CML4607F

Law for Engineers

Week 2: The world of work

Class notes 2024

Please note: The notes do not cover all the topics we discuss in class but serve as additional reading, including relevant provisions from legislation.

The Constitution

Labour rights originate in the Constitution.

- **Section 2 of the Constitution**: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

All law, legislation and actions must therefore comply with the Constitution. Certain specific fundamental rights in Chapter 2 (the Bill of Rights) are extremely relevant to labour law and the employment relationship:

- **Section 9 – Equality**

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

- **Section 10 – Human dignity:** "Everyone has inherent dignity and the right to have their dignity respected and protected".

  This means that employees have the right to be treated with human dignity.
- **Section 12 – Freedom and security of the person** "(1) Everyone has the right to freedom and security of the person, which includes the right—

  (a) not to be deprived of freedom arbitrarily or without just cause;

  (b) not to be detained without trial;

  (c) to be free from all forms of violence from either public or private sources;

  (d) not to be tortured in any way; and

  (e) not to be treated or punished in a cruel, inhuman or degrading way.

  (2) Everyone has the right to bodily and psychological integrity, which includes the right—

  (a) to make decisions concerning reproduction;

  (b) to security in and control over their body; and

  (c) not to be subjected to medical or scientific experiments without their informed consent"
- **Section 13 – Prohibition of slavery** "No one may be subjected to slavery, servitude or forced labour".

  Employees are therefore entitled to remuneration and to their autonomy to resign if they choose not to work for a certain employer.
- **Section 14 – Privacy** "Everyone has the right to privacy, which includes the right not to have—

  (a) their person or home searched;

  (b) their property searched;

  (c) their possessions seized; or

  (d) the privacy of their communications infringed.
- **Section 16 – Freedom of Expression** "(1) Everyone has the right to freedom of expression, which includes—

  (a) freedom of the press and other media;

  (b) freedom to receive or impart information or ideas;

  (c) freedom of artistic creativity; and

  (d) academic freedom and freedom of scientific research".
- **Section 18 – Freedom of association** "Everyone has the right to freedom of association".

This means that employees have a right to form trade unions and participate in their activities.

- **Section 22 – Freedom of trade, occupation and profession** "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".
  Note: This right may justifiably be limited by a reasonable restraint of trade.
- **Section 23 – Fair labour practices** "(1) Everyone has the right to fair labour practices.
  (2) Every worker has the right—
    (a) to form and join a trade union;
    (b) to participate in the activities and programmes of a trade union; and
    (c) to strike.
  (3) Every employer has the right—
    (a) to form and join an employers' organisation; and
    (b) to participate in the activities and programmes of an employers' organisation.
  (4) Every trade union and every employers' organisation has the right—
    (a) to determine its own administration, programmes and activities;
    (b) to organise; and
    (c) to form and join a federation.
  (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)".

This is the foundation which legislation must comply with and the below list of labour legislation gives effect to the constitutional (labour) rights of employees and gives content to the above list of fundamental rights.

- Labour Relations Act 66 of 1995 (LRA)
- Basic Conditions of Employment Act 75 of 1997 (the BCEA)
- Employment Equity Act 55 of 1998 (the EEA)
- Occupational Health and Safety Act 85 of 1993 (OHSA)
- Compensation for Occupational Diseases Act 130 of 1993 (COIDA)
- Unemployment Insurance Act 63 of 2001 (UIA)
- Minimum Wage Act 9 of 2018 (NMWA)

Who is an employee:

The courts have developed tests to distinguish between employees and independent contractors, namely the control test, organisation test or dominant impression test.

The below excerpt is from the following textbook: C Garbers, PAK le Roux, EML Strydom, AC Basson, MA Christianson, W Germishuys-Burchell and C de Villiers *The Essential Labour Law Handbook* (2024) 8th ed, 97-98.

"This [dominant impression] test, often seen as the standard test currently used by our courts, relies on various indicators to determine whether or not the relationship in question is one of employment. Instead of looking at just one factor (like control or integration) it examines a number of factors –

> 'The dominant impression test, it seems, entails that one should have regard to all those considerations or indicia which would contribute towards an indication whether the contract is that of service [ie employment] or a contract of work [ie independent contractor] and react to the impression one gets upon a consideration of all such indicia …. This is still unsatisfactory but, it seems to me that, it is as unsatisfactory as is the question of how one decides whether a dismissal is fair or unfair and indeed, whether certain conduct is reasonable or unreasonable.'
> – *Medical Association of SA & Others v Minister of Health & Another* (1997) 18 *ILJ* 528 (LC) at 536.

The factors, or indications, that the court would take into consideration to obtain a dominant impression, include the following –

- The right of supervision, in other words, whether the employer has the right to supervise the other person, (ie 'the worker').
- The extent to which the worker depends on the employer in the performance of duties.
- Whether the worker is allowed to work for another. Normally, someone who is an employee in terms of an employment contract is not allowed to work for anyone else.
- Whether the worker is required to devote a specific time to their work.
- Whether the worker is obliged to perform their duties personally. Usually, someone working for another in terms of an employment contract is obliged to render the services personally. In the case of an independent contractor, it does not really matter who does the work as long as the job gets done.
- Whether the worker is paid according to a fixed rate or by commission.
- Whether the worker provides their own tools and equipment.

- Whether the employer has the right to discipline the worker. The existence of this right would normally indicate control, which, in turn, would be indicative of an employment contract.

There is an important difference between the control and dominant impression tests. In the dominant impression test, the existence or absence of control is only one factor that must be taken into account. As the Appellate Division (as it was then) held in 1979 –

> 'The presence of such a right of supervision and control is indeed one of the most important indicia that a particular contract is in all probability a contract of service. The greater the degree of supervision and control to be exercised by the employer over the employee, the stronger the probability will be that it is a contract of service. On the other hand, the greater the degree of independence from such supervision and control the stronger the probability will be that it is a contract of work . . . Notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole *indicium* but merely one of the *indicia*, albeit an important one and that there may also be other important indicia to be considered depending upon the provisions of the contract as a whole.'
>
> – *Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A)* at 62D-G.

All the factors together create what is called a 'dominant impression'. The court weighs up all the relevant factors and then determines whether or not the dominant impression created is that the person performing these duties is an employee".

Labour legislation creates a legislative presumption in favour of the worker being an employee (rather than an independent contractor). Should one or more of the facts in the below list be present, the legislative presumption operates in favour of the employee and the onus is on the employer to show that the person is not an employee.

- **Section 200A of the LRA:**

"Presumption as to who is employee. —

(1) Until the contrary is proved, for the purposes of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present—

(a) the manner in which the person works is subject to the control or direction of another person;

(b) the person's hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organisation, the person forms part of that organisation;

(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

(e) the person is economically dependent on the other person for whom he or she works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person.

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act".

Fixed term employment contracts:

- **Section 186(1)(b) of the LRA:** ***Meaning of dismissal and unfair labour practice.—***

"(1) "Dismissal" means that—

(b) an employee employed in terms of a fixed term contract of employment reasonably expected the employer—

(i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

(ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee".

- **Section 198B of the LRA*: "Fixed term contracts with employees earning below earnings threshold.***

"(1) For the purpose of this section, a "fixed term contract" means a contract of employment that terminates on—

(a) the occurrence of a specified event;

(b) the completion of a specified task or project; or

(c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).

(2) This section does not apply to—

(a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act;

(b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless—

(i) the employer conducts more than one business; or

(ii) the business was formed by the division or dissolution for any reason of an existing business; and

(c) an employee employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.

(3) An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if—

(a) the nature of the work for which the employee is employed is of a limited or definite duration; or

(b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.

(4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee—

(a) is replacing another employee who is temporarily absent from work;

(b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;

(c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;

(d) is employed to work exclusively on a specific project that has a limited or defined duration;

(e) is a non-citizen who has been granted a work permit for a defined period;

(f) is employed to perform seasonal work;

(g) is employed for the purpose of an official public works scheme or similar public job creation scheme;

(h) is employed in a position which is funded by an external source for a limited period; or

(i) has reached the normal or agreed retirement age applicable in the employer's business.

(5) Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.

(6) An offer to employ an employee on a fixed term contract or to renew or extend a fixed term contract, must —

(a) be in writing; and

(b) state the reasons contemplated in subsection (3) (a) or (b).

(7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.
(8)(a) An employee employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment".

Common law requirements for a valid employment contract

There are general requirements for valid contracts, with two additional requirements for employment contracts (*essentialia*), namely:

1. That the employee makes their services available to the employer; and
2. That the employer remunerates the employee.

Without the above requirements, the contract would not be considered an employment contract.

There are also implied duties of employees and employers that form part of the employment contract without the parties having to agree to these terms (*naturalia*). Where any of the parties fail to adhere to the below implied duties, it is considered a breach of contract.

The below section is adapted from the following textbook: Collier & Fergus (eds) *Labour Law in South Africa: Context and Principles* (2018).

Duties of employees

1. To report for work
2. To be reasonably proficient / to perform with due care and skill
3. To follow the lawful and reasonable instructions of the employer
4. To be respectful and obedient
5. To act in good faith and to further the employer's interests (and avoid a conflict of interest)
6. To comply with any reasonable restraint of trade agreement

Duties of employers

1. To receive the employee into service (ie allow him or her to work)
2. To remunerate/pay the employee
3. To provide reasonably safe and healthy working conditions
4. Vicarious liability for the actions of employees (employers may be held liable for the actions or omissions of their employees which cause harm to others, if those actions or omissions were committed during the course and scope of their employment)

Note that all these principles are subject to the Constitution and amendment by legislation. For example, when an employee takes leave, he or she is entitled to be paid despite the duty to report for work. This is because of the Basic Conditions of Employment Act 75 of 1997 which entitles all (full time) employees to paid annual leave of at least 15 working days a year.

Probation

Item 8 of Schedule 2 to the Labour Relations Act, which contains the Code of Good Practice: Dismissal, determines the following in relation to employees on probation:

"(1)(a) An employer may require a newly hired employee to serve a period of probation before the appointment of the employee is confirmed.
(b) The purpose of probation is to give the employer an opportunity yo evaluate the employee's performance before confirming the appointment.
(c) Probation should not be used for purposes not contemplated by this Code to deprive employees of the status of permanent employment. For example, a practice of dismissing employees who complete their probation periods and replacing them with newly hired employees, is not consistent with the purpose of probation and
constitutes an unfair labour practice.
(d) The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment.
(e) During the probationary period, the employee's performance should be assessed. An employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service.
(f) If the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet the required performance standards. If the employer believes

that the employee is incompetent, the employer should advise the employee of the respects in which the employee is not competent. The employer may either extend the probationary period or dismiss the employee after complying with subitems (g) or (h), as the case may be.
(g) The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.
(h) An employer may only decide to dismiss an employee or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. A trade union representative or fellow employee may make the representations on behalf of the employee.
(i) If the employer decides to dismiss the employee or to extend the probationary period, the employer should advise the employee of his or her rights to refer the matter to a council having jurisdiction, or to the Commission.
(j) Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period".

Selected issues from the world of work: Restraint of trade

Applicable principles

In deciding whether a clause in restraint of trade is valid or not, a court will enquire into whether the prohibition on competition is contrary to the public interest or not. The enquiry brings into conflict two basic principles, namely "the principle that everyone should have complete freedom to trade and earn a livelihood as, when and where he pleases and the principle of sanctity of contracts which means that all contracts freely entered into by those of full age and competent understanding should be enforced".
This conflict was brought to the fore in *Magna Alloys & Research* (*SA*) *v Ellis*, where the Appeal Court accepted the approach followed in *Roffey v Catterall*, *Edwards & Goudré*. However, the court placed a stronger emphasis on the role of public policy and propounded the following principles:

(a) Agreements contrary to public policy or interest are not enforceable. An agreement that restricts a person's freedom of trade will be contrary to public policy and thus unenforceable if the circumstances of the case are such that the court is of the opinion that the enforcement of the agreement would harm the public interest.

(b) Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be able to participate freely in the business and professional world.

(c) An unreasonable restriction of a person's freedom to trade would probably also be contrary to public policy.

(d) Acceptance that enforcement of an unreasonable restrictive provision is contrary to public interest means, when a party alleges that he or she is not bound by a restrictive condition to which he or she has agreed, that:

(i) he or she bears the onus of proving that the enforcement of the condition would be contrary to public policy;

(ii) the court would have to consider the circumstances obtaining at the time when it was asked to enforce the restriction; and

(iii) the court would not be limited to a finding that the agreement is severable, but would be entitled to declare the agreement partially enforceable or unenforceable.

The requirement of reasonableness.

The essential criterion in determining whether a restraint of trade clause is contrary to public policy is that of reasonableness. In *Basson v Chilwan*, and reformulated and expanded in *Nampesca* (*SA*) *Products v Zaderer*, it was stated that reasonableness must be determined with reference to the following considerations:

(a) Is there an interest deserving of protection ("protectable interest") at the termination of the agreement? Two kinds of interests are worthy of protection, namely:

(i) **trade secrets** (confidential information); and

(ii) **trade connections**, in other words, trade connections and relations with customers, suppliers, potential customers, and others.

(b) Is that interest being prejudiced?

(c) If so, how does that interest weigh up qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

(d) Is there another facet of public policy not having anything to do with the relationship between the parties which requires that the restraint should either be enforced or disallowed?

(e) Is the restraint wider than is necessary to protect the protectable interest?

(f) Is the restraint consistent with section 22 (Freedom of Trade, Occupation & Profession) of the Constitution?

Reasonableness would require that the interests of the parties must be balanced by having regard to:
(a) the nature, extent and duration of the restraint; and
(b) factors peculiar to the parties and their bargaining powers and interests.

The onus of proving that a restraint of trade is unreasonable rests on the person who seeks to escape the application of the restraint on him or her. A competitor employer may not be ordered to terminate the services of an employee, but he or she may be interdicted from employing the said employee for the outstanding part of the restraint of trade. In exceptional circumstances the restraint interdict may be enforced pending an appeal against the judgment.

Case law (summaries)

The below summaries provide valuable practical scenarios for the application of some the principles we discuss in class.

***G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. and Others* (CA2/2015) [2016] ZALAC 55 (25 November 2016)**

Principle: An employer is entitled to full disclosure of all relevant information when a decision is being made to employ a person as a security guard given the trust implicit in the nature of that position. Dismissal is fair even where the misrepresentation is discovered after 14 years, and the employee has a good service record.

Facts: When the employee applied for employment with the company in 1996, he was asked in a written application for employment: *"Have you ever been convicted of a criminal offence?"* He indicated that he had not, and the employer employed him as a security guard. Fourteen years later, on 30 July 2010, the employee applied for promotion to the position of controller. A criminal record check was undertaken. It indicated that he had two previous criminal convictions: one for rape in 1982 for which he, being 17 years old at the time, received six lashes; and the second for assault with intent to do grievous bodily harm in 1991 for which he paid a fine of R200. The employer, after a disciplinary hearing, dismissed the employee for 'misrepresentation and/or dishonesty concerning an application for employment and/or breach of PSIRA Regulations code of conduct'. Section 23(1)(d) of the Private Security Industry Regulation Act 56 of 2001 (PSIRA Act), (the operation of which post-dated the employee's employment), provides that a person may be registered as a security service provider if he or she *"was not found guilty of an offence specified in the Schedule within a period of 10 years immediately before the submission of the application to the Authority".*

At the disciplinary hearing, the employee's defence was that he did not know that he had been convicted of a criminal offence as he had not gone to jail. Concerning his rape conviction, he stated that: *'I was 17 and did not understand the law. It was not rape. She was my girlfriend. She agreed to it because she was not where she was supposed to be'.* He stated further that the assault case related to an incident in which *'(a)nother man who came from jail to visit a lady in my mother's house. When he*

grabbed this lady I defended her, and assaulted him. He laid a charge against me. I had to go to court. My brother got a lawyer to defend me. I was given a fine and my brother paid the fine.' At arbitration his dismissal was found substantively unfair and retrospective reinstatement was awarded. On review the Labour Court found that while the employee had committed misconduct, dismissal was unfair and retrospective reinstatement was ordered. But on appeal, the LAC found the employee's dismissal was substantively fair, given the serious nature of the misconduct committed. The appeal was upheld with no order as to costs.

Extract from the judgment: [40] 'The employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is *"a sensible operational response to risk management"*. Obtaining employment on false pretences whether by misrepresenting qualifications, skills, experience or prior work history has been found to justify dismissal, with it stated in Boss Logistics v Phopi and others that if this were not so, a sanction short of dismissal would only serve to reward dishonesty. [41] A conviction for rape and assault is antithetical to employment in the position of a security guard given the nature of that position. The fact that the PSIRA Act bars the employment of a person in the security industry until 10 years has elapsed from the date of a criminal conviction illustrates the seriousness with which criminal infractions are, for obvious reason, viewed in the industry. An employer is entitled to full disclosure of all relevant information when a decision is being made to employ a person as a security guard given the trust implicit in the nature of that position; and where an express question is asked of a potential employee, an employer is entitled to expect an honest answer in response.[42] It is so that the third respondent's years of service and clean disciplinary record provided mitigation and, as stated in Edcon Ltd v Pillemer NO and Others, were *"an important consideration in determining the appropriateness of...dismissal"*.

However, as was stated by this Court in Toyota SA Motors (Pty) Ltd v Radebe and Others: *'...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...'.

[43] It is so that there existed no risk of repetition by the third respondent of the offence in its precise form and that the damage suffered was limited to his employment in circumstances in which the appellant may otherwise not have employed him. However, the fact remained that the third respondent was employed on false pretences in circumstances in which he had deliberately concealed the true state of affairs from the appellant. His conduct was dishonest and constituted a serious breach of the appellant's disciplinary code. When confronted with evidence of his misconduct, the third respondent did not express any remorse but blamed his dishonesty first on his lack of knowledge that his offences amounted to convictions and then later on his belief that after 1994 his criminal record no longer existed.

[44] Having regard to all of these relevant factors, and in spite of the absence of direct evidence showing the breakdown in the trust relationship and the appellant's misplaced reliance on the provisions of PSIRA, I am satisfied that the sanction of dismissal imposed by the appellant on the third respondent was fair. The false misrepresentation made by the third respondent was blatantly dishonest in circumstances in which the appellant is entitled as an operational imperative to rely on honesty and full disclosure by its potential employees. It induced employment and when discovered was met with an absence of remorse on the part of the third respondent. The fact that a lengthy period had elapsed since the misrepresentation, during which time the third respondent had rendered long service without disciplinary infraction, while a relevant consideration, does not compel a different result. This is so in that the fact that dishonesty has been concealed for an extended period does not in itself negate the seriousness of the misconduct or justify its different treatment. To find differently would send the wrong message. [45] In spite of the LRA's emphasis on progressive discipline, given the nature of the misconduct committed and the absence of any remorse shown and having regard to considerations of fairness, the appellant was entitled to cancel the employment contract and dismiss the third respondent. It is, in any event, relevant to note that the third respondent in the referral of his dispute to arbitration sought compensation and not reinstatement as a remedy for unfair

dismissal. Having regard to the real dispute between the parties and the provisions of s193(2), the imposition of a sanction short of dismissal was therefore unwarranted.[46] It follows that the appeal must succeed. The orders of the Labour Court are set aside and replaced with an order that the dismissal of the third respondent was fair. An order of costs would be neither just nor fair.

Order [47] In the result the following order is made:

1.The appeal is upheld with no order as to costs.

2.The order of the Court a quo is set aside and replaced with the following order:

1.'The arbitration award issued by the first respondent is reviewed and set aside; and replaced with the order that the dismissal of the applicant was substantively fair.

2.There is no order as to costs.'

Walter McNaughtan (Pty) Ltd v Schwartz & others **(2004) 25 *ILJ* 1039 (C)**

Principles:

1. Whether information constitutes a trade secret is a factual question. It has to: (1) be capable of application in a trade or industry; (2) be useful, not be public knowledge and property; (3) be known to only a restricted number of people or a closed circle; and (4) be of economic value to the person seeking to protect it.
2. A protectable interest in the form of customer connections does not come into being simply by having had contact with an employer's customers. What is required is the establishing of relationships of such a nature that the employee could easily have induced customers to follow him or her to a new business. Whether such relationships have come into being is a question of fact.

Facts: The applicant company imports and distributes in South Africa, truck parts, bus and truck hardware, aluminium windows, automotive paints and associated products. The applicant's principal place of business is in KwaZulu-Natal and it has branches in Johannesburg, Cape Town, Pinetown and Empangeni.

The ex-employee is a sales and technical representative previously employed by

Bulldog Abrasives Southern Africa (Pty) Ltd, with its principal place of business in Johannesburg, where it trades as a supplier of automotive paints and accessories.

The company sought to interdict the former employee from continuing to act in breach of an agreement in restraint of trade between them. Immediately upon termination of employment, the former employee had taken up employment with Bulldog Abrasives. It was common cause that in the course of this new employment he had been soliciting business from the applicant's customers. The employer alleged that the proprietary interests which it had sought to protect by means of the agreement were, first, its trade secrets or confidential information and, second, its trade connections.

The former employee denied that he had been acting in breach of the restraint. As regards the alleged proprietary interests, he denied that he possessed sufficient information for it to have constituted a trade secret or confidential information. He also denied that the nature of his contact with the employer’s customers was such that he could easily have induced them to follow him to a new business and, further, that any influence he might have had over the customers had been enhanced by virtue of his employment with the employer.

It appeared from the evidence that the former employee had had prior dealings with the employer's customers whilst in other prior employment, as well as during the course of conducting his own business for some years prior to his taking up employment with the applicant. It also appeared that, when he took up employment with the applicant, he did so on the basis that he could bring with him his existing customers. Furthermore, it appeared that, in the course of conducting his own business, he had performed exactly the same functions as he subsequently performed for the applicant.

The court found that the trade secrets or the confidential information or the goodwill or trade connections of the party in whose favour a covenant in restraint of trade had been undertaken constituted a proprietary interest worthy of protection. The court found further that the onus was on the former employee to show, on a preponderance of probabilities, that it would be unreasonable to enforce the covenant in restraint of trade that he had undertaken in favour of the applicant and that the applicant was not

entitled to the protection of the trade secrets identified by it or its customer connections.

Whether information constituted a trade secret was a factual question. For information to be confidential it had to (1) be capable of application in trade or industry, that is it had to be useful; not be public knowledge and property; (2) be known to only a restricted number of people or a closed circle; and (3) be of economic value to the person seeking to protect it.

The court found that, judged against the above criteria, the information possessed by the employee might well technically have constituted confidential information and have been an interest worthy of protection at the termination of the employer-employee relationship. However, if regard were had to the limited usefulness such information had in the industry, as well as the fact that the usefulness of the employee's knowledge diminished as time passed, the instant case was one where the said interests did not weigh up against the employee's interest not to be economically inactive and unproductive. The court held accordingly that the restraint, insofar as it sought to protect the particular trade secret of the applicant company by means of the restraint of trade agreement was unreasonable and unenforceable. The court found that a protectable interest in the form of customer connections did not come into being simply by having had contact with an employer's customers. What was required was the establishing of relationships of such a nature that the employee could easily have induced customers to follow him or her to a new business. Whether such relationships had come into being was a question of fact.

The court found further that customer connections would be capable of protection by means of a covenant in restraint of trade only if the attachment or influence that would have enabled the employee to induce customers to follow him or her to a new business had not existed before but had come into being only during his or her employment with the particular employer. Not only had the former employee stated that no such enhancement had occurred whilst he was employed by the applicant, but he succeeded in showing that his functions with customers whilst he was employed had been exactly the same as before. The court found that the former employee had succeeded in proving that the restraint, to the extent that it sought to protect the

applicant's customer connections, was unreasonable and, accordingly, unenforceable.

The application was dismissed.

Extract from the judgment:
'Whether the information constitutes a trade secret is factual question (see *Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321 (W) at 333 *f*). For information to be confidential, it must *(a)* be capable of application in trade or industry, that is, it must be useful; not be public knowledge and property; *(b)* it must be known only to a restricted number of people or a closed circle, and *(c)* be of economic value to the person seeking to protect it (see *Townsend Productions (Pty) Ltd v Leech & others* at 53J-54B).

A protectable interest in the form of customer connections does not come into being simply by having contact with an employer's customers (see J D Heydon *The Restraint of Trade Doctrine* at 108-9). What is required is the establishing of relationships of such a nature that the employee could easily induce customers to follow him or her to a new business (see *Rawlins & another v Caravantruck (Pty) Ltd* at 541D; *Nampesca (SA) Products (Pty) Ltd & another v* I *Zaderer & others* 1999 (1) SA 886 (C) at 889B-C; (1999) 20 ILJ 549 (C)). Whether such relationships have come into being is a question of fact and depends on the nature of the employee's duties; his personality; the frequency and duration of the contact with customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left (see *Rawlins & another v Caravantruck (Pty) Ltd* at 541G-I).'

***Ganes & another v Telekom Namibia Ltd* (2004) 25 *ILJ* 995 (SCA)**
Principle: The duty of good faith means that an employee is obliged not to work against the employer’s interests, not to place himself in a position where his interests conflict with those of the employer, not to make a secret profit at the expense of the

employer, and not to receive from a third party a bribe, secret profit or commission in the course of or by means of his position as employee.

Facts: The employee was manager of procurement for Telekom and at the same time received unauthorized payments from companies that contracted with Telekom from time to time. The court said that the duty of good faith meant that an employee was obliged not to work against the employer's interests, not to place himself in a position where his interests conflicted with those of the employer, not to make a secret profit at the expense of the employer, and not to receive from a third party a bribe, secret profit or commission in the course of or by means of his position as employee

Extract from the judgment:
[26] 'The employer may claim from an employee any bribe, secret profit or commission received by him from a third party without the consent of the employer in the course of his employment or by means of his position as employee.4 The English law is to the same effect. In Chitty on Contracts 28th ed vol 1 para 30-172 the English Law is stated thus: 'Where an agent receives from a third party a bribe, secret profit or commission in connection with his principal's affairs his principal is entitled to claim it; the same principle holds in regard to the relationship of employer and employee.'

[27] In the present case the first appellant breached his duty of good faith to the respondent. He took money from Dresselhaus, Global Telecom and EPS in return for looking after their interests in their dealings with the respondent whereas in terms of his employment contract with the respondent he was obliged to look after the respondent's interests. These payments clearly constituted bribes. Although the first appellant denied that he promoted the interests of Temsa in its business dealings with the respondent, the agreement to pay and the payment of commission to him in respect of payphones supplied to the respondent was likely to serve as an incentive to the first respondent to promote Temsa's interests in their dealings with the respondent. These payments, therefore, similarly constituted bribes received by the first appellant.

[28]Counsel for the appellants did not contend that the payments were not in the nature of bribes and that they were not received by the first appellant in breach of a

duty of good faith to the respondent. In their heads of argument they submitted that even if it is accepted that the duty owed by an employee to an employer is a fiduciary one the employer may not claim payment from the employee of secret profits or commissions where these take the form of bribes. There is no merit in this contention and it was not advanced in oral argument before us. What was argued before us was that the payments received from Dresselhaus were in return for under-invoicing Dresselhaus, that the respondent did not suffer a loss in respect of such under-invoicing and that the amounts so received by the first appellant were, therefore, not recoverable.'

***City of Tshwane Metropolitan Municipality v Engineering Council of SA & another* (2010) 31 *ILJ* 322 (SCA)**

Principle:

For the purposes of a protected disclosure in terms of the Protected Disclosures Act, an opinion may be covered as if it is a fact. An opinion often relates to a fact, the existence of which can only be determined by considering the views of a suitably qualified expert.

Facts:

This case concerned a disclosure made by an employee, Weyers, an electrical engineer employed by the Tshwane Municipality. Weyers was appointed to ensure that safety regulations imposed by Occupational Health and Safety legislation were complied with. He raised concerns about the expectation that he should appoint certain unqualified system operators. System operators do very dangerous work on a live electrical network and their job is a specialist job requiring specialist work.

The pressure to appoint unqualified persons as system operators occurred against the background of the municipality's employment equity targets and its general transformation needs. Weyers raised the matter with high level managing officials at the municipality. This was not well received and he refused to cooperate with the appointment of persons who, in his judgement, were not fit to do the job and whose required appointment could lead to the lives of the public and/or fellow employees being endangered. More specifically, he wrote a letter to his professional body (the Engineering Council of South Africa) and the Department of Labour (DOL) in which he

expressed his concerns. He also commenced grievance procedures on the same day he wrote the letter. These were still pending at the time this matter came before the court.

As a result of this letter, disciplinary action was taken against Weyers for misconduct. He was subsequently found guilty of misconduct for writing the letter to the DOL. When the chair of the disciplinary tribunal refused to postpone the inquiry at the sanction stage, pending the outcome of an application to court, Weyers approached the court for an urgent interdict, which was granted. The reported judgment concerns the granting of a final interdict.

The Court considered whether Weyers' action constituted a 'protected disclosure' in terms of the PDA.

The court held that:
'In my opinion, Weyers made a general protected disclosure, as intended by s 9 and, consequently, is entitled to the protection afforded by s 3: he reasonably believed that the information disclosed, and any allegation contained therein are substantially true. He did not make the disclosure for purposes of personal gain. It was reasonable to make the disclosure. Weyers had previously made a disclosure of substantially the same information to his employer in respect of which no action was taken within a reasonable period after the disclosure, and the impropriety, in my view, is of an exceptionally serious nature. Moreover, the reasonableness of the disclosure, when tested against the provisions of s 9(3), is manifest. If nothing else, it was in the public interest.'

The municipality was interdicted from imposing any disciplinary action on Weyers for sending the letter. On appeal, the SCA confirmed the High Court's finding that Weyers' disclosure was a general protected disclosure in terms of section 9 of the PDA. It confirmed that honest opinions held by an expert in the field, such as Weyers, could constitute a fact and thereby fall within the ambit of the PDA.

Extract from the judgment:
40.'I turn then to consider the provisions of the PDA. Under section 3 of the PDA an

employee who makes a protected disclosure may not be subjected to an occupational detriment by his or her employer on account, wholly or partly, of having made that disclosure. An occupational detriment is defined in section 1 as including being subjected to any disciplinary action. Accordingly the question is whether Mr Weyers' action in sending his letter to the Department of Labour and the Engineering Council constituted a protected disclosure. If it did then the appellant was not entitled to institute disciplinary proceedings against him and he was entitled to obtain the interdict that was granted by the Pretoria High Court.

41.The material portion of the definition of a disclosure reads: 'any disclosure of information regarding any conduct of an *employer*, or an *employee* of that *employer, made by any employee* who has reason to believe that the information concerned shows or tends to show one or more of the following: 'that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject; that the health or safety of an individual has been, is being or is likely to be endangered...'

The first argument advanced before us was that the contents of the letter did not constitute information because they contained only Mr Weyers' opinion that people who were not competent were about to be appointed as system operators and not a fact or similar form of information. However a person's opinion is itself a fact, for as Bowen LJ pointed out: 'the state of a man's mind is as much a fact as the state of his digestion'.

In addition an opinion often relates to a fact the existence of which can only be determined by considering the views of a suitably qualified expert. Whether a person has the requisite skills to undertake a dangerous and skilled task is a question of fact, but prior to their appointment, which was the relevant time in this instance, that fact can only be ascertained by way of tests and the assessment of people who know what the job requires of their level of skill. The letter dealt with that issue and as such contained information concerning the possible lack of competence of those who were likely to be appointed to the system operator posts. It also contained information to the reader about the state of mind of Mr Weyers as the person in charge of the PSC centre and the person responsible, both under his contract and by virtue of his appointment

under the OHSA, for the safety of the machinery under his control and that of the PSC centre staff.

42. A further difficulty with this approach to the nature of information under the PDA is that its narrow and parsimonious construction of the word is inconsistent with the broad purposes of the Act, which seeks to encourage whistle blowers in the interests of accountable and transparent governance in both the public and the private sector. That engages an important constitutional value and it is by now well-established in our jurisprudence that such values must be given full weight in interpreting legislation. A narrow construction is inconsistent with that approach. On the construction contended for by Mr Pauw the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know of those opinions. A culture of silence rather than one of openness would prevail. The purpose of the PDA is precisely the opposite.

43. For those reasons I am satisfied that the letter contained a disclosure of information regarding the conduct of those employees of the appellant who had taken responsibility for the selection of people to be appointed as system operators and a professional view on the suitability of the persons concerned to be appointed to those jobs. Both the letter itself and the background sketched earlier in this judgment demonstrate quite clearly that this information concerned the actual or prospective health and safety of individuals in the employ of the municipality and possibly outsiders as well and related to compliance with statutory obligations in regard to safety. Accordingly the letter constituted ad is closure in terms of the PDA. In terms of the definition of a protected disclosure in section 1, whether it was protected depends upon whether it was made to the Department of Labour and the Engineering Council in accordance with section 9 of the PDA.

44. Section 9 reads in its material part as follows: '**General protected disclosure** 1. Any *disclosure* made in good faith by an *employee* –

> a. who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
>
> b. who does not make the *disclosure* for purposes of personal gain, excluding any reward payable in terms of any law; is a *protected disclosure* if –one or

more of the conditions referred to in subsection (2) applies; and in all the circumstances of the case, it is reasonable to make the *disclosure*." The conditions in subsection (2) that are relevant for the purposes of this case are contained in paragraphs (c) and (d) which read:

c. "that the *employee* making the *disclosure* has previously made a *disclosure* of substantially the same information to:

i. his or her *employer*; or

ii. a person or body referred to in section 8, in respect of which no action was taken within a reasonable period after disclosure; or

d. that the *impropriety* is of an exceptionally serious nature."

45.The effect of these provisions is that the disclosure would be protected if Mr Weyers acted in good faith; reasonably believed that the information disclosed and the allegations made by him were substantially true; was not acting for personal gain and one or other of the conditions in section 9(2)(c) and (d) was satisfied. Mr Pauw rightly conceded that the first three requirements were satisfied. In the light of the evidence summarised earlier in this judgment he could do no less. It is plain that Mr Weyers was throughout painfully aware of his professional responsibilities and of the need to provide residents of Tshwane with a safe and reliable electricity supply. His concern about the dangers arising from appointing people who, after testing, he regarded as insufficiently skilled to undertake the onerous duties attaching to a system operator position shines through each document. His bona fides and his belief in the truth of what he was saying are apparent. As this case shows he made the disclosure at considerable personal cost and not for personal gain. He acted in the discharge of what he conceived, and had been advised, was his professional duty. The disclosure was made to parties that would manifestly be interested in such disclosure. It would be surprising in those circumstances to learn that the disclosure was not protected.

46.Mr Pauw confined his contentions on this part of the case to the submission that Mr Weyers had not made a prior disclosure to his employer of substantially the same information in terms of paragraph (c), as the latter was at all times aware of his view, so that nothing was disclosed to it. He also contended that the disclosure did not relate to any impropriety as required by paragraph (d). Accordingly, so he submitted, the last necessary element of a protected disclosure was missing.

47. I cannot accept these contentions. In regard to the first it was put to him that the effect of his submission was that if the employer knew of a problem before the employee went and reported it there could be no prior disclosure to the employer and accordingly no protected disclosure could be made to anyone else. There was no answer to this point and the postulate cannot be correct. Its effect is that if an employee goes to the managing director and reports that bribes are being paid in order to secure contracts flowing from successful tenders that is not a disclosure if the managing director authorised the payments, and that knowledge would bar a protected disclosure to anyone else, such as the party issuing the tenders. Such a construction would undermine the whole purpose of the PDA because it has the result that the more culpable the employer in the conduct giving rise to the report and the greater its knowledge of wrongdoing, the less would be the protection enjoyed by the employee.

48.The alternative submission was that the letter merely reflected a disagreement between Mr Weyers and his employer and therefore there had been (and could be) no previous disclosure to the employer because that disagreement did not amount to a disclosure. However that is merely the argument that the letter contained no information decked out in a different guise and the way in which it is couched further undermines that original submission. If the letter is so construed then the information it contains is that there is a disagreement between the manager of the PSC centre, a skilled and highly qualified electrical engineer, and the representatives of management and human resources concerning the abilities of persons to be appointed as system operators in the PSC centre. That is a most important item of information that could cause the Department of Labour to intervene to conduct a safety inspection and engage with the relevant individuals to address the concerns being raised by Mr Weyers. Equally it could cause the Engineering Council to become involved in the interests of public safety and protecting the standing and reputation of its member. It also illustrates why these were the appropriate parties to whom to make the disclosure in question.

49.In my view therefore the requirements of section 9(2)(c) were satisfied, it being common cause that the relevant officials in the municipality had disregarded Mr Weyers' concerns and intended to ride roughshod over them. Accordingly he had made the disclosure to his employer and no action had been taken consequent upon

it, other than to disregard his bona fide concerns. It was not suggested that a reasonable period for acting upon his disclosure had not passed.

50.That conclusion suffices to hold that the letter embodied a protected disclosure. The same result is reached by considering the requirements of sub-section (d). An 'impropriety' is defined in section 1 as being conduct in any of the categories in the definition of disclosure, which includes any conduct that shows or tends to show that the health or safety of an individual has been, is being or is likely to be endangered. Having regard to the nature of the enterprise and the nature of the work that system operators would be employed to perform it would be likely that the safety of an individual would be endangered by the appointment of a person who did not possess the skills necessary to do the job safely. That is an impropriety as defined and, against the background set out in paragraphs [3] to [6] above, it cannot be contended that it was not an impropriety of an exceptionally serious nature. Clearly lives were at risk as the municipality's own advertisement for the position had stated.

51.It follows that the respondents proved that the publication of the letters to the Department of Labour and the Engineering Council constituted a protected disclosure by Mr Weyers. It was accordingly impermissible for the municipality to discipline him for doing so and it would be impermissible for it to impose any sanction upon him for doing so. Lest it be taken that in referring to the municipality in this regard I am attributing conduct to the council of the municipality it is appropriate for me to record that it is unclear from the record, and counsel were not in a position to inform us, of the extent to which the council, as opposed to its officials acting in accordance with their delegated powers were responsible for both the disciplinary proceedings and the opposition to the present litigation, including this appeal. Accordingly my references to the municipality must be understood as referring to the conduct of those officials as representatives of the municipality. It is important to say this because it is not apparent that in the dispute that arose the broader interests of the residents of Tshwane and their need for service delivery, in the form of a safe and stable supply of electricity, were always kept in mind. In addition the manner in which these proceedings were conducted was deplorable with an answering affidavit being delivered by the manager: legal support services supported by purely formal confirmatory affidavits. The answering affidavit was replete with vague, evasive and in many cases demonstrably

untruthful denials, as well as an attack on Mr Weyers' bona fides that could not be, and was not, supported by counsel in argument. This judgment would not be complete without recording that this was not justified and that it was not in the interests of the residents of Tshwane.

52.The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.'