduction: CASE LAW PROGRAMME



INTRODUCING THE SPEAKERS



Section 2: COLLECTIVE DISPUTES

a. STRIKES



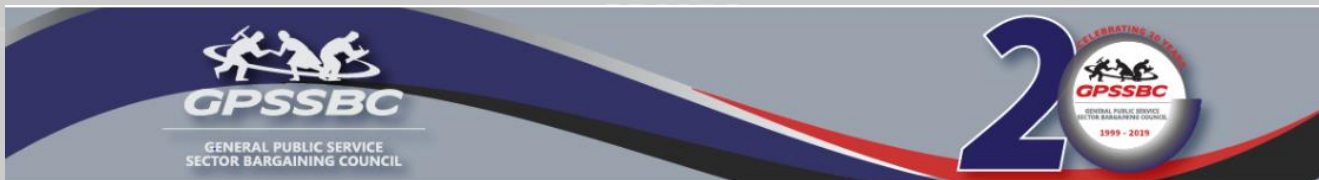
NUMSA AND OTHERS VS DUNLOP MIXING AND TECHNICAL SERVICES (PTY) LTD AND OTHERS, LAC JUDGMENT, CASE NUMBER DA16/2016 DELIVERED 17 JULY 2018:

Category of employees dismissed for failure to provide employer with identities concerning perpetrators of violent acts during a strike

Arbitrator believed that failure to positively place each employee at the scene where misconduct occurred was detrimental to the employers case

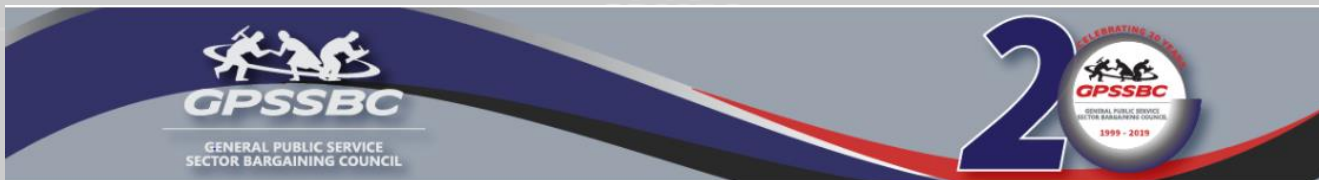
LC and LAC

Can consider the indirect evidence approach



NUMSA AND OTHERS VS DUNLOP MIXING AND TECHNICAL SERVICES (PTY) LTD AND OTHERS, LAC JUDGMENT, CASE NUMBER DA16/2016 DELIVERED 17 JULY 2018:

- LAC restated principle of Derivative Misconduct;
- Duty of good faith towards employer requires employees who have actual knowledge of the perpetrators to inform employer of knowledge
- Employer needs to lead evidence on balance of probability to place employees on the scene and can do so based on circumstantial evidence in order to draw inferences from the whole body of evidence
- Employer to define Derivative Misconduct in Disciplinary Code

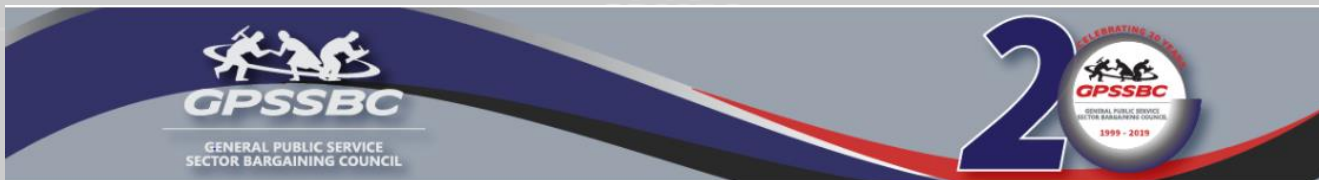


CODE OF GOOD PRACTICE:COLLECTIVE BARGAINING



SECTION 3:INDIVIDUAL DISPUTES

a. PRECAUTIONARY SUSPENSIONS

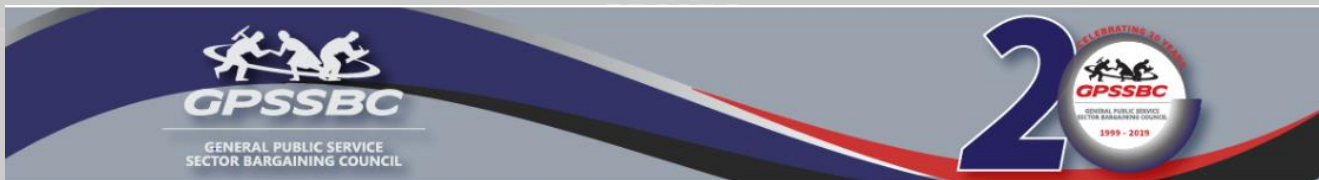


ALLAN LONG V SAB,CCMA,M.MBULI NO CCT 61/18

The FACTS

Allan Long responsible for compliance

- ✓ Unlicensed trailer
- ✓ Fatal crash
- ✓ All trailers NOT licensed
- ✓ Suspended



Long v SAB CONTINUED

Case went through the CCMA arbitration as well as REVIEWED Labour and Labour Appeal court process

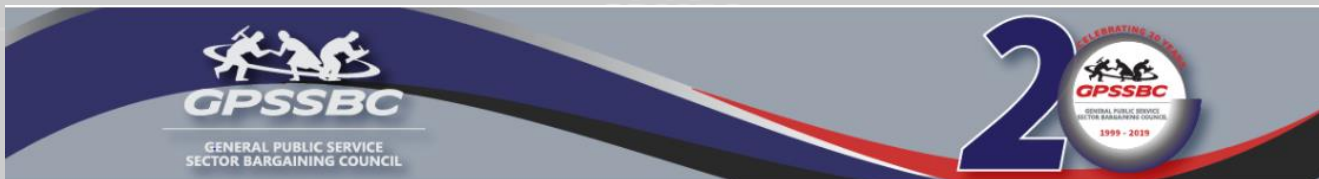
CONSTITUTIONAL COURT HELD:

- ✓ Where suspension is precautionary

- ✓ On full pay

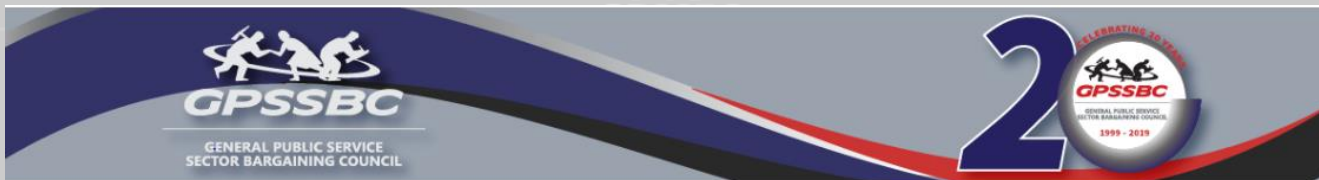
NO NEED TO GIVE EMPLOYEE OPPORTUNITY TO MAKE REPRESENTATIONS

BUT BEWARE COLLECTIVE AGREEMENT



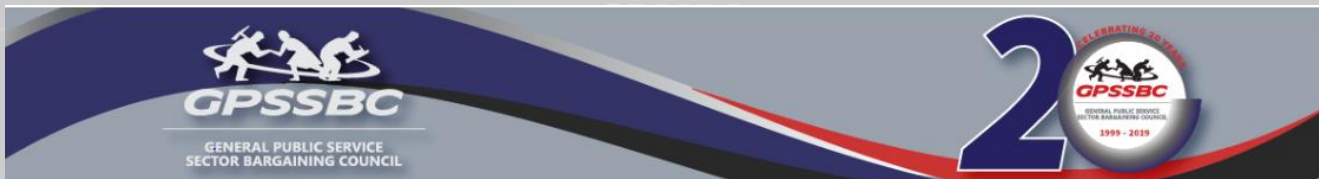
SECTION 3: INDIVIDUAL DISPUTES

b. Deemed dismissals



APPLICABLE LEGAL PRINCIPLES TO DEEMED DISMISSALS

- Section 17 of the Public Service Act legislatively immunises an employer from an unfair dismissal referral where an employee fails to report for work for a continuous period of one calendar month.
- Commonly called termination by operation of law.
- Four jurisdictional requirements must be satisfied before a termination may be deemed to be one by operation of law.
 - He or she had to be an employee
 - He or she had to have absented himself or herself from official duties
 - His or her absence had to be without permission
 - The absence had to exceed a calendar month
- All four requirements need to be present in order for an employer to rely on a termination by operation of law.



RAMONETHA V DEPARTMENT ROAD AND TRANSPORT LIMPOPO(LAC) UNREPORTED (2018)1 BLLR 16 (LAC)(2018)39 ILJ 384

The Facts

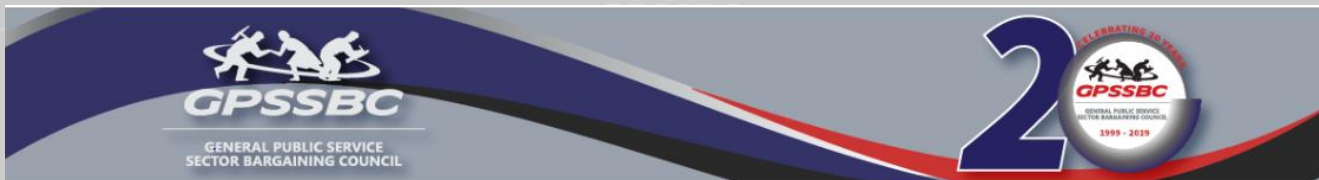
- ❑ Employee was absent without permission in excess of 30 days
- ❑ On return was permitted to continue working for seven months, during which he was paid
- ❑ Eight months later a misconduct hearing convened at which section 17(3)(a)(i) applied and determined no right to a hearing
- ❑ Eleven months later advised that he was deemed to have been dismissed due to unauthorized absence

HELD

Labour Court dismissed and said not acted ultra vires

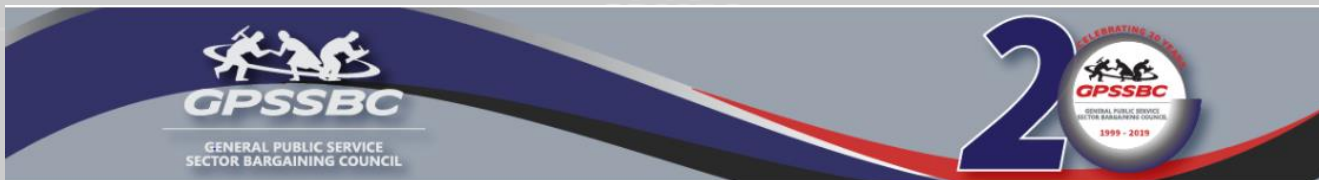
Labour Appeal Court found to be unlawful, arbitrary and irrational since had been reinstated for seven months after deemed dismissed.

Employee Reinstated retrospectively



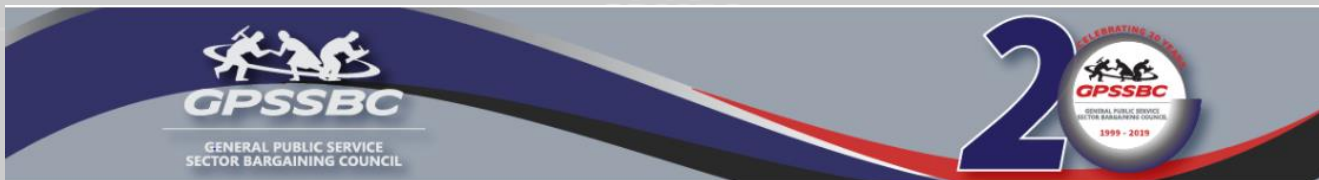
GROOTBOOM V NATIONAL PROSECUTING AUTHORITY & ANOTHER [2014] 1 BLLR 1 (CC)

- Boshielo AJ found on the facts that the employee in that case had not absented himself from his employment as he had been placed on suspension.
- ✓ It was therefore impossible for him to absent himself from his place of employment within the meaning of section 17(5)(a)(i) from when his employer expressly required his absence from the workplace
- ✓ That meant that he was absent with the permission of his employer. Therefore, one of the essential requirements of section 17(5)(a)(i) had not been met.



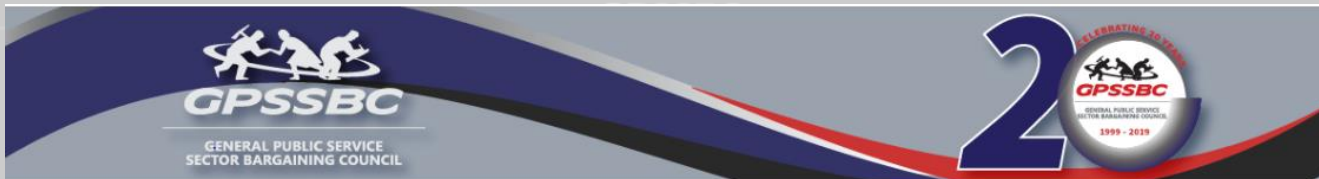
PHENITHI V MINISTER OF EDUCATION & OTHERS 2008 (1) SA 420 (SCA), [2006] 9 BLLR 821 (SCA)

- ❑ it was held that terminations by employers by operation of law are not decisions by employers and are not reviewable actions.
- ❑ In other words, employers do not exercise any discretion whatsoever when terminating employment through statutory provisions like the old section 17 (5) or the current section 17 (3)
- ❑ However the Executive Authority's decision is capable of being reviewed under Section 158 (1) (h) on the grounds of legality



PSA OBO SMIT V JOSEPH MPHAPHULI NO. AND OTHERS (2014) 35 ILJ 2254 (LC)

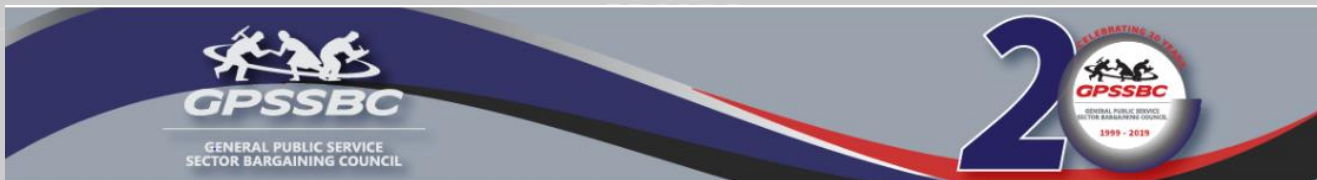
- MEC's decision was found to be irrational and unreasonable as he failed to give reasons for his refusal to re-instate.
- The decision was reviewed and set aside.
- The court remitted the matter back to MEC to consider the representations made in terms of the section 17(5)(b) of the Public Service Act afresh and to apply his mind properly.
- Section 5 (3) of Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA) provides that "If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason."
- ✓ The discharge of employees in terms of the two legislations *supra* does not constitute a normal dismissal for misconduct defined under the Labour Relations Act, 66 of 1995 as amended.
- ✓ Such discharge of employees can be termed as a termination of **employment by operation of the Law.**
- ✓ The dismissal of employees under the Labour Relations Act *supra* must comply with schedule 8 (Code of Good Practice on dismissal) read together with section 188 of the Act.



A close-up photograph of a breakfast meal. In the center is a bright yellow ceramic cup filled with dark coffee, sitting on a matching yellow saucer. To the left of the cup is a golden-brown chocolate croissant, split open to reveal a thick, dark chocolate filling. In the background, more croissants and two fresh red strawberries with green leaves are visible. The entire scene is set against a dark, textured background.

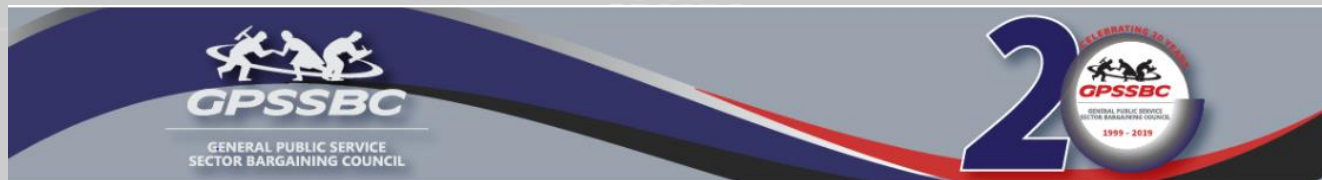
SECTION 3: INDIVIDUAL DISPUTES

MEANING OF REINSTATEMENT



Equity Aviation V CCMA 2008 12 BLLR 1129 CC

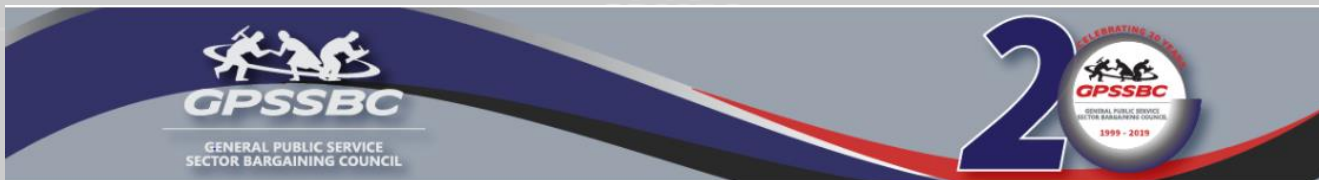
Primary remedy is reinstatement



Myers v National Commissioner of the SAPS and Others(2013)34 ILJ 1729(SCA)

The Facts

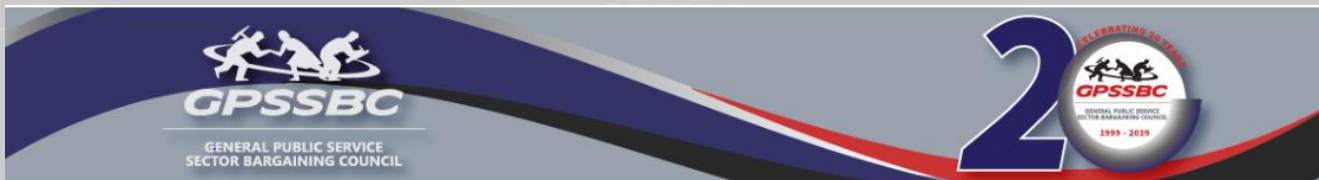
- ❑ Meyers a policeman of 28 years service
- ❑ Issued a media statement printed in “die Burger” newspaper in breach of a standing order (to Police Regulations)
- ❑ Complained in the statement about the poor condition and treatment of police dogs
- ❑ Charged with contravening regulations of SAPS and dismissed



Myers continued...

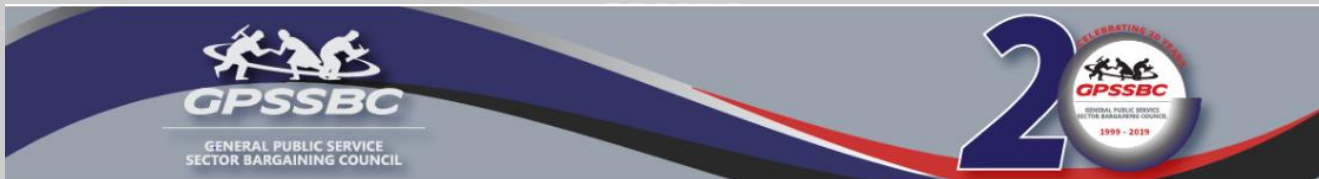
ISSUE :WAS DISMISSAL REASONABLE UNDER THE CIRCUMSTANCES?

- Traversed all dispute resolution processes:
 - Bargaining Council dismissal upheld
 - Labour court overturned the dismissal
- Saps to LAC where they succeeded
 - Looked at review test and applied a test of “grossly unreasonable”
- Matter then went to SCA:
 - Found in favour of Meyers
 - Looked at the test for review saying LAC had applied incorrect test and not the one set out in Sidumo



SECTION 3: INDIVIDUAL DISPUTES

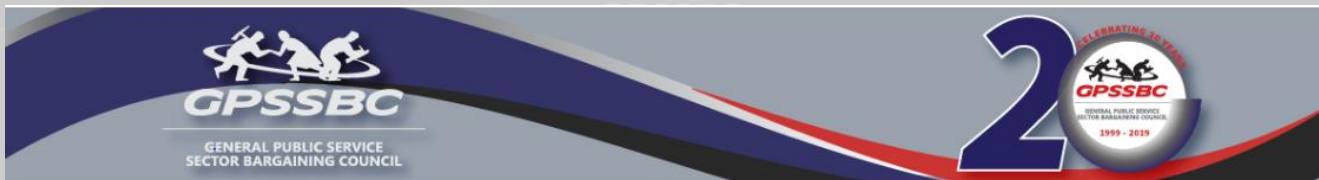
Altering a chairpersons Sanction



MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT V GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL & OTHERS (2017) 38 ILJ 213 (LC)

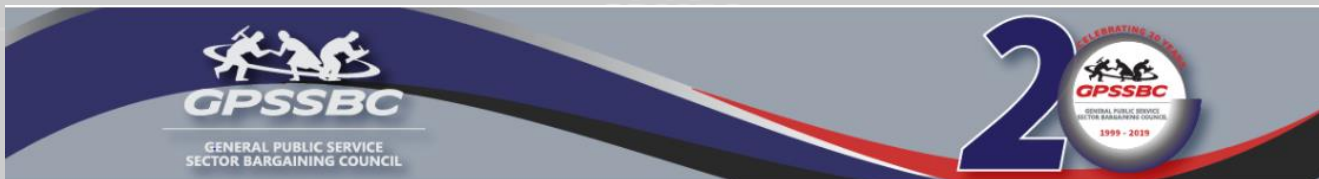
The Facts

- Employee was charged with numerous offences for “removing” /stealing various traffic control documents
- At hearing entered a plea agreement
 - He would plead guilty in exchange for a lesser sanction
 - Sanction to be determined by the chairperson of the enquiry
- The disciplinary chairperson gave effect plea agreement.
- Employer unhappy with chairpersons findings
 - Chairperson had failed in their view to give an “appropriate” sanction
- Employer changed the sanction of suspension for three months without pay to dismissal.



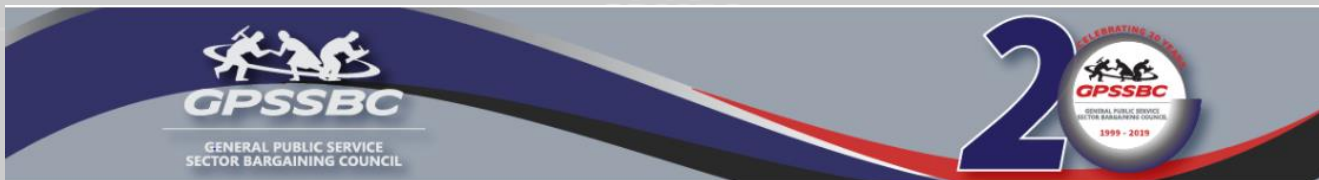
MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT V GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL & OTHERS (2017) 38 ILJ 213 (LC)

- The Court found that the Public Service Act (Proc 103 of 1994) and the public service disciplinary code gives the chairperson of a disciplinary hearing the power to make a final decision on the sanction to be imposed on an employee.
- The employer, therefore, has no power to interfere in the sanction imposed by the chairperson.
- The court found that there was no reason to interfere with the bargaining council arbitrator's finding
- Finding that the substitution of the sanction was unlawful and invalid.



SECTION 3:INDIVIDUAL DISPUTES

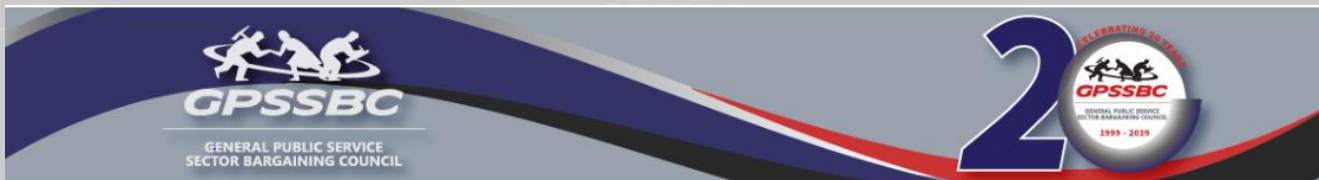
Relevant principles on Inconsistency and Discipline



MASUBELELE V PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL AND OTHERS (JR 1151/2008) [2013] ZALCJHB 3 (17 JANUARY 2013)

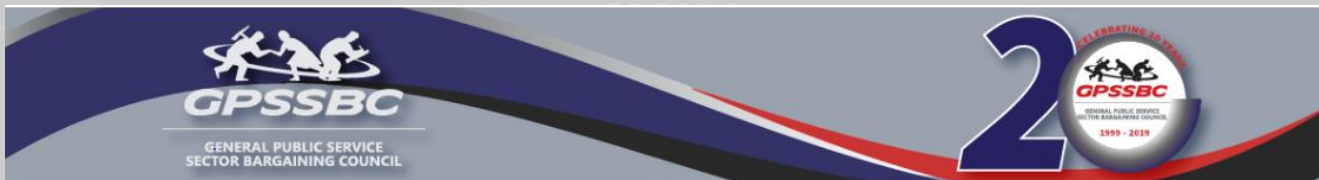
The ratio in the judgment in SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd is clear. The following principles apply to the determination of the issue of inconsistency so as to ensure inconsistency is not found to exist in the case of dismissal of employees:

- ❑ Employees must be measured against the same standards (like for like comparison);
- ❑ The chairperson of the disciplinary enquiry must conscientiously and honestly determine the misconduct;
- ❑ The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, or induced by improper motives or by a discriminating management policy (this conduct must be bona fide);
- ❑ A value judgment must always be exercised.



MPHIGALALE V SAFETY & SECURITY SECTORAL BARGAINING COUNCIL & OTHERS (2012) 33 ILJ 1464 (LC)

- This court, in numerous previous decisions, has viewed dishonesty in a serious light and has come to the conclusion in most instances that it results in a breakdown of the trust relationship between the parties.
- The decision of the commissioner that the dismissal of the applicant was fair, in spite of the existence of a previous inconsistent sanction imposed on two policemen previously for the same misconduct and mitigating factors, was reasonable.
- It follows, therefore, given the nature of the misconduct committed by the applicant that the SAPS “cannot be expected to continue repeating a wrong decision in obedience to a principle of consistency”, even in spite of there being no evidence of notice by the employer to its employees that employees who were found guilty of corruption would henceforth face dismissal.
- This is particularly so given the criminal nature of the misconduct, the fact that it was committed by a person employed in the trusted office of policeman, as a result of the severe impact that corruption has upon society and the importance of an appropriate operational response when imposing an appropriate sanction in the current circumstances. Objectively, there exists little need to remind those officials employed in positions of trust and responsibility in society that fundamentally dishonest practices may result in dismissal.



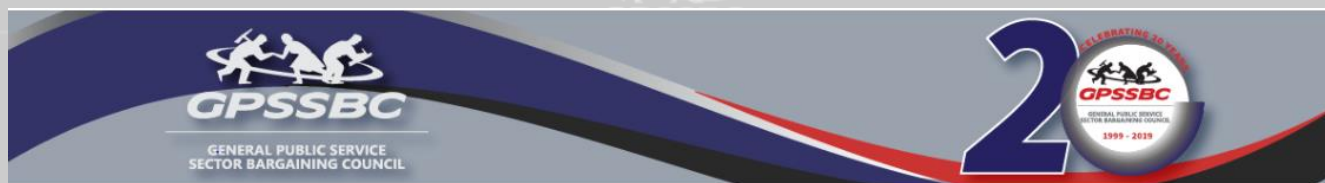
Stokwe v MEC Department of Education CCT33:18

The facts

Employee charged with 4 counts of misconduct for awarding contract to her spouse's company without required approval

Declared to HR ,but not obtained approval from Department head

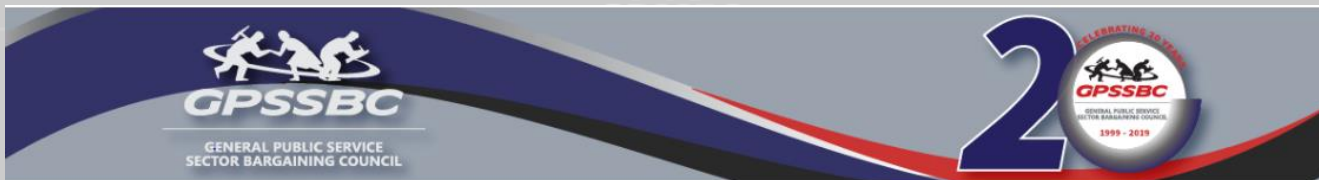
- ❑ Hearing scheduled first 12 August 2010
- ❑ Eventually held 30 March 2011.
- ❑ Advised of her dismissal on 22 June 2011



Stokwe continued....

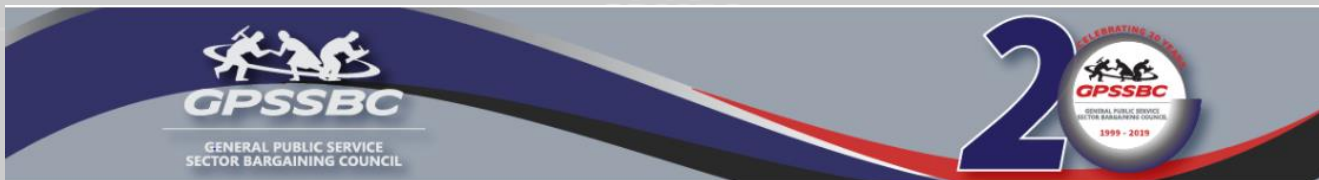
- ❑ Employee Appealed the dismissal sanction (Educators act schedule 2, if appeal suspends sanction)
- ❑ Employee kept asking for outcome
- ❑ Eventually advised not successful on 14 February 2014

Five years later sanction took place and she was dismissed



Stokwe continued....what happened next

- ✓ Employee referred a dispute to the council
- ✓ Commissioner felt not unfair because she had been employed all that time
- ✓ Labour court approached for a review
 - LC said the commissioners award was reasonable
 - LC and LAC Refused leave to appeal



Stokwe continued

Constitutional court

- Key to note that argument was enhanced to say 5 year delay was unexplained and unjustified ,entitled to speedy resolution
- Department argued ,inter alia, codes are a guide and not rigid

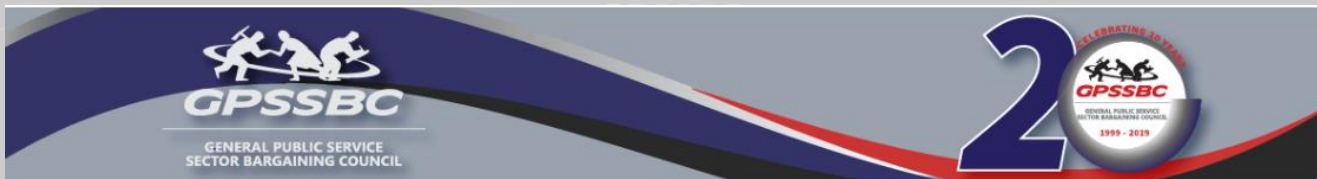
HELD

SUBSTANTIVELY

- Dismissal was substantively fair

PROCEDURELY

- Principles underlying any procedure to discipline an educator should be prompt and fair and concluded in shortest possible time
- If employee is retained for a time after sanction this is good evidence relationship has not broken down
- Excessive delay and failure to provide reasons not acceptable

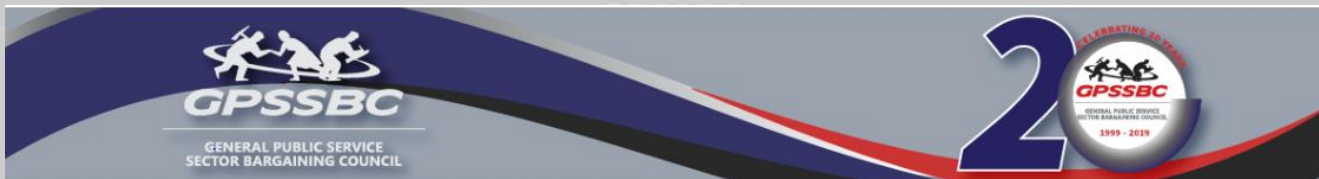


PSA obo Olufunmilayi Itunu Ubogu v Head of Department of Health Gauteng and others CCT6/17 CCT 14/17

- The facts: Ubogu was transferred from one hospital to another .Between 2010 and 2015 she received incorrect salary .Being paid the wrong rate for her role, and was informed she owed the state R 794 014.33.They proceeded to deduct this from her salary
- Issue was on proper construction of Section 38(2)(B)(i) of Public Service Act whether it entitles the state to deduct without due process or employees knowledge or agreement

CONSTITUTIONAL COURT

- ✓ court confirmed the Labour courts jurisdiction to declare the impugned section constitutionally invalid
- ✓ Confirmed that section does not pass constitutional muster as it permits unfettered self help in violation of the constitution(Section 1 © and hence is unconstitutional



Resigning to avoid dismissal: Catch me if you can

Mtati v KPMG

Services(PTY)ltd(2017)

Facts: Mtati gave 2 Resignations
One on notice one immediate

- Interdict brought

Held: on notice can still continue
with hearing

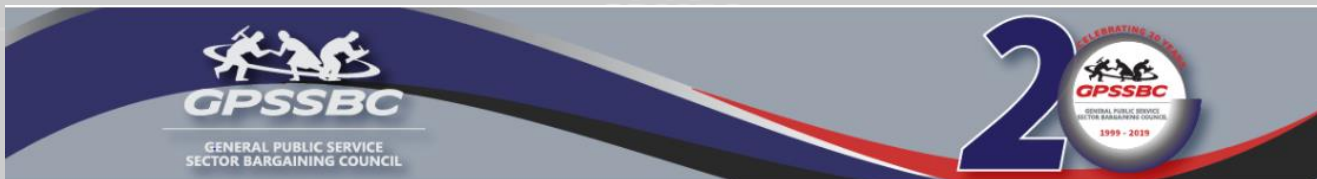
Immediate effect employer
looses the power to discipline

Coetzee v Zeitz Mocca foundation Trust

Facts: Coetzee resigned with
immediate effect

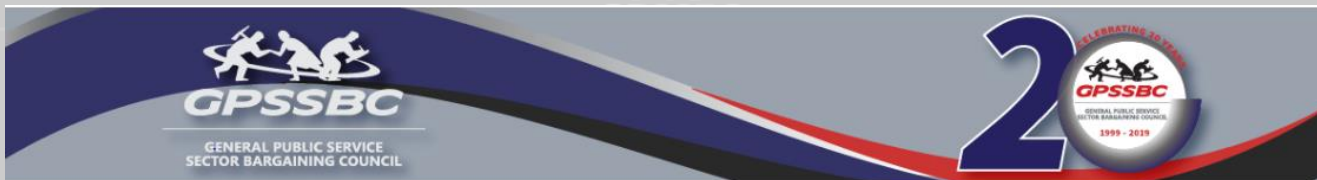
- Interdict to prevent hearing, stop
proceedings, declaring
employer no power to proceed

Held: Acceptance by employer of
resignation with immediate effect
is key

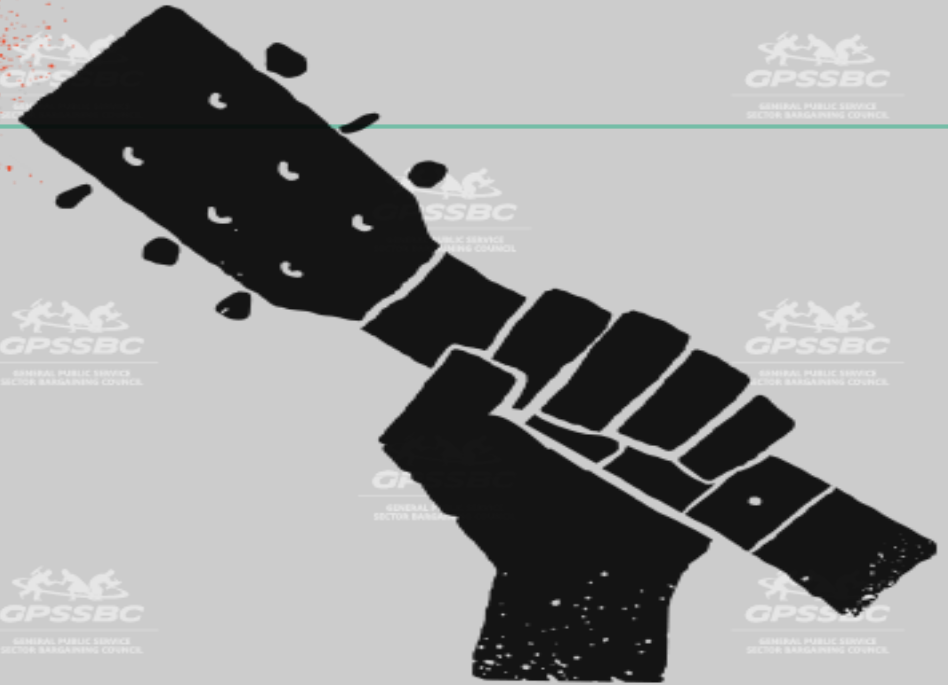


SECTION 4:DISCRIMINATION

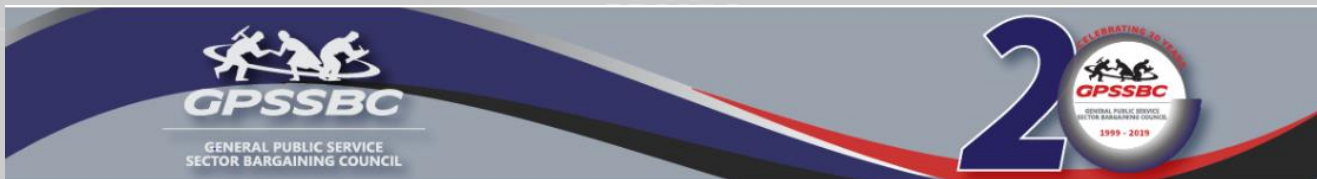
discrimination



**PROTEST SONGS
HAVE HELPED SHAPE HISTORY
PROVING THAT
WHEN PEOPLE **COME
TOGETHER**
AND RAISE THEIR VOICES
EXTRAORDINARY THINGS CAN HAPPEN**

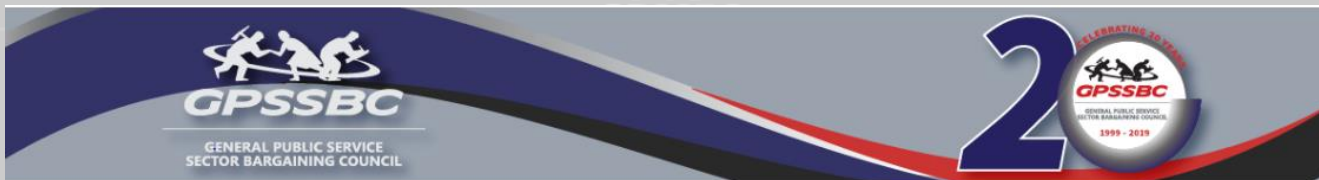


**DUNCANMEC V GAYLARD
N.O., MEIBC, NUMSA OBO
MPAHLINI & 7 OTHERS**



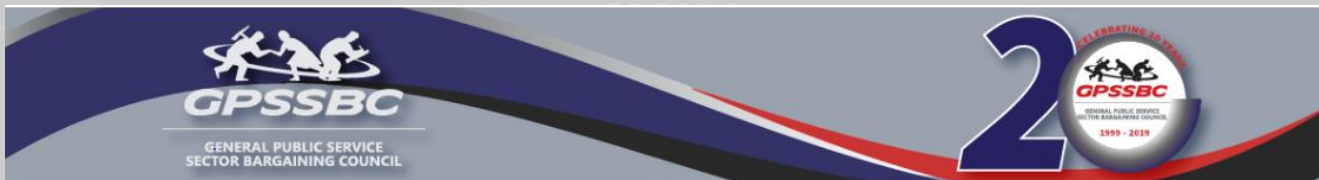
ISSUES TO BE CONSIDERED

- Racially offensive conduct alleged through singing of struggle songs
- Backdrop of how courts to consider racially offensive conduct
- Examines the duty of courts in trying to implement and oversee the clause in the constitution dealing with RACISM



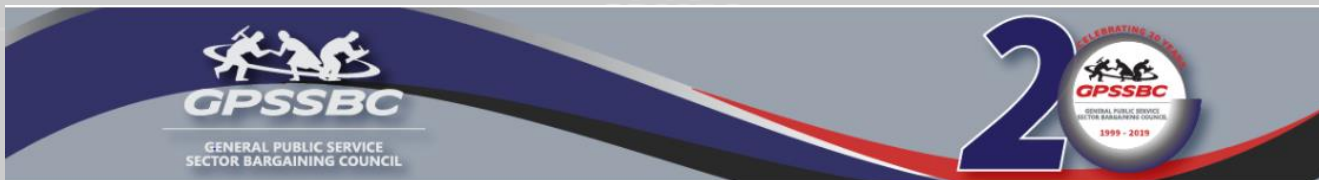
Facts

- Employees embarked on a short unprotected strike post lunch hour.
- During this time they danced & sang a well known struggle song in isiZulu translated as follows:
 - “Climb on top of the roof and tell them that my mother is Rejoicing when we hit the boer”
- Employees charged with misconduct
 - ❑ Participating in an unprotected strike,
 - ❑ Inappropriate behaviour by ignoring ultimatum and dancing and singing racial songs in an offensive manner



Conclusions of VARIOUS HEARINGS

- Chairperson concluded that the charge relating to racism was so serious as to warrant dismissal, even though employers code did not make it a dismissible offence
- Rejected NUMSA argument that not all employees participated(some just dancing) on basis that they were complicit
- Heard at MEIBC, where arbitrator concluded that “singing struggle songs was while inappropriate, not necessarily racism.”
- Drew a distinction between singing the songs and being a racist, because of it being a struggle song and its concomitant history.
- But she did say that it can be offensive and cause hurt to those who hear it

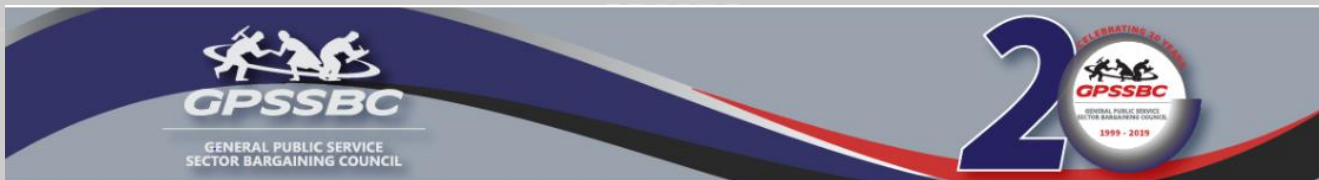


Issues through the courts

MEIBC, arbitrator concluded that “singing struggle songs was while inappropriate, not necessarily racism.”

Court ultimately concluded that the use of the word “**boer**” alone is NOT racially offensive

Concludes: Not every instance of racism constitutes an employee being guilty of racism



Contact Information

If you have any further questions, please do not be afraid to contact us directly

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THANK YOU

