Onus of proof: is the balance of probabilities a fair and reasonable standard in deciding possible dismissal in misconduct cases or does the legal framework regulating disciplinary hearings need an overhaul?

by

PASCAL SIPHELELE ZULU

(9904891)

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Supervisor: Ernest Tenza

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ABSTRACT

This dissertation aims at examining the fairness and reasonableness of the balance of probabilities as the onus of proof in deciding misconduct cases where dismissal, as a sanction, is the likely outcome. The standard to determine the guilty verdict when an employee has committed misconduct is completely decided on the balance of probabilities. The application of this standard (due to a number of variables, including the lack of proper understanding of the standard by the presiding officers) has led to a number of employees that are accused of serious misconduct being dismissed unfairly. This has increased the number of dismissal cases referred to the Commission for Conciliation and Mediation Commission, Labour Court, Labour Appeal Court, Bargaining Councils and Private Forums.

South Africa is a country that constantly seeks to achieve socio-economic justice - the question is whether the use of the balance of probabilities to determine the guilt or otherwise of employees causes a threat to the attainment of such justice. Based on this study's findings, the majority of cases adjudicated at company level are overturned at CCMA in favour of employees. The study proposes that the Labour Relations Act, no 66 of 1995, Schedule 8, (Code of Good Practice: Dismissal) be reviewed and amended to ensure that the Regulatory Framework governing disciplinary cases on misconduct cases is changed.

DECLARATION BY SUPERVISOR

I, **ERNEST TENZA,** hereby declare that this dissertation by **PASCAL SIPHELELE ZULU** for the degree of Master of Laws (LLM) in labour Studies accepted for examination

Signed……

Date……...

ERNEST TENZA

DECLARATION BY STUDENT

I, PASCAL SIPHELELE ZULU, declare that this dissertation submitted to the University of Kwa-Zulu-Natal (Pietermaritzburg Campus) for the degree of Masters of Laws (LLM) in Labour Studies has not been previously submitted by me a degree at this university or any other university, that is my own work and in design and execution all material contain herein has been duly acknowledged**.**

Signed……

Date……...

PASCAL SIPHELELE ZULU

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CHAPTER ONE
INTRODUCTION AND OVERVIEW OF THE STUDY

1. GENERAL INTRODUCTION

Since the dawn of the new democratic dispensation in South Africa, government has put in place legislative frameworks within which South African companies and organizations would operate. One of the major strategic objective was to ensure that just like the rest of society, South African organisations in both private and public sectors eradicate discriminatory policies and practices by transforming in order to reflect new democratic principles which are based on the recognition of human rights, equality and freedom.[1] The growing unemployment rate and reported dwindling number of investors has attracted divergence of intellectual response. It is a fact that South Africa has a very high rate of unemployment.[2] This is caused by (amongst other things) inequalities that engulfs most sectors in the country. "South Africa is known as one of the most unequal countries in the world, reporting a per-capita expenditure Gini coefficient of 0,67 in 2006, dropping to 0,65 in 2015".[3] The argument goes on to say that labour laws, and in particular the Labour Relations Act (LRA),[4] have failed to contribute towards the creation of suitable jobs which, in turn, would contribute towards socio-economic justice in South Africa. This argues that the LRA has failed to achieve one of its core mandate which is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act which are to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Frica, 1996.[5] Section 23 (1) of the constitution states that "every person shall have the right to fair labour practices". The argument will be supported by statistical evidence demonstrating that it is easy to dismiss an employee who is accused of misconduct despite the provisions of the LRA and the constitution which are meant to achieve the opposite. This argument does not mean in any way that where there is demonstrable evidence of gross misconduct and demonstrable break-down in the trust relationship between the employee and the employer, such employers should not exercise their right to dismiss accused employees after due process.

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[1] Constitution of South Africa, 1996.

[2] L Chutel & D Kopf 'All the charts that show South Africa's inequality is only getting worse' *Quartz* 10 May 2018, available at https://qz.com/africa/1273676/south-africas-inequality-is-getting-worse-as-it-struggle-to-create-jobs-after-apartheid/, accessed on 01 January 2019.

[3] 'How unequal is South Africa?' available at *http://www.statssa.gov.za/?p=12930*, accessed on 1 January 2019.

[4] Labour Relations Act 66 of 1995.

[5] S1 of the Labour Relations Act 66 of 1995.

In a case of *Potgieter v Tubatse Ferrochrome & Others*[6] commissioner finding that employee's dismissal was substantively unfair, but granting compensation because employment relationship had broken down because employee publishing report in the newspaper. Labour Court upholding arbitration award but the Labour Court judgment set aside and the Commissioner Award was reviewed and set aside. The employee was re-instated retrospectively. On a similar matter in a case of *AFGEN (Pty) Ltd v Ziqubu*,[7] an employee dismissal was found by the Commissioner to be based on fair reasons but awarded partial payment on the basis that the employment relations has broken down and the reinstatement was not possible. The employee appeal the CCMA award to Labour Court but the Court confirmed the CCMA position that the relations between the employee and the direct superior was non-existent and such not feasible to reinstate the employee.

In a case between *Edcon Ltd v Pillemer NO and Others*[8] the court established the importance of demonstrable evidence of breakdown of trust relationship. The Court was of the view that it was not enough to mere pronounce the breakdown without providing evidence in that regard. In essence the court was of the view that alleged breakdown of trust relationship between the employer and the accused employee must be presented with evidence for the presiding officer in examine the veracity of such evidence. Hence, it is important to balance the argument of safeguarding the LRA and the constitutional rights of employees not to be unfairly dismissed with the constitutional right of the employers to dismiss employees where evidence on the balance of probabilities exist. If such balance is not created, this may actually discourage investors to continue to invest in South Africa and this adding to the high rate of unemployment and poverty. The research argues that to fulfil the letter and the spirit of both the LRA and constitution, of protecting jobs and eradicating poverty, the standard of proof that is currently used to determine whether the employee is guilty or not need to be scrutinise within the context of reviewing the existing Regulatory Framework governing disciplinary hearing relevant to misconduct cases. This is so because the contentious issue is whether the balance of probabilities is the appropriate standard of proof in deciding whether the employees accused of misconduct are guilty or not. The paper will advance the argument that the legal framework regulating disciplinary hearings need an overhaul. The applicable provision of the LRA is

[6] *Potgieter v Tubatse Ferrochrome & Others* (JA 71/12) [2014] ZALAC 114 (12 June 2014).
[7] *AFGEN (Pty) Ltd v Ziqubu*, (JA34/18) [2019] ZALAC 40 (13 June 2019).
[8] *Edcon Ltd v Pillemer NO and Others* (191/08) [2009] ZASCA 135; [2010] 1 BLLR 1 (SCA); (2009) 30 ILJ 2642 (SCA) (5 October 2009).

section 188, read with the Code of Good Practice in Schedule 8 of the LRA. Section 1(3) of schedule 8 states that the key principle in the Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees. Section 2 refers to fair reasons for dismissal,

> "A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty"[9]

The code further emphasizes the endorsements of the Courts that discourages harsh discipline.

> "This approach regards th purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings"[10]

These provisions of the LRA are highly contested in the policy formulation discourse. The current public debates on the effects of the LRA sadly have been impoverished by politics which evokes emotions from all sides of the debate. This is despite the fact that the LRA is considered by many as a fresh start in a democratic South Africa, an Act that harnessed to the Bill of Rights which, for the first time, guaranteed a range of labour and related rights.[11] Section 23(1) of the constitution[12] provides that "*everyone has a right to fair labour practice"*.[13] The LRA, however, fails to create a clear foundation from which the right not to

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[9] Schedule 8 of the Code of Good Practice: Dismissal.

[10] Schedule 8 of the Code of Good Practice- Dismissal.

[11] Be consistent if you start with inititial followed by surname it must be like thsaat throughoyt. Not that in the next note it's the surname followed by initial ses this note and note 13 belowR Le Roux and A Rycroft "Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges" (2012) *JUTA* vii. See also S23 Constitution.

[12] Constitution of South Africa, 1996.

[13] Le Roux R & Rycroft A (2012) *Juta* 102.

be unfairly deprived of work security might be derived. While it may be true that the Courts have established that the determination of a fair sanction for workplace misconduct necessarily entails a value judgement, they have failed to recognize that principled decision-making requires a coherent conception of justice.[14]

> *"*To the extent that a balance metaphor of employer versus employee interest is currently employed to determine the fairness if the sanction of dismissal, I suggest that the model is flawed. A conception of justice more closely aligned with constitutional values of dignity and autonomy requires that the sanction of dismissal is a rational response to employer goals of economic efficiency, and that a relationship of reasonable proportionality exists between the sanction and those goals."*[15]*

The emphasis by the constitutional Court has always been that the security of employment is a core constitutional value, which is aimed at protecting all employees' rights to fair labour practices.[16]

This study intends to analyses the fairness and reasonableness of the standard of proof applied in misconduct cases. This analyses will have to be juxtaposed with the review of the regulatory framework governing disciplinary hearings that deals with the same cases. The juxtaposition of these two important areas of law will provide a clear identification of legal gaps if any with compliance with section 23 (1) of the constitution and Schedule 8 of LRA.

This will take place on three fronts. Firstly, whether the civil standard of balance of probabilities is in compliance with the constitution and the LRA. Secondly, the implications of beyond reasonable doubt if such standard was to be applied in misconduct cases where dismissal is likely to be the outcome of the hearing. Thirdly, establish a need to review the Regulatory Framework governing disciplinary hearing in misconduct cases. This may require legislative amendment among other things, to make provision for the Commission for Conciliation, Mediation and Arbitration (CCMA) or similar Forums to be Forums of first instance when dealing with cases of misconduct with possible dismissal outcome. This will certainly require capacity created within CCMA to be able to perform this function. The assumption is that the CCMA will be best placed to handle hearing proceedings in a much fair

[14] Le Roux R & Rycroft A (2012) *Juta* 102.
[15] *Idem.*
[16] S23(1) Constitution.

and objective way if it is proper capacitated. The reality is that the majority cases end up at CCMA after being referred by dismissed employees seeking relief.

In addition, section 188A of the LRA allows the referral of disputes that involves a dismissal to the CCMA and Bargaining Council before the dismissal can take place. This process is a combination of both the disciplinary hearing and an arbitration. If applied correctly, it will reduce frivolous cases that are being referred to CCMA causing huge administrative problems and potentially increasing the cost of doing business in South Africa. It could be argued that using the CCMA as a forum of first instance might have huge administrative burden and impact on the quality of the awards issued. The paper will show that CCMA is flooded with huge number of cases already. But if proper capacity is provided, the amendment to support the suggestion will still be feasible. This would mean that, instead of having the workplace internal disciplinary hearing as a forum of first instance, matters where gross violations are alleged, the CCMA or other forums will play that role. This does not mean in any way that this research has full confidence in how CCMA handles referrals. In fact, this research would have argued that more work in as far as the development of required core competencies of CCMA Commissioners requires urgent attention. This Researcher would support this view later in the paper.

If indeed, the proposed LRA amendment would have adverse effect on the system due to CCMA lack of capacity and capabilities, alternatively, independent chairpersons could be made available to employers via the CCMA subject to an increase budget. This would mean that only accredited Chairpersons approved by the CCMA will be deployed to companies and Government Departments to serve as presiding officers.

There is immense value in this review of the LRA to be consistent with the South African constitutional values that promotes fairness and social justice. The question is whether the "balance of probabilities" is the correct test in determining the outcome of a disciplinary hearing or the legal Framework Regulating disciplinary hearings requires review? In a country, which constantly seeks to achieve socio-economic justice, the question is whether the use of balance of probabilities to determine the guilt or otherwise of employees causes a threat to the attainment of such justice? The paper argued that the LRA must take into account the socio-economic dynamics of South African citizens. To stretch the argument even further, no law including the South African constitution should operate in isolation from the realities of South African citizens. As the South African constitution point out:

"We live in a society in which in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have to hollow ring. The constitutional commitment to address these conditions is expressed in the preamble which, after giving recognition to the injustices of the past, states: 'We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, Improve the quality of life of all citizens and free the potential of each person".[17]

1.1. BACKGROUND

There are three grounds that are recognised by the LRA as justifying the dismissal of an employee, namely, misconduct, incapacity or poor work performance and operational requirements.[18] Schedule 8 of the LRA provide guidelines for the procedure that should be followed where misconduct is alleged to have been committed. According to item 2(1) of the LRA, "a dismissal is unfair if it is not in accordance with a fair procedure, even if it complies with any notice period in the contract of employment or the legislation governing employment".[19]

> "Workplace misconduct falls into two categories: gross and general. While general misconduct is a problem for employers, gross misconduct is a reason for swift disciplinary action, usually dismissal. Gross misconduct is an act, often but not always considered illegal, performed by an employee. The act is serious enough to warrant an immediate firing – legally referred to as being "summarily dismissed." General misconduct is not egregious, meaning it isn't an intentional act to harm the company or another person. General misconduct, also called simple misconduct, is

[17] P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 33.
[18] S188 of the Labour Relations Act 66 of 1995.
[19] Schedule 8 of the Labour Relations Act 66 of 1995.

not usually a situation in which a person is summarily dismissed on the spot".[20]

The standard to determine the guilty verdict of the employee accused of misconduct is wholly on the balance of probabilities which is a standard that apply to civil cases. This standard is different from the criminal standard which is proof beyond reasonable doubt. In other words, reasonable doubt happens when the Court or the presiding officer is unable to find the defendant guilty of the alleged crime or misconduct due to lack of proof.[21] In this situation the prosecution must provide evidence that does not create doubt in order for the Judge to convict the accused. Cited by Griessel[22], the Labour Court in *Potgietersrus Platinum Ltd v CCMA*[23] found that all that is required of the employer is to demonstrate that circumstantial evidence[24] shows that an employee is guilty of the misconduct. This, the court held, is more plausible than the possibility that he/she did not commit the misconduct. In law, a person who alleges that something happened, is vested with the duty to prove to or demonstrate to the satisfaction of the court that indeed such thing happened (i.e.: employer in this case), then onus shifts to the employee in this instance to prove otherwise. However, should the employer be able to demonstrate a sufficient evidentiary basis to implicate the employee on a balance of probabilities, a mere and persistent denial by the employee, without offering an actual version to answer to the evidence of the employer, is not a sufficient defense. According to Griessel, in weighing up the probabilities, the chairperson is not required to exclude every possible doubt in order to conclude the employee's guilt.[25]

[20] K Leonard 'What is misconduct in the workplace?' 12 March 2019, available at *https://smallbusiness.chron.com/misconduct-workplace-16111.html*, accessed on 28 September 2018.

[21] 'Dismissing an employee: overview', available at *https://uk.practicallaw.thomsonreuters.com/0-381-1412?originationContext=knowHow&transitionType=KnowHowItem&contextData=%28sc.Default%29&comp=pluk*, accessed at 23 January 2019.

[22] J Griessel 'Evaluating Evidence on a Balance of Probabilities' 18 August 2015, available at *https://www.linkedin.com/pulse/evaluating-evidence-balance-probabilities-judith-griessel*, accessed on 8 August 2018.

[23] *Potgietersrus Platinum Ltd. v CCMA* (J1459/98 of 30 July 1999).

[24] Circumstantial evidence is evidence that relies on an inference to connect it to a conclusion of fact - such as fingerprint at the scene of a crime.

[25] J Griessel 'Evaluating Evidence on a Balance of Probabilities' 18 August 2015, available at *https://www.linkedin.com/pulse/evaluating-evidence-balance-probabilities-judith-griessel*, accessed on 8 August 2018.

1.2. PROBLEM STATEMENT

The fairness and reasonableness of the balance of probabilities as a standard of proof seems to have attracted divergence of intellectual response, even though very little has been written or research done on this subject. At the center of these views, is whether section 188 and the LRA in general, has contributed towards the achievement of the socio-economic justice by making sure that any dismissal as an outcome of a disciplinary process is consistent with the principles of fairness. Documentary evidence suggests that the LRA and section 188 in particular may have had the opposite outcome on the broader legislative objectives which were to eradicate unemployment, protect jobs and create decent and sustainable jobs for the previously disadvantaged communities. This would inevitable eradicate poverty. In 1993, respondents in the Southern Africa Labour and Development Research Unit (SALDRU) living standards survey were asked to identify the top three priorities that they hoped the new government would achieve. Among African, Coloured and Asian respondents the top priority was "jobs", which was put ahead of housing.[26] The LRA was introduced behind that background. According to the Director General of Labour Department, during the period 1994 to 1999 the Department of Labour was hard at work to implement an ambitious large-scale labour market overhaul aimed at the promotion of decent labour standards and effective use of human capital.[27] Through the new LRA, the Director General argued that the Department had rolled out a floor of rights including those who hailed from unorganized sector of the economy.[28]. Clearly, from the Department of Labour perspective, the intentions and the objectives of the LRA were basically aimed at correcting the historical injustices perpetrated against Africans, Indians, Coloured and women.[29] This, however, raised concerns as to whether the intervention through legislation such as LRA was the right approach in seeking to meet these very legitimate concerns. The business community together with the official political party, the Democratic Party, argued that the introduction of the LRA among others were the direct cause of the high rate of unemployment that South Africa is witnessing. According to The Merc Business Report,[30] foreign firms were becoming more negative about the government and the economy. The 20-year old Southern African Service of the US-based Investor Responsibility Research Center polled more than two thousand, (2000) companies, which either have business in South Africa

[26] S Zulu*The Labour Relations Act 1995: But What About the Workers?* (Unpublished Industrial Relations Honors thesis, University of Natal, 1999).
[27] South Africa Department of Employment and Labour *Industrial Action Report* 2018.
[28] *Ibid.*
[29] *Ibid*.
[30] 'Foreign investors concern with Labour Legislations' The Mercury Business Report, 12 February 2001.

or export to the country. The largest number, seven hundred and fifty-one, (751) were US companies, followed by two hundred and eighty-eight (288) from Britain and two hundred and forty-five, (245) from Germany. Since 1997, according to The Merc Business Report,[31] the perception of the country has become worse. Only 26% of respondents (down from 48% in 1997) said the government policies were better than those of other emerging markets. The percentage of those who said local policies were worse rose from 1% to 15%. All of those companies were very unhappy with employment legislation, particular the LRA.

On the other hand, the Labour Movement, particularly Congress of South African Trade Unions (hereunder referred to as Cosatu), view state intervention as being insufficient. According to the Industrial Strategy handbook[32] the Federation believed that big business wanted to turn the clock back to the days of apartheid, where they could hire and fire at will. There may be merit in this argument since the number of employees referring their unfair dismissal cases to CCMA is alarmingly high. This exposes vulnerable employee with no financial muscle to challenge their unfair dismissal up to the highest Courts in the land, which would the Labour Appeal Court or the constitutional Court depending of the issues in dispute.

This study will attempt to address the following questions:

(a) Whether the balance of probabilities as the onus of proof in disciplinary hearings is in compliance with the constitution and the LRA?
(b) Whether there is a need to review the Regulatory Framework governing disciplinary hearing in misconduct cases. This may include using the CCMA or a similar Forums as forums of first instance in all dismissal cases. Alternatively, provide accredited Chairpersons as presiding officers in all disciplinary cases?
(c) What would be the possible legal implication to both employers and employees if the standard of proof is changed to a standard of proof beyond reasonable doubt as applied in criminal matters[33]?

[31] *Ibid.*
[32] Congress of South African Trade Unions *Industrial Strategic Handbook* 2001.
[33] See para 5.1.

1.3. RESEARCH PURPOSE

The purpose of this study is in two-fold:

(a) To establish whether the balance of probabilities as a standard of proof in disciplinary cases relating to misconduct, prejudice employees as in most cases allegations of wrongdoing are not always fully interrogated and tested similar to the beyond reasonable doubt as in criminal cases.

(b) To establish whether there is a need to review the Regulatory Framework governing disciplinary hearing in misconduct cases.

The hypothesis is that if the LRA is amended either to address (a) or (b) above, this would ensure fairness in dealing with misconduct cases and thus reduce the number of employees dismissed, while at the same time expedite the finalization of cases.

1.4. LITERATURE REVIEW

Since the enactment of the LRA, we have witnessed a number of dismissals involving misconduct being referred to the CCMA, Labour Court, Labour Appeal Court and in some instances to the constitutional Court. The CCMA deals with over hundred and fifty thousand, (150 000) cases every year. This is over and above the thousands of cases handled by the Labour Court, Labour Appeal Court, Bargaining Councils and Private Forums. Employees lose approximately 40% of cases referred to CCMA for arbitration. The majority of these cases have been lost due to poor provision of evidence by the employee, rather than due to the fact that the allegations are false.[34] This is further complicated by the case law itself as it does not provide guidelines that would enable employees to properly defend themselves in some cases. In the recent case of *EOH ABANTU (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*,[35] the Labour Appeal Court held a view that there is no requirement that competent verdicts on disciplinary charges should be mentioned in the charge-sheet subject though to the general principle that the employee should not be prejudiced. This is in short means it does not matter even if the verdict of the sanction does not speak to the allegations in the charge sheet for as long as the employee was not prejudiced by being denied knowledge of the case. According to the judgement, prejudice is absent if the record shows that had the

[34] South Africa Dept of Employment and Labour *Industrial Action Report* 2018.

[35] *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JA4/18) [2019] ZALAC 57 (15 August 2019).

employee been alerted to the possibility of a competent verdict on a disciplinary charge, he would not have conducted his defense any differently or would not have had any other defense. The judgement ignored a compelling argument that the presiding officer cannot find the accused negligent when he was not alleged to have been negligent. It is irregular for the presiding officer to find the accused guilty on some charge, on one hand, and having changed some of the charges after the conclusion of the enquiry on the other hand, but found negligence on the part of the accused.

One of the key elements of fairness is that an employee must be made aware of the charges against him or her. It is always best for the charges to be precisely formulated and given to the employees in advance to afford them the fair opportunity for preparation and proper defense. The reasoning of the judgement creates a situation where the presiding officers would play a role of the Initiator and that of the presiding officer at the same time. The presiding officers may have decided on behalf of the employer that the allegations on the charge sheet may not be precise and decide to rule on matters that are not on the charge sheet because the employee may have committed the offence even though she/he is not charged for it. This judgement does not contribute positively to the labour law jurisprudence as this exacerbate the manipulation of internal processes to suite the employer's desired outcome.

The table below highlight the types and the number of all unfair dismissal cases referred to the CCMA by dismissed employees between the periods November 1996 to June 2018. Overall, there are two hundred and nineteen, two hundred and nineteen thousand, one hundred and thirteen, (219 1513) unfair dismissal cases referred at CCMA during the said period and of those, there are six hundred and fifty-nine thousand, eight hundred and fifty-five, (659 855) cases on unfair dismissals related to misconduct.

Table 1: CCMA Statistics on unfair dismissals from 11 November 1996 to June 2018

UNFAIR DISMISSALS FROM 11 NOVEMBER 1996 TO JUNE 2018		
Description	**Issue**	**Count**
Unfair Dismissals	Dismissal related to a protected disclosure	156
Unfair Dismissals	Unfair Discrimination	72

Unfair Dismissals	Refusal to Perform Work of a Striker	3
Unfair Dismissals	Incapacity (Substance)	22
Unfair Dismissals	Selective re-employment	377
Unfair Dismissals	Termination of contract with or without notice	58646
Unfair Dismissals	Dismissal related to transfer (s197 / s197A)	703
Unfair Dismissals	Termination by temporary employment services	525
Unfair Dismissals	Termination of Employment With/Without Notice	23
Unfair Dismissals	Unfair dismissals	173232
Unfair Dismissals	Refusing to Join, Refused Membership - Closed Shop	5
Unfair Dismissals	Dismissal related to probation	3896
Unfair Dismissals	Specific Issue	1
Unfair Dismissals	Dismissal related to unfair discrimination	2537
Unfair Dismissals	Ill Health (Procedure)	9
Unfair Dismissals	Dismissal related to incapacity	46908
Unfair Dismissals	Refused to join, refused membership - closed shop	47
Unfair Dismissals	Operational Requirements (Procedure)	321

Unfair Dismissals	Poor Performance (Procedure)	21
Unfair Dismissals	Unfair Dismissal Disputes	370485
Unfair Dismissals	Dismissal related to employee exercising right in terms of Act	521
Unfair Dismissals	Dismissal due to participation in unprocedural strike	1013
Unfair Dismissals	Refusal to reinstate after maternity leave	933
Unfair Dismissals	Procedural Fairness	4
Unfair Dismissals	Refusal to Reinstate After Maternity Leave	11
Unfair Dismissals	Reason for dismissal not known	693146
Unfair Dismissals	Dismissal related to refusal to accept demand (mutual interest)	87
Unfair Dismissals	Individual Misconduct (Substance)	152
Unfair Dismissals	Dismissal related to misconduct	659855
Unfair Dismissals	Dismissal related to domestic sectoral determination	194
Unfair Dismissals	Operational requirements facilitation (more than 50 employees)	5948
Unfair Dismissals	Operational Requirements (Substance)	546
Unfair Dismissals	Constructive dismissal related to transfer (s197 / s197A)	1070
Unfair Dismissals	Dismissal related to participation / support of protected strike	618

Unfair Dismissals	Dismissal related to freedom of association	225
Unfair Dismissals	Non-renewal of fixed term contract	5968
Unfair Dismissals	Selective Re-employment	10
Unfair Dismissals	Dismissals from Closed Shop	19
Unfair Dismissals	Participation in Unprocedural Strike (Substance)	5
Unfair Dismissals	Industrial Action (Procedure)	5
Unfair Dismissals	Dismissal During Probation	1
Unfair Dismissals	Refusal to Accept Offer being Bargained Collectively	4
Unfair Dismissals	Dismissal related to pregnancy or maternity	2351
Unfair Dismissals	Dismissal related to refusal to perform work of a striker	44
Unfair Dismissals	Constructive dismissal	73768
Unfair Dismissals	Dismissal related to operational requirements	86960
Unfair Dismissals	Poor Performance (Substance)	8
Unfair Dismissals	Individual Misconduct (Procedure)	14
Unfair Dismissals	Ill Health (Substance)	4
Unfair Dismissals	Dismissal related to farming sectoral determination	40

TOTAL		**2191513**

These referrals may point to a number of reasons, which may include the fact that the referrals are easy and free. Hence, the majority of dismissed employees would also want to get confirmation from the external body whether their dismissals were fair and whether such decision could be overturned and/or get compensation. This was also confirmed by Bendemanand Mischke, cited by Leeds C and Wocke A, that due to the ease of access to the CCMA and the rate of unemployment in South Africa, it has becomes possible for dismissed employees to refer their cases to CCMA no matter how weak those cases are. In this economic climate the fairly rational response of an employee who has lost his/her job, whether fairly or unfairly, is to refer the matter to the CCMA in the hope and expectation of receiving some form of compensation. The referral of cases by ill-informed or ill-intentioned individuals who see the CCMA as a vehicle for ill-gotten financial gain is at the expense of those with legitimate claims. When such cases are entertained or achieve a degree of success, there is a temptation for others to refer their cases, regardless of the merit of those cases, and thus a spirit of entitlement is created (Christie 2001). In addition, unions are suspected of referring all cases regardless of the merit of the cases (Bendeman 2006). A further matter complicating the speedy resolution of legitimate cases in the CCMA.[36]

Notwithstanding the above, the number of cases refereed to CCMA and the success rate by employees who have referred these matters raises serious questions on whether the balance of probabilities is the appropriate standard to decide whether the employee is guilty of misconduct or not. What and how evidence in presented and processed in a disciplinary hearing also have a huge impact on the outcome and in particular when the principle of a reasonable decision maker tested is applied

The constitutional court in the case of *Sidumo v Rustenburg Platinum Mines*[37] provide a clear meaning of what reasonable decision maker test is. The Commissioner and in the case of a workplace disciplinary hearing must first conduct a factual enquiry to establish whether the employee indeed committed the acts of misconduct. The question is whether the internal

[36] C. Leeds and Wocke 'A Methods of reducing the referral of frivolous cases to the CCMA', 15 April 2018, available, accessed on 16 August 2019. https://pdfs.semanticscholar.org/5071/8907b90caa0ddc9892e9b5e6df107ab04e18.pdf,

[37] (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007).

chairpersons have the ability in terms of their level competences to make factual determination on the bases of the balance of probability.

In a case of CCMA, the LRA as amended makes provision for CCMA Guidelines on Misconduct Arbitration.[38] These Guidelines are issued by the CCMA in terms of section 115(2)(g) of the LRA. In terms of section 138(6), a Commissioner conducting an arbitration must take into account any code of good practice that has been issued by NEDLACC and any guidelines published by the CCMA that are relevant to the matter being considered in the arbitration proceedings. Section 2 of these Guidelines deals with how the arbitrator should conduct arbitration proceedings, evaluate evidence for the purpose of making an award, assess the procedural fairness of a dismissal, assess the substantive fairness of a dismissal and determine the remedy for an unfair dismissal.

The Code of Good Practice: Schedule 8 also make provisions that any person who is determining whether a dismissal for misconduct is unfair should consider—

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and
(b) if a rule or standard was contravened, whether or not—
    (i) the rule was a valid or reasonable rule or standard
    (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
    (iii) the rule or standard has been consistently applied by the employer; and
    (iv) dismissal with an appropriate sanction for the contravention of the rule or standard.

Unlike the CCMA Guidelines on Misconduct Arbitration, the Code does not explicitly provide such guidelines for internal presiding officers on how to evaluate evidence in line with the balance of probability test.

The proper application of the balance of probability as the standard of proof in disciplinary matter should also be viewed within the context of presiding officers' and CCMA Commissioners competencies. It is not uncommon to find presiding officers and Commissioners in some instances applying the standard incorrectly. This has huge ramification on the outcome of the hearing and thus prejudicing both the employer and employee. In a case

[38] GN 597 of GG 38573, 17/03/2015.

of *NEHAWU obo Hobo v Commission for Conciliation, Mediation and Arbitration and Others*,[39] the Labour Court held that the Commissioner applied the wrong test to determine the sanction which was a demonstration that the Commissioner misconceived the nature of the enquiry that he was obligated to undertake, in short he was asking the wrong questions and in doing so applied the wrong test. What was even more worrying being that when the matter was remitted to the second respondent (Commissioner) to determine a fair sanction, this again could not be done correctly as the Labour Appeal Court upheld the appeal on the grounds that the order of the lower court was not followed by the CCMA.

This is a clear demonstration that even with competent and skilled Commissioners who are employed to adjudicate on labour dispute can apply the test incorrectly. If you stretch the same argument, it could have argued that with internal presiding officers with no formal training in most cases, such matters would unavoidable be handled incorrectly and inevitable prejudice employees.

South Africa is ranked among the countries with the worst levels of unemployment and poverty and the greatest inequalities. According to Chutel and Kopf,[40] in their article: All the indicators have demonstrated inequality in South Africa has worsened. Recently published World Bank reports (World Bank Report: Overcoming Poverty and Inequality in South Africa) reflected that the gap is not only worsening, it is across all generations. According to these reports about half of the population lives in poverty, and 27% of the population are exposed to poverty.[41] This problem has its historical root. For instance, in 2013, Statistics South Africa, discovered unemployment in South Africa was only reduced by a small margin.[42] The more realistic expanded unemployment rate - which includes discouraged job-seekers who have given up looking for work - declined from 36.6% in the first quarter of 2012 to 36.2% in the second quarter. The lower "official" rate of unemployment fell in the same period from 25.2% to 24.9%. This represents a drop of just 0.3% and just 56 000 fewer workers without jobs, a drop in the ocean of the total of 4.47 million who remain unemployed. The results of the Quarterly Labour Force Survey (QLFS) for the first quarter of 2018, indicate that the

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[40] L Chutel & D Kopf 'All the charts that show South Africa's inequality is only getting worse' *Quartz* 10 May 2018, available at https://qz.com/africa/1273676/south-africas-inequality-is-getting-worse-as-it-struggle-to-create-jobs-after-apartheid/, accessed on 01 January 2019.

[41] *Ibid.*

[42] South Africa Dept Statistics *Labour Market Dynamics in South Africa* (2018).

unemployment rate is 26.7%.[43] In extrapolation, it becomes clear that there is a number of unemployed dependents reliant on working family members for survival.

According to the article titled: *Labour laws, BEE hamper small business* published in the New Age Newspaper,[44] inflexible labour legislation and black economic empowerment are frustrating small business growth, according to an index released. Cited in the article, Chris Darroll, CEO of SBP, the research company which compiled the index, argued that major regulatory barriers identified by the index are inflexible labour laws among other things. Darroll believed that South Africa is squandering a critical economic asset and source of job creation by failing to create an environment for the small and medium enterprise sector to flourish. According to the article, (2011) SME Growth Index is the first annual study produced by SBP. It surveyed 500 small and medium enterprises (SMEs) and would initially track their performance for the next three years. According to the article, the firms chosen survived the first two years of operation, employed between 10 and 50 employees, and operated in sectors that the government had prioritized for growth - manufacturing, business services and tourism. Respondents said inflexible labour legislation constrained their growth.[45] SMEs also expressed anxiety about increased inflexibility if proposed amendments to labour legislation materialize. In terms of the report cited in the article, less than half the firms on the panel had grown their staff numbers over the past five years, while less than a third had created new positions in 2011. South Africa's SMEs are simply not growing at the pace needed for large-scale wealth and job creation.[46]

Labour movements such as the Congress of South African Trade Union (Cosatu) has entered the debate on the question of whether the perceived rigidity of labour law is the cause of high unemployment rate in South Africa They claim that State intervention has been insufficient in addressing workers' concerns on this matter. According to the Industrial Strategy handbook[47], the Federation believed that big business wanted to turn the clock back to the days of apartheid, where they could hire and fire at will. The Cosatu Secretariat Report[48], argued that apartheid created a dual labour market, with a high level of legal protection for Whites and very little for

[43] *Ibid.*
[44] 'Labour Laws, BEE hamper small business' *Polity* 22 November 2011, available at https://www.polity.org.za/article/labour-laws-bee-hamper-small-business-2011-11-22, accessed on 1 January 2019.
[45] *Ibid.*
[46] *Ibid.*
[47] Congress of South African Trade Unions Policy Unit *Industrial Strategy Handbook* (2001).
[48] Congress South African Trade Union *Secretariat Report* (2003).

lower-level African workers. This report highlighted considerable progress made by democratic state in replacing this system with an integrated, fair and coherent framework for labour relations. In large part, the report states that this success has arisen from the commitment to negotiate labour laws at the National Economic Development and Labour Council.[49]

In response to the existing South African labour market challenges, such as high unemployment rate, perceived rigid or inflexible labour laws and negative foreign investors, some within the government sector are now calling for the "dual labour market" system. The Dual Labour Market has its origins from American economists Doeringer and Piore.[50] They defined the phenomenon noticed by them in which the labour market appeared to be separated into a primary and a secondary sector.

Daw and Hardie[51] define the primary labour market as consisting of jobs that offer above-median wages, benefits, and maximum job security. The secondary labour market is comprised of those working in jobs with none of these properties, and the intermediate labour market consists of those whose job rewards include some, but not all, of the properties of primary labour market jobs. They called these the primary sector and the secondary sector. The two sectors were defined not in terms of specific occupations or industries, but rather by a set of general characteristics. Thus, jobs in the secondary sector tend to have low wages and fringe benefits; poor working conditions, high labour turnover, little chance of advancements; and often arbitrary and capricious supervision. In contrast, jobs in the primary sector have many of the opposite characteristic, employment was steady, working conditions were better, wages were higher, and there were significant opportunities for advancement. A further important difference between the two sectors concerns on the job training. Jobs in the secondary sector offered little or no training – they were "dead-end" jobs – whereas those in the primary sector provided extensive training, most of which, in their view, was usually specific rather than general.[52]

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[49] *Ibid.*

[50] M.L. Wacher ' Primary and Secondary Labor Markets: A Critique of Dual Approach 10 July 1999, available at http://www.eurofound.europa.eu/emire/irel/, accessed on 5 December 2018.

[51] Daw J & Hardie J 'Compensating differentials, labour market segmentation, and wage inequality' (2012) 41(5) *SSR* 1184.

[52] S Hoffman *Labour Market Economics* (1986).

Already in Western Europe there are strong features of flexibility in the labour market coming from business and government approach on employment policy.[53] The business community, together with the Democratic Alliance which is the biggest opposition party in Parliament,[54] argued that the introduction of some of the legislations, particularly the LRA were the direct cause of the high rate of unemployment that South Africa is witnessing today. Very few foreign investors, they argued, would invest in a country where there was a high level of state intervention in the labour market with little room for employers to hire and fire when required by the circumstances. According to Tim Harris, DA shadow Minister of Finance, proposal on labour market reform that promote labour market flexibility, can help South African to create jobs at a faster rate. A document posted on www.da.org.za, titled Jobs in Jeopardy: How Red Tape Undermine Economic Growth and Job Creation, highlighted difficulty in firing employees, rigidity of working hours, costs of shedding redundant employees.

The inflexibility and the rigidity of the LRA in dismissing employees guilty of serious misconduct is raised despite enormous flexibility and the low standard of proof in which is the balance of probability. Those who have a different view such as the Democratic Alliance,[55] the unemployment rate is, to a greater extent, due to inflexible and rigid labour legislations, such as LRA. This means, the labour legislations and in particular the LRA is not flexible enough for employers to hire and fire at will.[56] This in their view discourage potential investors to invest in South Africa and directly limit the creation of job opportunities as the processes to dismiss employees guilty of misconduct is long and costly. The view is that the existing LRA regulated flexibility by over-proceduralising, by bureaucratizing dismissal procedures and by treating codes of practice as if they were strict legal requirements.

The South African's extremely low ration of employment to working age population is often blamed on "rigid" labour laws. However, the World Bank's Employment Workers indicators provide no persuasive evidence to support this claim.[57] South Africa's "wicked labour laws" are not only throwing millions of people into the dustbin of joblessness, not only crippling our economy, not only the cause of hideous poverty and humiliation, not only a primary reason for

[53] H.L Holscher, C. Perugini and F Pomei 'Wage inequality, labour market flexibility and duality in Eastern and Western Europe15 August 201, available at www.amielandmelburn.org.uk, accessed on 7 August 2018.
[54] T. Harris ' labour market reform that promote labour market flexibility' 12 May 2012, available at www.da.org.za, accessed on 6 September 2018.
[55] Ibid
[56] Ibid.
[57] Ibid

SA being about the most unequal society on the planet. If the argument of inflexibility of labour law has anything to go by, such laws deny South Africans a fundamental human right, the right to work.[58] The overall official unemployment rate has been above 20 per cent since the late 1990s, with a peak of 27 per cent in 2002 and currently it is sitting at 29 per cent. The fundamental objection to the crude reductionism of the critics is that they attribute all the blame for this structural unemployment to a single factor: the labour laws. However, in 2008 the Organisation for Economic Co-operation and Development (OECD) found little evidence that employment protection legislation is restrictive.[59]

Undoubtedly, rigid labour laws might also affect levels of employment and the ability of companies to compete in globalized markets. There is no persuasive evidence that the laws on hiring workers and making them redundant are more burdensome on employers in South Africa than elsewhere, except for the USA. There seems to be evidence that there is a link between labour laws and economic performance or unemployment.[60]

The challenges of the LRA since 1996 have been underscored by its inability to produce a substantial reduction of poverty and unemployment. However, the debate is further complicated by different interpretations on LRA strategic role in promoting social justice. [61] As a result, it may be argued that on close scrutiny the LRA, section 188 may not be fully constitutional. Any law that is in conflict with the constitution is unlawful and invalid. The South African's post –apartheid constitutional system was premised on the constitutional supremacy. The idea of a supreme constitution forms the bases on which South Africa's democracy constitutional dispensation is founded. In its founding provisions the South African constitution expresses supremacy first as a foundational value, and second declares the supremacy of the constitution as a binding and enforceable rule unambiguously. Section 2 of the constitution provides that it is the supreme law of the Republic. Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[62] As such there is very little room for alternative interpretation of section 2. This provision is reinforced in the General

[58] T. Harris ' labour market reform that promote labour market flexibility' 12 May 2012, available at www.da.org.za, accessed on 6 September 2018.
[59] *Ibid.*
[60] *Ibid.*
[61] Le Roux R & Rycroft A (2012) *JUTA* 25.
[62] P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 55.

Provisions Chapter of the constitution. Section 237 demands that all constitutional obligations must be performed prudently and without delay.[63]

An American write Klare indicate four objectives of modern labour law, which is to, promoting allocative and productive efficiency and economic growth, macroeconomic management (by achieving wage stabilization, high employment levels and international competitiveness), establishing and protecting fundamental rights and redistributing wealth and power in the employment context.[64]

As such, all measures to protect and defend the creation and sustainability of employment must be employed in line with Klare's four objectives of modern labour law. Employers must also understand the need to fight the scourge of poverty and other social ills associated with unemployment.

There is an assertion that the main object of labour law will always be to assist the weaker party. Most critics would agree that this assertion holds true at a fundamental level – that employees have greater security under labour law than they would have had in its absence.[65]

This does not in any way suggest that employees who are guilty of gross misconduct should not be dismissed, if such sanctions are fair and reasonable under the circumstance. However, to ensure fairness and reasonableness in deciding whether an employee is guilty of misconduct where dismissal is a likely outcome, the standard has to be stringent, in recognition of the existing socio-economic conditions and challenges. As such, some employees get exposed to huge reputational damage that follow wrongful terminations. Regrettable, in some instance even the arbitration awards are ignored by the employers. Hence, employees would then have to apply for such Awards to be made court orders through a very financially and procedural challenging process. To do so, it requires financial resources which most of the applicants do not have. This becomes a direct violation of their constitutional right and dignity[66] and labour rights.[67]

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[63] *Ibid.*
[64] Le Roux R & Rycroft A (2012) *JUTA* 25.
[65] Le Roux R & Rycroft A (2012) *JUTA* 1.
[66] *Constitution, 1996.*
[67] S23(1) Constitution.

The reality in the South African context is that application of any law has to take into account the socio-economic and political context. A number of legal opinions have been written quite extensively on the standard of balance of probabilities vis a vis the standard on beyond reasonable doubt. What is not clear, is whether such legal opinions have factored in the socio-economic and reputational ramifications of applying the weaker standard that is the balance of probabilities in instances where dismissal is the possible sanction.

1.4.1. Conceptual and theoretical analysis of proof on balance of probabilities

In order to understand the legal implications and the remedies to address the legal questions arising out of the application of proof on the balance of probabilities, it is imperative to theoretically first understand proof on the balance of probabilities. The development of standards of proof can be traced back in centuries. "Aristotle, in the third century BC, was the founder of formal logic with his theory of syllogisms and laws of thought in Organon. This Aristotelian view that the truth can be established by logical and deductive4.reasoning prevailed for more than a millennium."[68]

In practice, there has always been a standard to establish the truth. The requirement for prosecution to prove its case is a historical concept dating back to Roman times. The Code of Justinian bares testimony.[69] However, with the abolition of trial by order pursuant to an order of the Lateran Council in 1215, legal practitioners were required to develop principles and procedures to ensure the accuracy of establishing the trust. Canon lawyers looked to the Roma Law as a valuable source for the principles of proof and concluded that guilt must be proven and not presumed**.** In Burdett, the King's Bench approved reliance upon presumptions in criminal cases by analogy with the practice in civil cases.[70] Best J stated: "It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get the truth, they must be and the same in all cases, and in all civilized countries. Glanville Williams has observed that the tendency to reason from civil rules of evidence to criminal rules was a major source of confusion in the early years."[71] Lord Denning described the civil standard as of a balance of probabilities as *"*it must have reasonable degree of probability but not so high as is mandatory in a criminal case.[72]

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[68] Le Roux-Kemp A "Standards of proof: Aid or pitfall?" *OBITER* 2010 31(3) 688.
[69] Idem.
[70] Stumer A "The Presumption of Innocence: Evidential and Human Rights Perspective" *Sing. J.L.S* 301.
[71] *Idem.*
[72] J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (1999).

Thomas Bayes[73], argued that while the basic principles of reasoning and logic are similar in science and in law and, have the same origins, the functions of these two disciplines and the propositions to be established are completely different. Bayes identified the following differences as major contrast between science and law. Firstly, as for science, the propositions are usually predictive in nature whilst in law propositions are usually post-dictive. Science furthermore, has its aim to construct a system of descriptive, general theories based on particular data, while the law consists of a system of normative, general rules that are individualized to apply to particular cases.[74]

Secondly, law and science lies in the standards of proof utilized to measure acceptable as proof. Scientific standards of proof are expressed numerically, in terms of degrees of probability, while legal standards of proof are expressed in words and in terms of degrees of belief. The standards of proof used in the legal discipline is evaluated. Whiles there are two main recognisable standards of proof in the legal global systems, namely, proof on the balance of probabilities or the "preponderance of the evidence" and standard of proof beyond reasonable doubt, there are other four standards of proof namely: "Clear and convincing proof, Proof to a moral certainty, Absolute certainty and Intime conviction. Proof on a balance of probabilities is the lowest threshold of the five standards of proof mentioned above."[75]

It has to be noted that Courts have, in certain instances, applied the higher criminal standard of proof in non-criminal matters; justifying the deviation that the law simply reflects a policy choice of the higher standard as the correct standard in the particular matter.[76]

A school of thought focuses on the flexibility of the two well-known standards of proof, proof beyond a reasonable doubt and proof on a balance of probabilities, argued that the flexibility of a particular standard of proof is recognized as degrees of proof within a particular standard of proof.[77] Cornhill CJ described the standards of proof as flexible standard(s) to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters.[78] In accordance with this line of thought, Denning LJ in

[73] *Ibid.*
[74] Le Roux-Kemp A "Standards of proof: Aid or pitfall?" *OBITER* 2010 31(3) 689.
[75] Idem.
[76] Le Roux-Kemp A "Standards of proof: Aid or pitfall?" *OBITER* 2010 31(3) 690.
[77] Le Roux-Kemp A "Standards of proof: Aid or pitfall?" *OBITER* 2010 31(3) 689.
[78] Le Roux-Kemp A "Standards of proof: Aid or pitfall?" *OBITER* 2010 31(3) 690.

Bater v Bater[79] held that the degree of proof, in a particular standard of proof and in a particular case, depends on the gravity of the subject matter and not only the trite distinction made between the standard of proof in criminal and civil matters. In yet another case, *Hornal v Neuberger Products Ltd*[80] Morris LJ held that *"the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale deciding as to the balance of probabilities"*.

> "More inconceivable than the notion that there is an indirect correlation between the probability of a matter and graveness of the matter is the dictum that the standards of proof are flexible and may vary with the gravity of the misconduct alleged or the seriousness of the consequences for the person concerned".[81]

The standards of proof in terms of the probability theory, are based on the mathematical theory of probability and have been defined as percentage definitions and viewed as lying along a continuum of guilt. Judge Weinstein in *United States v Schipan*[82], for example, described proof on a balance of probabilities as placed at 50% on a scale from 0% to 100%, measuring the probability that the matter allegedly eventuated. Proof beyond a reasonable doubt has a probability of more than 90%. The threshold probability for clear and convincing proof is said to lie somewhere between 50% and 90%.[83]

In an interesting survey conducted by Judge Weinstein amongst the Judges of the Eastern District New York Court about their assessment of the standards of proof, four standards of proof were used, namely, evidence on a balance of probabilities, clear and convincing proof, clear, unequivocal and convincing proof and finally, proof beyond a reasonable doubt.[84] Again in 1981, a similar survey was conducted amongst all active, senior and retired federal Judges in the USA (McCauliff 1982 35 *Vanderbilt LR* 1324-1325). It is reported that of the 171 Judges who took part in the survey twenty-one Judges indicated that proof beyond a reasonable doubt should be associated with the percentage 100%, as an indication of the probability that the matter under question actually eventuated. Thirty-one Judges estimated proof beyond a reasonable doubt to be at 95% and sixty-five Judges at 90%. In the same survey 170 Judges assigned a percentage value to the standard of proof, clear and convincing proof. Most of the

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79 *Bater v Bater* [1951] P 35 CA 36-37.
80 *Hornal v Neuberger Products Ltd* ([1957] 1 QB 237 CA 266).
81 Le Roux-Kemp A "Standards of proof: Aid or pitfall?" *OBITER* 2010 31(3) 690.
82 *United States v Schipan* (289 F Supp 43 (EDNY 1968) aff'd 414 F.2d 1262 (2d Cir 1969).
83 *United States v Fatico* (458 NOTES / AANTEKENINGE 697 F Supp 388, 410 (EDNY 1978))
84 Ibid

Judges indicated that clear and convincing proof should be associated with a 75% probability rate.[85]

Interestingly, the standards of proof in terms of the probability theory is that the court does not necessarily attach a percentage of certainty to a standard of proof, but rather abstracts from the probability theory a risk of loss factor. The isolated risk factor is then said to represent the symbolism of each standard of proof. In a preponderance standard the parties bear the risk of an erroneous verdict equally. In a clear and convincing standard the state bears more of the risk than the individual does and in a reasonable doubt standard the state bears almost the entire risk of error. But, this quantification of the standards of proof has not received general acceptance: "Of course the law could determine a numerical quantification on the level of doubt which is permissible. But the point is that the law does not do this. It leaves the standard of satisfaction required vague. It requires a credibility statement that the facts in issue occurred beyond a reasonable doubt and not a statistical statement that the probability of the facts in issue is 0.99 or 0.999 and so on".[86]

In a 1981 survey[87] there were number Judges who complained that the use of percentages in quantifying the standards of proof is misleading as standards of proof deal with qualitative judgments rather than quantitative judgments. Also, that the use of percentages will not bring about greater legal certainty and that it will result in a decision-making process that is mechanical, unrealistic and unknown to law.[88]

Lord Hoffman entered the fray on the proof on balance of probabilities using a mathematical analogy. He argued that if a legal rule requires a fact to be proved a Judge must decide whether or not it happened. There is no room for a finding that it might have happened. For him the law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a

[85] Le Roux-Kemp A "Standards of proof: Aid or pitfall?" *OBITER* 2010 31(3) 697.
[86] Le Roux-Kemp A "Standards of proof: Aid or pitfall?" *OBITER* 2010 31(3) 696.
[87] In 1981, a survey was conducted amongst all active, senior and retired federal judges in the USA (McCauliff 1982 35 Vanderbilt LR 1324-1325).
[88] Le Roux-Kemp A "Standards of proof: Aid or pitfall?" *OBITER* 2010 31(3) 697.

value of 1 is returned and the fact is treated as having happened."[89]

Hoffman raised an interesting question in relation to the difference between succeeding on the balance of probabilities and failing on the balance of probabilities. He cited a case between Miller v Minister of Pensions where Denning J said*;*

> "If the evidence is such that the tribunal can say we think it more probable than not the burden is discharged, but if the probabilities are equal it is not.". Expressing that in percentage terms, if a judge concludes that it is 50% likely that the claimant's case is right, then the claimant will lose. By contrast, if the judge concludes that it is 51% likely that the claimant's case is right then the claimant will win. One may well ask how the judge is expected to measure the probabilities of a case to 1%!"[90]

The analysis above lead to another question as to why should there be two different standards of proof. The direct answer to the question is risky. Having two standards reflects a fundamental assumption that our society makes about the comparative costs of erroneous factual decision. The expressions "proof on balance of probabilities", and "proof beyond reasonable doubt" are quantitatively imprecise. Nevertheless, they do communicate to the fact finder different ideas concerning the degree of confidence he/she is expected to have in the correctness of his conclusion. If the standard of proof in a criminal trial was proof on a balance of probabilities, rather than proof beyond reasonable doubt, there would be a smaller risk of factual errors resulting in the release of guilty person, but greater risk of factual errors resulting in conviction of the innocent person. The standard of proof in a particular type of litigation therefore reflects society's assessment of the harm attaching to each kind of error. It is this that explains the difference between criminal and civil standards of proof. In a civil suit we generally regard it as no more serious for there to be no erroneous verdict in the defendants' favour as there to be such a verdict in the plaintiff's favour. Proof on the balance of probabilities therefore seems the appropriate standard. [91]

This is not to suggest that the standard of proof is capable of eliminating any risk of erroneous conviction. While a high standard of proof does not eliminate all risk of wrongful conviction,

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[89] J Griessel 'Evaluating Evidence on a Balance of Probabilities' 18 August 2015, available at *https://www.linkedin.com/pulse/evaluating-evidence-balance-probabilities-judith-griessel,* accessed on 8 August 2019.

[90] *Idem.*

[91] C Allen *Practical Guide to Evidence* 4 ed (2008) 3.

there is no doubt that dilution of the standard of proof can result in conviction on cases that would otherwise have resulted in acquittals. Hence, the standard of proof beyond reasonable doubt is an important protection for defendants.[92]

1.5. STRUCTURE OF DISSERTATION

The following chapters are proposed for this dissertation:

- Chapter Two : Onus of Proof
- Chapter Three : Conceptual Analysis of Misconduct
- Chapter Four : An assessment of the constitutionality of the Proof of Balance of Probabilities in Disciplinary Hearings
- Chapter Five : The Research Design
- Chapter Six : Presentation of Results
- Chapter Seven : Discussion of Results
- Chapter Eight : Recommendations and Conclusion

1.6. CONCLUSION

The importance of reviewing the standard of proof in dealing with misconduct cases becomes essential in the South African socio-economic context. It could be said that the number of employees dismissed after internal disciplinary hearings raises serious questions on the standard of proof used and/or the entire regulatory framework governing disciplinary hearing on misconnect cases. The end results boarders on inconsistency with the constitutional values of a free and just society based on human dignity, equality and freedoms[93] which promote security of employment for all. There are obvious procedural flaws in the system that requires further scrutiny. Such scrutiny should not be limited to the standard of proof used but also to the framework that regulates the Labour Relations regime in South Africa.

[92] Stumer A "The Presumption of Innocence: Evidential and Human Rights Perspective" *Sing. J.L.S* 301.
[93] S1 Constitution.

CHAPTER TWO

ONUS OF PROOF

2. INTRODUCTION

The onus of proof is a legal obligation located on the state or the plaintiff during criminal or civil proceedings respectively to prove the case against the accused.[94] This legal principle is generally accepted in legal proceedings that no one can be civil or criminally held responsible without the prosecutor acting on behalf of the state or the plaintiff proves its case to the required standard of proof[95] in order to establish whether the accused is guilty or otherwise. This principle is extremely important as it protects innocent persons from wrongly convicted of crime.[96] It has to be noted that this principle is not universally observed. For example, in Pakistan under the Ordinance, Qanoon-e-Shahadat Order 1984 (QSO), the Banker's Book Evidence Act 1939 and the Commercial Documents Evidence Act 1939[97], the onus of proof lies with the accused. Moreover, a very objectionable provision in the Ordinance that has been pointed out by the lawyers is that the accused is presumed to be guilty unless he proves his innocence.[98] It would be an error of law in the South African legal system if the onus of proof is placed on the accused as it is not required in terms of the constitution section 35 (3) (h)and enabling legislations both in criminal and civil matters. This legal principle is also protected n the International Covenant on Civil and Political Rights (ICCPR).[99]

This extra burden of proof for the state in a criminal matter and for the employer in a civil labour dispute matter is to a greater extent deals with two basic fundamentals. Firstly, it deals with the principle of presumption of innocence. At the center of the criminal and civil procedural law is the presumption of innocence. The presumption has recognition at common law and increased general acceptance as evidenced from its inclusion in critical international

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[94] 'What is onus of proof'' *Harpers Finch Lawyers Online* available at https://www.harperfinch.com.au/court/onus-proof-qld/, accessed on 12 March 2019.

[95] This standard is balance of probabilities or preponderance of probabilities in civil cases.

[96] Ibid

[97] WA Phulpoto 'Burden of Proof' *Courting The Law* 25 November 2019, available at *https://courtingthelaw.com/2019/11/25/commentary/burden-of-proof/*, accessed on 30 November 2019.

[98] Zaque MZ 'Ehtesab Commission: A device to hoodwink the people' *The Free Library* 1 December 1996, available at *https://www.thefreelibrary.com/Ehtesab+Commission%3A+A+device+to+hoodwink+the+people-a019459754*, accessed on 6 July 2019.

[99] J Palamara 'What Does "Beyond a Reasonable Doubt' Mean?' *gotocourt.com.au*, available at *https://www.gotocourt.com.au/criminal-law/beyond-a-reasonable-doubt/*, accessed 2 August 2019.

human rights documents.[100] The Bill of Rights[101] in the South African constitution section 35 (3) of the constitution, declares that every accused person has a right to a fair trial. Secondly, it deals with the balance of power between the parties involved as the power is always skewed towards the state and the employer with powerful entities and resources to investigate allegations of criminality in the case of the State and misconduct allegations in the case of the employer. This may be argued though that the employer may not have the same investigative capacity and capability as that of the state, hence the burden of proof is lesser than that of the state.

It is on the basis of the latter point above that the standard of proof differ depending on whether the matter is criminal or civil. The standard of proof is the degree to which a party must prove its case to succeed.[102] Generally, the standard of proof must have some level of certainty and sufficient evidence required to establish proof in a criminal or civil proceeding.[103] To satisfy that standard, the burden of proof sometimes known as the "onus", is required.[104] Onus of proof can be defined as the obligation to persuade the court, by the end of the trial, of the truth of certain allegations. Alternatively, the burden of proof is the duty which is cast upon the particular litigant, in order to be successful, of the finally satisfying the court that he is entitled to succeed on his claim or defense.[105] There are three ways in which the burden of proof can be applied, the first one is to show the duty of advancing evidence in support of a proposition at the beginning or later; secondly to make that of establishing a proposition as against all counter-evidence; and thirdly, an unselective use in which it may mean either or both of the others.[106]

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[100] G Moore 'Use of reverse burdens of proof in legislation' *Rule of Law Project* 12 January 2019, available at https://ruleoflaw.org.za/2018/01/12/use-of-reverse-burdens-of-proof-in-legislation/, accessed on 30 January 2019.

[101] Constitution. 1996.

[102] 'Burden and standard of proof' available at *https://www.iclr.co.uk/knowledge/glossary/standard-and-burden-of-proof/*, accessed on 1 March 2019.

[103] 'Standard of proof' (n.d.) in Merriam-Webster Dictionary https://www.merriam-webster.com/legal/standard%20of%20proof, accessed on 1 March 2019

[104] Ibid

[105] Z Hlophe et al *The Law of Evidence in South Africa* (2019) 63.

[106] 'Distinction between burden of proof and onus of proof' *Advocatetanmoy Law Library*, 22 August 2018, available at *https://advocatetanmoy.com/2018/08/22/distinction-between-burden-of-proof-and-onus-of-proof/#:~:text=Raghavamma%20v.-,A.,in%20the%20evaluation%20of%20evidence*, accessed on 1 March 2019.

2.1. TEST OF BEYOND REASONABLE DOUBT V TEST ON BALANCE OF PROBABILITIES

In criminal matters, the standard of proof determines the amount of evidence the state or the accused need to provide for the Judge to reach a particular outcome. Unlike in a civil matter, the beyond reasonable doubt is an absolute test for the state to comply with to prove its case and this assessment is made on the strength of the state's case.[107] The beyond reasonable doubt test has its origin from the due process clause of the Fifth and Fourteenth Amendments of the United States constitution.[108] It helps to support the presumption of innocence.

In a cased between *S v Robinson and Others,*[109] the court made it clear that the onus rest with the state to prove its case beyond reasonable doubt in all criminal cases. In *S v Nkuna,*[110] the Court cited *R v Mlambo* dealing with the principle of beyond reasonable doubt the court held:

> "The evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."

In *S v Meyer* [111] the court found that the state has the burden of onus which requires it to meet the beyond reasonable doubt threshold in demonstrating its case against the accused. However, the same cannot be said about the accused, the court was of the view that if the accused submission sound plausible the court has a duty to conclude the case on the acceptance of that submission and exonerate the accused.[112] This means that the beyond reasonable doubt test is not applicable to the accused. All that is required by the court in a criminal case, is that the

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[107] Z Hlophe et al *The Law of Evidence in South Africa* (2019) 63.

[108] 'What Is Proof Beyond a Reasonable Doubt?' *available at https://www.hg.org/legal-articles/what-is-proof-beyond-a-reasonable-doubt-35819,* accessed on 20 February 2020

[109] *Robinson and Others v S* (AR18/2017) [2018] ZAKZPHC 22 (25 May 2018).

[110] *Nkuna v S* (A18/2016) [2018] ZALMPPHC 21 (11 May 2018).

[111] *Meyer v S* (A011/2016) [2017] ZAGPJHC 399 (13 September 2017).

[112] Ibid

accused version must be reasonably possible. In case of S v *Shackell*[113] Brand AJA held the view that:

> "A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

In the case of *S v Ntsele*[114] Eksteen AJA stated the following:

> "Prove guilt beyond reasonable doubt – not beyond a shadow of doubt – if only remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt."

It is important to note that for the court to apply the test of beyond reasonable doubt, it need to look at evidence provided in totality. This means that in order to discharge the onus of proof, evidence must be provided in a form of documents, oral testimony, witnesses and so on. The fact that there are contradictions in some of the evidence provided by the state does not mean that the state case is below the standard especially if such contradictions are not material to the case.

In case between *S v Skhosana*[115] the court cited *S v Nyembe***,** Van Oosten, J to illustrate the above mentioned point and provide some guidelines on how the court must apply the test when evaluating evidence.

> "A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in

[113] *Shackell v S* 2001 (4) ALL SA 279 (SCA).
[114] *S v Ntsele* 1998 (2) SACR 178 (SCA).
[115] *S v Skhosana* (20/2017) [2018] ZAGPJHC 13 (9 February 2018).

> the following passage from *Mosephi and Others v R* LAC (1980 – 1984) 57 at 59F – H: The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it, there is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

Clearly, the admissibility of evidence in a criminal case becomes critical. This is so because not every evidence available is necessarily admissible. Evidence can only be provided if they comply with certain rules. However, section 35 (5) of the constitution provide the kind of evidence that cannot be accepted in court. This include evidence obtained by any means which violates rights that are guaranteed in the bill of rights and if such admission of that evidence would lead to unfair trial. The rules governing this are referred to as the rules regulating the admissibility of evidence.[116] If evidence is regarded as admissible, it can be presented in court where the opposing party, and to a lesser extent then court, will test and examine it. The court will then analyse the evidence to see how influential it may be.

In civil matters and during disciplinary hearings in the workplace, the standard of proof is less than the one in criminal law. It is generally accepted that the civil standard of proof is a balance of probabilities. With this standard, a case that is more probable should succeed. The court or the presiding officer evaluate the evidence and make a call on which version is most likely to be true. It may very well be that the actual truth may never be established. What is essential is to decide which of the parties has presented the most probable version. If both versions appear

[116] Z Hlophe et al *The Law of Evidence in South Africa* (2019) 52.

to be probable, then the person pursuing the case loses on the basis of the *maxim melior est conditio defendents*.[117] This means the position of the defender will prevail.[118]

In the case between the *South African Bank of Athens and 24 Hour Cash CC*,[119] the court argued that when the two competing versions intersect the question of credibility comes into play as well. In cases where there are two versions that are mutually destructive, before the onus is discharged, the court must first establish that the story of the plaintiff upon whom the onus rests is true and the other false. In the same case between the *South African Bank of Athens and 24 Hour Cash CC*, the court cited the case of Van der Spuy, AJ in *Selamolele v Makhado*, by highlighting what was being weighed in the "balance" was not quantities of evidence, but was probabilities arising from that evidence and all the circumstances of the case. It further referred to the judgment in the Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others*.[120] In that case Nienaber, JA summarised the legal position as follows:

> "The technique generally employed by Courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities".[121]

Just like in a criminal matter, in order to discharge the onus, evidence must be provided in a form of documents, witnesses and so on. However, unlike in a criminal law system, there are minimal admissibility requirements for evidence. Nearly all relevant evidence is admitted. The complex range of evidentiary admissibility rules, typical of the current South African law of evidence, is absent.[122] Only relevant evidence is admissible in court. Relevance does not mean evidence provided is necessary material to the case. In the absence of rules to determine the admissibility of evidence in civil matters, creates elements of surprises to parties and

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[117] 'Balance of probabilities' (n.d.) *available at https://legal dictionary.thefreedictionary.com/balance+of+probabilities*, accessed on 12 March 2019
[118] Ibid
[119] The South African Bank of Athens Appellant and 24 Hour Cash CC Respondent CASE NO: A3027/2016
[120] *Ibid.*
[121] *Ibid.*
[122] Z Hlophe et al *The Law of Evidence in South Africa* (2019) 65.

particularly to the accused as he/she may not have capacity and resources to gather counter evidence on information presented particularly if it is material to the case.

It must also be mentioned that there are exceptions in some civil cases where the burden of proof is raised to a higher standard called "clear and convincing evidence."[123] In such cases the burden of proof requires the accuser to prove that a particular fact is considerable more likely than not to be true. This standard has a higher threshold than the majority of the evidence standard, but it cannot be equivalent to the standard used in criminal cases, known as beyond a reasonable doubt.[124]

It is observed from the literature that the term onus of proof is generally used interchangeable with burden of proof. Both these legal terms could roughly be construed to mean the legal obligation of the accuser to prove the case against the accused in both criminal and civil cases. However, Anil Rishi Case *Anil Rishi Vs. Gurbaksh Singh, AIR 2006 SC 1971,* the court held a view that there is an important difference that exist between a burden of proof and onus of proof.[125] The burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. This means the onus can move from the plaintiff to the defendant during the course of the hearing. Such a shifting of onus is a continuous process in the evaluation of evidence. In addition, these two legal concepts are closely related and that they occur sequentially. In essence, the mere denial would not be enough to exonerate the accused against the allegations. This means as soon as the plaintiff has been able to produce a high degree of probability in a civil matter so as to shift the onus on the defendant, it immediately becomes the defendant duty to discharge his/her onus and in the absence thereof the burden of proof lying on the plaintiff shall be considered to have been discharged by the plaintiff. In certain circumstances, the burden will move to the other party. For instance, in criminal cases in which a defence of insanity is raised, it is for the defence to establish it on a balance of probabilities, ie to the civil standard.[126]

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[123] 'Evidentiary Standards and Burdens of Proof' *May 2019,* available at *https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/,* accessed on 22 August 2019.

[124] *Ibid.*

[125] 'Distinction between burden of proof and onus of proof', available at *https://advocatetanmoy.com/2018/08/22/distinction-between-burden-of-proof-and-onus-of-proof/#:~:text=Raghavamma%20v.-,A.,in%20the%20evaluation%20of%20evidence*, accessed on 12 August 2019.

[126] *Ibid.*

The general principle which is wildly acceptable in all legal proceedings is that the accused whether in a civil or criminal matter is not required to prove or disprove anything. However, in cases where the defendant wants to raise a defence, they may have what is called an evidential onus or evidential burden which obliges them to provide evidence which might be sufficient to indicate that they do have a defence. The evidential burden differs from the burden of proof. It is defined as the duty or burden that rest on a party at any particular point in a trial to lead enough evidence to force the other side to respond. The evidential onus is therefore not by definition an "onus of proof". There are no requirements for the defendant to prove they have a defence.[127] All that they are required to do is to be able to raise the possibility of a defence and be able to demonstrate some form of evidence to be able to support their defence claim.[128]

According the Hlope Z, et al, there are a number of important points of the evidentiary burden from this definition. This include the fact that the concept is entirely procedural in nature. Firstly, it exists purely to regulate the order of the presentation of evidence in trials and has no basis in substantiative law. Secondly, the evidentiary burden can essential be placed on either side in a trial. Thirdly, the reference is often made to the evidentiary burden in the context of establishing a prima facie case and we must thus remain mindful of the meaning of this concept. Lastly, it raises the following questions on who does the evidentiary burden rest on first and when does it shifts.[129]

In a civil matter it can be concluded that the parties (the plaintiff and the defendant) have the same weight of onus because the facts will be adjudicated upon on the balance of probabilities. [130] Both parties have to bring equal amount of probabilities to sway the outcome. It is important to note, unlike the persuasive onus which has a high threshold of beyond reasonable doubt, in the evidential onus the defendant has a lower threshold to satisfy since it is primarily based on the balance of probabilities. In other words, the probability of the defence being true must just be greater than it being false.

Just like in criminal cases, not all civil cases necessary place an onus of proof to the plaintiff or the accuser. For example, in a delict case, the laws of delict as interpreted by case law and

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[127] 'What is onus of proof'' *Harpers Finch Lawyers Online* available at https://www.harperfinch.com.au/court/onus-proof-qld/, accessed on 12 March 2019.

[128] *Idem.*

[129] Z Hlophe et al *The Law of Evidence in South Africa* (2019) 65.

[130] *Ibid*.

established in the body of precedent determine who bears the onus of providing the essential element of negligence, causation, wrongfulness. In other civil cases where either side makes several allegations with regards to an element(s), it may well occur that the ones of proof in respect of each item falls on a different party. For example, the plaintiff will bear the onus in respect of the issues or elements alleged in the pleadings, but the defendant may bear the onus in respect of a special defence that he or she has raised.[131]

It is important to highlight that in a criminal matter, the state has a heavier onus because it has a burden of proof to prove beyond reasonable doubt. This is in accordance with the South African law which says the person who alleges must prove. Once the onus of proof shift and goes to the defendant the onus is still with the state but it is lighter. So the weight of the onuses is not the same in a criminal matter. The shifting of the onus of proof does not in any way take away the accused constitutional right to remain silent.[132] The accused's right not to testify but remain silent, contained in section 35(3)(h) of the constitution, read with section 35(3)(j), are integral elements of right to a fair trial. Silence at trial has no evidentiary value and cannot be directly or indirectly indicative of guilty. The only permissible and narrow inference to be drawn is one based on the prosecution's prima facie case.[133]

The accused's common law right to silence must be created with the accused's constitutional right to silence. Section 35(3) (h) of the constitution prohibits the drawing of adverse inferences from the accused's failure to testify during trial. The fundamental core concept of the constitutional right is that if the state fail to make a case the court cannot draw an adverse inference from the accused failure to testify since the onus is on the state to prove.[134]

Of importance is that the shift of onus to the defendant is not the same as reverse of onus. The provision in a statute obliges the accused to prove or disprove an element of an offence on a balance of probabilities.[135] As a result of this section the burden of proof move from the state to the accused. It was the accused who had to demonstrate and prove ownership of goods, alternatively that goods that were found to be in his possession were duly authorised by the

[131] Z Hlophe et al *The Law of Evidence in South Africa* (2019) 65.
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*

owner. This was considered by the Courts to be in direct violation of the constitution that protect the accused from wrongly accused and be expected to prove his innocence.

In the case of *S v Singo*[136] cited in a case between *S v Mosele*,[137] the court dealt with the principle of the onus placed on the accused person but mainly focusing on the constitutionality part of it. In its findings, the court established that the accused person is presumed innocent but the applications of the reverse onus will not consistent of that right. The court argued that the reverse onus is punitive and is not consistent with the accused constitutional right of a just trial as per sections 35(B).

In the same case between S *v Mosele*,[138] the constitutional court held *in S v Zuma*[139] that the South Africa Courts have been dealing with the legalities around the presumption of innocence over the years. In that case the court raised serious concerns with the constitutionality of section 217(1) (b) (ii) of the Criminal Procedure Act, 51 of 1977. This section have a reverse onus provision. According to section 217 (1) (b) (ii):

> "the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof as the proceedings in question- be presumed, unless the contrary is proved, to have been freely and voluntary made by such person in his sound and sober senses and without having been unduly influenced thereof, if it appears from the document in which the confession is contained that the confession was made freely and voluntary by such person in his sound and sober senses and without having been unduly influenced thereto."[140]

Kentridge AJ, when providing clearer understanding of section 25(3)(c) of the constitution, the Judge found the Canadian cases to be of great help and strike similarities between the Canadian Charter of Rights and Freedoms contained in chapter 3 of the interim constitution which is now chapter two of the Bill of Rights. According to section 11 (d) of the Canadian Charter of Rights and freedoms make provision for the accused person: "to be presumed innocent until

[136] *S v Singo* [2002] ZACC 10; 2002 (2) SACR 160 (CC).
[137] *Mosele v S* (A351/2014) [2015] ZAGPPHC 240 (29 April 2015).
[138] *Ibid.*
[139] *S v Zuma* 1995(2) SA 642 (CC); 1995(4) BCLR 401 (CC).
[140] Criminal Procedure Act 51 of 1977.

proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". The Canadian Supreme Court has over the years held the view that no conviction of the accused person will be consistent with section 11(d) when a reasonable doubt still exists as to his or her guilt.[141]

The constitutional court found this clause to be unconstitutional in the judgement between *S v Samuel Manamela, Jabulani Mdlalose and the Director Jeneral of Justice.*[142] The court found that section 37(1) of the General Law Amendment Act 62 of 1955 was inconsistent with the constitution and accordingly, invalid. This judgement was premised on the constitutional right to a fair trial in section 35 (3) of the constitution. This would include innocent until proven guilty and the onus on the state to proof the accused is guilty beyond reasonable doubt.

Section 37 of general law amendments Act reads as follows:

> "Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause, proof of which shall be on first – mentioned person, for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he receives them or that such person has been duly authorised by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory."[143]

In the workplace the onus of proof largely depends at what stage the matter is adjudicated. For instance, during internal disciplinary proceedings, the employer has the legal duty to prove that the employee is guilty of misconduct if the employee is charged for such. The employer will be required by law, schedule 8 of the LRA to investigate the allegations and institute a disciplinary hearing chaired by the independent presiding officer. If the outcome of that disciplinary hearing is dismissal and the aggrieved employee refers the dismissal to CCMA the

[141] *Mosele v S* (A351/2014) [2015] ZAGPPHC 240 (29 April 2015).
[142] *S v Samuel Manamela, Jabulani Mdlalose and the Director General of Justice* (CCT25/99/14 April 2000).
[143] *Ibid*.

onus of proof that he or she was dismissed rests with the employee. As soon as the employee prove that indeed there was a dismissal, the onus immediately moves to the employer to prove that there was a fair and recognized reason for the dismissal and the process followed was fair. In this context 'onus' means that, should the employer contest that the employee was dismissed, the employee must submit evidence to prove that he or she was indeed dismissed.[144]

An entry point is to give a meaningful assessment of the relevant sections in the LRA that impact on the onus of proof and also to establish the extent to which they can be applied in a hearing in terms of sections 187 and 188 of the LRA. These sections refers to automatic unfair dismissal and other unfair dismissals respectively. In terms of the LRA with regard to any dismissal, the employee must establish the existence of the dismissal. Once the existence of a dismissal is established, the onus shifts to the employer to establish that the dismissal is fair.[145]

Additional provisions relevant to the onus issue are that in terms of section 185 (a), every employee has the right not to be unfairly dismissed. Section 186 (1) (a), the most basic form of dismissal is when an employer terminates a contract of employment with or without notice. Section 187 (1) (c), it is automatically unfair to dismiss an employee in order to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee and section 188(1)(a)(ii), a dismissal that is not automatically unfair is unfair if the employer fails to prove that the reason for the dismissal is fair, based on the employer's operational requirements.[146]

According to Ismail R, et al, in the event where there is disagreement on the applicability of the sections referred to above, the onus issue can possible be construed in one of two ways:

> "If the employee relies on section 187(1)(c) as a cause of action, then in terms of section 192(1), the words 'any dismissal' could imply that the employee bears the onus of proving the automatically unfair dismissal as it appears to fall within the ambit of 'any dismissal'. According to Ismail R, et al, The last two words in section 192(1) are "the dismissal". On a technical level, this

[144] R. Botha ' Who bears the onus to provedismissal and what does it means? 30 January 2014, available at *https://solidariteit.co.za/en/bears-onusprove-dimissal-mean*, accessed on 12 August 2020

[145] R Ismail & L Tshoose *Analysing the Onus Issues in Dismissal emanating from the Enforcement of Unilateral changes to Conditions of Employment* (2011).

[146] *Ibid*

> could also refer to the specific dismissal which forms the basis of the employees' cause of action. So, if the dismissal in question relates to section 187(1)(c), the employee bears the onus of proving that the dismissal was effected for the purpose specified therein. If the employee overcomes this onus, the enquiry comes to an end. Where the employee fails to overcome this onus, the employer may still have to prove that the dismissal is fair[8] in terms of a new enquiry, provided that the employee can establish a dismissal in terms of section 186(1)(a)." [147]

On the other hand, Ismail R, et al, argued that a different interpretation could follow relating to the onus. This would mean that in terms of section 192(1), all that an employee needs to prove is the existence of the dismissal, and not explicitly the type of dismissal specified in section 187(1)(c). In other words, to discharge the onus in section 192(1), all the employee needs to prove is that the employer has terminated the contract of employment with or without notice,[9] after which, the onus will shift to the employer to prove that the dismissal is fair.[10] If this interpretation is correct the employer bears the onus of proving that the dismissal was not effected for the purpose specified in section 187(1)(c). Where the employer overcomes this onus of establishing that the dismissal was not automatically unfair, the employer will then have the further onus, in terms of section 188(1)(a)(ii), of proving that the dismissal was effected for a fair reason, based on the operational requirements of the employer. This will entail establishing substantive fairness in terms of section 189. It must be borne in mind that in terms of section 188(1)(b), procedural fairness must also be established by the employer.[148]

The starting point in dealing with the issue of contestation relates to the question on whom does the onus rest when section 187(1) (c) is read with section 192 of the *LRA*. In *SACWU v AFROX* , the LAC held the view that section 192(2) provides that once a dismissal is established through evidence provided by the employee, in terms of section 192(1)] the onus moves to the employer to prove whether the dismissal was both procedural and substantively fair.[149] The court was of the view that in instances where automatically unfair dismissal is alleged, the onus shift to the

[147] *Ibid.*
[148] R Ismail & L Tshoose *Analysing the Onus Issues in Dismissal emanating from the Enforcement of Unilateral changes to Conditions of Employment* (2011).
[149] *Ibid.*

employer to prove that the dismissal was consistent with the reason set out in section 187(1)(a)-(f).[150]

According to Ismail R, at al, the LAC in *Afrox* referred to "*a*" dismissal in section 192(1), but section 192(1) refers to "*the*" dismissal.[151] At the superficial level this may sound minor as far as Ismail R, at al, is concerned, but they argued that the use of these words may be material on the onus issue. The word "*the*" in section 192(1) is likely to shift the onus on the employee to prove that the purpose of the dismissal falls within the ambit of section 187(1)(c). That being said, the word "*a*" which is not used in section 192(1) has a generalised effect and allows the employee to only prove that his employment contract was terminated by the employer with or without notice. If that is the case, the employer would then have to prove in terms of section 192(2) that the purpose of the dismissal is not within the scope of section 187(1)(c).[152]

2.2 CONCLUSION

The onus of proof is the legal principle that is accepted in South African legal system. It protect the accused person(s) in both criminal and civil system not to be wrongly convicted of crime. The debate around the fairness of standard of proof in civil matters requires further scrutiny. Notwithstanding the limitation on the civil law system, such scrutiny will require detailed analysis on the feasibility or applicability of the beyond reasonable doubt test as onus of proof in civil matters if that could be considered as an option in ensuring justice and fairness in misconduct matters.

[150] R Ismail & L Tshoose *Analysing the Onus Issues in Dismissal emanating from the Enforcement of Unilateral changes to Conditions of Employment* (2011).

[151] *Ibid*

[152] *Ibid*

CHAPTER THREE
CONCEPTUAL ANALYSIS OF MISCONDUCT

3. INTRODUCTION

Misconduct, as a concept, has attracted diverse views. Its definition has also been adjusted, depending on the circumstances of the offence. It is one of the main reasons why employees are dismissed from work if allegations of misconduct are established through normal disciplinary processes. "Yet no comprehensive legal definition of the term is to be found in statute or case law".[153]

3.1 DESCRIPTION OF MISCONDUCT

In the context of labour law and for the purposes of this paper, "misconduct is said to take place when an employee culpably disregarded the rules of the workplace*"*[154]**.** In my view and consistent with the existing South African laws, misconduct should be defined as being an act (commission or omission) which is wrongful, in that it violates a rule that ought to have been known by an employee. In the normal course of events and in South African context, these rules could be found in employment contracts or employer's disciplinary codes.

Misconduct is divided into two degrees; "ordinary misconduct" and "gross misconduct". The latter is defined by the extent of the deviation from the expected standard.

> "Gross misconduct is an act, often but not always considered illegal, performed by an employee. The act is serious enough to warrant an immediate firing – legally referred to as being "summarily dismissed." The employee might be dismissed without notice or pay in lieu of notice even for a first offense. Even if the employer is justified with quick dismissal, firing someone immediately may result in an employment complaint against the company."[155]

Acts of gross misconduct includes offensive behaviour, gross insubordination, theft and fraud, and damage to property among others. Whiles general misconduct or normal misconduct is considered to be minor offences which on its own does not necessarily lead to dismissal. These acts include continuing lateness or absentism, inappropriate comments to fellow employees or customers, or misrepresentation of job application information.

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[153] J Grogan *Dismissal* (2010) 142.
[154] J Grogan *Dismissal* (2010) 143.
[155] K Leonard 'What is misconduct in the workplace?' 12 March 2019, available at *https://smallbusiness.chron.com/misconduct-workplace-16111.html*, accessed on 28 September 2018.

It is worth noting that misconduct could further be categorised into team misconduct and collective misconduct. Team misconduct exists where the culpability of employees involved is invisible. An example, in a shop shrinkage of stock is observed, but no identification of a culprit. The employer may hold all those working as responsible. Justification for disciplinary action will be valid due to the fact that (i) each employee has a duty of care to the employer and expose individual or group bent to harm the employer, and (ii) an employee had known, or reasonably have known of misconduct and identity of perpetrators but chose not to alert the employer. This is called derivative misconduct.[156]

Misconduct can be committed by one or members number of employees acting together. It may not be difficult to take action against an individual employee who has committed misconduct. However, to dismiss an employee(s) for misconduct, it is important that the particular employee or employees who committed the act be identified. The principle of law in cases of misconduct is that the onus rests on the employer to prove misconduct.[157] This means that the employer must identify the employee(s) who committed the act of misconduct. The issue then is how to deal with a situation where employees who can identify those who committed the acts of misconduct but fair to do so. If the employer cannot prove which employee committed the act, it can trust that other employees who were part of the group will help identify the actual perpetrator(s). If none come forward to assist the employer, the employer can dismiss the whole group of employees for breach of their duty of good faith (derivative misconduct) to their employer.

The concept of derivative misconduct was first introduced into South African labour law by the Labour Appeal Court in *Chauke & Others v Lee Service Centre CC t/a Lesson Motors.*[158] The facts of the case are: A shop steward in a panel shop was dismissed for gross negligence. In protest against his dismissal other employees went on a rampage and committed acts of sabotage against the employer. As a result, the employer was unable to identify the responsible employees. After issuing the employees with an ultimatum which was also not heeded, the employer dismissed all employees.

By definition derivative misconduct does not locate misconduct as the principal misconduct of the culprit, but in the refusal by colleagues to notify the employer of the identity of the actual

[156] *NULAW & others v Bader Bop Ltd* [2004] 8 BLLR 799 (LC) at 804J.
[157] *Ibid*
[158] (1998) 19 *ILJ* 1441 (LAC).

culprit.[159] However, derivative misconduct should not be confused with collective guilt where all members of a group are presumed to be guilty only because the alleged culprit is a members of that group as is the case with the criminal law of doctrine of common purpose.[160] With derivative misconduct, the whole group of employees is dismissed for misconduct for the mere reason that they are not prepared to cooperate with the employer to identify the culprit.

As a result, such conduct is considered to be violation of trust relationship. In the case of *Dunlop Mixing and Technical Services (Pty) Ltd and others v National Union of Metalworkers of South Africa (NUMSA),*[161] the Labour Court held that an employee is bound indirectly by a duty of good faith towards the employer. The breach of that duty by the employee(s) refusing to cooperate with the employer by providing information that is in the business interests of the employer being improperly undermined is tantamount to derivative misconduct.[162] The same case was appealed up to the constitutional court. This was after NUMSA challenged the outcome of the Labour Appeal Court which agreed with the lower Court to dismiss all employees who did not discharge their duty of good faith towards the employer in that they remained silent by not disclosing knowledge of the wrongdoing.

The Labour Appeal Court dismissed the appeal on the ground that the arbitrator's finding on presence at the scenes of violence was illogical in its inability to take into account circumstantial evidence and inferential reasoning. However, Coppin JA, who agreed with the outcome of the majority judgment, but had a concern that the Court judgment "creates the impression that by employee's presence alone at the scene where misconduct occurred places a duty for him or her to exonerate himself of herself".[163] Otherwise, the constitutional Court agreed with the reasoning of the Labour Appeal Court in as far as the interpretation and the application of derivative misconduct. However, looked at the matter as it pertains to a strike action, the constitutional Court was of the view that Dunlop had a reciprocal duty of good faith required, at the minimum, that the safety of its employees is guaranteed before expecting them

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159 *Chauke & Others v Lee Service Centre CC t/a Lesson Motors.* See, also, *Foschini Group v Maidi & others* (2010) 31 *ILJ* 1787 (LAC).

160 *Stocklush (Pty) Ltd t/a Meadow Meats & others v FAWU obo Setouto & others* (C880/14) [2015] ZALCCT 6 (8 October 2015).

161 *Dunlop Mixing and Technical Services (Pty) Ltd and others v National Union of Metalworkers of South Africa (NUMSA).obo Nganezi and others* [2016] 10 BLLR 1024 (LC).

162 *C. D. Hofmeyer* 'Strikes; derivative misconduct and the employee's duty of good faith' available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/employment/employment-alert-11-july-strikes-derivative-misconduct-and-the-employees-duty-of-good-faith-.html,* accessed on 12 August 2019.

163 *Dunlop Mixing and Technical Services (Pty) Ltd and others v National Union of Metalworkers of South Africa (NUMSA).obo Nganezi and others* [2016] 10 BLLR 1024 (LC).

to disclose information or exonerate themselves. The constitutional Court was of the view that this was not sufficiently done.[164] Derivative misconduct may, however, be criticised for being unfair to those who did not, in any way, commit the act, but found themselves dismissed because they failed to assist the employer where they needed their assistance. This could be justified on the ground that the employee has a duty to provide information that will assist the employer to bring the guilty one(s) to book. Where the employee is reasonably believed to have information at their disposal concerning the guilty parties but fails or refuses to disclose such information, the refusal or failure to notify the employer with information is, in itself, is an act of misconduct. It is their silence that makes them guilty of misconduct. But the constitutional court held the view that derivative misconduct should not be used until all avenues of discipline for primary misconduct have been exhausted, because it would be wrong to rely on a charge of derivative misconduct as a quicker way to dismiss, rather than dismissal for actual individual participation.

Collective misconduct is the type of misconduct that occurs when more than one employees place themselves guilty of the same misconduct at the same time**.** The employer is able to identify these employees. An example of such misconduct becomes clear in case of strike where employees decide to intimidate others, lock those not on strike out, or engage in vandalizing the place of employment. The fact that misconduct can constitute a fair reason for dismissal does not mean the employer is exempted from following a fair procedure prior to dismissal.[165] The Code of Good Practice: Dismissal provides that a union official or employee representative should be granted an opportunity to make representations on behalf of the striking workers at the very earliest opportunity.[166] The purpose of affording the union or employee representative an opportunity to make representations, is to give them an opportunity to respond and deal with the issue in question in a proper and *bona fide* manner, prior to embarking on any action. Regardless of whether facts are known or not, a hearing can provide a completely different understanding of the allegations. During a disciplinary hearing, the accused employees are expected to use the opportunity to convince the employer that they are not guilty and why they should not be dismissed.[167] The aim of providing the implicated party

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[164] *Ibid*.

[165] S69(5) of the Labour Relations Act 66 of 1995.

[166] Item 6(2) of the Code of Good Practice: Dismissal.

[167] In *NULAW & others v Bader Bop Ltd,* "A series of meetings took place between management and the shop stewards. During these meetings the shop stewards articulated their demands and conveyed their members' anger at management's disciplinary decision. Management prevailed on union leadership to intervene. The union leadership was afforded an opportunity to persuade the workers to return to work. When this did not eventuate, the shop stewards were required to provide reasons why an ultimatum to return to work or to be dismissed should not be issued".

an opportunity to be heard, is to ensure they are aware of the accusations against them, and are given an opportunity to state their case.[168]

Misconduct as a concept has an ideological and philosophical aspect to it. With regards to the former, the concept has different definitions and consequences depending on who alleges it and to whom it has been attributed to. For the employer (the plaintiff), it can be used as a punitive tool and for the employee (the defendant) it has dire consequences, particularly to their socio-economic circumstances. Further on, the ideological aspect of this concept, is the fact that employers have historically been perceived as being the symbols of oppression and exploitation particularly by the African working class. This perception has its own origins from the apartheid era, due to the relationship that existed at the time between apartheid state and business elite. European settlers who invaded this country from the 17th to the 19 century gave racism in South Africa the ideology of white supremacy and black inferiority. Since then, racism and exploitation have characterised the labour relations in South Africa.[169] Although blacks made a significant contribution towards the economic growth, particularly during the early development of capitalism, they were not counted among its beneficiaries. Instead, they were marginalised, barred from holding certain occupations, excluded from decision-making processes. Africans were increasingly important contributors to economic growth. Collectively they made possible the building of railways and cities, opening of mines and the production of and an increase in the flow of foodstuff. Individually though, the opportunities for social and economic advancement remained very limited.[170]

There was growing evidence that business was part of the apartheid machinery that supported it, benefited from it and helped create a climate conducive to worker oppression and exploitation. As a result, the black working class do not see a relationship between themselves and the capitalist class as being a mutually beneficial one. Therefore, some of these misconducts, particularly theft and corruption, stems from an "us and them" mind-set. Hence, workplace discipline in South Africa is generally views as a reflection of power relations issue. Even in instances where employees have witnessed misconduct, there is always reluctance to report it. In 2013 South African Business Ethics Survey (SABES) found that 14% of corporate South Africa's employees have witnessed misconduct in 2012. This is a huge statistical reduction from the 18% who witness misconduct in 2009 when a similar study was conducted.

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[168] This is referred to as the *audi alteram partem* rule.

[169] S Zulu*The Labour Relations Act 1995: But What About the Workers?* (unpublished Industrial Relations Honors thesis, University of Natal, 1999) 21.

[170] R Smollan *Black Advancement in the South African Economy* (1998).

About (64%) of those who observed misconduct reported it. This represents, however, a slight reduction from the 66% who reported misconduct in 2009. The report indicate that more than one third (34%) did not report.[171]

From a legal philosophy perspective, depending on which legal philosophy or school of thought the employer belongs to, established misconduct can have various consequences. As opposed to the constitution, which provides an interpretation clause[172], the sources of labour law, its guidelines and codes of good practice, fall short in giving philosophical direction.

In *S v Adams* the court provided its views on the moral nature of legislation "An Act of Parliament creates law, but not necessarily equity?". In essence, the existing relevant law and various disciplinary codes merely creates rules with no consideration of equity and social justice. It is fallacy that one can be blind to the surrounding circumstances and be guided solely by positive law.

The Courts in South Africa have pronounced on a number of occasions that Courts are not law maker.[173] Court only enforces the law as it finds it and as long as it does not violates the constitution provisions. The Courts further stated that it is not the judiciary duty to try and promote policies that are not based in the law or prescribe what it believes to be the correct public attitudes or standards concerning those policies.[174] While an argument can be made that the Courts play a secondary role in the law making process in terms of section 39(2) of the constitution, it is the author's submission that this section merely provides the manner in which the law should be developed and is not a clear directive or mandate of the Courts to develop the law. It is common practice for employers to adopt a legal positivist approach to matters of misconduct, resulting in the problem which forms the basis of this research. The statutory and respective institutional policy definitions of misconduct and processes thereof are followed without deviation or consideration of mitigating circumstances. If the established wrongful act checks all the boxes of gross misconduct, the policy is followed blindly without a second thought for individual circumstances, leading to dismissal and all its ancillary consequences.

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171 L. Groenewald & P. Vorster 'South African Business Survey 2019', available at *https://www.tei.org.za/wp-content/uploads/2020/08/SABES_2019.pdf*, accessed on 14 November 2019.

172 S39 Constitution.

173 *Bongopi v Chairman of the Council of State, Ciskei* 1992 3 SA 250 (CkG) 265 G – I.

174 *Ibid.*

To understand the legal positivism the most essential departure point is the rejection of metaphysics. Legal positivists regard this as mere speculation. For Legal positivists, what matters are things that can be directly observed and not some assumption that this set of rules exists. This leads to the first main idea in legal positivism, namely that facts and values must be separated from each other. You can clearly see that this is a rejection of natural law. Legal positivists do not think that law is based on some set of eternal and unchanging rules. For them, law must be based on facts and Judges must decide cases based on the facts and not on something like morality.[175]

However, if it were absolute necessary to accept an African legal philosophy (ALP) to disciplinary matters, Ubuntu as a concept would influence how employers decide matters. Where allegations of misconduct through normal disciplinary proceedings, the ALP approach would direct decision-makers to consider all relevant circumstances of each case and strive for reconciliation in matters which do not place the organisation, or other employees at serious risk.[176] In instances where ALP approach is accepted, cases of misconduct would be viewed as educational, especially where such acts of misconduct are due to the employee's ignorance of the rule or where there are reasonable circumstances which are not contained either in the policy or the law. Cases would be viewed in the light of their individual circumstances as opposed to the unsympathetic and Eurocentric positivist approach.[177]

It is the view of the author that ALP is a distinctive African philosophy that does not borrow from Western patterns, which is more acceptable to the author of this paper. There are several types of ALP, namely; ethnophilosophy, which is based on common thought and shared wisdom; sage philosophy, which is based on the wisdom of one sage; and nationalistic ideological philosophy, which is a political theory based on old socialism.[178] While the different types of ALP have different points of emphasis, the themes of communitarianism, reconciliation, and *ubuntu* are central to all of them.

However, this does not mean that, where a case of misconduct exists, it should not properly be investigated and decisively handled, as abandoning controls would promote anarchy. All that this paper avers is that the entire workplace discipline regime will have to take into cognisance

[175] Department of Jurisprudence *Legal Philosophy: Only Study Guide for LJU4801* (unpublished study guide, Unisa, 2017).
[176] *Ibid*
[177] *Ibid*
[178] *Ibid*

that employees are social beings with families for whom they are financially responsible. This therefore requires a thorough scrutiny of personal circumstances, and this would require the participation of family members, either as observers or witnesses in such cases. This would give the employer an opportunity to fully comprehend the consequences of possible misconduct whist, at the same time, giving family members the opportunity to understand the circumstances that led to the dismissal. Elements of *ubuntu*[179], such as the ethic of reciprocity, responsibility and accountability can be integrated and become part of the disciplinary process, to would give effect to the community values and the general moral code of the community. Ubuntu as one of the key principles can be instrumental in promoting the quality of life in South Africa.[180]

This may, of course, be seen as a costly and tedious process since the paper also proposes that the forum of first instance be external in matters that may conclude in dismissal. However, in reality, this will create a bond between the employers, employees and communities and thus strengthens the employees' commitment and accountability to the parties involved. This will ultimately contribute towards the elimination of avoidable dismissals.

3.2 PROCEDURE TO BE FOLLOWED WHEN DISMISSING AN EMPLOYEE FOR MISCONDUCT.

Before an employer can hold an employee liable, there must be a standard set of rules that should guide employees conduct. Most importantly, employees must be given such rules on their first day at work or when such rules are reviewed. In Australia, the document establishing disciplinary policies, get communicated to all employees equally. Hard copies are given to new hires on their first day and have them acknowledge receipt in writing.[181] In South Africa this practice is not common. Some companies will do it during orientation sections where such documents are communicated to staff or through union representatives during policy review process.

Any person who is vested with the responsibility of determining whether a dismissal for misconduct is unfair should consider schedule 8 of the LRA which state that any person who is determining whether a dismissal for misconduct is unfair should consider whether or not the employee broke the rule or standard governing the conduct in the work-place and if such a rule

[179] Ubuntu is an African philosophy that places emphasis on collective accountability and what is the best interest as a whole, as oppose to Eurocentric individualistic philosophies.

[180] *https://www.entrepreneur.com, accessed on 22 September 2019.*

[181] *Ibid*

or standard that was broken was valid or reasonable. Further, whether the employee was aware, or could reasonably be expected to have been aware, of the rule or standard and the rule or standard has been consistently applied by the employer. Most importantly whether the dismissal was an appropriate sanction for the contravention of the rule or standard.[182]

These are guidelines to help employers to ensure that their processes are not contrary to law. The expectation would be that all employees would be made aware of all HR policies and Company Disciplinary Code. Normally, the Disciplinary Code would have a list of all contraventions and possible sanctions where such code have been contravened. Generally, company Disciplinary Codes are not exhaustive codes of conduct. In instances where an offence or misconduct is not included in the disciplinary code, the employer would still have a discretion on how to deal with the matter. It is not always ease for the employer when drafting the code to anticipate all possible wrongdoings.[183]

In terms of the law, a company together with the recognised trade unions must develop a Code of Conduct that will regulate the conduct of employees in the workplace. Usually, employers consider misconduct as a serious offence and, as such, they are not expected to tolerate acts of misconduct indefinitely.[184] The position in law is that whenever an employer considers that employees are or may be guilty of misconduct, it can take disciplinary action against them. This means that if misconduct is serious the employer may be justified in dismissing the employees involved in the misconduct. Generally, it is inappropriate to dismiss an employee for a first offence unless it is grossly serious and of such a heavy gravity that it makes a continued employment relationship difficult or intolerable. An intolerable relationship would be one where trust has been broken down. .

It is not uncommon for the presiding officer in an internal disciplinary hearing to award a dismissals a sanction contrary to the company's Disciplinary Code. *In a matter between Hosea Mushi and Exxaro Coal (Pty) Ltd Grooteluk Coal Mine,*[185] an employee was dismissed for endangering the life of the foreman and insubordination. The Commissioner and the Labour Appeal Court found that the dismissal not comply with disciplinary code of the employer. The Code stipulated that in cases where the employee is insubordinate the sanction should be the final warning. The Court held a view that where there was no evidence of serious misconduct

[182] Schedule 8 of the Code of Good Practice: Dismissal.
[183] A Basson et al *Essential Labour Law* (1998) 72.
[184] *CEPPWAWU & others v Metrofile (Pty) Ltd* [2004] 2 BLLR 103 (LAC) at 115G.
[185] *Mushi v EXXARO Coal (Pty) Ltd Grootegeluk Coal Mine* (JA62/2018) [2019] ZALAC 44 2019.

which amount to an irreparable broken down relationship between the employer and the employee reinstatement with a final written warning was suitable.

As a matter of principle, most company Disciplinary Codes are always clear and requires that, for a serious misconduct, an investigation must be conducted, and formal disciplinary enquiry shall be convened where allegations of misconduct prove to have merits. In some instances the employment contracts would make provisions on how parties would deal with disputes, including on how disciplinary matters would be handled should they arise. This may include the application of section 188A of the LRA. This provision makes it possible for parties to refer a dispute that has the possible dismissal outcome to the CCMA or Bargaining Council for adjudication. This combine the actual disciplinary hearing and an arbitration process.

This section[186] reads as follows:

> 1) An employer may, with the consent of the employee request a *council*, an accredited agency or the Commission to conduct an arbitration into allegations about the conduct or capacity of that employee.
> (3) The *council*, accredited agency or the Commission must appoint an Arbitrator on receipt of –
> (a) payment by the employer of the prescribed fee; and
> (b) the employee's written consent to the inquiry.
> (4) (a) An employee may only consent to a pre-dismissal arbitration after the employee has been advised of the allegation referred to in subsection (1) and in respect of a specific arbitration."

In an article by Maloka TC and Peach V, they highlight three most important points relevant to section 188A and in support of the author's assertion that this session provide efficiency in dealing with employees disciplinary matters. Firstly, they argued that pre-dismissal arbitration is founded on an agreement between the employee, the employer and the CCMA or any other accredited dispute settlement agency. Secondly, any Arbitrator appointed with the section 188A process, exercises the employer's disciplinary authority, including the right to dismiss an employee. Lastly, the written consent of the employee to the pre-dismissal arbitration must

[186] Schedule 8 of the Code of Good Practice: Dismissal.

be obtained. The basis on which the pre-dismissal procedures contemplated in terms of section 188A depends, is the written consent of the employee.[187] Maloka TC and Peach V, argued that once the employee has consented to section 188A process, such employee forfeit his/her right to be disciplined in accordance with internal disciplinary process.

The major advantage to the employee who is charged for allegations of misconduct in terms of internal processes, the employer may not challenge the CCMA Arbitrator's findings and decision in favour of the employee. However, the employer may review the decision of the Arbitrator who conducted the pre-dismissal arbitration if the employer is of the view that they are legal ground to do so. The effect of a section 188A pre-dismissal arbitration on the employer's unfettered managerial prerogative can hardly be overstated. Clearly, that the section 188A procedure take away the employer's disciplinary authority over the misbehaving employee and place it in the arbitrator's domain. [188] It is important to note that once parties have agreed to section 188A the employer cannot unilaterally cancel the pre-dismissal agreement or withdraw from the section 188A process. The process would be binding unless parties decide otherwise. The most important provision in the section is that only CCMA or any other accredited dispute settlement agency can facilitate section 188A. If the agreement between the employer and the employee is to refer the pre-dismissal hearing to any other structure or person(s) not accredited as per section 188A, that process will not be incompliance with the LRA.[189]

In a case between *Mogotlhe v Premier of the North-West Province and Another*,[190] the court cited the constitutional court Chirwa matter on the authority of parliament to determine Ms Chirwa's claim on alleged unfair dismissal of a public sector employee. The court made a clear determination that there is no exception to the rule. According to this judgement, all disputes related to employment regarding allegations of unfair conduct either by public or private sector employers must be resolved through dispute resolution mechanism as stipulated in the LRA. This will include dispute resolution institution such CCMA, Bargaining Forums among others.

[187] Maloka and Peach "Is an agreement to refer a matter to an inquiry by an arbitrator in terms of section 188A of the LRA a straightjacket?" (2016) *DE JURE*.
[188] *Idem.*
[189] Ibid
[190] *Mogotlhe v Premier of the North-West Province and Another* (J 2622/08) [2009] ZALC 1; [2009] 4 BLLR 331 (LC); (2009) 30 ILJ 605 (LC) (5 January 2009).

The *Chirwa* judgment restrict all labour-related dispute to be resolved through mechanisms established by the LRA .[191]

If there is no agreement, the employer shall appoint the independent presiding officer to preside over the matter.[192] In instances where misconduct has been committed by more than one employee, generally the Disciplinary Codes or enabling legislation do not prohibit collective disciplinary hearing.[193] It is always difficult for employees to deal with group discipline. In such cases, individual hearings becomes costly and likely to drag for a considerable time due to a number of witness availability and may even prolong periods of suspensions in instances where employees were suspended. The major challenge in employee discipline is how the rules are applied and whether they are applied consistently. Ordinarily, if people who have committed similar offence and dealt with differently, that amount to unfair practice. The Courts have made a clear distinction between what it termed 'historical inconsistency' and 'contemporaneous inconsistency'.[194] The 'historical inconsistency' takes place in instances when the employer has, in the past, not imposed a specific sanction for contravention of a specific disciplinary rule but changes over time. While contemporaneous inconsistency would happen in instances where two or more employees have committed the same or similar offence but sanctioned differently.[195]

In the case of *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others*,[196] the court held the view that all claims derive from inconsistency will not succeed if the employer was able to provide evidence of differentiation between employees who committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors. The basis for the principle governing the need for consistency in discipline was stated by the Labour Appeal Court in *Gcwensha v CCMA & Others*,[197] in the following terms: "Disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standards." The Court went

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[191] *Mogotlhe v Premier of the North-West Province and Another* (J 2622/08) [2009] ZALC 1; [2009] 4 BLLR 331 (LC); (2009) 30 ILJ 605 (LC) (5 January 2009).

[192] Ibid

[193] *C.D Hofmeyer*, 'Strikes; derivative misconduct and the employee's duty of good faith' available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/employment/employment-alert-11-july-strikes-derivative-misconduct-and-the-employees-duty-of-good-faith-.html*, accessed on 23 October 2019.

[194] J Grogan *Dismissal* (2010) 150.

[195] 'Workplace Discipline' available at *https://www.labourguide.co.za*, accessed on 19 December 2019.

[196] [2009] 11 BLLR 1128 (LC).

[197] (2006) 3 BLLR 234 (LAC),

further to say "when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated …"[198]

When misconduct is alleged to have been committed, the presiding officer is obliged to consider both mitigation and aggravating circumstances before the decision is made. This is so even if more than one employee have committed similar or the same offence. Their mitigating factors are considered differently and as such it is possible that the outcome of the hearing could differ in sanction. However, it is important to note that mitigating factors cannot be used to justify misconduct but they are presented by the accused and considered by the presiding officer when making a decision on the consequences of the legal and moral liability of the employee who has been found guilty. But they have to be weighed against opposing aggravating factors. Mitigating factors are evaluated during sentencing against aggravating factors by the employer. This is required in law and in circumstances where guilty verdicts against the accused has been pronounced. This means that mitigating factors would be considered as part of the sentence, whereas the standard of proof is about establishing whether the employee is guilt or not. Both the CCMA's Misconduct Arbitration Guidelines [199] and the LRA deals with the provision on mitigation of sentence. Section 3(5) of Schedule 8 prescribe aspects that are to be considered when deciding whether or not to impose a penalty of dismissal. In terms of this section, after weighing the seriousness of misconduct the employer must also consider elements relevant to the employee's circumstance such as length of service, previous disciplinary record, personal circumstances, the nature of the job and the circumstances of the infringement itself.

According to Grogan, J,

> "Mitigating factors should be considered after the employee has been found guilty of the offence; whether there are mitigating (or aggravating) factors constitutes a separate inquiry. A variety of considerations may be relevant when considering a plea in mitigation. These include a clean disciplinary record, long service, remorse, the circumstances of the offence, whether the employee confessed to his misdemeanor and any other factors that might serve to reduce the moral culpability of the employee. An employer is not

[198] Workplace Discipline' available at *https://www.labourguide.co.za, accessed on 19 December 2019.*

[199] 'Labour Relations Act: Guidelines on misconduct arbitration' available at *https://www.gov.za/documents/labour-relations-act-amended-commission-conciliation-mediation-and-arbitration-guidelines?gclid=EAIaIQobChMIkKKYzsW37gIVvBkGAB16kAvxEAAYASAAEgKcHfD_BwE* accessed on 20 January 2020

> required to take mitigating factors into account merely because they evoke sympathy. The test is whether, taken individually or cumulatively, they serve to indicate that the employee will not repeat the offence"[200]

In a case of *IDWU obo Linda and Others v Super Group and Others*,[201] the court was quite strong on the fact that the presiding officer did not consider the mitigating factors against the sentence on employee's desertion charge. According to the court, a reading of the disciplinary enquiry minute does not reveal that a sensible appreciation existed of the employees' predicament. It was indeed appropriate to weigh the business embarrassment factor as the chairman did, but in the absence of addressing the circumstances holistically, the question of the *degree* of culpability was fudged. Accordingly, despite the employees having been guilty of desertion, and despite the magnitude of the consequences of the employer's business credibility, the sanction of dismissal was found to be unsuitable. Having evaluated the effect of their misconduct on the business credibility of the employer, a final written warning would be proportional to their misbehaviour.

3.3 OTHER TYPES OF DIMISSALS

The LRA make provision for other two types of dismissal other than misconduct. Employers are allowed under the LRA to dismiss employees for incapacity[202] (poor performance or ill-health) and operational requirements. Starting with the dismissal due to operational requirements, section 189 regulates this process. Section 189(1) indicate that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult any person whom the employer is required to consult in terms of a collective agreement; or the workplace forum if there no collective agreement and a registered trade union representing employees that are expected to be affected by the proposed dismissal or the employees likely to be affected by the proposed dismissals or any other person nominated to represent such employees for that purpose. The purpose of consultation to a greater extent among other things is to ensure that parties reach agreement on proper methods and procedures to be followed to avoid dismissals all together or minimise the number of possible dismissals in the event where such dismissals are

[200] In his book entitled *Dismissal* (Juta, 2014) at page 211, Professor John Grogan remarked as follows regarding Mitigating Factors: Juta Legal and Academic Publishers 978-1-4851-2077-3

[201] *IDWU obo Linda and Others v Super Group and Others* (JA19/2015) [2017] ZALAC 17; (2017) 38 ILJ 1292 (LAC); [2017] 10 BLLR 969 (LAC) (28 February 2017).

[202] LRA: Code of Good Practice

unavoidable. [203] When dismissal if fully effected, employees who have been selected for dismissal would not go through the dismissal hearing as they would not have committed any offence.

The dismissal due to Incapacity, ill health or injury also requires a different approach. According to LRA: Code of Good Practice, item 11 provide specific guidelines in cases of dismissal arising from ill health or injury. It is important to note that for anyone to fully understand the Code of Good Practice: Dismissal (the Dismissal Code) and specifically item 11, understating of the other code issued in terms of the Employment Equity Act, i.e., the Code of Good Practice on Key Aspects on the Employment of People with Disabilities (the Disability Code) becomes essential and must be read together.[204] However, there is distinguishable difference between the Code of Good Practice: Dismissal and Disability Code. The Dismissal Code primarily is more about dismissal of employees who are medically incapacitated, whereas the Disability Code is more about the employer's duties and responsibilities before the actual dismissal. If these duties and responsibilities are not complied with, any dismissal based on incapacity could not only be declared substantively and/or procedurally unfair, but might also constitute an automatically unfair dismissal in terms of section 187 of the Labour Relations Act.[205]

Again, incapacity on the grounds of ill health or injury can either be permanent or temporal. In terms of the Code, in situations where the employee is temporarily unable to perform his or he duties, the employer has an obligation to first investigate the degree of the incapacity or the injury.[206] In circumstances where there are possibilities of incapacitated employee being absent for a time that is unreasonably long, the employer must investigate possible alternatives short of dismissal. When such alternatives are evaluated, the employer may have to factor in the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In circumstances where an employee is permanently incapacitated, the employer should determine the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.[207]

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[203] Section 189 of LRA

[204] B. Jordaan 'How to deal with disability vs. Medical incapacity' Labourwise 2 June 2017, available at *https://www.labourwise.co.za/labour-articles/disability-vs-medical-incapacity*, accessed on 20 November 2019

[205] *Ibid.*

[206] *Ibid*

[207] *Ibid*

The Labour Appeal Court raised a question on whether the employer in all fairness, be expected to wait any longer before considering dismissal?[208] This approach has been held to apply both in cases of lengthy absence, and in cases of intermittent absences from the workplace. There are certain rules to be followed in determining fairness under these circumstances. The employer must ascertain whether the employee is still capable of performing the very same duties that he or she was employed to perform, and if not then to what degree would he or she be unable to perform those duties. In terms of the Code, affected employees are permitted to participate in these investigation, which may involve further medical investigation.[209]

There are clear guidelines in terms of item 9 of the Code (the Dismissal Code) regarding dismissal for poor work performance**.** According to the Code**,** any person tasked to establish the fairness of dismissal due to poor work performance is required to establish whether or not the employee failed to meet a performance standard; and if the employee did not meet a required performance standard whether or not the employee was aware of such performance standard, or could reasonably be expected to have been aware, of the required performance standard; and whether the employee was given a fair opportunity to meet the required performance standard; and lastly whether the dismissal was an appropriate sanction for not meeting the required performance standard.[210]

3.4 CONCLUSION

Misconduct as currently defined is not problematic as it includes the elements that characterise conduct not consistent with the expected standard. It becomes imperative for employers to make a clear distinction between these three types of dismissals (Misconduct, poor performance or ill-health). More so because required procedures in dealing with these types of terminations are not the same. No employer is allowed to dismiss employees either due to misconduct, operational reasons or incapacity (ill health or poor performance) without following the due process as prescribed in the Code of Good Practices. Otherwise such dismissal or termination of employment could be considered to be unfair.

[208] Ibid

[209] 'Fairness of dismissal for incapacity – ill health- Labour Guide' available at *https://www.labourguide.co.za/discipline-dismissal/341-fairness-of-dismissal-for-incapacity-ill-health,* accessed at 01 December 2019

[210] Ibid

CHAPTER FOUR
AN ASSESSMENT OF THE CONSTITUTIONALITY OF THE PROOF OF BALANCE OF PROBABILITIES IN DISCIPLINARY HEARINGS

4. INTRODUCTION

South Africa became a constitutional democratic state in 1994 in accordance with the interim constitution of 1993. This was a significant departure from the apartheid system as the new dispensation guaranteed constitutional supremacy, the rule of law and most importantly the human rights. Section 2 of the constitution is a supremacy clause which establishes that all other laws and actions are subject to the constitution. In essence, the South African constitution guarantees the rights of individuals and minorities through legal and institutional means. Chapter 2 of the constitution protects the rights of all citizens regardless of their race, class, religious beliefs and gender. As a matter of fact, section 7 (2) of the constitution calls on the state to respect, protect, promote and fulfil the rights in the Bill of Rights.[211] All institutions in South Africa, both private and public have the constitutional obligation to observe the fundamental principles of human rights and the rule of law through policies and regulations that are consistent with the spirit and the latter of the constitution. Some of the rights guaranteed in the Bill of Rights include the rights to equality (s 9), human dignity (s 10), life (s11) and privacy (s 14), among others. Most importantly, this chapter also deals with labour relations in the workplace which is housed in section 23 of the constitution.

Any Act of Parliament, policy or regulation that violates a fundamental guaranteed right in the constitution is deemed inconsistence with the constitution and is invalid.[212] Since the down of democracy in 1994, South Africa has always positioned itself to be part of the global village. Hence, it is the signatory to a number of international treaties and international instruments to ensure the observance of the fundamental human rights.[213] Due to this commitment, section 39(1)(b) of the constitution states that the Courts, and other legal bodies, when interpreting the

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[211] Constitution, 1996.

[212] S36(1) Constitution.

[213] Examples include; Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (ratified10 December 1998), International Covenant on Civil and Political Rights (ratified 10 December 1998) and International Covenant on Economic, Social and Cultural Right (ratified 12 January 2015). Source: C Zungu 'The role, relevance and application of international law in South Africa' available at *https://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html*, accessed on 2 January 2019.

Bill of Rights need to consider international law.[214] Section 3 of the LRA also makes provision "that any person applying the provisions of the LRA must interpret its provisions to give effect to its primary objects, in compliance with the constitution and in compliance with the public international law obligations of the Republic." [215]

4.1 INTERNATIONAL LAW AND THE NEED FOR SOUTH AFRICA TO COMPLY WITH IT

South Africa is a signatory to the International Labour Organisation (ILO) which is the United Nations Agency aimed at bringing together governments, employers and workers to set labour standards, develop policies and devise programmes promoting decent work for all women and men[216]. The constitution has made provision in section 233 that when Courts are interpreting any legislation, they must prefer reasonable interpretation of the legislation that is consistent with internal law over any alternative interpretation inconsistent with international law.[217]

The main objective of the ILO, is to provide employees, employers and governments' equal voice in shaping Labour standards, policies and programmes.[218] These labour standards are either conventions or recommendations. Conventions are legally binding international treaties that may be ratified by member states, whereas recommendations are non-binding guidelines. This has become important to all members of the global community to obtain decent and productive work, in conditions of freedom, equity and dignity[219].

> "We must do more to empower individuals through decent work, support people through social protection, and ensure the voices of the poor and marginalized are heard. Let us make social justice central to achieving equitable and sustainable growth for all."[220]

Member states are obliged to observe these labour standards through relevant legislations. They can use these standards as a bench-mark or they can incorporate them into law. South Africa is

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214 C Zungu 'The role, relevance and application of international law in South Africa' available at *https://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html*, accessed on 2 January 2019.

215 *Ibid.*

216 International Labour Organisation *Rules of the Game: A brief introduction to Internal Standards Revised Edition* (2014).

217 Ibid

218 *Idem.*

219 *Idem.*

220 International Labour Organisation *Rules of the Game: A brief introduction to Internal Standards* Revised Edition (2014).

as a country is no exception to this obligation. It has ratified all ILO Standards and have aligned its labour laws accordingly.[221] Section 23(1) of the constitution provides that '*everyone has a right to fair labour*'. The LRA in particular, is considered by many as an Act that harnessed certain sections in the Bill of Rights by guaranteeing a range of labour and related rights.[222] Section 1 of the LRA pronounces itself as being aimed at "advancing economic development, social justice, labour peace and democratization of the workplace". It has to be appreciated that section 23(1) of the constitution is a highly contentious right and it does not guarantee employees the right to hold into their jobs if they have committed misconduct."

It has to be mentioned that Article 8 of the International Labour Organisation Convention on Termination of Employment 158 of 1982 (ILO Convention) as part of the protection of employment, requires that in determining the fairness of a dismissal, the presiding officer must determine the dismissal dispute as an impartial adjudicator. This is a protection afforded to employees who are vulnerable. Even though there is no ILO standard relevant to the balance of probability as the standard of proof *per se*, Article 8 of the Convention on Termination of Employment 158 of 1982 deals with the fundamental principles of equity, fairness, dignity, protection of employment and social justice which underpins the values on which all member states, including the Republic of South Africa must base their labour legislations. In addition, it standard does emphasis the important of the independent adjudicator to ensure protection of vulnerable employees. As things stand in South African Labour Law, the appointment and the independency of presiding officers in internal disciplinary hearing raises serious questions with regards to the compliance with the ILO standard. Further, the international law principles such as the UN Guiding Principles on Business and Human Rights, known as the Ruggie Principles, place a duty upon states to take measures to prevent the abuse of human rights by business enterprises within their territory.

Interestingly, the South African Human Rights Commission (SAHRC), had also investigated the violation of human rights by employers. One of the SAHRC strategic focus areas for 2014/15 period was Business and Human Rights. This was with a view to increase its institutional knowledge and understanding of the ways in which business activities affect the enjoyment of human rights. As such, the SAHRC has consistently promoted the African

[221] International Labour Organisation *Rules of the Game: A brief introduction to Internal Standards* Revised Edition (2014).
[222] S23 Constitution. See also Le Roux R & Rycroft A (2012) *JUTA* vii.

Charter on Human and Peoples' Rights (the Banjul Charter) to which South Africa is a signatory. The Banjul Charter requires member states, like South Africa, to take legislative and other steps to protect persons against violations of their socio-economic rights by private actors.[223]

Further, the SAHRC, also place reliance on the International Labour Organisation's Protection of Wages Convention. This Convention compel each state to prevent the violation of socio-economic rights by private actors within its jurisdiction. For the SAHRC, the rights to equality and dignity, cannot be separated from matters that have to do with poverty. Economic and social rights often include the most basic primary needs for human beings. Poverty is more than a lack of adequate income. It is rather, as the *Human Development Report 1997* puts it, a lack of the necessities to be a self-respecting, dignified and wholesome human being. Poverty *is* a denial of human rights.[224]

Apartheid in South Africa has left the legacy of socio-economic deprivation for its citizens. According to the World Bank Group in1995, as a result of the past discriminatory policies, South Africa has one of the worst social indicator records (i.e., health education, potable water, fertility, and mortality).[225] According to this study, 40 percent of the households surveyed (equivalent to 53 percent of the population) account for less than 10 percent of the total consumption. In contrast, 10 percent of households (approximately 5,8 percent of the population) account for over 40 percent of the country's total consumption.[226] The survey also found that poverty in South Africa has racial dimension. For instance, Africans represent nearly 95 percent of South Africa's impoverished as opposed to five percent in the Coloured and the Indian communities and less than one percent in the white communities.[227]

[223] South African Human Rights Commission Report on Business and Human Rights for the 2014/15 financial year 30.
[224] South African Human Rights Commission Report on Business and Human Rights for the 2014/15 financial year. (page no)
[225] *Ibid.*
[226] 'World Bank Group Key Indicators of Poverty in South Africa 1995', available at *https://www.sahrc.org.za/*, accessed on 5 January 2019.
[227] Ibid

4.2 BALANCE OF PROBABILITIES AND FAIR LABOUR PRACTICES

In light of the above, the question that has to be responded to by this research is whether the balance of probability, as a standard of proof, complies with both the constitution of the Republic of South Africa, in particular the Bill of Rights, and the International Labour Organisation standards on equity, fairness, protection of employment and social justice. In dealing with this question, the critical and most relevant area that requires scrutiny is the subjectivity of the test applied to determine whether the employee accused of misconduct is guilty or not. At face value, perhaps it could be argued that the use of the balance of probabilities as the standard of proof has the potential to infringe employee's right to fair labour practice.

Cited by Griessel[228], the Labour Court in *Potgietersrus Platinum Ltd. v CCMA*[229] found that the employer is only required to demonstrate that circumstantial evidence[230] shows that an employee is guilty of the misconduct. This, the court held, is more believable than the possibility that he/she did not commit the misconduct. In reality there are checks and balances inherent to the system to ensure that the application of the test meet required standard of the fair labour practice as prescribed by the constitution. It may be true that the balance of probabilities as standard of proof, does not create predictability to the outcome of the hearing as the test is not beyond reasonable doubt. Hence, there is always conflicting judgements between and among various structures dealing with cases of dismissals. This does not in any way suggest that in criminal matters where a different standard of proof is used such conflicting and contradictory judgements are not experienced.

As a consequence of lack of predictability in civil matters and in particular in disciplinary matters, there is a growing belief that had the standard of proof being applied in South Africa would have less employees dismissed unfairly and the less number of cases referred to CCMA by dismissed employees. The implications that comes with such unfair dismissals results in high rate of unemployment, inequality and poverty that could have been avoided.

It must be appreciated that the writers of the LRA were mindful of the challenges that could be created by the "beyond reasonable doubt" test if applied in disciplinary hearings. Firstly, the

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[228] J Griessel 'Evaluating Evidence on a Balance of Probabilities' 18 August 2015, available at *https://www.linkedin.com/pulse/evaluating-evidence-balance-probabilities-judith-griessel,* accessed on 8 August 2018.

[229] *Potgietersrus Platinum Ltd v CCMA* (J1459/98 of 30 July 1999).

[230] Circumstantial evidence is evidence that relies on an inference to connect it to a conclusion of fact—such as a fingerprint at the scene of a crime.

employers would not have the capacity and capabilities similar to those of the State to prove cases beyond reasonable doubt. Secondly, that such a test will create delays that could be caused by the complications of the process by the parties, but in particular the employer attempting to meet the standard as they would have the onus to prove the case beyond reasonable doubt. The LRA was established with a clear objective to expedite the resolution of labour disputes in an efficient and cost-effective manner. Special procedures have been created to avoid the delays and costs associated with dispute resolution. Section 7 of Schedule 8 provide clear guidelines in cases of dismissal for misconduct.

Primarily, the purpose of the LRA is to expeditious resolution of labour disputes in the Country. In case between *Noosi v Exxaro Coal*[231]the court cited the constitutional court judgement in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[232] The LRA introduced simplified mechanisms to expeditiously deal with labour disputes. Disputes of this nature require speedy resolution as the delay could be detrimental not only to the employees who may be without a source of income pending the resolution of the dispute, but also detrimental effect on the employer who may have to reinstate workers after a number of years if the employee is not found guilty for misconduct.[233]

Whiles this could be factually correct, the opposite is also true, that the right to a fair disciplinary hearing cannot be overridden by expediency. So the need for speedy and cheap resolution of disputes does not mean that the right to a fair hearing should be undermined. This right is a constitutional right which has to be observed at all times. Otherwise, any outcome of a disciplinary process that does not appreciate the principle of fairness is inconsistent with the constitution of the Republic of South Africa and invalid.

There have been calls to consider the inclusion of PAJA in dealing with misconduct cases to ensure fairness. This is despite the fact that this proposition was opposed by the constitutional Court.[234] In a case of *Marius v Overstrand Municipality*[235] the constitutional Court was cited as having defined the connection of the constitutional right to fair labour practices and that of the right to administrative justice as follows:

[231] *Noosi v Exxaro Matla Coal* (JA62/2015) [2017] ZALAC 3 (10 January 2017).
[232] *Commercial Workers Union of SA v Tao Ying Metal. Industries and others (*2008) 29 ILJ 2461 (CC)).
[233] Ibid
[234] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) BCLR 158 (CC).
[235] *Marius v Overstrand Municipality* (CA24/2013) [2014] ZALAC 107 (25 September 2014).

> *"*Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognized by the constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer or consequences for other citizens, it does not constitute administrative action."[236]

But contrary to this view, the constitutional court also confirms that both the constitution and the LRA does accord employers with preferential status regarding their views on the fairness of a dismissal. There could only be one reason why such emphasis was made by the constitutional Court. That reasons is largely informed by the fact that employers' involvement in making dismissal decisions fly in the face of common law doctrine of *Nemo judex in causa sua.*[237]

The fact that the employer would investigate, initiate a disciplinary hearing, appoint the presiding officer and have a final decision-making power as to whether the employee is guilty of misconduct or not, not only violate this basic principle and the constitutional principles of fairness. It also violate Article 8 of the ILO Convention on Termination of Employment 158 of 1982 which requires that in determining the fairness of a dismissal, the presiding officer must determine the dismissal dispute as an impartial adjudicator. This is a protection afforded to employees who are vulnerable. Even in a case of *Marius v Overstrand Municipality*,[238] the matter was whether the employer had the authority to review the outcome of the disciplinary hearing or the sanction of a presiding officer who's mandated by the employer was to perform administrative act. The employer's review was in line with the LRA section 158(1)(h). The LAC entry point was to evaluate section 158(1)(h), particularly the language used. It held the

[236] *Marius v Overstrand Municipality* (CA24/2013) [2014] ZALAC 107 (25 September 2014).

[237] *Nemo judex in causa sua (*or *nemo judex in sua causa)* is a Latin phrase that means, literally, "no-one should be a judge in his own case". It is a principle of natural justice that no person can judge a case in which they have an interest". Available at *https://www.iilsindia.com/blogs/2017/05/24/analysis-priniciple-nemo-judex-causa-sua/*, accessed on 2 January 2019.

[238] *Marius v Overstrand Municipality* (CA24/2013) [2014] ZALAC 107 (25 September 2014).

view that the authority and decisions taken by the state as an employer are reviewable by the Labour Court on such grounds as are permissible in law. On the assumption that a determination by an independent presiding officer at a disciplinary hearing is a decision or act of the employer.

The overriding principle of the *ratio decidendi* in *Gcaba* and *Chirwa* is that once the rules and structures have been established for instantaneous dispute resolution and protection of rights in a particular area of law, it is advisable that such system be used for that purpose. Put in differently, the LRA has remedies to deal with unfair dismissal and unfair labour which should be used by aggrieved employees rather than seeking review under PAJA.[239]

> "The *ratio* cannot justifiable be extended to deny an employer a remedy against an unreasonable, irrational or procedurally unfair determination by a presiding officer exercising delegated authority over discipline. The remedies available to an aggrieved employee under the unfair dismissal and labour practice jurisdiction of the LRA are not available to employers. Section 191(1)(a) of the LRA expressly restricts these remedies to "the dismissed employee or the employee alleging the unfair labour practice". The only remedy available to the employer aggrieved by the disciplinary sanction imposed by an independent presiding officer is the right to seek administrative law review; and section 158(1)(h) of the LRA empowers the Labour Court to hear and determine the review. To hold otherwise is to deny the employer any remedy at all against an abuse of authority by the presiding officer." [240]

Despite the above, the general belief is that employers can willy-nilly change the outcome of the hearing if not satisfied with the outcome without following the due process. In a case of *Moodley v Department of National Treasury and Others*,[241] the employer substituted a lesser sanction with dismissal. The presiding officer of a disciplinary hearing found a demotion as appropriate sanction but the employer changed the presiding officer's sanction to that of

[239] *Nemo judex in causa sua (*or *nemo judex in sua causa)* is a Latin phrase that means, literally, "no-one should be a judge in his own case". It is a principle of natural justice that no person can judge a case in which they have an interest". Available at *https://www.iilsindia.com/blogs/2017/05/24/analysis-priniciple-nemo-judex-causa-sua/*, accessed on 2 January 2019.

[240] *Ibd*

[241] *Moodley v Department of National Treasury and Others* (JA13/2016) [2017] ZALAC 5; [2017] 4 BLLR 337 (LAC); (2017) 38 ILJ 1098 (LAC) (10 January 2017).

dismissal. The arbitrator ordering employer to revert to chairperson's sanction. At the Appeal Court, the Court argued that the arbitrator failed to consider section 193 of the LRA, whether it was still practicable to reinstate the employee considering the nature of the misconduct for which employee charged. Such failure vitiates the award. The constitutional Court's judgment in Kruger restated. The appeal dismissed the Labour Court's judgment but upheld it for different reasons. There is no fairness for the employer to be the Judge in his own case. It is for that reason why the constitutional court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[242] is of the view that there is no preferential status to the employer's view on the fairness of a dismissal.

The constitutional court confirms that it is only the CCMA and not the employer who can have administrative action function that would be lawful, reasonable and procedurally fair in line with the LRA. Clearly, if internal or in-house disciplinary hearing would not be able to perform such administrative functions, with guaranteed inherent compliance with natural justice principles of fairness and equality, the disciplinary regime as defined by the LRA loses its validity. The Rule of Law requires a process for making factual determinations. To address this, there are two most important questions to be answered. Firstly, is whether the current system as provided by the LRA comply with that requirement? Secondly, does the legal system make provisions for conducting orderly trials and hearings, contain rules of evidence that guarantee rational procedures of inquiry.

The Code of Good Practice: Schedule 8 provide clear guidelines on how the presiding officers can come to a dismissal outcome. If applied correctly the balance of probabilities as an onus of proof would pass the constitutional scrutiny of fairness. This may not be sufficient to address the inefficiencies and perceived unfairness of the system. This may not necessary create a constitutional crisis on whether the balance of probabilities constitute a fair labour practice.

It is on the basis of this that this paper argues that perhaps the perceived collapse of the internal disciplinary mechanism cannot necessary be attributed to the standard of proof which is the balance of probabilities. The challenges seems to go beyond the standard of proof but rather on the Legal Framework regulating disciplinary hearings regime. Hence, this paper advocate for the amendment of the LRA that the CCMA once properly capacitated be the forum of first instance in dealing with internal disciplinary matters. Alternatively, independent presiding

[242] *S v Makwanyane* 1995 (3) SA 391.

officers trained and accredited by the CCMA be provided to all disciplinary matters. This will go a long way to ensure that all parties would be equal before the law and the decision would be made by the independent Chairperson with no vested interest in the matter and in compliance with Article 8 of the International Labour Organisation Convention on Termination of Employment 158 of 1982 (ILO Convention) which requires that in determining the fairness of a dismissal, the presiding officer must determine the dismissal dispute as an impartial adjudicator. This will guarantee firstly, substantive legitimacy. Secondly, that there is no abuse of power. Thirdly, protecting the liberty of the citizen and lastly, finally, the Rule of Law implies the precept that similar cases be treated similarly.[243]

That is why it is not surprising thatthe majority of dismissal cases would automatically lead to the CCMA or the Bargaining Forum for remedy.

Given the volume of statistical information to demonstrate this evidence, the author has sampled this information by highlighting certain periods and only from the CCMA database. For instance, statistical analysis of the case management system (CMS) database of the CCMA for the financial years 1996 to 2004/5 and 2017/18.

Table 2: Total Number of Cases Referred to the CCMA

	1996	1997/8	1998/9	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05
Caseload	2,917	67,319	86,182	88,756	103,096	110,639 [110,553]	118,254 [126,330]	127,715	128,018 [126,272]

Source: *CCMA Annual Reports, 1996-2003/04. Official figures for 2004/05 are taken from "Review of Operations, 2004-2005". Numbers given in brackets were retrieved from the CCMA database*.

The table above indicate that there has been a steady increase in the number of cases referred to CCMA with the result that the number of disputes referred in 2004-2005 is almost double that referred in the first full financial year of operation 1997/8. Fast forward, a total of 186 902 cases were referred to the CCMA during the 2017/18 financial year. This translates to an average of seven hundred and fifty four (754) new cases referred every working day. About 75% of all cases referrals related to unfair dismissal[244].

[243] Burns R A *Theory of the Trial* (1999).
[244] Commission for Conciliation Mediation and Arbitration *Annual Report 2017/18* (2019).

Table 3 Frequency and Percentages of Unfair Dismissal cases: 2001 - 2005

	2001/02		2003/04		2004/05	
	Frequency	%	Frequency	%	Frequency	%
Unfair dismissal	76,182	80.38	89,968	83.48	87,673	79.89

Source: *CCMA Annual Reports, 1996-2003/04. Official figures for 2004/05 are taken from "Review of Operations, 2004-2005". Numbers given in brackets were retrieved from the CCMA database.*

Table 4: Misconduct Cases

	2001/02	2003/04	2004/5
Dismissal related to misconduct	12	14,314	16,895

Source: *CCMA Annual Reports, 1996-2003/04. Official figures for 2004/05 are taken from "Review of Operations, 2004-2005". Numbers given in brackets were retrieved from the CCMA database.*

Both table 3 and table 4 reveals that the majority of cases referred to CCMA are unfair dismissal, particularly misconduct cases. More than 75% of all cases are unfair dismissals and specifically misconduct cases. This number has increased since 1996 when the CCMA was established. Already, there are strong views that the CCMA is battling to cope with the volume of cases referred to it

The information obtained from the CCMA does not contain any information concerning the length of service of employees who refer disputes to the CCMA. While an employee's length of service may not be of immediate relevance for the administrative purposes of the CCMA, it is an issue that is important to assess the impact of protection against unfair dismissal on the economy. However, there seems to be general view that a number of dismissal cases referred to the CCMA are about employees with very short length of service.[245]

In 2002, the LRA was amended to introduce the pre-dismissal hearing. It is not evidently clear from the literature of the reasons why such amendment was made other than the fact that it would create a single hearing platform to replace a process that would start with the internal

[245] Benjamin P and Gruen C 'The Regulatory Efficiency of the CCMA: A Statistical Analysis of the CCMA's CMS Database' (2006) *DPRU* 57.

hearing and eventually end with the arbitration. The pre-dismissal arbitration effectively meant that a disciplinary hearing is in effect conducted by the CCMA arbitrator. The award made at the pre-dismissal arbitration has the same status as that of an ordinary arbitration. Statistical evidence shows that the impact of this amendment has been marginal with very few pre-dismissal arbitrations conducted in either 2003/4 or 2004. The reason for this is the requirement for agreement between the employer and the employee over the hearing of a pre-dismissal arbitration and the fact that the employer is required to pay the fees of an arbitrator.[246] The introduction of pre-dismissal hearing could be another indication that there was a realisation that the legal framework regulating internal disciplinary hearings was not adequate.

The amendment itself was progressive development. It indirectly responded to the position advanced by this paper. The administration and the cost associated with pre-dismissal hearing seemed to be the reasons why there has been such a low interest in utilising this mechanism. Otherwise, this could have been the perfect start towards the CCMA being the forum of the first instance in dealing with misconduct cases. At the center of this paper is the realization that with the current legal framework regulating the disciplinary hearings need to be reviewed as it has the potential to undermine the basic constitutional rights of accused employees to a fair and just process.

4.3 WHAT ARE THE LEGAL IMPLICATIONS FOR BOTH THE EMPLOYER AND THE EMPLOYEES IF THE STANDRAD OF PROOF WAS TO BE CHANGED?

This section would provide brief analysis of section 36 of the constitution. It must be stated upfront that it is not the intention of the author to conduct a full limitation clause analysis. The writers of the South African constitution were mind-full of the fact that constitutional rights would not be absolute and can in certain circumstances be limited. These circumstances could be the rights of others as well as competing social interest. As such section 36 (1) of the constitution, contain a general limitation clause that allows for the constitutionally valid limitation of rights in certain instances.[247]

[246] Benjamin P and Gruen C 'The Regulatory Efficiency of the CCMA: A Statistical Analysis of the CCMA's CMS Database' (2006) *DPRU* 31.
[247] P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 378.

The constitution state that "the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an 'open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including, a) the nature of the right; b) the importance of the purpose of the limitation; c) the nature and extent of the limitation; d) the relation between the limitation and its purpose; and e) less restrictive means to achieve the purpose".[248]

But the test is whether such limitations are reasonable and justifiable. Determining whether a limitation of rights is justified or not is difficult. First, South Africa is a country emerging from a historical period during which individuals' fundamental rights and freedom were systematically and routinely violated, first under colonialism and then apartheid, often under the colour of law. Second, the commitment to the rights –based constitutional order means that society's political, social, economic and historical controversies are often resolved using the language and the logic of rights.[249] At times, this requires Courts to address these pressing and complex issues, some of which invoke age-old questions that go to the heart of how society and government should be structured and should function, using contested empirical bases. This sometimes places court in a difficult position in relation to other arms of government, namely the legislature and the executive, as well as the public at large. But once a court has determined that a particular measure limits a protected right, it turns its attention to the second stage of the limitation analysis where it must consider whether the limitation of the right can be justified. If the Court finds that the limitation is justified, the measure has passed the test of constitutionality.[250]

It has to be understood that for the court to make a clear and legally sound determination at the justification stage, the starting point is that the limitation measure must be sourced in a law of general application. This means the limiting measure must be in terms of something the court recognises as law.[251] Once the Court has weighed the right and the limiting measure in their fullest sense and has taken into account the implications for other rights, then it is left to resolve the conflicting ends using the balancing and proportionality metaphors. When it comes to this stage, there are broadly two possible arguments available to the court. First, the court may conclude that the limitation is justifiable because its effect on the right is proportionate. This,

[248] Constitution, 1996.
[249] P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 360.
[250] *Ibid.*
[251] P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 376.

in practise often involves a finding that the measure strikes the periphery of the right, making its limitation easer to justify. Second, alternatively, the court may decide that the limitation is not justifiable, in other words the right must prevail. The reason may be because the effect on the right is disproportionate to the good achieved by the measure and the means chosen is disproportionate in the sense that it not well tailored to the purpose.[252]

This papers argues that, if the current legal framework regulating disciplinary hearings does not meet section 35 (3) of the constitution which guarantee specific rights of all the accused persons, which include a right to a fair trial, the right to be informed of the charges with sufficient detail to answer it and the right to be informed of this right promptly, the rights of accused employees to be trialled and be adjudicated fairly by the same standard as in the normal court is not justifiable and reasonable. This is because the outcome of a disciplinary hearing is as dire if the accused employee is eventually dismissed. Such dismissal would eventually lead to other violations such as the right to human dignity.

The only justification that is advanced by the proponents of the status quo is that the current labour relations regime and particularly schedule 8 of the LRA expedite the labour dispute. As stated in the previous chapter, the constitutional Court in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*, is of the view that, the LRA has provided a mechanism that will expedite the resolution of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes.

The decision in a civil matters and in particular in labour matters, cannot be resolved for expediency when the fundamental rights, which are entrusted in the constitution are violated. The reality is that in a long run if such matters are appealed put to the level of the Labour Appeal Court, it can take up to five years for such matters to be resolved. That is only if the accused employee has financial muscle to challenge the unfair dismissal to that level. The case of *Sidumo v Rustenburg Platinum Mines Ltd and Others* took five years before the constitutional, [253] court could rule on the matter. Regrettable, the matter was only resolved when the plaintiff had passed on. Already there is case law presented in the previous chapter where the judgement of the Labour Appeal Court has agreed with the internal disciplinary

[252] *Ibid.*
[253] *Sidumo v Rustenburg Platinum Mines Ltd and Others* (Case CCT 85/06 Decided on 05 October 2007.

hearing that even if the sanction is not in accordance with the actual charge sheet the sanction should remain. This further complicates employees' right to justice and fairness.

For De Vos et al, limitation process is crucial not to restrict the right unnecessarily by adopting an excessively narrow interpretation of the right as this would result in the premature termination of the enquiry at the expense of the litigant.[254] It is important that the rights must be viewed against the context of South Africa's apartheid past. During the apartheid era, government officials routinely abused their discretionary powers. These discretionary powers were constantly expanded by legislation, especially in the latter years of the apartheid regime. The constitution seeks to prevent a recurrence of this abuse of power.[255] This is done by shifting the focus of the enquiry from the justifiability of the limiting measure to the justifiability of the effect of that measure on a particular group or individual. Can we justify the end results of the law.[256]

Justice Wallis of the Supreme Court of Appeal delivered a paper at the South African Society for Labour Law (SASLAW) National Conference in Cape Town in which he used a conception of the rule of law as a set of rules that enables the law to achieve the goals of accessibility, clarity, intelligibility and predictability and tested the state of labour law against those goals. He identified certain obstacles standing in the way of achieving these goals, one of them being how the Courts addressed the issue of fairness in labour law. He identified broader obstacles to achieve fairness under the rule of law. "The cause of these obstacles may be how we view our history, conceptualise the rule of law, conceptualise the determination of efficiency in economics, view what a successful country and economy requires, and conceive the role Courts play in a democracy like ours."[257] He argued that there can be no satisfactory applications of fairness in labour law without addressing South Africa's historical deficit.[258]

In reality, if the LRA and the constitution was to be amended to introduce the beyond reasonable doubt test as the new standard of proof in disciplinary matters, this would have serious legal implications to both employers and employees. Firstly it will fly in the face of what the LRA and the constitution intended to achieve which was simple, quick, cheap and

[254] P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 581.
[255] *Ibid.*
[256] *Ibid.*
[257] Juta *The Tokiso report on the state of labour dispute resolution in South Africa* (2015).
[258] *Ibid.*

informal approach to the adjudication of labour disputes. Secondly, the employer will have no capacity to investigate allegation of misconduct similar to State investigative capacity. This will inevitable delay the finalisation of such matters and prejudice both parties. Thirdly, the amendment of the LRA and the constitution from the balance of probabilities to beyond reasonable doubt test will automatically requires parties to have legal representation in order to fully interrogate the allegations and evidence against the new standard. Not all the employees accused of misconduct will have sufficient resources for legal representation. Lastly, no investor would want to invest in South Africa whether the process to dismiss an accused employee is legally cumbersome.

4.4 CONCLUSION

The constitutionality of the balance of probability as a standard on proof in disciplinary hearings proves to be consistent with the South African constitution. However, the legal framework regulating the disciplinary matters have serious limitations, which among others, is the right to fairness, equality and social justice for ordinary South African employees. The constitutional Court judgement on *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, raised fundamental issues that need to be followed up by constitutional review in order to ensure compliance. Further research would be required to ascertain user friendly methods and costs free Pre- dismissal disciplinary in order to ensure that CCMA becomes the Forum of first instance in dealing with misconduct cases. Alternatively, the CCMA provide competent independent presiding officers to chair internal disciplinary matter but under the auspices of CCMA.

CHAPTER FIVE

THE RESEARCH DESIGN AND METHODOLOGY

5. INTRODUCTION

A research design is generally defined as a plan that a researcher uses to obtain research participants and collect information in response to the research problem. In this study, the research process is qualitative research method using multiple methods of in - depth interviews and focus groups. However, semi-structured interviews and focus groups can be utilised as separate methods to supplement other methods or as a means for triangulation in multi-methods research. It is common that the Researchers will pull on a range of methods and theories.[259] The process is a double barrel technique. The results of this double-barreled technique will be analysed using descriptive and deductive analysis.

5.1 SEMI-STRUCTURED INTERVIEWS AND FOCUS GROUPS METHODS

Semi-structured interviews (sometimes referred to as informal, conversational or 'soft' interviews) are verbal interchange where one person, the interviewer, attempts to elicit information from another person by asking questions.[260] Ordinarily, on this method the interviewer would prepare a list of prearranged questions and semi-structured interviews would then unfold in a manner that conversational by ensuring that all interviewees get the opportunity to express themselves on matters they feel are important.[261] Whereas focus group method (sometimes referred to as focus-group interviews) is where a group of people, usually between six (6) and twelve (12), would meet in an informal setting to talk about a particular topic that has been set by the researcher.[262] The facilitator who in most cases is the researcher would keep the group on the topic but is otherwise non-directive, allowing the group to explore the subject from as many angles as they please. Semi-structured interviews and focus groups are about talking with people but in ways that are self-conscious, orderly and partially structured. Krueger and Casey (2000: xi) explain that both semi structured and focus-group interviewing is about talking but it is also about listening. It requires first and foremost a facilitator or a researcher to pay attention to what the participants had to say and not being

[259] R Longhurst 'Semi- Structured Interviews and Focus Groups' in N.J. Clifford et al (2 ed) *Key Methods in Geography* (2010) 103.
[260] *Ibid*
[261] *Ibid.*
[262] *Ibid.*

judgmental. Secondly to create a comfortable environment for people to share. For the researcher to be careful and systematic with the things the participants share with him or her.[263]

Ordinarily, researchers will try to establish a group with similar participants as possible. It is argued that this is normally done to attempt to have a group of people who have things in common and would feel more relaxed having a conversation to each other. Focus groups tend to last between one and two hours.[264] The most important aspect of this is how members of the group interact and communicate. Whiles semi-structured interviews are different in that they rely on the interaction between interviewer and interviewee. Focus groups are also different from interviews in that it is possible to gather the opinions of a large number of people for comparatively little time and expense. Generally, focus groups are recommended to researchers wishing to understand the new field or who are involved in an exploratory study.[265]

5.1.1 Why Qualitative Research?

The label 'qualitative research' is a generic term for a range of different research approaches. These differ in their theoretical assumptions, their understanding of their object of investigation and their methodological focus.[266] But they may be summarized under three broad headings: theoretical reference points may be sought, first, in the traditions of *symbolic interactionism* and *phenomenology*, which tend to pursue subjective meanings and individual sense attributions. Second, in *ethnomethodology* and *constructivism*, which are interested in everyday routine and the construction of social reality. A third point of reference is found in *structuralist* or *psychoanalytical* positions, which move from aa supposition of latent social configurations and of unconscious psychic structures and mechanisms.[267] These approaches also differ in their research goals and in the methods they apply.[268] In its approach to the phenomena under investigation it is frequently more open and thereby 'more involved' than other research strategies that work with large quantities and strictly standardized, and therefore more objective, methods and normative concepts.[269]

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[263] R Longhurst 'Semi- Structured Interviews and Focus Groups' in N.J. Clifford et al (2 ed) *Key Methods in Geography* (2010) 103.
[264] *Ibid.*
[265] Ibid
[266] U Flick, E von Kardorff & I Steinke *A Companion to Qualitative Research (2004)* 5.
[267] R Longhurst 'Semi- Structured Interviews and Focus Groups' in N.J. Clifford et al (2 ed) *Key Methods in Geography* (2010) 103.
[268] U Flick, E von Kardorff & I Steinke *A Companion to Qualitative Research (2004)* 5.
[268] *Ibid.*
[269] *Ibid.*

Qualitative research is based on everyday events and/or the everyday knowledge of those under that are being researched.[270]

> "Action processes for instance, the development of advisory conversations are situated in their everyday context. Despite the growing importance of visual data sources such as photos or films, qualitative research is predominantly a text-based discipline. It produces data in the form of texts, for example, transcribed interviews or ethnographic fieldwork notes and concentrates, in the majority of its (hermeneutic) interpretative procedures, on the textual medium as a basis for its work.[271] In its objectives qualitative research is still a discipline of discovery, which is why concepts from epistemology – such as abduction enjoy growing attention. The discovery of new phenomena in its data is frequently linked, in qualitative research, to an overall aim of development."[272]

5.1.2 Relationship with Quantitative standardized Research

Qualitative and quantitative-standardized research have developed in parallel as two independent spheres of empirical social research. But in instances where research questions correspond both qualitative and quantitative research may also be used in combination.[273] However, it must be mentioned that they also differ from each other on crucial points. For example, differences between the two research approaches are seen in the forms of experience that are considered to be subject to methodical verification and, consequently, admissible as acceptable experience. This impinges in a critical ways on the role of the researcher and on the degree of procedural standardization.[274]

The most important aspect of quantitative research is more on the observer's independence of the object of research. Whiles qualitative research depend on the investigator's (methodically controlled) subjective perception as one component of the evidence.[275] Quantitative research

[270] U Flick, E von Kardorff & I Steinke *A Companion to Qualitative Research (2004)* 5.
[271] *Ibid.*
[272] *Ibid.*
[273] U Flick, E von Kardorff & I Steinke *A Companion to Qualitative Research (2004)* 9.
[274] *Ibid.*
[275] *Ibid.*

relies, for its comparative statistical evaluation, on a high degree of standardization in its information collection. This as a result lead to a situation where in a questionnaire for instance, the ordering of questions and the possible responses are strictly prescribed in advance, and where ideally the conditions under which the questions are answered should be held constant for all participants in the research. Qualitative interviews are more flexible in this respect, and may be modified more clearly to the course of events in individual cases.[276]

Qualitative research also recommended in cases where there is an interest in resolving a field exploration that has not been fully researched.[277] By using such naturalistic methods as participant observation, open interviews or diaries, the first set of data may be obtained to allow the formulation of hypotheses for subsequent standardized and representative data collection.

5.2 PROBLEM STATEMENT

The fairness and reasonableness of the balance of probability as a standard of proof in misconduct seems to have attracted divergence of views in both academic and legal fraternity. At the center of these views, is whether section 188 and the LRA (which regulates dismissals for misconduct), has contributed towards the achievement of the socio-economic justice by making sure that dismissals for misconduct as an outcome of a disciplinary process is consistent with the principles of fairness. The study was to assist in establishing the following:

(d) Whether the balance of probabilities as the onus of proof in disciplinary hearings is in compliance with the constitution and the LRA?

(e) Whether there is a need to review the Regulatory Framework governing disciplinary hearing in misconduct cases. This may include using the CCMA or a similar Forums as forums of first instance in all dismissal cases. Alternatively, provide accredited Chairpersons as presiding officers in all disciplinary cases?

(f) What would be the possible legal implication to both employers and employees if the standard of proof is changed to a standard of proof beyond reasonable doubt as applied in criminal matters[278]?

[276] *Ibid.*
[277] *Ibid.*
[278] See para 5.1.

5.3 OBJECTIVES OF THE STUDY

The research formulated the following objectives to specify the nature of, and provide focus to the study:

(c) To establish whether the balance of probabilities as a standard of proof in disciplinary cases relating to misconduct, prejudice employees as in most cases allegations of wrongdoing are not always fully interrogated and tested similar to the beyond reasonable doubt as in criminal cases.

(d) To establish whether there is a need to review the Regulatory Framework governing disciplinary hearing in misconduct cases.

The researcher also formulated objectives of each specific dimension identified for the study:

- **Understanding of labour laws:** The objective is to establish the levels of understanding of relevant labour laws by presiding offers in dealing with complexities of internal disciplinary hearings.

- **Understanding of organisation or company's disciplinary code:** The objective is to establish whether companies had disciplinary codes to guide employees' conduct and are applied consistently in disciplinary hearings.

- **Technical ability to preside over disciplinary hearings:** The objective is to establish whether the presiding officers have the technical know-how to navigate over complexities of internal disciplinary hearings.

- **Level of independence of presiding officers in companies':** The objective is to establish whether decisions of Presiding Offers are legally correct and independent from companies' influence.

5.4 SAMPLING, TECHNIQUES AND DESCRIPTION OF THE SAMPLE

Collecting data from participants is always a challenge experienced from both logistics and costs. Therefore, most researchers would find it convenient to collect data from a sample group instead of the whole population.[279] For the purpose of this study, the researcher identified three production companies in Durban, which constituted twelve (70%) of participants and ten (30%) of participants in one Provincial Department one State Owned Enterprise in Pietermaritzburg.

[279] 'Data Collection' available at *http/www.Michgan.gov/Mded*, accessed on 11 May 2019.

Two third of participants participated through semi-structured interviews, while ten one third participated through Focus Groups.

In qualitative research methods the sample size used is often smaller than that used in quantitative research methods. The reason for that is because qualitative research methods are often concerned with garnering an in-depth understanding of a phenomenon, which are often centered on the how and why of a particular issue, process, situation, subculture, scene or set of social interactions.[280] In depth-interview work is not as concerned with making generalizations to a larger population of interest and does not tend to rely on hypothesis testing but rather is more inductive and emergent in its process. As such, the aim of grounded theory and in-depth interviews is to create 'categories from the data and then to analyse relationships between categories' while attending to how the 'lived experience' of research participants can be understood.[281] From the research scholars, there are a number debates on what sample size is the right size. Most scholars argued that the concept of saturation is the most important factor to think about when considering over sample size decisions in qualitative research.[282] Saturationis defined by many as the point at which the data collection process no longer offers any new or relevant data. Saying it differently, the conceptual categories in a research project can be considered saturated when gathering fresh data no longer provide new theoretical insights, nor reveals new properties of your core theoretical categories.[283] With that estimating the number of participants will always be difficult to determine and as such saturation in a study depends on a number of aspects, including the quality of data, the scope of the study, the nature of the topic, the amount of useful information obtained from each participant, the number of interviews per participant, the use of shadowed data, and the qualitative method and study design used.[284]

The research indicate that it is very rare for the qualitative researchers to justify the sample sizes of qualitative interviews. What further complicate matters, leading qualitative research methodologists provide few concrete guidelines for estimating sample size.[285] Yet, like many disciplines, scant attention is paid to estimating sample size for qualitative interviews. In part,

[280] SL Dworkin 'Sample Size Policy for Qualitative Studies Using In- Depth Interviews' (2012) *Arch Sex Behav* 1319.
[281] *Ibid.*
[282] *Ibid*
[283] *Ibid.*
[284] Part 2
[285] S.J Gentles et al 'Sample in qualitative research: Insight from an overview of the methods literature' (2015) 1772.

this may be due to the fact that qualitative research emerges from a paradigm of emergent design with a hesitation to estimate sample size at the often fluid and undefined initial stages of research.[286] While some scholars in qualitative research do not express a view on the topic of how many interviews are adequate, there is however, inconsistences in what is suggested as a minimum.[287] An extremely large number of articles, book chapters, and books recommend guidance and suggest anywhere from 5 to 50 participants as adequate.[288]

5.4.1 Description of the Sample

The sample may be differentiated on the basis of biographical data (work experience, nature of post, qualifications and trade union membership) ***(Table 5)***.

Table 5

Composition of Sample

Variable	Frequency	%
Sex		
Female	14	63.6
Male	8	36.4
Total	22	100.00
Race		
Black	12	54.5
Coloured	3	13.6
Indian	5	22.7
White	2	9.1
Total	22	100.0
Age		
20-29	2	9.1
30-39	8	36.4
50-59	10	45.4

[286] *Idem.*
[287] Ibid
[288] SL Dworkin 'Sample Size Policy for Qualitative Studies Using In- Depth Interviews' (2012) *Arch Sex Behav* 1319.

Over 60	1	4.4
Total	1	100.0
Length of Work		
Less than 5 years	1	4.5
6-10	8	36.4
16-20	5	22.7
21-25	2	9.1
Over 30	1	4.5
Total	22	100.0
Nature of Post		
Permanent	19	86.4
Temporary	2	9.1
Total	22	100.0
Qualifications		
National Diploma	5	22.7
B.Tech	4	18.2
M.Tech	2	9.1
B. Degree	3	13.6
B. Degree (Hons)	7	31.8
Masters Degree	1	4.4
Total	22	100.0
Category of Employment		
Top Management	1	4.5
Middle Management	17	77.3
Professional	4	18.2
Membership		
Trade Union	16	72.7
Employers Association	1	4.5
Other	3	13.6
Total	2	9.1

According to Table 5, there are presently more females than males from the sample selected. Out of twenty-two respondents who participated in the research 63.6% are males and 36.4 are females. Furthermore, most participants, 45.4% were between the ages of 50-59. Approximately 45% are younger than 40 years. In addition, there are presently many Blacks than any other race group from the participants selected. Of the twenty participants, twelve (54.5%) were Black, followed by Indians, five (22.7%)

Table 5 also indicate that eight (36.4%) of the participants had between 6-10 years of length of work and only two (9.1%) had between 21-25 length of work. In addition, of the twenty respondents, nineteen (86.4%) hold permanent posts while two (9.1%) hold temporary posts. Table 5 also reflected that seven (31.8%) of the respondents possesses a B.Degree (Hons), while five (22.7%) hold national Diploma. In addition, of the twenty-two respondents, seventeen (77.3%) were in middle-management and represented the majority of respondents and only one (4.5%) were in top management. The professional category constituted four (18.2%).

Finally, Table 5 indicates that sixteen (72.7%) were members of Trade Unions and only one (4.5% belonged to Professional formations.

5.4.2 Data Collection

In the light of the research problem and the particular population in question, the research collected information through various research methods.

5.4.3 Interviews

As a data collection instrument, two third of participants were personally interviewed (Appendix C). All interviews were personally conducted and semi-structured interviews with open-ended questions. This was important to do in light of the sensitive nature of the topic and the respondents coming from divergent background. There are however, advantages and disadvantages attached to personal interviews like other data collection techniques. Welman and Kruger (2001:159)[289] highlight the advantages as high response rate and control over responding. But the disadvantages being Cost and ease of application and anonymity.

In this study, two third of presiding officers from different companies were personally interviewed to establish the extent to which they conduct disciplinary hearings. The researcher

[289] Welman C & F Kruger *Research Methodology for the Business and Administrative Science*s 2 ed (2002) 159.

also interviewed five Union representatives from the same companies and Provincial Government. The purpose was to validate some of the responses received from the presiding officers.

5.4.4 Process followed

All personal interviews were arranged and conducted on a one-on-one basis through virtual system called ZOOM for some and physically visited their workplace to have interviews conducted in their offices. Only the English language was used as a medium of communication. The researcher did not tape record respondents as they wanted the interviews to be confidential. Information gathered during personal interview were hand written.

Focus groups were also arranged and conducted through virtual system called ZOOM. All participants were comfortable to have such discussion through virtual system as it did not require them to travel and converge in one place.

5.4.5 Reliability and Validity

The researcher described the instrument used to collect data as having been reliable and valid. Based on the correlation between information gathered through personal interviews and information gathering through Focus Group there is evidence that reliability and validity exists. Furthermore, interview questions and focus group topics were based on prior reading of the literature and interaction with informed others, which enhanced the validity of the questions/items included in the interview process.

5.4.6 Administration

The researcher personally conducted personal interviews and facilitated Focus Group discussion.

5.4.7 Data Analysis

An undertaken was made to ensure utmost confidentiality. In other words, the names of the organisations will not be named. The information that was collected was interpreted using descriptive and deductive analysis. *5.4.12 Descriptive Analysis*

The researcher used descriptive statistics to summarise data and to interpret the result. According to Welma and Kruger (2001)[290], descriptive statistics is concerned with the

[290] Welman C & F Kruger *Research Methodology for the Business and Administrative Science*s 2 ed (2002) 171.

descriptive and/or summarisation of the data obtained for a group of individual unites of analysis and include:

5.4.8 Deductive Analysis

Deductive analysis, requires a designed or approach. As such, researchers will create various categories well on time for analysis. Then, they will map connections in the data to those specific categories. Deductive analyses allow the researcher to point to key themes essential to his or her research. [291]

5.5 CONCLUSION

Chapter 5 focuses on the critical methods and procedure that the researcher had to consider in the planning of the research. Planning incorporated the research instrument employed (in this case, personal interviews and Focus Group), validity and reliability of the process and how the data was processed and analysed. The next chapter, Chapter 6, focuses on the presentation of the results.

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[291] 'A method of analysing interview transcripts in qualitative research' available at *https://www.rev.com/blog/analyze-interview-transcripts-in-qualitative-research,* accessed on 15 December 2019

CHAPTER SIX
PRESENATION OF THE RESULTS

6. INTRODUCTION

The narrative information presented in this chapter arise from the data collected by means of semi-structured interviews and Focus Group by twenty-two presiding officers of internal Disciplinary Hearings in three Durban companies and one Provincial Government Department and one State Owned Enterprise in Pietermaritzburg. In addition, and for purposes of validating some of the information, five union representatives were also interviewed using semi-structured interviews. The information that was collected through semi-structured interviews and Focus Group was interpreted by means of Descriptive and Deductive Analysis. In addition, information was also collected at CCMA. An interview with relevant CCMA Official responsible for CCMA Data was also conducted. The below information was provided from the CCMA Data Base which has been kept since 1996.

6.1 CCMA: NOVEMBER 1996 TO DECEMBER 2018

The records obtained from the CCMA indicate that from 1996 to 2018, there are hundred and nine thousand and seven and hundred and thirty-eight (109 738) dismissal cases due to misconduct that were referred to CCMA for adjudication. Out of this number, fifty-seven and nine hundred and seventeen (57 917), which is more than fifty percent (50%) of cases were awarded in favour of employees who would have otherwise been dismissed had the employers' decisions on dismissals were final and not referable to independent external structures such as CCMA and Bargaining Forums. The table below provide the number CCMA records between 1996 to 2018.

Table 6: CCMA Awards from November 1996 to December 2018

NOVEMBER 1996 TO DECEMBER 2018	
AWARDS IN FAVOUR	**COUNT**
Employee	57917
Employer	51296
Other	525

TOTAL	**109738**

The table below are CCMA awards on misconduct cases on year by year: 2003 – 2006.

Table 7: CCMA Awards on Misconduct cases on year by year 2003 - 2006

JAN TO DEC 2003	AWARDS	JAN TO DEC 2004	AWARDS	JAN TO DEC 2005	AWARDS	JAN TO DEC 2006	AWARDS	JAN TO DEC 2007	AWARDS
Employee	47	Employee	432	Employee	999	Employee	2404	Employee	3549
Employer	7	Employer	110	Employer	145	Employer	1579	Employer	3531
Other	1	Other	6	Other	4	Other	9	Other	44
TOTAL	55	TOTAL	548	TOTAL	1148	TOTAL	3992	TOTAL	7124

The table above indicates that there were twelve thousand, eight hundred and sixty seven (12 867) misconduct cases referred to CCMA between 2003 and 2006, about seven thousand and four hundred and thirty one (7 431) cases which are the majority of all the cases adjudicated, were awarded in favour of employees.

The table below are CCMA awards on misconduct cases on year by year: 2008 – 2012.

Table 8: CCMA Awards on Misconduct Cases on year by year: 2008 – 2012.

JAN TO DEC 2008	AWARDS	JAN TO DEC 2009	AWARDS	JAN TO DEC 2010	AWARDS	JAN TO DEC 2011	AWARDS	JAN TO DEC 2012	AWARDS
Employee	4250	Employee	4750	Employee	6066	Employee	5486	Employee	4625
Employer	3861	Employer	4821	Employer	5368	Employer	5159	Employer	4419
Other	19	Other	75	Other	55	Other	84	Other	77
TOTAL	8130	TOTAL	9646	TOTAL	11489	TOTAL	10729	TOTAL	9121

The table above indicate that there were forty nine thousand, one hundred and fifteen (49 115), misconduct cases referred to CCMA between 2008 and 2012, about twenty five thousand and

one hundred and seventy seven (25 177) cases which are the majority of all cases adjudicated, were awarded in favour of employees.

The table below are CCMA awards on misconduct cases on year by year: 2013 – 2014.

Table 9: CCMA Awards on Misconduct cases on year by year: 2013 – 2014

JAN TO DEC 2013	AWARDS	JAN TO DEC 2014	AWARDS	JAN TO DEC 2015	AWARDS	JAN TO DEC 2016	AWARDS	JAN TO DEC 2017	AWARDS	JAN TO DEC 2019	AWARDS
Employee	4093	Employee	4033	Employee	4324	Employee	4243	Employee	4444	Employee	4158
Employer	3521	Employer	3585	Employer	3495	Employer	3849	Employer	3993	Employer	3838
Other	65	Other	43	Other	8	Other	27	Other	4	Other	4
TOTAL	7679	TOTAL	7661	TOTAL	7827	TOTAL	8119	TOTAL	8441	TOTAL	8000

The table above indicate that there were forty seven thousand and seven hundred and twenty seven (47 727) misconduct cases referred to CCMA between 2013 and 2019, about twenty five thousand and two hundred and ninety five (25 295) cases which are the majority of all cases adjudicated, were awarded in favour of employees.

The table below highlight pre-dismissal cases refereed to CCMA for adjudication. This table covers the period between 2002 to 2018. In comparison, the figures referred to CCMA for arbitration due to misconduct are more than those that were refereed for pre-dismissal cases during the period under review.

There are nine hundred and sixty five (965) pre-dismissal cases adjudicated during the period under review.

Table 10: Pre-Dismissal Awards on Misconduct cases: 2002 - 2018

	JAN TO DEC 2002	JANA TO DEC 2003	JAN TO DEC 2004	JANA TO DEC 2005	JANA TO DEC 2006	JANA TO DEC 2007	JANA TO DEC 2008	2009	2010	2011

Pre-Dismissal Arbitration	8	82	90	64	73	54	48	98	113	142
Inquiry by Arbitration	0	0	0	0	0	0	0	0	0	0
TOTAL	8	82	90	64	73	54	48	98	113	142
	JAN TO DEC 2012	JANA TO DEC 2013	JAN TO DEC 2014	JANA TO DEC 2015	JANA TO DEC 2016	JANA TO DEC 2017	JANA TO DEC 2018			
Pre-Dismissal Arbitration	97	1	90	5	0	0	0			
Inquiry by Arbitration	0	100	1	110	108	129	174			
TOTAL	97	101	91	115	108	129	174			

The tables below are pre- dismissal Awards on misconduct cases on year by year: 2003 – 2018. In comparison, out of one hundred and twenty seven (127) Awards, ninety three (93) which is the majority of Awards were in favour of employers.

Table 11: Pre-Dismissal Awards on Misconduct cases: 2003 - 2010

JAN TO DEC 2003		2004	2005	2006	2007	2008	2009	2010
Employee	0	2	3	5	3	3	8	8
Employer	3	1	1	7	18	10	25	28
Other	0	0					1	1
TOTAL	3	3	4	12	21	13	34	37

Table 12: Pre-Dismissal Awards on Misconduct cases: 2012 – 2018

JAN TO DEC 2011		2012	2013	2014	2015	2016	2017	2018
Employee	15	9	3	8	3	8	4	7
Employer	21	17	24	14	16	12	23	26
Other	0	0	0	0	0	1	2	0
TOTAL	36	26	27	22	19	21	29	33

The inference one could draw from the above and is supported by the research is that the figures are a reflection of either the inconstant application of the standard of proof by presiding officers which led to unprecedented figures of unfair dismissals or the unreliability of the current legal regulatory framework systems in dealing with internal misconduct cases. Clearly, given the number of cases overturned by the CCMA (which is more than fifty percent (50%) over a period of sixteen (16) years) in favour of employees, the numbers do not provide confidence on the current legal regulatory framework to provide justice and fairness to employees who are charged for misconduct. In comparison with cases referred by employees to CCMA, there are few cases that were dealt with by the CCMA through pre-dismissal process. In terms of the figures of all those cases that were adjudicated through pre-dismissal process between 2003 to 2018, ninety three (93) out of hundred and twenty seven (127) were in favour of employers. This is not to say that all Pre-Dismissal cases are necessary fair and just. Clearly, with evidence provided, there is a measure of independence and fairness as envisaged by the constitution of South Africa and the LRA. If more cases were dealt with through pre-dismissal provision, South Africa would have witness less cases of unfair dismissal.

6.2 DESCRIPTIVE STATISTICS

The researcher's motivation to undertake this study was based on the assumption that the balance of probability as a standard of proof in internal disciplinary hearings requires scrutiny given the number of cases the CCMA overturn in favor of employees. Alternatively, the review of the legal Regulatory Framework governing internal disciplinary hearing, in particular on matters where dismissal is the possible outcome. These assertion were addressed through the following three dimensions:

- Understanding of Labour Law by the presiding officers.
- Technical ability to preside over disciplinary hearings.
- Level of independence of presiding officers from companies they work for.

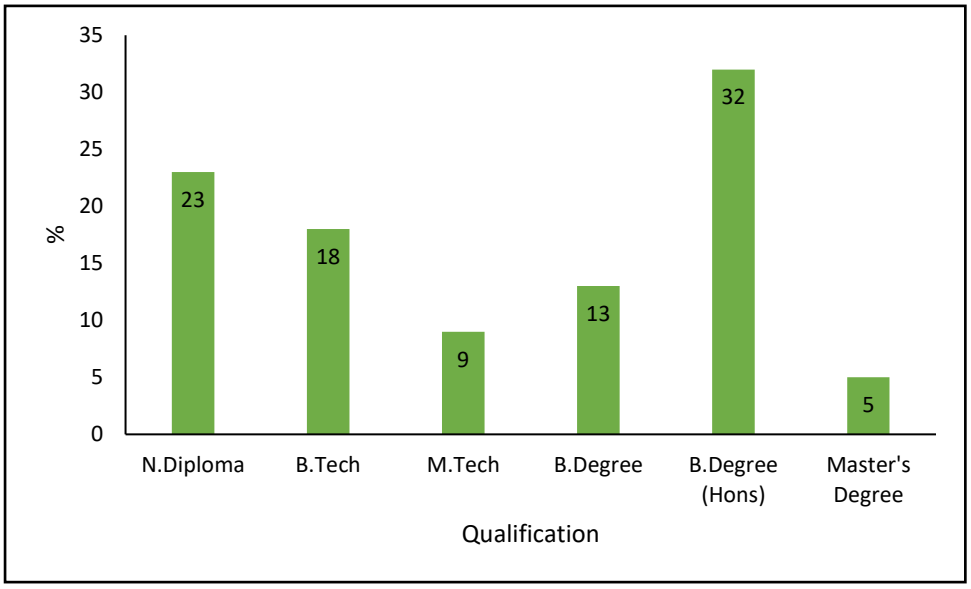
It has to be noted that all twenty two participants were all full time employees working for the companies and government institutions identified for this research. The majority of participants were more than 10 years of length of employment. The table below indicate their length of employment:

Table 13 : Length of employment

Duration (in years)	**%**
Less than 5	5
6-10	36
10-15	23
16-20	23
21-25	9
Over 30	4

To assess certain levels of competencies of participants, they were asked about the level of academic qualifications. The Researcher considered this aspect as one of the most critical barometers to establish in determining the ability of participants to understand and contextualize interconnected aspects of legal framework regulating internal disciplinary hearing processes.

Table:14 Participants highest level of Qualification



The table above indicate that all participants had post high school qualification with the majority having post graduate qualification. Of importance, none of the participants had legal qualification(s) or qualification relevant to the duties and the role of being a presiding officer in a disciplinary hearing. This was a concerning revelation particularly that the majority of participants never received training relevant to these duties.

These responses above were consistent with the fact that almost half of the participants indicated that they do not know and understand labour laws post 1994. This figure excludes almost one fourth of the participants who were not even sure whether they were ever trained by their companies or organsiations to efficiently perform the presiding officer's duties. About half of the participants were never trained either by their current or previous employers to perform the presiding officers duties. This was more evident during the discussion from the Focus Group as most of the participants were trained on various areas relevant to their substantive positions and HR Policies but not on the presiding officers functions specifically. Even where participants were trained as presiding officers such training was not frequent. Where such trainings was conducted the frequency was not more than once on average. It was only one participant in a Focus Group who indicated that in his Company all presiding officers and Initiators were trained almost every two years. Both presiding officers and Initiators were company employees and all in management positions. It was not clear from the discussion

where training was not provided whether such was due to lack of funding from the Companies or just something that is less prioritised. The majority of the participants in both Focus Group and semi-structured interviews confirmed that they have issued more dismissal verdicts than written warnings as presiding officers. They confirmed that the majority of the cases where they were presiding over were referred to CCMA. Most of those cases where a dismissal was a sanction and referred to CCMA for remedy such sanctions were overturned. This is despite the fact that once these matters are at CCMA their companies will be represented by Legal or Human Resources representatives. There were few exceptions as some have indicated that their decisions to dismiss accused employees were upheld by the CCMA.

Without the basic understanding of labour law, company's disciplinary code and technical ability to handle disciplinary hearing, would inevitably lead to findings and sanctions that a competent presiding officer would not have made. The constitution and the LRA with specific reference to Schedule 8: Code of Good Practice, have specific provisions that have to be complied with by the presiding officers. Without basic understanding of labour law and company disciplinary code, it becomes difficult if not impossible for any person given the responsibility to preside over a disciplinary matter to understand and contextualize interconnected aspects of legal framework governing disciplinary hearing matters and technical competencies required. Some of these technical competencies requires certain procedures to be followed in chairing a disciplinary hearing and could only be developed through ongoing trainings relevant to the role. These procedures could be costly as they could taint the procedural fairness of the hearing if not fully complied with. It is therefore essential that anyone tasked with chairing a disciplinary hearing must ensure that the hearing is conducted in an equitable manner. Despite this glaring shortcomings, the majority of the participants were quite confident that they understand what was required of them as presiding officers.

The Focus Group also discussed this aspect of academic and technical competencies required to chair a disciplinary hearing. The general view from the participants was that there was a need for a minimal requirement to be met by all those employees assigned to preside over disciplinary hearings. The reasons advanced by the group was largely on the legal technicalities and risk associated with decisions coming out of the disciplinary processes. The overwhelming view from the Focus Group was that the chairing of a disciplinary hearing required certain degree of legal and technical know-how which could only be obtained through an academic qualification or relevant ongoing training.

Therefore, it should not come as a surprise as to why almost half of the respondents did not have basic understanding of the difference between Misconduct and Gross Misconduct, the distinction between the Balance of Probability and the Beyond Reasonable Doubt as the onus of proof.

Just about half of the participants knew the distinction between Gross Misconduct and normal misconduct, the Balance of Probability and the Beyond Reasonable Doubt. During the Focus Group discussion, attempts were made by the majority of participants to define the four concepts and make a distinction. The Gross Misconduct and normal misconduct were fairly defined with clear distinction. However, it appeared to be a challenged with participants to have a similar understanding of a difference between the Balance of Probability and the Beyond Reasonable Doubt as the onus of proof. It was only two participants who attempted to define the concepts with serious limitations of understanding. About half of the participants were unsure what the difference was whiles the other 30% of participants attempted to explain the difference. It became evidence that even though the majority of participants have heard about both these legal concepts particularly the beyond reasonable doubt as the onus of proof but the same group could not define it or understand the difference between the two concepts. If anything, there seems to be a conflation of understanding of the two onus of proof. When participants asked about the standard of proof they used (between the two standards) to determine the verdict of the accused employees, it became evident that even though the majority of participants used the balance of probabilities as an onus of proof, but most of them were not aware that they were using the required standard. It became clear from the Focus Group that there is some measure or standard used by the participants without knowing whether such a standard of proof being applied is the legally required standard.

Clearly, if the in-house presiding officers would not understand the legal principles which are central to the outcome of a disciplinary hearing, the procedural and sustentative fairness of the process becomes compromised.

Following the general view from the semi-structured interviews and focus group discussions regarding the importance of legal and technical know-how, one can draw an inference on the correlation between lack of understanding of labour laws and lack of training for presiding officers with poor decision making which most of the time lead to unfair dismissals.

It was however surprising that the majority of the participants both in a Focus Group and semi-structured interviews claim to have full understanding of how to chair a disciplinary hearing despite limited experience to do so. Most of the participants never had prior experience in presiding over disciplinary hearings before employed by their current employers. The majority of participants have been employed prior to their current employers. It was only two of the participants who have had such experience prior to their current employers. Consistent with this information, it was evident from the participants that the principle of progressive discipline was not generally applied in line with the letter and the spirit of the LRA which promote progressive discipline over dismissal. As indicated in previous paragraphs, most participants indicated that they have recommended for more dismissals in cases where they were presiding over. This explains why most of these cases once referred to CCMA they get overturned.

Without solid legal background and lack of basic training on HR company policies and no prior-experience of presiding over Disciplinary Hearings exposes accused employees to injustice. The independence of the presiding officer is paramount on the fairness of the disciplinary hearing process. The majority if not all of the participants were employees and permanently employed by the companies and Organisations sampled for this study. All participants were in agreement that if presiding officers are employed by the same company their impartiality or independence raises serious questions and negative perceptions on the fairness and impartiality of the presiding officers. About half of the participants indicated that as presiding officers, they were called to account by their employers for their decisions taken at the Disciplinary Hearings as this in most cases this is part of their performance indicators. It has to be highlighted though that some participants were never called to account for their decision taken at the hearings. However, they will from time to time be asked to explain how they took such decisions especially at management meetings. It is for that reason why most participants would put more emphasis on the employers' submission during the actual hearings before making a decision.

About all participants as presiding officers do allow accused employees to lead evidence. Clearly that count for nothing if their weighing of evidence was biased towards the employer. As a matter of facts during the Focus Group discussion the general view was that the accused must prove their innocent. This is also not consistent with the maxim; *Affirmati non neganti incumbit probatio.*[292] This in essence suggested that a sizable number of the presiding officers

[292] Principles of natural justice; he who alleges must prove.

did not believe in weighing the evidence equally from both the parties. This prejudice the employees during disciplinary hearings. The weighting of evidence by the presiding officers was juxtaposed with their understanding of innocent until proven guilty principle. It was encouraging to note that the majority of participants fully understood the principle.

Consistent with the above, about half of the participants disagreed with the statement that when employees are accused of misconduct they are always guilty. Whiles about one third agreed with the statement. presiding officers should not have pre-conceived ideas on matters before the disciplinary hearings. They have to look at the facts before them and decide. The fact that thirty percent of the respondents agreed with the statement borders on violation of principle of fairness and objectivity. This brings to question the independence of presiding officers when adjudicating over matters of misconduct. This is consistent with the fact that the majority of presiding officers are employed on a permanent basis by the very same employers they are presiding on their behalf. It is therefore logical to assume that the outcome of any disciplinary hearings would be in line with the desired outcome of the employer. About two thirds of respondents agreed that they consult with the employer before deciding on the matter. Only about one fourth disagreed with the statement, whiles only about a quarter strongly disagreed.

About half of participants agreed with the statement that the fact that they are permanently employed does not affect their judgements when deciding on matters. Whiles, about one third of participants disagreed with the statement.

There are one hundred and nine thousand, seven hundred and thirty-eight (109 738) of cases referred to CCMA from 1996 to 2019. This is a clear demonstration that the majority of employees who are charged for misconduct have no faith either to the ability of preceding officers to competently handle their cases or to the system internal mechanism to ensure fairness and social justice.

6.3 CONCLUSION

In this chapter, information was collected by means of semi-structured interviews and Focus Groups. In addition, the desktop analysis was used where the statistics data was analysed. The responses were presented in a narrative format. It became evident from the information obtained that to a greater extent there are serious challenges on how internal disciplinary hearings are managed from legal point of view. Without solid legal background and lack of basic training on HR company policies and no prior-experience of presiding over disciplinary

hearing expose accused employees to injustice. This by extension affect the fairness of internal hearing. In the following chapter the findings of the study will be compared and contrasted with the findings of the researchers in the field.

CHAPTER SEVEN
DISCUSSION OF RESULTS

7. INTRODUCTION

This chapter discusses the key findings of the study in terms of the fairness and reasonableness of the balance of probability as a standard of proof in misconduct cases or whether the existing legal framework regulating disciplinary hearings need an overhaul. The discussion encompasses a comparison of the results obtained from semi-structured interviews, Focus Group with desktop information. This enabled the research to emphasize the validity of the information and possible trends and occurrences.

7.1. DISCUSSION OF RESULTS

Overall there is correlation between results obtained from the semi-structured interviews and Focus group discussion with the records obtained from the CCMA. The high number of dismissal cases referred to CCMA for adjudication since 1996 seemed consistent with the fact that during semi-structured interviews and focus group discussions it became evident from the participants who are presiding officers that very little emphasis was placed on progressive discipline. In fact most of them had more dismissal outcomes than written or final warnings. This is a clear demonstration of non- compliance with the LRA which advocate for progressive discipline in the workplace. As a result most dismissed employees refer their cases to CCMA for external reviews.

The CCMA and the Courts are very strict when they have observed that progressive discipline was not complied with. In a case of *South African Rugby Union v Watson and other*,[293] the presiding Judge with reference to appellant's own disciplinary code and procedure, he held the view that a process of progressive discipline, should have been applied in order try and correct first respondent's conduct, particularly to determine whether the first respondent could respond in a positive way to such process. Based on this evidence, it was not "reasonable for the arbitrator to conclude that Watson was incapable of changing when he had not been afforded an opportunity to do so." Hence dismissal was not the appropriate sanction. The learned Judge found that third respondent had conflated the issue of incompatibility with that of ordinary misconduct and accordingly, the sanction imposed was not one that a reasonable decision-maker could have made in the light of the evidence placed before him.

[293] *South African Rugby Union v Watson and others,* [2019] 7 BLLR 638 (LAC).

The CCMA records indicate that one hundred and nine thousand, seven hundred thirty-eight (109 738) dismissal cases due to misconduct were referred for adjudication from 1996 to 2018. About fifty-seven thousand and nine hundred and seventeen (57 917), which is more than 50% of cases were awarded in favor of the employees who were unfairly dismissed. Hence, it is not surprising that more than 50% cases awarded in favor of employees. There is a clear correlation between CCMA Awards with the fact that most of the participants in the study lack understanding of labour law, little or no experience of participants in presiding over internal disciplinary hearings or lack of presiding officers' independence. Most of the participants never had prior experience in presiding over disciplinary hearings before employed by their current employers. This is further compounded by little or no on-going training of presiding officers by their employers. Importantly most participants had academic qualifications that are not relevant to their role as presiding offers.

An inference could be drawn from the above and is supported by evidence that without understanding of labour law very little if any application of the onus of proof which is the balance of probabilities will be consistent with the spirit and the latter of the LRA and the constitution. The participants had difficulty in making a distinction between the beyond reasonable doubt and the balance of probabilities as onus of proof applied in criminal and civil matters respectively. If such distinction is not fully understood by the presiding officers, the outcome is bound not to be fair and just. Whiles the majority of participants claim to know how the chair a hearing, but presiding over a hearing requires technical ability to assess and make certain determination based on the evidence presented and impartiality.

Ordinarily, presiding officers in internal disciplinary hearing must have a basic understanding of labour law. This does not mean they must have legal qualification to discharge their presiding officers' duties. Rather this basic understanding could be acquired through relevant training. This would allow them to apply relevant sections of the law in handling the actual hearing proceedings and in deciding the outcome. What is most important is that the presiding officer is someone who is impartial, properly skilled in chairing hearings and fully knowledgeable in the discipline of law. Without this basic understand it is inevitable that both the process and the outcome would be riddled with errors which would render the entire process unfair and largely prejudicial to the accused employees.

The technical knowhow was assessed through a number of different questions and statements. Even though the legal background to understand legal matters during a disciplinary hearing

may not be the requirements, but exposure to relevant literature would allow the presiding officers to have basic understanding of what the Balance of Probability as a standard of proof means and also be able to differentiate between the balance of probability as a standard of proof and the beyond reasonable test. Most importantly, they would know how to handle basic procedural aspects of disciplinary hearing and be able to distinction between Gross Misconduct and Normal Misconduct.

This finding is very much consistent with the fact the majority of respondents do not have the legal background to appreciate the technical intricacies of handling disciplinary hearings and making correct judgements. presiding officers must have the technical know-how of how to adjudicate over a disciplinary hearing case of misconduct. This requires the ability to analyse evidence presented before them. Where the presiding officer fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Again where presiding officers fail to follow proper process they may produce an unreasonable outcome. Presiding officers must be able analysis material evidence in totality using required analytical tools prescribed by the LRA. The general view based on the evidence gathered is that the entire regime on employee discipline in South Africa is not considered by most employers as the most critical aspect in the employer and employee relationship. The fact that some companies would deploy staff with no technical know-how to handle matters of staff disciple points to the direction that companies lack appreciation of the complexities in presiding over employee's disciplinary hearings. There seems to be a belief that chairing a hearing is similar to chairing an ordinary meeting.

Even with intense training, fully understanding of labour law and meeting required competencies, the CCMA commissioners still get some of their decisions overturned on review at the Labour Court and superior Courts. This suggest that even with CCMA commissioners, the application of the required test is not always correct. In some instances, even what would appear to be straightforward procedure would not be complied with. For instance, the rights of employees preferred by the CCMA guidelines are not observed by some Commissioners. As such, this disadvantage some employees who would have referred unfair dismissal cases at CCMA with a hope to obtain justice. CCMA Commissioners are charged with the responsibility to conduct arbitration in a manner that is consistent with the Law. They may adopt an adversarial or inquisitorial approach but are not allowed to intervene in a manner that seems to create impressions of partiality in support of party to the dispute. For instance, Commissioners are not allowed to help any party to the dispute to the disadvantage of the other,

expressing doubt about the credibility and reliability of a witness. Most importantly, they have the duty to assist unrepresented litigants. In the case of *Nkomati Joint Venture v Commissioner for Conciliation, Mediation and Arbitration and Others*[294] the employer was challenging the fact that failure by the Commissioner to provide support and to inform it that it was required to re-open its case and lead evidence in rebuttal of employee's new version was a gross irregularity. The purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues. An arbitrator may commit a gross irregularity, fail to fairly try the issues or render an unreasonable award when under a duty to lend a helping hand and then fails to do so. The Appeal court found that the commissioner ought to have intervened when employee recanted on his plea of guilty and directed employer to re-open its case. Failure to lend a helping handed at that stage, Court found, amounted to a gross irregularity in the conduct of the arbitration proceedings, which resulted in an unreasonable outcome. The Court remitted the matter to the CCMA for a determination *de novo* before a commissioner other than the second respondent**.** The question that one should ask is how frequent does this happen and what control measures does the CCMA has in place to ensure that the rights of employees are protected. Clearly, presiding over a disciplinary hearing should not be taken for granted as something that can easily be done without requisite competencies. In light of the case of *Nkomati Joint Venture V Commissioner for Conciliation, Mediation and Arbitration and Others*, the question should be asked as to how many of the presiding officer would know the helping hand principle to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues at the hearing.

On the contrary, in some cases there is evidence of presiding officers interfering with the running of the proceedings. In the case of *Labuschagne v Anncron Clinic,* [295] the employee who was employed as an administrative manager at the clinic was dismissed for putting laxative in a cup of yoghurt that had been eaten by the hospital manager before he went on an air trip. During investigation, the accused employee admitted putting the laxative in the yoghurt but claimed that it had not been intended for the hospital manager. The arbitrator found that chairperson of the internal disciplinary hearing had continually interrupted the accused employee while she was trying to question the complainant's witnesses during the disciplinary hearing.

[294] *Nkomati Joint Venture v Commissioner For Conciliation, Mediation and Arbitration and Others* 118 (JA 155/2017) [2018] ZALAC 53; (2019) 40 ILJ 819 (LAC) (12 December 2018).
[295] *Labuschagne v Anncron Clinic* (2005, 1 BALR 40 CCMA).

On the basis of the finding, the arbitrator considered such conduct by the chairperson as unfair and ordered the employer to pay the employee six months' remuneration in compensation. Even though the presiding officer is mandated to be in charge of the disciplinary hearing, he or she does not have the absolute mandate to do anything he/she likes. In some instance, and to ensure that the disciplinary hearing comply with the law, some employers would hire the services of the labour law expert to chair its more serious cases that could end up in dismissal and in a CCMA hearing.[296]

It must be said though that the LRA neither deals with the employee's right to cross-examination nor prescribes the extent to which the employee can digress from the point of the hearing. However, CCMA arbitrators and Labour Court judges all insist that employees are given the right to cross-examine the complainant's witnesses. This is because such cross-examination is the democratic right of anyone accused in any formal process.[297] In fact cross examination also allows the presiding officer to weigh evidence in order to make a rational decision. Weight of evidence is a degree of probability (both intrinsically and inferentially) which is attached to it by the tribunal which is attached to it by the tribunal of facts once it is established to be relevant and admissible in law.[298]

Besides, the constitution and the LRA with specific reference to Schedule 8: Code of Good Practice, have specific provisions that have to be complied with by the presiding officers. In the final analysis, the presiding officers becomes the custodians of the entire process by making sure that the process complies with schedule 8 provisions and at the very least with the company's disciplinary code.

Presiding officer in a disciplinary hearing major responsibility is to ensure that the hearing is conducted in an orderly manner which is free of unbecoming behaviour which may include but not limited to anger, swearing and other insulting behaviour or language. Most importantly, firstly the presiding officer must ensure that all the evidence presented during the hearing is properly recoded and considered. Secondly, he or she must make his or her findings finding whether the accused employee if guilty or not based on presented evidence. As previously state the employee will also have the opportunity to state mitigating factors and the employer to state opposing aggravating factors.

[296] 'Discipline and Dismissal' available at *https://www.labourguide.co.za,* accessed on 19 December 2018.
[297] *Ibid.*
[298] L-T Choo *A Evidence* 5 ed (2018).

Thirdly, that the presiding officer must make a recommendation regarding an appropriate sanction in line with the disciplinary code. In the event where the employee is not satisfied with the ruling he/she may submit a written notice of appeal within seven days, stating reasons on which the appeal is based.[299] It is important to note that not all disciplinary code would have appeal as the provision and this would not necessarily constitute prejudice against the employee as she or he would still be able to refer the matter either to the CCMA or the Bargaining Forum.

Clearly, if there is no understanding of the labour law relevant to the duties and function of presiding officers the outcome becomes questionable. This is further compounded by the fact that the legal framework does not make mandatory for employees appointed to preside over internal disciplinary hearings to meet certain minimum competency requirements in order to satisfy the basic standard of understanding of labour law and relevant procedures. There must be minimum core competencies to be met by all candidates before being appointed. Such core competencies must be knowledge of all relevant labour legislations, knowledge of company policies and knowledge of the CCMA policies and procedures. Like the CCMA, Commissioners are required to meet certain standard of knowledge such a CCMA policies and procedures, the LRA, BCEA, PFMA, Case management system and so on. With all those requirements that each CCMA Commissioners had to comply with, there are still cases that are badly handled with shocking decisions.

What complicate matters even worse is that there is very little training provide by companies to presiding officers on Human Resources policies and particularly company Disciplinary Codes are meant to create constancy in the application of company rules and regulations. By their nature, HR policies create fairness and predictability in companies and in particular among employees. The basis for any disciplinary charge(s) against any employee in a company must be the company's Disciplinary Code that sets the standards of conduct for all employees. This is largely because, the Company Code would define the required standard of conduct, Disciplinary Procedures in dealing with misconduct and possible sanctions. For the Disciplinary Code to comply with LRA, it will have to reassure employees to adhere to the appropriate standards of conduct required of them by providing for progressive and corrective action where there have been transgressions. On the basis of the above, the expectation is that all employees and in particular the presiding officers would be trained on HR policies and

[299] 'Disciplinary hearing: employers must follow these steps' available at *http://lwo.co.za,* accessed on 11 February 2019.

disciplinary code. It is difficult to understand how presiding officers without such training or induction would ensure fairness of disciplinary proceeding and outcome if the basic documents which are the foundation of any possible disciplinary charge(s) are not understood by them. The likelihood under such circumstances is that even employees who are alleged to have committed acts of misconduct would not know which part of the Code they may have violated. Clear, not all the rules will necessary be in a code. For instance, rules relating to OHSA may be unwritten but employees would still be required to comply with the law which must be adhered to. However, the expectation is that company rules that are considered to be substantive may have to be in writing through the code. Other rules and standards may come through the code but company circulars, notices, day-to-day instructions, custom and practice. The principle is that all rules must be relevance to the workplace.[300]

The LRA is quite explicit in that for the employer to press charges against the employee who is accused of having committed an offence, it has to ensure that the rules exist and the rule was understood by the employee who is alleged to have committed the misconduct and most importantly the rule was broken. If such rule does not exist and the rule could not possible be known by the employee who is charged for misconduct, such process has no basis in law.

Any person who is task to determine whether a dismissal for misconduct is fair, the Code of Good Practice prescribes that such person must first establish whether or not the employee broke the existing rule or standard which regulates conduct and whether such rue or standard is of relevance to the workplace. Secondly, if a rule or standard was broken, whether or not the rule or standard was relevant and valid; whether the employee was aware of, or should reasonably have been aware of the rule or standard; whether the rule or standard has been applied consistently, and whether the penalty was appropriate for the contravention of the rule or standard.[301]

It is therefore not surprising that in most cases the presiding officers would contradict the employer's own disciplinary code when deciding on the sanction. In a case of *Housea Mushi and EXXRO Coal (Pty) Ltd Grootegeluke Coal Mine*[302], an employee was dismissed for risking the life of the foreman and insubordination. During the hearing the employee showed remorse for acting in an incorrect manner. The matter was then refereed to CCMA for arbitration. At the CCMA, the Commissioner found that the dismissal was not appropriate sanction

[300] *https://www.ee.co.za*, accessed on 10 August 2019.
[301] *Ibid*
[302] Housea *Mushi v EXXARO Coal (Pty) Ltd Grootegeluk Coal* Mine (JA62/2018) [2019] ZALAC 44 2019.

considering the employer's disciplinary code which requires final warnings for acts of insubordination. The Commissioner awarded the employee's reinstatement.

The employer appealed the CCMA decision to Labour Court. The court found that where there is no evidence of misconduct of such serious nature that would make employment relationship intolerable, reinstatement with a final written warning was appropriate. The court also found that the arbitrator was not wrong on his decision. In fact, the court found that the arbitrator had applied himself to the facts presented to him as expected which included the fact that the dismissed employee had no past records of misconduct with the employer, the employee had been in the employ of the employer for a very long time but most importantly the employer's disciplinary code prescribe a final written warning for misconduct similar to the one committed. The Courts have on a number of occasions encouraged progressive discipline in the workplace and in this case the court held a view that the arbitrator's decision that the dismissal as a sanction was severe The court concluded that there was no reviewable wrongdoing on the part of the Commissioner and his decision was not one which a reasonable decision-maker could reach on the material before him.[303]

In this study, the ability of presiding officers to ensure fairness and proper application of the balance of probability as a standard of proof in misconduct cases was also evaluated based on biographical profiles in terms of length of service. The study reveals that the majority, thirty-six percent (36%) of respondents have between 6 to 10 years' length of employment. This is followed by twenty-three 23% of respondents with length of employment between 10 to 15 and 16 to 20 respectively. About five (5%) of respondents have less than five years' length of employment. Clearly, the figures indicate that majority of respondents have not much working experience to be given responsibilities of presiding over disciplinary hearings. The technical expertise and overall understanding of workplace dynamics becomes critical in dealing with such matters. It has to be said that even though a long length of service alone would not provide required expertise in dealing with disciplinary hearing matters, but it can go a long way in creating an understanding of what could possible may have happed in the matter. The longer the length of service the better. As such it would make sense for companies to identify and appoint presiding officers with long employment history as it could assist to the presiding officer's assessment and analysis of the facts.

[303] Housea *Mushi v EXXARO Coal (Pty) Ltd Grootegeluk Coal* Mine (JA62/2018) [2019] ZALAC 44 2019.

The fact that all presiding officers who participated in the study were full time employees of the companies they were appointed as Disciplinary Hearing chairpersons bring their independence into question. In fact, most of them confirmed during semi-structured interviews and focus group discussions that they would be held accountable in one form or another on the outcome of the hearings they were presiding over. This renders their impartiality null and void. The one of the concerns raised by union representatives involved in Focus Group was largely around the independence of internal presiding officers. They argued that the majority if not all of presiding officers are managers who always act in the interest of management and companies. They believed that with no segregation of duties, such managers seldom decide against the employer which in effect would be against fellow managers.

The independence of the presiding officers is paramount to the fairness of a disciplinary hearing process. Any sign of partiality from the presiding officer should render the proceedings of the hearing unfair and in violation of the constitution. It has to be stated that what does not necessarily constitute bias is the relationship of the chairperson to the employer's representative. There are many instances where an employee is permanent and has been in the employ of the employer for a very long time but still being impartial. The study however, established that about half of respondents rely more on employer's submission during a disciplinary hearing before they make a decision. On extrapolation, the findings indicate that the majority of presiding offers are not independent. This is largely made by the fact that the majority of them are employees of the same companies they are presiding on behalf and the fact that they preside over matters which they have already formulated ideas and opinions. As such the influence of senior management on the outcome of such process is not a remote possibility. The research shows that it easy for employers to dismiss employees for reasons not based in law. Employers then collude to dismiss employees using a number of strategies. These strategies may include instructing the presiding officer in advance to dismiss the employee accused of misconduct. Such conduct by the employers renders the presiding officer's participation partial. This constitutes a serious breach of the employee's right to fair procedure. It is for that reason why CCMA would be harsh on employers who are found guilty of such conduct. Once that has been established by the CCMA, the employee is likely to be reinstated with full back pay or to be granted heavy compensation to be paid by the employer.[304]

[304] 'Presiding Officers must be unbiased' 25 February 2016, available at *http://www.hrpulse.co.za*, accessed on 20 July 2019.

There are a number of ways in which the presiding officer's partiality can be discovered. This would include but not limited to the presiding officer grants the complainant (person bringing the case for the employer) the opportunity to obtain more evidence, take adjournments or interrupt the employee; but does not grant the employee similar rights.

Again the presiding officer would disregard evidence submitted by the employee or the presiding officer is appointed to preside on the matter where he or she was the primary witness. In some cases the presiding officer would make certain comments early in the hearing that indicate that he/she has predetermined the outcome of the hearing and fixated.[305] In the case of *FAWU obo Sotyatu vs JH group Retail Trust (2001, 8 BALR 864)* the arbitrator found that the manager who chaired the disciplinary hearing had been the one who had held the employee. This was found to indicate bias and was unfair. The employee was reinstated with full back pay.

The reality is that by law companies are compelled to afford employees procedural rights but the majority of employers still do not comply by ensuring that they appoint presiding officers that are unbiased and independent of undue influence. The reasons for such conduct may vary. But the most common include the employer's intention to hold a kangaroo court and get the employee dismissed regardless of evidence or that presiding officer appointed to chair the hearings are not properly trained or the employer has no appreciation of what constitutes bias.[306]

In addition to the above, there are other clues that may indicate that the presiding officer could be biased. These include, the presiding officer having previously clashed with the accused employee or had prior knowledge of the details of the case or unreasonably turns down requests from the employee for representation, witnesses, an interpreter or other requirements or makes a finding that are not based on facts brought before the hearing[307].

In a case of *Fourie & Partners Attorneys obo Mahlubandile vs Robben Marine cc* (2006, 6 BALR 569), the employee was dismissed for misconduct. The matter was later refereed to CCMA and the arbitrator found that the employee was guilty of the alleged misconduct but still found the dismissal to be unfair. This was primarily because the presiding officer of the

[305] *Ibid.*
[306] https://www.skils sportal.co.za, accessed on 10 December 2019
[307] *Ibid*

disciplinary hearing had revealed his bias by asking the employee at the beginning of the hearing "do you have an excuse for stealing the chickens?" [308]

It is for that reason why it is not surprising that about one thirds of participants agreed with the statement that when employees are accused of misconduct they are always guilty and about two thirds of participants of participants also agreed that employees who are accused of misconduct must prove their innocence. Presiding officers should not have pre-conceived ideas on matters before the disciplinary hearings. They have to look at the facts before them and decide. The fact that one third of the respondents agreed with the statement borders on violation of principle of fairness and objectivity.

It must be stated though that the close relationship between the accused employee and the presiding officer working in the same company does not on its own give rise to bias. The issues are about the perceptions created of bias. It does not mean the presiding officer will be bias but the perception will be created of partiality if clear demarcations are not properly defined. If the independence is not clear defined, accused employees will have reasonable apprehension of bias and it will not be unreasonable for accused employees to feel that way. Hence, union representatives who were part of the focus group believed that internal presiding officers are not impartial. In a case of R *V S (RD) [1997] 3 SCR 484,* the Judge argued that the Courts should be held to the highest standard of impartiality. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer.

> "The trial will be rendered unfair if the words or actions of the presiding officer give rise to a reasonable apprehension of bias to the informed and reasonable observer. Judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all candidates of every race, religion, nationality and ethnic origin. A reasonable apprehension of bias, if it arise, colors the entire trial proceedings and cannot be cured by the correctness of the subsequent decision."[309]

[308] 'Presiding Officers must be unbiased' 25 February 2016, available at *http://www.hrpulse.co.za*, accessed on 20 July 2019.
[309] *R v S (RD) [1997] 3 SCR 484,*

In the same case, the Judge describe impartiality as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. On the contrary, bias denotes a state of mind that is in some way inclined to a particular result or that is closed with regard to particular issues. Whether a decision – maker is impartial depends on whether the impugned conduct given rise to a reasonable apprehension of bias. The Judge argued that it is always difficult to establish the actual bias because ordinarily it is impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.[310] The Judge further argued that:

> "The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically and having thought the matter through-conclude."[311]

Of importance is that for Judges to be considered neutral in any matter they do not require to do way with their life experience. Whether the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements depends on the facts.[312]

Whiles there is general acceptance that Judges can never be neutral in the sense of being absolutely objective, but Judges have the legal duty to strive for impartiality. The Judge must approach the case with an open mind, used her experience and knowledge of the community to achieve an understanding of the reality of the case and apply the fundamental.[313]

> "It appears that the test for apprehended bias is objective and that the onus of establishing it rests up on the applicant. In the case of *The President of the Republic of South Africa, The Minister of Sport and Tourism, The Director General of the National Department of Sport and Recreation Versus South African Rugby Football Union, Gauteng Lions Rugby Union, Mpumalanga Rugby Union and Dr Louis Luyt: Case CCT 16/98 (Constitutional ZACC 9)* A cornerstone of any fair and

[310] Ibid
[311] *R v S (RD) [1997] 3 SCR 484,*
[312] Ibid
[313] I*bid*

> just system is the impartial adjudication of dispute which come before the Courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to the quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."[314]

Realistically, it is practically difficult if not impossible for the Judge or the presiding officer to be absolute neutral. This brings into question the current legal regulatory framework which allows employees of the same company to be presiding officers on internal matters. Clearly without such independence, the question of impartiality will always raise questions. In fact, reading from the input by the participants in both semi-structured interviews and focus groups discussion such independence is nonexistence. The fact that some will have predetermined ideas even before the actual hearing processing as reflected in the focus group discussion renders the internal hearings unfair. In most cases. Even though this is not common and not mandatory in law but some companies would employ the services of third parties such as attorneys or labour experts to chair disciplinary hearing to address this.

In comparison with the cases referred to pre-dismissal process, the figures of cases between 2003 to 2018, demonstrate that ninety-three (93) out of hundred and twenty-seven (127) were in favor of employers. This is not to say that all pre-dismissal cases are necessary fair and just. More so because the study did not establish how many cases were overturned on review by labour Court and superior Courts. However, this demonstrate that internal disciplinary hearings have inherent flaws ranging from poor application of law to lack of independence by presiding officers. Hence, more than 50% dismissal cases referred to CCMA for adjudication get overturned. The fact that the four most important dimensions which was **1**) Understanding of labour laws, 2) Understanding of organisation's or company's disciplinary code and 3) Technical ability to preside over disciplinary hearings, 4) Level of independence of presiding officers in Companies could not be answered in affirmative during semi-structured interviews and group discussions further reaffirms that the probability of internal disciplinary hearings on

[314] The President of the Republic of South Africa, The Minister of Sport and Tourism, The Director General of the National Department of Sport and Recreation Versus South African Rugby Football Union, Gauteng Lions Rugby Union, Mpumalanga Rugby Union and Dr Louis Luyt: Case CCT 16/98 (Constitutional ZACC 9)

misconduct cases being compliant with the LRA and the constitution on fairness and just process is limited.

To have a competent and qualified presiding officer is not a privilege but the employee's right to a fair hearing. To ensure that the employer complies with the employee's rights and in order to be able to prove such compliance, the employer has no choice but to use a properly skilled presiding officer and to set up a formal hearing, the record of which becomes part of the evidence at the CCMA. It is at the CCMA where the employer will be required to prove that it complied with legal procedure when dismissing the employee.[315]*In Schoon v MEC, Department of Finance, the High Court of Appeal* decided that the chairperson of a disciplinary enquiry cannot rely on the disciplinary code alone but must also take into account the provisions of the Promotion of Administrative Justice Act 3 of 2003. Without properly qualified presiding officers, chances are that he/she would not even able to understand the laws relevant to the hearing processing. This means understanding of the internal company policies and the company disciplinary Code would not suffice. More is required. This does not mean that once all presiding officers have relevant qualifications and requisite skills competences all disciplinary hearings would comply with the provisions of the law or at least there will be no referral. In reality the difference will be marginal if any, given the fact that the application of the balance of probability as the standard of proof would still not being applied adequately. It is not uncommon to have a matter being analysed and decided quite differently from the time the matter was handled by the internal presiding officer up to the level of the Labour Appeal Court. In fact, in some instance the constitutional C

ourt would also have a different interpretation and decide differently from the rest of all the lower Courts. This tells one that even if other required elements of ensuring a fair hearing are observed, the most fundamental element which is the applications of the balance of probability as a test would still not be adequately observed or at least understood by all the same.

[315] Discipline and Dismissal' available at *https://www.labourguide.co.za*, accessed on 19 December 2018.

7.2 CONCLUSION

Chapter 7 focused on the discussion of the results. This chapter discussed points that were based on the research conducted and other research results obtained from semi-structured and Group Discussions. From the information presented from the previous chapters, it is evident that the LRA has no adequate mechanism to ensure the integrity and the fairness of internal disciplinary hearings. On the balance of evidence provided and analyses, some employees who are accused of misconduct are still exposed to internal processes that are bias towards the employers. The weakness of the system, inefficiencies and misapplication of the balance of probability as the standard of proof and/or legal regulatory framework that does not have inherent checks and balances leaves vulnerable employees exposed to unfair dismissals, thus contribute to social ills such as high level of unemployment and poverty. The next chapter, Chapter 8, focuses on recommendations for future research and recommendations based on the findings of this study.

CHAPTER EIGHT
RECOMMENDATIONS AND CONCLUSION

8. INTRODUCTION

This study investigated whether the balance of probability as the standard of proof in dealing with internal disciplinary matters was a fair standard given the number of employees dismissed since the promulgation of the new LRA or it is the very legal framework regulating hearings that needed an overhaul.

The study could not with certainty establish that the balance of probabilities as the standard of proof on its own contribute to the high level of unfair dismissal witnessed since 1996. Evidence was presented in previous chapters that South Africa has since witnessed an increased in numbers of referrals to CCMA due to unfair dismissals. However, there are clear indications from the information obtained through qualitative study and literature review that the LRA has no inbuilt mechanism that guarantees the integrity of internal processes, by ensuring that it set minimum standard for presiding officers to qualify as chairpersons of internal disciplinary hearings. If such minimum standards were to be established, the immediate benefit would be for all chairpersons have requisite competences to preside over internal disciplinary hearings and it also ensure their independence which is the essential part of a fair process. In that way there will be very little room for dismissed employees and stakeholders like Trade Unions to have doubts about the system and predictable reduce the number of CCMA or Bargaining Forums referrals. The reality based on the information obtained in this study is that there are huge possibilities that even in circumstances where there are misapplications of the balance of probabilities as the standard of proof by the presiding officers, such misapplications stems from the inefficiencies of the system and not the standard per ser. The fact that anyone can be a presiding officer in a disciplinary hearing without meeting certain standards of competencies required is a challenge. As such the argument that seeks to create doubts on the fairness of the onus of proof used in disciplinary hearings cannot be substantiated with facts. The entire framework has gross legal flaws that requires the legal regulatory framework to be reviewed and amended. Otherwise the system as it stands compromises the fairness of the process and deny justice to vulnerable employees who get subjected to unfair dismissals. As a result, these legal fla workplace violate the very same fundamental rights contained in the South African constitution and the LRA which grantees fairness and justice to all employees accused of misconduct. This chapter discusses recommendations based on the findings of the study.

8.1 RECOMMENDATIONS FOR FURTURE RESEARCH

Whilst a stringent research process was followed when undertaking the current study in order to ensure an objective process with valid and reliable results, like any other study, this one too has limitations and, recommendations to better the process followed.

8.1.1 Future Themes

During the course of the investigation the researcher became aware of a number of concerns regarding the balance of probability as a standard of proof. Some of these areas of concerns were highlighted in the study, but require in-depth research as they are most certainly influential on the legal discourse in South Africa.

An investigation in the following themes should be considered for further research:

- Legal implication on the application of beyond reasonable test on internal disciplinary hearings, particularly misconduct cases.

8.1.2 Comparative Analysis

This study identified three companies in one or less the same industry and one Provincial Government Department and one State Owned Enterprise. Future studies should identify companies from across different industries throughout the country with a sample size that is sufficiently representative.

8.1.3 Geographical Regions

Only companies in Kwazulu Natal were identified for purposes of the study. Future studies should involve all nine provinces such that comparative analyses may be conducted.

8.1.4 Adopt a triangulated Approach

The researcher only used semi-structured interviews and Focus Groups discussions to obtain data. Future studies should enhance the validity and reliability of search findings by adopting a triangulated approach which will include personal interviews, a questionnaires and observation as methods of data collection.

8.2 RECOMMENDATION BASED ON THE RESULTS OF THE STUDY

The three options are meant to address two main areas of deficiencies in the system, namely, lack of required competencies and lack of independence by internal presiding officers.

8.2.1 Regulation of Minimum Standard on Core Competencies Model

The existing regulatory framework governing misconduct need an overhaul. It will be important that a regulation be developed that will establish minimum standard core competencies required to be met by anyone appointment to be a presiding officer. This will have to be mandatory for any employer in a form of entity/company/government department seeking to appoint any person to perform the functions and duties of the presiding officer in an internal disciplinary hearing. It has to be noted that competencies do not necessarily establish baseline performance levels; rather they are used to raise the bar on required performance.

The Minimum Standard on Core Competencies (MSCC) should consist of four broad competency areas:

- Working knowledge of basic labour law and correct procedure;
- Technical ability in weighing up evidence and experienced in separating the facts from opinions and hearsay, in order to arrive at a verdict of guilt or innocence;
- Be able to justify and give reasons upon which the decided sanction is based.
- Proficiency in report writing;

8.2.2 Options 1: CCMA as fora ab initio

The recommendation is to have CCMA as the forum of first instance. All allegations of misconduct regardless of the possible outcome must be referred to CCMA for adjudication and award. The outcome of such proceedings would be binding to all parties. In this way, fairness and social justice will be will guaranteed.

Essential, the paper is calling for the amendment of section 188A of the LRA which makes it possible to refer a dispute that involves a dismissa**l** to the CCMA and Bargaining Council before the dismissal actually occurs. This process is a combination of both the disciplinary hearing and an arbitration.

With the recommended amendment, the following should be considered:

- Compulsory pre- dismissal hearing by either the CCMA, Bargaining Forums or Accredited agency for all misconduct cases. This will be applicable to all the cases of misconduct regardless of the possible outcome. This would call for the amendment of section 188A making it mandatory that all misconduct must be refereed to CCMA, Bargaining Forums or Accredited Agency for adjudication. Once the allegations of

misconduct are made and the employer has provided the charge sheet with all the allegations against the employee, the employer must approach the CCMA, bargaining council or accredited agency to conduct the pre-dismissal arbitration. The Arbitrator would then fulfil this task while taking full note of the employer's disciplinary code and/or code of conduct.

8.2.3 Options 2: Identification of Independent Chairpersons

This option could be used as an alternative to option 1 above. Most importantly because the information obtained through literature review and CCMA records suggests that the CCMA seems to be overwhelmed by the number of cases referred to it. Some will argue that referring all disciplinary processes to the CCMA would be undesirable given its current load and challenges. As such this would create serious capacity challenges. If the CCMA challenges are not addressed through the creation of additional capacity, giving them additional responsibility will further compromise the fundamental principle as envisaged in the LRA of speedy resolutions of labour disputes.

The second option recommendation is for the CCMA, Bargaining Forums or Accredited Agency to create a pool or a database of independent Chairpersons made available to employers for adjudication of internal disciplinary matters. In essence, the regulatory framework governing internal disciplinary hearing would make it mandatory for all employers to notify the CCMA, Bargaining Forums or Accredited Agency as soon as the decision to charge the accused employee is made. Such declaration by the employer will require these bodies to deploy any of the presiding officer from database to chair the disciplinary hearing. This will serve to encourage settlement and or poor and unreasonable awards.

The feasibility of option two will again dependent largely on the availability of the budget to training/capacity development for identified independent chairpersons. Given the limited resources available, the paper recommends that a strategic partnership between the CCMA, Bargaining Forums or Accredited Agency with relevant Sector for Education and Training Authority (SETA) be established. The envisaged partnership will allow CCMA, Bargaining Forums or Accredited Agency to source funding that will enable the entities to conduct training and capacity development programs in order for identified independent Chairpersons to meet the required minimum core competences standards and be accredited to function under the auspices of either the CCMA, the Bargaining Forum or the Accredited

Agency. No independent Chairperson will be allowing to perform these duties without valid accreditation. Again, this will go a long way in ensuring that only competent and independent presiding officers are assigned to all employers seeking to conduct disciplinary hearings.

8.2.4 To *maintain the Balance of Probabilities as the Standard of Proof in disciplinary hearings*

The information obtained from the study does not indicate any correlation between the balance of probabilities as the standard of proof and the number of unfair dismissal. The balance of probability as the standard of proof as not proven to be inadequate to establish the validity of the allegations against accused employees to an extent that this has contributed to the travesty of justice and rendered South African employees exposed to unfair dismissals

What became evidence among others the information obtained were the limitations on the system whereby presiding officers assigned to chair internal disciplinary hearings were not competent enough to perform such duties and lack impartiality in their judgments. As such the argument that seek to advocate the application of the beyond reasonable doubt in civil matters and in particular in internal disciplinary matters would be legally substantiated. If such suggestion was to be considered, the application of beyond reasonable doubt in disciplinary matter would have both administrative and legal ramifications. For instance, employers will not have resources and capacity to investigate in order to provide evidence against the accused employee beyond reasonable doubt. If anything the application of this standard will delay the finalisation of disciplinary matters and further prejudice parties in dispute. Further, this will have direct implication of investors who may be discouraged by inability to resolve labour disputes timeously. This will further contribute to the high rate of unemployment and poverty in South Africa.

As such this paper recommends that there is no legal basis to consider any amendment to LRA, schedule 8 to allow a different standard to be used in disciplinary hearings.

8.3 CONCLUSION

Evidently, more work is to be done to review the existing regulatory framework governing misconduct cases. There is an urgent need to adapt this framework to the current systems challenges. What was envisaged by the South African constitution and LRA and the highly celebrated constitution of fairness, social justice and job security will remain a pipe dream.

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APPENDIX A

Semi- Structured Interviews

SEMI-STRUCTURED PERSONAL INTERVIEWS: PRESIDING OFFICERS

Questions to employees interviewed are presented below. In order to maintain each employee's personal privacy no names were given:

Q1: How long have been working:

A:

Q2: How long have you been employed by your current employer?

A:

Q3: What is your current position in your Organisation?

A:

Q4: What academic qualification do you have?

A:

Q5: Did you have experience prior to being appointed as the presiding officer?

A:

Q6: What is your understanding what the balance of probability as the standard of proof is?

A:

Q7: Do you understanding what the beyond reasonable test means and what is the difference if this standard and the balance of probabilities as the standard?

A:

Q8: On average, how many employees do you recommended for dismissal in a year?

A:

Q9: How many of your recommendations were challenged at CCMA/Bargaining Forum?

A:

Q10: How many of your recommendations for dismissal were upheld by the CCMA/Bargaining Forum?

A:

Q11: Do you feel competent to preside over disciplinary hearings?

A:

Q12: Do you have the legal background?

A:

Q13: How often do you attend refresher courses relevant to your duties as the presiding officer?

A:

Q14: How much influence does your company senior management have on your decisions as the chairperson of the Disciplinary hearing?

A:

Q15: Do you normally reflect and regret your decisions after presiding on disciplinary hearing?

A:

Q16: Have you ever been trained to preside over a disciplinary hearings and/or Company related policies and procedures?

A:

Q: How often do you get to know about the allegations against the accused employee before the actual disciplinary commences?

A: