PRACTICAL VOCATIONAL TRAINING (PVT) STRUCTURED COURSEWORK PROGRAMME FOR CANDIDATE LEGAL PRACTITIONERS (CANDIDATE ATTORNEYS)

Labour dispute resolution, in terms of Regulation 6(10)(g)

LEGAL PRACTICE COUNCIL

Author acknowledgement

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GUIDE FOR LABOUR DISPUTE RESOLUTION

Regulation 6 (10)(g)

FIFTEEN GUIDES

There are fifteen guides for practical vocational training of candidate attorneys. This guide deals with the Labour Dispute Resolution module in regulation 6(10)(g).

OVERVIEW

On 20 September 2014 Parliament assented to the Legal Practice Act 28 of 2014 (LPA). In terms of section 4 of the LPA, the Legal Practice Council (LPC) was established on 31 October 2018. The following day, on 1 November 2018 the bulk of the rest of the LPA came into effect.

The Legal Practice Act regulates all legal practitioners whether on the practising roll or the non-practising roll. There are three forms of legal practice. They are an attorney, an advocate and an advocate with a Fidelity Fund certificate: see section 34 of the LPA.

Under section 109(1)(a) of the LPA, the LPC published GN R921 in GG 41879 of 31 August 2018, as amended by GN R3779 in GG 49104 of 11 August 2023. The compulsory course work required in the regulations for candidate attorneys was standardised by the LPC in terms of the Norms and Standards. Regulation 6(10) reads:

"(10) The programme of structured course work referred to in sub-regulation (1)(a) and (b) must be standardised and uniform throughout the Republic and comprise the following modules:

(a) constitutional practice;
(b) professional legal ethics;
(c) personal injury claims;
(d) high court practice;
(e) magistrate's court practice;
(f) criminal court practice;
(g) **labour dispute resolution**;
(h) alternative dispute resolution;
(i) attorneys' bookkeeping;
(j) wills and estates;
(k) matrimonial law;
(l) legal costs;
(m) drafting of contracts;
(n) information and communication technology for practice, and associated aspects of cyber law; and
(o) introduction to practice management."

On 11 December 2020 the LPC published the Norms and Standards in Government Gazette 43981 under section 3 (g)(i) read with section 6(1)(b)(i) and section 95(1)(n) of the LPA.

Regulation 6(10) requires candidate attorneys to be trained in the modules listed above. The similarity between regulation 6(10) for candidate attorneys and regulation 7(9) for pupils is not an accident. Section 32 of the LPA permits legal practitioners at any time, as determined in the rules and upon payment of the fee determined by the LPC, to apply to the LPC to convert their enrolment as attorneys to that of advocates and *vice versa*. Consequently, the training of candidate legal practitioners must allow for seamless section 32 conversions.

Each guide *per* module deals with the requirements in regulation 6(10). Examiners set questions derived only from the latest LPC candidate attorneys' curriculum and reading list. The combined curriculum and reading list is referred to as the "syllabus".

Each of the fifteen guides will assist training supervisors, mentors, busy legal practitioners and candidate attorneys to navigate the syllabus. The focus is on practical vocational training.

INTRODUCTION TO EACH GUIDE

Each guide *per* module in Regulation 6(10) is designed to assist candidate attorneys to understand, in real time, the minimum that is required under practical vocational training to become effective attorneys in practice. The essence of effective legal practitioners is the ability to read, to assimilate legal principles from that reading and to apply those principles in practice to the facts of your client's case and in argument before courts, tribunals, disciplinary bodies, and any other forms of formal gatherings and meetings.

The guides avoid prolixity.
However each guide requires dedicated concentration.

For the examinations, candidate legal practitioners (candidate attorneys and pupils) must be up to date with the latest Constitutional Court and Supreme Court of Appeal cases to within one week before the date of each exam.

The guides do not rehash what you studied at University. Your LLB proves your capability. This guide will assist you to prepare for the LPC admission examinations. More importantly, this guide will also equip you to be an effective, competent, calm and (reasonably) confident attorney when you enter the legal profession.

REQUEST TO CANDIDATE ATTORNEYS FOR DUE DILIGENCE
Please read this guide attentively.
Please carry out all recommended court attendances.
Please carry out all the recommended practical exercises.
Please complete reading all the material in the LPC reading list.
Please note the notional hours to complete all 15 guides are 400 hours.
Please note this guide, like the other fourteen guides, is sufficient for self-study.
Please remember, the exams are based on the LPC's most up to date reading list.

- Currently the most up to date reading list is from 28 March 2025 of Notice 3086 of 2025 published in Government Gazette 52388.
- Matters omitted from the LPC reading list will not be in the examinations unless the statute, case or article is included in your exam paper and allows you extra reading time to consider that statute, case or article.
- Matters mentioned in the LPC reading list will be the subject of exam questions.
- You will be required to answer the exam questions from the perspective of:
    - Facts first
    - Law later
- The LPC exams, also referred to as assessments, are practical in nature.
- The questions will proceed from the following perspective: –
    - What would you, as attorney of record, advise your client to consider?
    - What would you, as attorney of record, advise your client to do?
    - When and why would you refer a matter to another attorney or to counsel?
    - And similar practical questions.

REFERENCES
One of the products of Juta & Co Ltd is Jutastat. Many of the notes to this guide are downloaded from Jutastat. Please read the notes with care and diligence. This guide also relies on the Southern African Legal Information Institute (SAFLII).
SAFLII is free and open access on the Internet.

NOTE WELL
The sequence of this guide follows the sequence in the most recent LPC syllabus of 28 March 2025 for candidate attorneys. The fifteen guides are designed to be updated when the LPC so requires. Bullet points below are drafted to assist you to grasp the material in the reading list. You must decide whether to accept or to amend the bullet points to suit your understanding. When there are no bullet points, you need nonetheless to read the rule or case to prepare for your exams.

LPC SYLLABUS AND THE OFFICIAL SOURCE FOR ALL EXAMINATION QUESTIONS AT THE LPC ATTORNEYS' ADMISSION EXAMS

CURRICULUM AND COURSE CONTENT	READING LISTS
This column is sourced from the Norms and Standards the LPC published on 11 December 2020 in Government Gazette 43981 **NOTE WELL**: Practice Directives will not be examined unless a copy of the relevant directive is supplied to candidates writing the exams. Introduction to the Industrial Relations Framework. Identification of an employee. Permanent employees. Temporary employees. Disciplinary Proceedings and Hearings. Unfair labour practices and Dismissals. Bargaining Agents, Forums and Collective Bargaining. Dispute resolution including disputes about collective agreements The process of conciliation. How to prepare and move an interdict in the labour court. How to differentiate between a sufficiently representative trade union, majority and minority unions How to determine the validity of an extension of a collective agreement to members not party to the collective agreement	PRINCIPAL WORKS • Grogan, Workplace Law Juta, 13th Edition 2020 • Grogan, Dismissal, Juta, 4th Edition COIDA and domestic workers Mahlangu and Another v Minister of Labour and Others 2021 (2) SA 54 (CC) at paras [71] to [107] Suspension Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others [2023] ZASCA 112 at paras [31] to [33] Strikes and lockouts National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd [2023] ZACC 11; (2023) 44 ILJ 1189 (CC); 2023 (7) BCLR 814 (CC); [2023] 7 BLLR 609 (CC); 2023 (4) SA 449 (CC) at paras [47] and [48] Numsa obo Dhludhlu and Others v Marley Pipe Systems (SA) (Pty) Ltd 2023 (1) SA 338 (CC) Disciplinary proceedings Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee 2002 (5) SA 449 (SCA) ([2002] ZASCA 44) at para [5] and the important nuances at paras [12] and [20] to [22]

How to ensure a strike is protected Labour Relations Act 66 of 1995 (LRA) Chapter II Freedom of Association and General Protections – sections 4 to 10 Employees' right to freedom of association Protection of employees and persons seeking employment Employers' right to freedom of association Protection of employers' rights Rights of trade unions and employers' organisations Procedure for disputes Burden of proof Chapter III Collective Bargaining Part A Organisational rights – sections 11 to 22 Part B Collective agreements – sections 23 to 26 CHAPTER VII DISPUTE RESOLUTION Part A Commission for Conciliation, Mediation and Arbitration – sections 112 to 114 Part C Resolution of disputes under auspices of Commission – sections 133 to 135 Rules for the Conduct of Proceedings before the CCMA: GN R3318 of 2023 IN GG 48445 of 21 Apr 2023 Part D Labour Court – sections 151 and 156 to 166 Part E Labour Appeal Court – sections 172 to 180 and 182 and 183 Labour Appeal Court Rules and Labour Court Rules GN 4775 of 2024 GG 50608 of 3 May 2024 Chapter VIII Unfair Dismissal And Unfair Labour Practice – sections 185 to 197B Basic Conditions of Employment Act 75 of 1997 (BCEA) Chapters Two, Three, Four and Five Employment Equity Act 55 of 1998. Chapters II and III	Dyantyi v Rhodes University 2023 (1) SA 32 (SCA) at paras [21] to [23] Dismissal Amcu v Royal Bafokeng Platinum Ltd 2020 (3) SA 1 (CC) at paras [102] to [126] Collective Bargaining and Organisational rights CCMA rules NUMSA v Bader Bop (Pty) Ltd & another [2003] 2 BLLR 103 (CC) Solidarity & others v Eskom Holdings Ltd (2012) 33 ILJ 464 (LC) Growthpoint Properties (Pty) Ltd v SACCAWU (2010) 31 ILJ 2539 (KZD). The Occupational Health and Safety Act 85 of 1993 (OHSA) and the Unemployment Insurance Act 63 of 2001 (UIA) Gunter v Compensation Commissioner 2009 (30) ILJ 2341 (0). Twalo v Minister of Safety and Security and Another 2009 (30) ILJ 1578 (Ck). Mahlangu and Another v Minister of Labour and Others 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC). Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others 2017 (3) SA 242 (CC) Securicor (SA) (Pty) Ltd v Lotter 2005 (5) SA 540 (E) **Remember the Guide for Professional Legal Ethics** Principles governing the hopeless case "The ethics of the hopeless case", Owen Rogers, Advocate December 2017 *University of South Africa v Socikwa and Others* (J 675/23; J 680/23) [2023] ZALCJHB 172 (7 June 2023)

INDEX FOR LABOUR DISPUTE RESOLUTION

Labour Dispute Resolution – HOW TO USE THE READING LIST

A. GENERAL

This module prepares you to understand the basic but essential principles, concepts and procedures of Labour Dispute Resolution. Candidates must read the sections of the Act, the rules and the case law indicated in the reading list. Some of the salient issues are set out in bullet points below.

The reason to read the references in the reading list is to prepare for your attorneys' admission exams. The examiners draft exam questions from the syllabus. The syllabus includes the column **Curriculum and Course Content** and the column **Reading List** in the table above.

Questions based on matters not in the syllabus are allowed only where the statute, case or article being examined is added into the examination paper. In that event, you will be given an extra fifteen minutes to read and consider the question before writing your exam. This principle applies to all the modules in regulation 6(10) and for all your admission exams.

The reading list is repeated below with bullet points to focus your grasp of the material. You will be able to download the case law from SAFLII onto your mobile devices at any time, and while in court.

Remember: the bullet points are designed to help you understand salient issues. The phrase: *Subject to your reading, the following points may be drawn from the case cited above* requires you to check whether the bullet points are indeed an accurate reflection of the case. Be proactive: you can develop your own bullet points for exam preparation and for use later in practice.

Note well: many candidate attorneys do not have access to the South African Law Reports nor the All South Africa reports published by LexisNexis. In this guide some references to the URLs of SAFLII are included. This will assist all candidates to access the relevant document, even when you are in court – of course – if the court has internet access and accessible WiFi.

Furthermore, many candidates do not have access to text book commentary on the rules. If you read the rules carefully you may not need the commentary. The rules are remarkably similar in their effect and application to the rules of the High Court.

The Department of Justice website also has up to date legislation and subordinate legislation.

See the following URLs:
https://www.justice.gov.za/
https://www.justice.gov.za/constitution/index.html
https://www.justice.gov.za/legislation/acts/acts_full.html
https://www.justice.gov.za/legislation/rules/rules.htm

B. INTRODUCTION

The main purpose of the Norms and Standards is to provide a national approach to standardise and implement practical vocation training of candidate attorneys in terms of regulation 6(10). Five years of deliberation including two colloquiums and frequent publications of the syllabus have preceded the gazetting of the LPC syllabus on 28 March 2025. In future, the LPC syllabus will be updated and amended as required by circumstances in the legal profession.

The topics dealt with below are part of the syllabus for Labour Dispute Resolution. After the topics, the reading list is dealt with in detail. It is important to understand that the topics underlined below form part of the syllabus from which examiners may set exam questions.

Legislation and rules

As a candidate attorney you need a working knowledge of the Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the rules of the CCMA. You need to read the rules of the Labour Court and the Labour Appeal Court so that you can navigate through those rules as quickly as a competent legal practitioner.

However, you do not need to know the Acts and the rules by heart. In practice you will always read the legislation and the rules applicable to your case while drafting pleadings and consulting with your clients.

See SAFLII:
https://www.saflii.org/za/legis/consol_act/lra1995188.pdf
https://www.saflii.org/za/legis/consol_act/bcoea1997309/
For the CCMA rules see below:
https://www.saflii.org/za/legis/consol_reg/rftcopitlc518/
https://www.saflii.org/images/LCRules/Labour%20Appeal%20Court%20Rules.pdf

CCMA rules:
https://legal-leaders.co.za/wp-content/uploads/2023/06/new-CCMA-rules-1.pdf?srsltid=AfmBOor8GGG-O9Dl9ZDG0ObjNWJiIl4OjG3m8O5l__nJZ9AZcwtFx4Q5

Examiners' obligations

There will be an emphasis on rules in regular use in practice. In your admission exams any question posed on the interpretation of an Act of Parliament or a rule requires the examiners to include that text in the question paper itself.
To reiterate: you do not need to know the legislation and rules by heart.

The following topics may be examined.
In any event, you need to know these topics from the Norms and Standards for practice when you qualify as an attorney. Only the introduction to the industrial relations framework and the identification of an employee will be dealt with before the reading list proper. All the other topics are covered in the reading list below.

Introduction to the Industrial Relations Framework

South Africa has a complex industrial relations framework that attempts to bridge the ideological divide between capitalist control of markets and productivity and democratic concern for social and economic rights for workers. In the abstract on *Measuring Labor Market Efficiency*, Debbie Collier and Paul Benjamin note that 'international organizations involved in the transnational shaping of the legal norms and institutions that regulate the labour market are poles apart in their mandates and worldviews'.

The authors add: 'This divergence of views among international organizations undermines the development and coherence of legal norms and standards for worker security and creates a fractious transnational legal order that has implications for the domestic debate on labour market regulation'.

[Published online by Cambridge University Press: 05 June 2015]
https://www.cambridge.org/core/books/abs/quiet-power-of-indicators/measuring-labor-market-efficiency-indicators-that-fuel-an-ideological-war-and-undermine-social-concern-and-trust-in-the-south-african-regulatory-process/F03C1F98BB0C616DF1E05923C3009D15

Currently South Africa's industrial relations framework can be identified by five pillars, all of which seek to be a bridge from the colonial and apartheid past into a more egalitarian democratic present. The five pillars are:

- Our Constitution
- Three key Acts of Parliament
- Our core institutions concerning labour law
- Collective bargaining based on union recognition by majoritarianism
- NEDLAC as a forum for four important role players
    - Government
    - Labour
    - Business and
    - Community

Constitution

The Constitution of the Republic of South Africa, 1996 has three key sections in the Bill of Rights that underpin our industrial relations framework.

- S 23 Labour relations
- S 18 Freedom of association
- S 22 Freedom of trade, occupation and profession

The most important is section 23.

It is quoted in full in the table below.

23 **Labour relations**

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right-
  (a) to form and join a trade union;
  (b) to participate in the activities and programmes of a trade union; and
  (c) to strike.

(3) Every employer has the right-
  (a) to form and join an employers' organisation; and
  (b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right-
  (a) to determine its own administration, programmes and activities;
  (b) to organise; and
  (c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

Three key Acts of Parliament

- Labour Relations Act 66 of 1995 (LRA)
- Basic Conditions of Employment Act 75 of 1997 (BCEA)
- Employment Equity Act 55 of 1998 (EEA)

Note to candidates

You need to be familiar with the three key Acts of Parliament (statutes).
You are not expected to know the statutes by heart.
Any questions in your admission exams which may relate to these statutes will contain an extract from the statute.

Core institutions concerning labour law

- Bargaining councils – see the LRA Chapter III Collective Bargaining, Part C: Bargaining councils
- CCMA – see the LRA at Chapter VII Dispute Resolution, Part A: Commission for Conciliation, Mediation and Arbitration
- Labour Court – see the LRA at Chapter VII Dispute Resolution, Part D: Labour Court
- Labour Appeal Court – see the LRA at Chapter VII Dispute Resolution, Part E: Labour Appeal Court

Collective bargaining based on union recognition by majoritarianism

- Organisational rights – see the LRA Chapter III Collective Bargaining, Part A
  - S 18 deals with the right to establish thresholds of representativeness. Here lies the principle of the majority union representation with an employer.
  - S 17 restricts union representative rights in the domestic sector from entering the premises of the employer's home
- Collective agreements – see the LRA Chapter III Collective Bargaining, Part B

NEDLAC as a forum for four important role players

- NEDLAC is the acronym derived from the National Economic, Development and Labour Council Act 35 of 1994
- NEDLAC is a juristic person with four chambers:
  - public finance and monetary policy chamber;
  - trade and industry chamber;
  - labour market chamber; and
  - development chamber.
- The purpose of NEDLAC is set out in section 5 as the objects, powers and functions of Council. See the table below.

5 **Objects, powers and functions of Council**

(1) The Council shall-
  (a) strive to promote the goals of economic growth, participation in economic decision-making and social equity;
  (b) seek to reach consensus and conclude agreements on matters pertaining to social and economic policy;
  (c) consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament;
  (d) consider all significant changes to social and economic policy before it is implemented or introduced in Parliament;
  (e) encourage and promote the formulation of co-ordinated policy on social and economic matters.

(2) For the purpose of subsection (1), the Council-
  (a) may make such investigations as it may consider necessary;
  (b) shall continually survey and analyse social and economic affairs;
  (c) shall keep abreast of international developments in social and economic policy;
  (d) shall continually evaluate the effectiveness of legislation and policy affecting social and economic policy;
  (e) may conduct research into social and economic policy;
  (f) shall work in close co-operation with departments of State, statutory bodies, programmes and other forums and non-governmental agencies engaged in the formulation and the implementation of social and economic policy.

(3) Nothing in this section shall preclude the Council from considering any matter pertaining to social and economic policy.

Identification of an employee

The legislature has dealt with the identification of an employee, permanent employees and temporary employees in some key statutes.

- The central theme for such identification is the amount of control an employer has in practice over the work of the employee.
- There is a tension often between employers seeking to designate people as independent contractors,
    - when in fact the so-called independent contractor has the employer as the primary source of income and
    - must abide by the work routine stipulated by the employer.

Consider the following statutory definitions.

- Unemployment Insurance Act 63 of 2001 an: '**employee**' *means any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor*.

- Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)

- Labour Relations Act 66 of 1995 (LRA)

- Basic Conditions of Employment Act 75 of 1997 (BCEA)

- Protected Disclosures Act 26 of 2000 (PDA).

- COIDA introduces three extra categories of employees:
    - Apprenticeships
    - Learnerships
    - casual employees

- Under COIDA all three of these categories are employees – in addition – obviously to the main definition of an employee.

- The COIDA main definition is a person who has entered into a contract of service. In law, a contract of service has many permutations. All the permutations can only be understood and applied after a review of the other crucial statutes.

- See the tables below:

    - COIDA
    - LRA
    - BCEA
    - PDA

COIDA
'**employee**' means a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes- (a) a casual employee employed for the purpose of the employer's business; (b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract; (c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker; (d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee; **but does not include**- (i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force; (ii) a member of the Permanent Force of the South African Defence Force while on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957; (iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act 7 of 1958), on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957; (iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work; (v) a domestic employee employed as such in a private household;
'**employer** ' means any person, including the State, who employs an employee, and includes- (a) any person controlling the business of an employer; (b) if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person; (c) a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;

LRA
213 Definitions '**employee**' means- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person <u>who in any manner assists in carrying on or conducting the business of an employer</u>, and '**employed**' and '**employment**' have meanings corresponding to that of '**employee**';
'**employment law**' includes this Act, any other Act the administration of which has been assigned to the Minister, and any of the following Acts:

(a) the Unemployment Insurance Act, 2001 (Act 63 of 2001); [similar definition to (a) above]
(b) the Skills Development Act, 1998 (Act 97 of 1998); [similar definition to the LRA above]
(c) the Employment Equity Act, 1998 (Act 55 of 1998); [similar definition to the LRA above]
(d) the Occupational Health and Safety Act, 1993 (Act 85 of 1993); [similar definition to (a) above]
(e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993); and
(f) the Unemployment Insurance Contributions Act, 2002 (Act 4 of 2002) [similar to (a) above]

200A Presumption as to who is employee

(1) Until the contrary is proved, for the purposes of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

(a) the manner in which the person works is subject to the control or direction of another person;
(b) the person's hours of work are subject to the control or direction of another person;
(c) in the case of a person who works for an organisation, the person forms part of that organisation;
(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
(e) the person is economically dependent on the other person for whom he or she works or renders services;
(f) the person is provided with tools of trade or work equipment by the other person; or
(g) the person only works for or renders services to one person.

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

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are employees.

(4) NEDLAC must prepare and issue a **Code of Good Practice** that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are employees.

198B Fixed-term contracts with employees earning below earnings threshold

(1) For the purpose of this section, a 'fixed-term contract' means a contract of employment that terminates on-
(a) the occurrence of a specified event;
(b) the completion of a specified task or project; or
(c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).

(2) This section does not apply to-
(a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act;
(b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless-
    (i) the employer conducts more than one business; or
    (ii) the business was formed by the division or dissolution for any reason of an existing business; and
(c) an employee employed in terms of a fixed-term contract which is permitted by any statute, sectoral determination or collective agreement.

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

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

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

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

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

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

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

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

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

(f) is employed to perform seasonal work;

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

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

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

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

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

(a) be in writing; and

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

(7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.

(8) (a) An employee employed in terms of a fixed-term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.

(b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed-term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014.

(9) As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an employee employed in terms of a fixed-term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.

(10) (a) An employer who employs an employee in terms of a fixed-term contract for a reason contemplated in subsection (4) (d) for a period exceeding 24 months must, subject to the terms of any applicable collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the Basic Conditions of Employment Act.

(b) An employee employed in terms of a fixed-term contract, as contemplated in paragraph (a), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (a) in respect of any period worked after the commencement of the said Act.

(11) An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed-term contract, the employer offers the employee employment or procures employment for the employee with a different employer, which commences at the expiry of the contract and on the same or similar terms.

BCEA
'**employee**' means- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and '**employed**' and '**employment**' have a corresponding meaning;
82 Temporary employment services (1) For the purposes of this Act, a person whose services have been procured for, or provided to, a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer. (2) Despite subsection (1), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person. (3) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any employee who provides services to that client, does not comply with this Act or a sectoral determination.
83A Presumption as to who is employee (1) A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present: (a) the manner in which the person works is subject to the control or direction of another person; (b) the person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organisation, the person forms part of that organisation; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom he or she works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person. (2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6 (3). (3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6 (3), any of the contracting parties may approach the CCMA for an advisory award about whether the persons involved in the arrangement are employees.

PDA
'**employee**' means- (a) any person, excluding an independent contractor, who works or worked for another person or for the State, and who receives or received, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer;
'**employer**' means any person- (a) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or (b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer;

Key Comparative Definitions

Across COIDA, the LRA, BCEA and PDA, the core features of an employee include:

- A person who works under a contract of service
- A person who receives or is entitled to remuneration
- The exclusion of independent contractors
- The inclusion of persons who assist in carrying on the business of the employer

Section 200A of the LRA and section 83A of the BCEA create a rebuttable presumption of employment where control, economic dependence, integration into the business, or provision of tools is present.

Section 83A of the BCEA mirrors section 200A of the LRA and creates the same rebuttable presumption of employment for employees earning below the statutory threshold.

- Finally, the phrase "who in any manner assists in carrying on or conducting the business of an employer" is so broad, our Courts will have little difficulty subsuming contracts relating to interns under that all-encompassing umbrella.

C. PRACTICAL MESSAGE FOR CANDIDATE LEGAL PRACTITIONERS

To avoid an unnecessary repetition on how you as candidates need to learn the skills to advise your clients and to take instructions in practice, please read pages 16 to 24 of the **Guide for Constitutional Practice**, and apply the necessary changes for matters that are not only constitutional issues but are labour matters.

As a candidate attorney, you must learn to:

- Take precise instructions
- Identify the dispute correctly
- Distinguish between arbitration and the Labour Court jurisdiction
- Advise clients on urgency and interim relief and
- Assess the prospects before initiating litigation

D. READING LIST

The reading list is to the point. Please read the following:

PRINCIPAL WORKS
• Grogan, Workplace Law Juta, 13th Edition 2020
• Grogan, Dismissal, Juta, 4th Edition

COIDA and domestic workers

Mahlangu and Another v Minister of Labour and Others 2021 (2) SA 54 (CC) at paras [71] to [107]
https://www.saflii.org/za/cases/ZACC/2020/24.html

Subject to your reading, the following points may be drawn from the case cited above.

- Section 1xix(d)(v) of COIDA excluded domestic workers employed in private households from the definition of 'employee', thereby denying them compensation in the event of injury, disablement or death in the workplace.
    - The Court held that the differentiation between domestic workers and other categories of workers was arbitrary and inconsistent with the right to equal protection and benefit of the law
    - The declaration of constitutional invalidity of s 1xix(d)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 made by the High Court of South Africa, Gauteng Division, Pretoria, was confirmed.
- The differentiation between domestic workers and other categories of workers also amounts to discrimination as domestic workers are predominantly black women.
    - This means discrimination against them constitutes indirect discrimination on the basis of race,
    - sex and
    - gender.
- Analysing discrimination within the framework of intersectionality proved to be a useful tool in determining the presence and extent of the discrimination. The [European Court of Human Rights] considered ways in which gender intersects with other identities and how these intersections contribute to unique experiences of oppression and privilege.
- The exclusion of domestic workers from the protections under COIDA resulted in a situation where domestic workers have, for decades into our democracy, had to bear work-related injuries or death without compensation.
- To conclude on equality, the exclusion of domestic workers and, therefore, their dependants from deriving benefits under COIDA limits the rights to equality before the law and equal protection and benefit of the law under s 9(1) and the right not to be discriminated against unfairly guaranteed in s 9(3).

Suspension

Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others [2023] ZASCA 112 at paras [31] to [33]
https://www.saflii.org/za/cases/ZASCA/2023/112.html

Subject to your reading, the following points may be drawn from the case cited above.

- Interim applications for the suspension of a legal practitioner pending an investigation are generally undesirable if the suspension sought is for a lengthy period.

- Such applications should be launched only where there is no other means of safeguarding the public from the alleged malfeasance of a legal practitioner.
- An interim order for suspension has a very grave impact on the professional life of a legal practitioner, who would be severely prejudiced if exonerated at the end of an investigation.

Note to candidates: This case is relevant to labour dispute resolution because interim suspension applications may arise in regulatory or professional disciplinary contexts, and the principles of proportionality and fairness are comparable.

Strikes and lockouts

National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd [2023] ZACC 11; (2023) 44 ILJ 1189 (CC); 2023 (7) BCLR 814 (CC); [2023] 7 BLLR 609 (CC); 2023 (4) SA 449 (CC) at paras [47] and [48]

https://www.saflii.org/za/cases/ZACC/2023/11.html

Subject to your reading, the following points may be drawn from the case cited above

- s 76(1)(b) and the phrase 'in response to a strike', bore two possible interpretations.
    - The first was that if there were a strike, an employer could lock out the strikers and use replacement labour, and
    - even were the strike to end, the lock-out with use of replacement labour could continue
- The second, and preferred, interpretation was that, in a situation of a strike, lock-out response, and use of replacement labour, the use of replacement labour was confined to the duration of the strike.
    - At the point the strike ended — the lock-out continuing — the employer lost the right to use replacement labour.
- In this case, the strike triggered the lock-out response, but on Monday,
    - when the lock-out began
    - there was no longer a strike, and
    - so no longer any entitlement to use replacement labour.

Numsa obo Dhludhlu and Others v Marley Pipe Systems (SA) (Pty) Ltd 2023 (1) SA 338 (CC)

https://www.saflii.org/za/cases/ZACC/2022/30.html

Subject to your reading, the following points may be drawn from the case cited above.

- During the course of an unprotected strike at the employer's premises, striking employees took part in a serious assault on one of its managers
- While the LAC's finding that all the employees were at the scene when the manager was assaulted, would be accepted,
    - mere presence and
    - watching
    - did not satisfy the established requirements for common purpose.
    - There must be evidence, direct or circumstantial,
    - that individual employees in some form associated themselves with the violence
        - before it commenced, or
        - even after it ended; and
        - the person concerned must have manifested his sharing of a common purpose with the perpetrators of the assault
        - by himself performing some act of association with the conduct of the others.

  - Merely being present cannot constitute association.
  - For liability to attach, there must be proof (on a balance of probabilities)
  - of an employee's complicity in the acts of violence
  - including having 'the necessary intention' in relation to the complicity.

- In this case, there was no evidence that — as a group — the striking employees ever associated with the assault.
- The principles applicable to common purpose had not been satisfied.
  - There was simply no basis for holding the 41 employees guilty of the assault, and
  - the dismissals on the basis of this finding of guilt were substantively unfair.
- Case remitted to the Labour Court for appropriate sanction.

Disciplinary proceedings

Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee 2002 (5) SA 449 (SCA) ([2002] ZASCA 44) at para [5] and the important nuances at paras [12] and [20] to [22]
https://www.saflii.org/za/cases/ZASCA/2002/44.html

Subject to your reading, the following points may be drawn from the case cited above

- Entitlement as of right to legal representation in arenas other than courts of law has long been a bone of contention
- The appellants laid no claim to any such general and absolute entitlement and declined to submit that legal representation is a *sine qua non* of any procedurally fair hearing
- Any rule purporting to compel such an organ of state to refuse legal representation no matter what the circumstances might be, cannot pass muster in law
- The internal disciplinary committee has a discretion to allow 'outside' legal representation
- By refusing to exercise its discretion, the internal disciplinary committee erred

Dyantyi v Rhodes University 2023 (1) SA 32 (SCA) at paras [21] to [23]
https://www.saflii.org/za/cases/ZASCA/2022/32.html

Subject to your reading, the following points may be drawn from the case cited above.

- Procedural fairness is a principle of good administration that requires a sensitive rather than heavy-handed application.
  - Context is all-important:
  - the content of fairness is not static but must be tailored to the particular circumstances of each case.
  - There is no room now for the all-or-nothing approach to fairness that characterised our pre-democratic law,
    - an approach that tended to produce results that were either overly burdensome for the administration or
    - entirely unhelpful to the complainant
- The question whether an affected person is entitled to legal representation in terms of PAJA requires
  - A weighing of considerations of timing and delay
  - prejudice to any affected party
  - availability of suitable alternative legal representation
  - together with all other relevant factors.
- And it has to be said that the answer should seldom be in the affirmative

Dismissal

Amcu v Royal Bafokeng Platinum Ltd 2020 (3) SA 1 (CC) at paras [102] to [126]
https://www.saflii.org/za/cases/ZACC/2020/1.html

Subject to your reading, the following points may be drawn from the case cited above

- S 189(1) of the LRA has been consistently interpreted not to require individual consultation
- S 23(1) of the Constitution, the right to fair labour practices, does not give an individual a right to be consulted in a retrenchment process
- Nor does s 189(1) of the LRA in dismissals based on operational requirements
    - Non-inclusion of an individual's right in s 189 was rational
    - The s 189 process is procedurally fair
    - It accords with international practice and standards

- **To sum up**: there is no procedural unfairness in the consultation process under s 189.
    - Dismissal for operational reasons involves complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits.
    - The process involves a shared attempt at arriving at an agreed outcome that gives joint consideration to the interests of employer and employees.
    - Because it is not dependent on individual conduct and requires objective selection criteria, it is pre-eminently the kind of process where union assistance to employee members will be invaluable.
    - The choice made for the pre-eminence of collective bargaining in s 189 is:
        - rational
        - sound
        - fair and
        - based on international practice and standards

Collective Bargaining and Organisational rights

CCMA rules **Please read the CCMA rules**
https://www.saflii.org/za/legis/consol_reg/rftcopbtcfcmaa887/

NUMSA v Bader Bop (Pty) Ltd & Another 2003 (3) SA 513 (CC); [2003] 2 BLLR 103 (CC)
https://www.saflii.org/za/cases/ZACC/2002/30.html

Subject to your reading, the following points may be drawn from the case cited above

- This case deals with LRA Chapter III, Collective bargaining, Part A on organisational rights
- S 23 of our Constitution deals with labour relations and permits national legislation to recognise union security arrangements contained in collective agreements subject to the limitations clause in the Bill of Rights
- In short, the Court allowed minority unions to engage in the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational facilities such as access to the workplace, stop-order facilities and recognition of shop stewards

Solidarity & Others v Eskom Holdings Ltd (2012) 33 ILJ 464 (LC)
https://www.saflii.org/za/cases/ZALCCT/2011/17.html
Subject to your reading, the following points may be drawn from the case cited above

- In this matter the court found in favour of Solidarity that Eskom be bound to honour an agreement that reactor operators at Koeberg Nuclear Power Station have the right to early retirement without the loss of benefits
- The case deals with the niceties of pleadings and the law of evidence: it is a discursive judgment which may take much effort to read

Growthpoint Properties (Pty) Ltd v SACCAWU (2010) 31 ILJ 2539 (KZD)
https://www.saflii.org/za/cases/ZAKZDHC/2010/38.html
Subject to your reading, the following points may be drawn from the case cited above

- Picketing is lawful in South Africa under s 17 of the Bill of Rights in our Constitution
- Picketing is also permitted under s 69 of the LRA
- Please read section 69
- **Note**: picketing is described in case law as follows:

  "Ingredients common to the act of picketing in all jurisdictions appear to be the physical presence of persons called pickets, the conveying of information, and the object of persuasion. The "presence" element may take many forms, from one or two persons, in the vicinity of the entrance of the premises, comparatively indifferent to the outcome of the dispute, to large numbers calculated physically to prevent ingress and egress . . . The conveying of information may also take many forms, from the use of handbills, arm bands, placards and sandwich boards to sound trucks, and from the recitation of events to the conveying of exhortative messages. The object of persuasion appears to remain constant, to induce a boycott of the picketed operations by employees, customers, suppliers and others on whom the employer is dependent for the successful operation of his enterprise."

  (A.W.R. Carrothers, E.E. Palmer and W.B. Rayner, *Collective Bargaining Law in Canada*, 2nd ed. (Toronto: Butterworths, 1986),
- If picketing causes an unreasonable nuisance to parties not involved in the labour dispute, courts may limit the picketing with appropriate orders on how to conduct the picketing and what level of noise is allowed during picketing

The Occupational Health and Safety Act 85 of 1993 (OHSA)

- OHSA has 50 sections
- The long title to OHSA reads:

  To provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council for occupational health and safety; and to provide for matters connected therewith.

- There is no preamble to OHSA
- S 1 defines *inter alia* an employee, an employer and a 'workplace' as any premises or place where a person performs work in the course of his employment.
- Ss 8 to 12 contain general duties on employers to maintain safety for their employees

- S 13 places a duty on employers to inform employees of safety measures
- S 14 places general duties of employees at work to maintain safety
- S 17 requires the establishment of a health and safety committee where an employer has more than 20 employees
- S 24 requires reporting incidents at work where an employee gets injured
- S 26 forbids victimisation of any whistle-blower
- S 39 contains a presumption of what an employee is

Note to candidates: In examinations, questions may focus on employer duties, reporting obligations, and statutory liability for failure to comply with workplace safety obligations.

Unemployment Insurance Act 63 of 2001 (UIA)

- UIA has 80 sections in total: some are A, B and Cs to ordinary section numbers
- The long title to UIA reads:

  To establish the Unemployment Insurance Fund; to provide for the payment from the Fund of unemployment benefits to certain employees, and for the payment of illness, maternity, parental, adoption, commissioning parental and dependant's benefits related to the unemployment of such employees; to provide for the establishment of the Unemployment Insurance Board, the functions of the Board and the designation of the Unemployment Insurance Commissioner; and to provide for matters connected therewith.

- There is no preamble to UIA
- A more popular acronym for the UIA is **UIF** for the Unemployment Insurance Fund
- The purpose of the Act is to establish an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment
- S 3 provides that the Act applies to all employers and employees, other than employees employed for less than 24 hours a month with a particular employer, and their employers.
- Chapter 3 on claiming benefits starts with section 12 which deals with the rights to benefits
- S 16 deals with the rights to unemployment benefits
- The benefits in of UIF are extensive: it is well worth your time to read those sections
- Under section 42 an employer must ensure that every statement or other information which must be kept and submitted in terms of the Act is correct.

MOST IMPORTANT: the employer's liability to pay for the benefits of the UIF is legislated under Chapter 2 of the Unemployment Insurance Contributions Act 4 of 2002 (Contributions Act)

- Chapter 2 of the Contributions Act deals with the duty to contribute to the UIF and the determination of contributions required
- The Contributions Act is also well worth your time to read

Note to candidates: In examinations, emphasis may fall on employer contribution duties and employee entitlement to benefits.

Gunter v Compensation Commissioner 2009 (30) ILJ 2341 (O)
https://www.saflii.org/za/cases/ZAFSHC/2009/144.html
Subject to your reading, the following points may be drawn from the case cited above.

- Gunter was the farm foreman and a passenger in a vehicle when he sustained head injuries in a collision
- His claim for compensation succeeded on appeal since it was found his journey was in the course and scope of his employment at the farm
- He was *en route* to purchase spare parts for a combine for harvesting sunflowers

Twalo v Minister of Safety and Security and Another 2009 (30) ILJ 1578 (Ck)
https://www.saflii.org/za/cases/ZAECHC/2009/1.html
Subject to your reading, the following points may be drawn from the case cited above.

- COIDA permits claims by employees for injuries at work caused by accident or negligence
- COIDA does not cover claims where an employee is intentionally killed (murdered) by someone
- Private disputes between people resulting in the intentional killing of an employee do not expand the scope of COIDA's compensation
- *Quaere*: surely this would be different if an employer killed an employee?
- The position differs where the employer is the intentional wrongdoer. This would require separate legal analysis

Mahlangu and Another v Minister of Labour and Others 2021 (2) SA 54 (CC)
https://www.saflii.org/za/cases/ZACC/2020/24.html
Subject to your reading, the following points may be drawn from the case cited above.

- Section 1xix(d)(v) of COIDA excluded domestic workers employed in private households from the definition of 'employee', thereby denying them compensation in the event of injury, disablement or death in the workplace.
    - The Court held that the differentiation between domestic workers and other categories of workers was arbitrary and inconsistent with the right to equal protection and benefit of the law
    - The declaration of constitutional invalidity of s 1xix(d)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 made by the High Court of South Africa, Gauteng Division, Pretoria, was confirmed.
- The differentiation between domestic workers and other categories of workers also amounts to discrimination as domestic workers are predominantly black women.
    - This means discrimination against them constitutes indirect discrimination on the basis of race,
    - sex and
    - gender.
- Analysing discrimination within the framework of intersectionality proved to be a useful tool in determining the presence and extent of the discrimination. The [European Court of Human Rights] considered ways in which gender intersects with other identities and how these intersections contribute to unique experiences of oppression and privilege.

- The exclusion of domestic workers from the protections under COIDA resulted in a situation where domestic workers have, for decades into our democracy, had to bear work-related injuries or death without compensation.
- To conclude on equality, the exclusion of domestic workers and, therefore, their dependants from deriving benefits under COIDA limits the rights to equality before the law and equal protection and benefit of the law under s 9(1) and the right not to be discriminated against unfairly guaranteed in s 9(3).

Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others 2017 (3) SA 242 (CC)
https://www.saflii.org/za/cases/ZACC/2017/3.html
Subject to your reading, the following points may be drawn from the case cited above

- The LRA gave 'workplace' a special meaning distinct from its ordinary, geographical, one. In the LRA's definition a workplace was where the employees of an employer, collectively, worked: the functional organisation — not geographical location — was primary
- The lower courts' finding that each mining house operated integrally as a single workplace, and that the Amcu-majority mines were not independent operations, is correct on constitutional principles, legal analysis and factual assessment
- Orderly and productive collective bargaining required some form of majority rule,
    - and s 23(1)(d) legitimately gave it enhanced power within a workplace,
    - thereby improving employees' bargaining power.
    - Amcu could not object to the provision on the basis that it enforced a form of majoritarianism when it itself sought to enforce a form of majoritarianism
- It is true the codification of majoritarianism in s 23(1)(d) limited the right to strike, but the limitation is reasonable, given the importance of its purpose: orderly collective bargaining

Securicor (SA) (Pty) Ltd v Lotter 2005 (5) SA 540 (E)
https://www.saflii.org/za/cases/ZAECHC/2005/2.html
Subject to your reading, the following points may be drawn from the case cited above

- Section 197 of the Labour Relations Act makes inroads on the common-law principle that a contract of employment may not be transferred without the consent of the employee
- But s 197 does not confer any greater or lesser reciprocal rights and obligations upon either the employee or new employer than that which existed between the employee and the old employer.
- In order to determine whether a restraint of trade agreement survives the transfer of a business under s 197,
    - one needs to examine as a matter of fact whether the restraint formed part of the goodwill of the business and
    - whether that goodwill formed part of the business being transferred as a going concern in terms of the section.
    - This is an objective factual enquiry which depends on the circumstances of each case.
- If the factual enquiry establishes that the restraint formed part of the transfer of the business the employee's obligations under the restraint are owed to the new employer and the new employer is entitled to enforce the restraint against the employee.

Note for candidates: in paragraph [11] the *Securicor* judgment deals with the word *assignment*. Please check whether you agree with the terminology used in the judgment after reading the following explanation of contract law terms.

- A right bound to its corresponding duty is an obligation
    - R + D = O
- A right is transferred by cession: cession is the noun
    - The verb to transfer a right is to cede
- A duty is transferred by delegation: delegation is the noun
    - The verb to transfer a duty is to delegate
- An obligation is transferred by assignment: assignment is the noun
    - The verb to transfer an obligation is to assign

The distinction between cession, delegation and assignment becomes particularly important in section 197 of the LRA on transfers of contracts of employment when businesses are sold.

When you apply the correct terminology to drafting contracts, you will understand the nature of contracts better. You will also notice that many contracts and statutes like the LRA confuse those terms by treating duties and obligations as synonyms. They do overlap: but they are not synonyms.

Remember:

- The cedent cedes a right to the cessionary
- The delegator delegates a duty to the delegate
- The assignor assigns an obligation to the assignee

Ethical duties in labour litigation

Remember: the Guide for Professional Legal Ethics
Principles governing the hopeless case
"The ethics of the hopeless case", Owen Rogers, Advocate December 2017

University of South Africa v Socikwa and Others (J 675/23; J 680/23) [2023] ZALCJHB 172
https://www.saflii.org/za/cases/ZALCJHB/2023/172.html
Subject to your reading, the following points may be drawn from the case cited above

- Courts are constitutional constructs designed to serve justice and enhance the rule of law.
- Courts are not theatres of amusement to elevate hedonism.
- Courts must be respected
    - by their officers and
    - those privileged to have the right of audience.

- Legal practitioners bringing hopeless cases to court must be prepared for consequences that flow.
- Legal practitioners must not align themselves with cases that are absolutely hopeless for pecuniary reasons and thereby frustrate *bona fide* litigants with worthy cases for courts to adjudicate.

Finally, section 162 0f the LRA deals with costs as follows:

> 162 **Costs**
>
> (1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
>
> (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account-
>
> (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
>
> (b) the conduct of the parties-
>
> (i) in proceeding with or defending the matter before the Court; and
>
> (ii) during the proceedings before the Court.
>
> (3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.

Nicholas J. Tee
January/February 2026