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# Employee or independent contractor ?

## *Twists and turns to determine employment relationship*

**by Ingrid Lewin**

Recently, the Labour Court and the Labour Appeal Court have had to consider some novel issues relative to the nature of the relationship between the parties before them. In addition to the usual question as to whether one of the parties to a dispute is an "employee" or an "independent contractor" (**Total SA (Pty) Ltd v National Bargaining Council for the Chemical Industry & Others** (2013) 34 ILJ 1006 (LC)), they have had to determine:

- whether a person "assisted" the other party in conducting or carrying out its business, in terms of the second part of the definition of "employee" in the Labour Relations Act (**Melomed Hospital Holdings Ltd v CCMA & Others** (2013) 34 ILJ 920 (LC));
- whether a person claiming to be an employee qualified as an "employee" in circumstances where he did not do any work during the course of the contract (**Independent Institute of Education (Pty) Ltd v Mbileni & Others** (2013) 34 ILJ 1538 (LC));
- whether and in what circumstances the corporate veil should be pierced in order to determine which entity was obliged to register as an employer with a bargaining council (**Bargaining Council for the Furniture Manufacturing Industry, KwaZulu Natal v UKD Marketing CC & Others** (2013) 34 ILJ 96 (LAC)); and
- hold two entities liable for an unfair dismissal (**National Union of Metalworkers of SA & Others v Lee Electronics (Pty) Ltd & Others** (2013) 34 ILJ 569 (LAC);
- whether a non-executive director and a significant shareholder in a company can also be an employee (**Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others** ((2013) 34 ILJ 392 (LC));
- whether the CCMA ought to have allowed oral evidence to be presented when it was called upon to determine whether an employer-employee relationship existed (**Shell SA (Pty) Ltd v National Bargaining Council for the Chemical Industry & Others** (2013) 34 ILJ 1490 (LAC)).

These decisions will be discussed in this contribution.

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# The existence of an employment relationship

In **Melomed Hospital Holdings Ltd v CCMA & Others** Judge Steenkamp was presented with the following set of facts-

Melomed, which operates three private hospitals in the Western Cape, needed to replace an independent contractor, a Dr Lamprecht, who employed and paid doctors to perform clinical duties at Melomed's emergency services units, because the good doctor, as the learned judge wryly records, was "too busy with cat scans of a different kind – he was an international adjudicator at feline shows" - and Melomed was concerned that it had too little control over his movements.

Enter Dr Adrian Burger who, initially, genuinely believed that he would be employed by Melomed. During the course of negotiations, a major problem arose - the ethical rules of the Health Professions Council of SA (HPCSA) forbid private hospitals from employing doctors to perform clinical duties. In order not to contravene the rules, Melomed instructed its attorneys to form a "special purpose vehicle", an incorporated company, through which Burger and other doctors (some of whom were foreign) would provide their services. Before the contract was signed and the company incorporated, Burger and the other doctors started working.

Pertinent to the dispute were the following factors.

- Burger worked only for Melomed and was wholly economically dependent on it.
- Melomed provided Burger with the "tools of the trade" – fully equipped emergency units, a laptop and a white coat
- His monthly income was fixed.
- His monthly salary pay slip reflected "Dr Adrian Burger Inc".
- He was required to work 48 hours a week.
- PAYE and UIF were deducted.
- He was offered the opportunity to join Melomed's medical aid and pension scheme.
- The employer's tax number reflected on the payslip was that of Melomed.
- His Melomed business card gave his job title as "clinical manager".

Melomed handled all human resources functions, administration and payroll regarding Burger's employment as well as the employment of other doctors.

Burger held weekly meetings with Ahmed Chohan, Melomed's COO, saying he believed this was necessary because he reported to Chohan. (Chohan denied this saying he interacted with Burger as a service provider).

Although Burger was the sole shareholder and director of the company, only Melomed had signing powers on its bank account and its registered address was that of Melomed.

When Melomed discovered that foreign doctors were not allowed to be employed in South Africa in accordance with HPCSA guidelines, Chohan brought this to Burger's attention and instructed Melomed's HR department not to employ any foreigners. When Burger failed to terminate the services of the foreigners (he wanted to give them time to "structure their affairs" before termination), without Burger's knowledge, Melomed terminated the purported agreement on the basis that the company was in breach of contract for failing to terminate the foreigners' services.

The day before the "agreement" was terminated, Burger discovered that large amounts of money had been transferred out of the company's bank account to Melomed. He then revoked the signing powers of Melomed's officials and became the sole signatory on the bank account. Burger was only told that the agreement had been terminated when he reported for duty four days later. He referred an unfair dis-

missal dispute to the CCMA after which Melomed launched liquidation proceedings against the company. At the arbitration Melomed argued that it was not the true employer.

Based on the factors summarized above, the arbitrator had little difficulty in coming to the conclusion, inter alia, that the object of the contract was for Burger to render personal services to Melomed, not to perform a specified job or to produce a specified result. The dominant impression was of an employment relationship between Melomed and Burger.

At the outset in the review application, Judge Steenkamp pointed out that the reasonableness test set out in **Sidumo & Another v Rustenburg Platinum Mines Ltd & Others** 2004 SA 24 (CC) on which the applicant had based this aspect of their case, did not apply to a commissioner's finding on jurisdiction: the question, said the learned judge, is not whether the commissioner's finding was reasonable but whether, on the facts, the applicant was an employee. The Court also had little difficulty in coming to the conclusion that Melomed, and not the company, was Burger's employee.

What is worthy of note in this matter is the test that the judge considered in coming to his conclusion. Referring to Paul Benjamin's article: **An Accident of History: Who is (and who should be) an Employee Under South African Labour Law** (2004)25 ILJ 2234 787 at 789, Judge Steenkamp emphasised the need to look more closely at the meaning of the second part of the definition of "employee" in the LRA, namely:

> *"(b) any other person who in any manner assists in carrying on or conducting the business of the employer" [my emphasis]*

and consider whether persons are conducting their own businesses or merely **assisting** an employer to conduct theirs.

> *["50] Along that fault-line, [Benjamin] suggested, lies the true divide between employment and self-employment. And that is exactly the situation that pertained before the arbitrator in this case. The evidence before the arbitrator led to a reasonable conclusion that Burger assisted Melomed in carrying on its business; he did not conduct his own business. On the evidence before the arbitrator, this conclusion was not only reasonable but correct".*

In another matter, whilst a CCMA commissioner found that a Mr Wilson was an employee, the Labour Court, in **Independent Institute of Education (Pty) Ltd v Mbileni & Others**, found otherwise.

Wilson was employed as the financial director of a company that owned a group of schools. The business was sold to the Institute and Wilson, as a shareholder, received a benefit from the proceeds. In terms of a "fixed-term service agreement", Wilson agreed to work for the company for a four-month handover period and thereafter to be paid a reduced retainer fee for a two-year period during which both he and the company would be obliged to try to find suitable alternative employment for him. The employer terminated the agreement prior to its completion on the basis that Wilson had breached his obligation to co-operate in finding alternative employment.

Wilson referred an unfair dismissal dispute to the CCMA where, based on the wording of the agreement and the fact that Wilson was not permitted to work for anyone else during the retainer period, the commissioner decided that he was an employee.

In coming to the conclusion that he was **not** an employee, the Labour Court found that Wilson had not performed any work for the Institute during the handover period. What "assistance" he did give during that period, said the Court, was essential to complete the finalization of the "purchase consideration" and therefore was done as the seller of the business and not as an employee. After that, he had not performed any work, nor had he assisted the employer in carrying out the company's business.

Interestingly, the Court distinguished this case from those involving illegal contracts and vul-

nerable workers saying that:

> *"[26] ... This case is not one in which the court should search for a constitutional slant in order to further expand the meaning of 'employment relationship' in our law. I find that Wilson was not an employee at the time of termination of the service agreement and was not dismissed. He did not enjoy the protection of s23 of the Constitution – the right to fair labour practices. In addition, he was far from belonging to a vulnerable group in our society, such as those accorded limited protection in Kylie by dint of the use of a constitutional slant."*

In addition, the Court distinguished this case from the "factual matrix" in **Wyeth SA (Pty) Ltd v Manqele & Others** (2005) 26 ILJ 749 (LAC) where the Court had to consider whether a person who had not yet commenced employment and, thus, had not performed any work, could be "dismissed" and decided that the definition of employee in the LRA included a person who had concluded an employment contract where the commencement of employment was deferred to a later date. In this regard, the court said:

> *"[25] In contrast to Wyeth, .... Wilson did render services to the applicant in terms of a short-term contract of employment until the end of the handover period, and after [that] he no longer rendered any services qua employee or contractor. This is reflected in the distinction made in the service agreement between the word 'remuneration' attached to the salary paid to him during the handover period, and the word 'retainer' describing the lower mount he was paid after the handover period in terms of that agreement to which he was a signatory."*

In **Protect a Partner (Pty) Ltd v Machaba-Abiodun & Others,** the Court applied the following three primary criteria established by the Labour Appeal Court (in **State Information Technology Agency (Pty) Ltd v CCMA & Others** (2008) 29 ILJ 2234 (LAC) to determine whether a person was an "employee".

- The employer's right of supervision and control ("the control test").
- Whether the employee forms an integral part of the organisation with the employer ("the organisation test").
- The extent to which the employee is or was economically dependent upon the employer ("the economic dependence test").

The "person" in this case, Ms Machaba-Abiodun, was invited initially to join the business (then a close corporation auditing firm) as a BEE partner and to act as a non-executive director. In addition, she was expected to spend one day a week furthering its business interests. Later, the business changed its status to a private company and Ms Abiodun concluded a shareholder's agreement with the CEO. She continued to receive a monthly salary and an additional amount which went towards paying off the loan she had been given to purchase a 45 percent shareholding. She was now required to spend three days a week on company business.

Two years later she was dismissed for misconduct, after a disciplinary enquiry. When she referred an unfair dismissal dispute to the CCMA, her erstwhile "employer" argued that she was not an employee.

Applying the control test to the evidence, the Court found that Ms Abiodun in all of the following respects, was subject to the control of the applicant:

- the applicant had the authority to hire and fire her;
- she was subject to the disciplinary control of the applicant and was dismissed in terms thereof;
- the applicant provided Abiodun with office space and equipment in order to "further the applicant's business";
- she had invested a "huge amount of money" to purchase her shares and, subject to the board's direction, was responsible for governance matters.

In dismissing the argument that, because she

was not a qualified auditor she was therefore unable to "partake" in the core business of the applicant and that she was not obliged to devote her time and energy to the applicant's business on a full-time basis, the Court said:

> *"[64] This contention misses the point. An employee does not form part of the organisation simply because he or she performs the same services or tasks as other employees in the organisation or because he or she does not do so on a full-time basis. On the contrary, both the BCEA and the LRA acknowledge part-time employment relationships and extend protection against the unfair deprivation of work security to them.*
>
> *[65] According to Benjamin [in the article referred to above] integration into the employer's organisation is now a factor that may be taken into account in cases in which the conventional aspect of control and supervision are not present."*

Like Steenkamp J (in **Melomed** above), the Court added that any criticism of the organisation test:

> *"[65]… must now be tempered by the fact that the statutory definition of an employee requires a court to consider whether the employee is assisting the employer conduct its business, an issue to which the 'organisation' test addresses itself"*

Finally, applying the economic dependence test, the Court found that, although her remuneration from the applicant was not her **only means** of income, it was the "lion's share" and dominant form of her earnings. For those who would argue a contrary view, the Court (citing Benjamin who indicates in his article that it is not necessary to establish the existence of all three criteria for the purposes of deciding whether an employment relationship exists) said that no one factor is decisive and it is possible, in certain circumstances to declare that an employment relationship exists if only one of the three factors is satisfied.

Having found that Ms Abiodun had discharged the onus, at the very least, in relation to the first two criteria, the Court ruled that she was indeed an employee.

## Lifting the corporate veil

In order to determine whether a number of entities could register as employers with a bargaining council, the Labour Appeal Court, in **Bargaining Council for the Furniture Manufacturing Industry, KwaZulu Natal v UKD Marketing CC & Others,** was asked to lift the corporate veil in circumstances where the bargaining council argued that the people working for the individual entities (registered close corporations and sole proprietorships) were, in fact, employees of UKD.

The facts of the matter were as follows. In 2003 UKD decided to restructure its business by setting up eleven individual entities to be owned by former employees. The entities, close corporations or sole proprietorships, would supply particular goods and services to UKD which would then act as wholesaler or distributor of the finished product to customers. When the entities tried to register with the bargaining council, it refused on the grounds that the entire set-up was a sham by UKD to avoid the consequences of an employment relationship.

In its determination as to whether or not the corporate veil should be lifted in this case, the Court relied on the common law and particularly the principles formulated by Smalberger JA in **Cape Pacific Limited v Lubner Controlling Investments (Pty) Ltd** 1995 (4) SA 790 (A).

Firstly the courts must strive to give effect to and uphold a company's separate personality as -

> *"[T]o do otherwise would negate and undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences attached to it." (At 803G)*
>
> *Secondly, where fraud, dishonesty or other improper conduct is apparent, the Court can then proceed to look at the substance rather*

*the form of the..“adopted structure to determine whether there has been a misuse of corporate personality which would justify its being disregarded”.(At 803H)*

Finally, quoting Smalberger JA quoting Gower “**The Principles of Modern Company Law”** (5 ed at 133) the court accepted that –

*"…. a company can be a façade even though it was not incorporated with any deceptive intentions; what counts is whether it has been used as a façade at the time of the relevant transactions”. (At 804C)*

Taking the following facts into account, the Court found that the bargaining council had not made out a case which would justify conflating the entire structure and operation into a business conducted, organized and operated solely and exclusively by UKD and there was no justification for the Court to conclude, on a balance of probabilities, that the entities did not operate for their own account or that UKD had any financial interest in them. The “uncontroverted evidence” was that:

- the close corporations were registered as employers for the purposes of UIF;
- some of the entities were duly registered with SARS as VAT vendors;
- the various entities hired and fired employees, paid their wages, made statutory deductions and regulated their employees’ hours of work;

And, said the Court:

*“[20] … [The] evidence certainly did not suggest that these respondents were not entitled to assume additional work outside of that which was required in terms of orders which had been procured by [UKD].”*

In **National Union of Metalworkers of SA & Others v Lee Electronics (Pty) Ltd & Others**, Davis JA cited **Amlin (SA) (Pty) Ltd v Van Kooij** (2008)(2) SA 558 (C) as a starting point. In **Amlin** the court noted that piercing the corporate veil necessitates:

*“That a court … “opens the curtains” of the corporate entity in order to see for itself what obtained inside. This only becomes necessary and obligatory in circumstances where justice will not otherwise be done to the litigants.”*

Judge Davis also referred to s 20(9) of the Companies Act 71 of 2008, which provides that, if a Court finds that the incorporation of the company, any use of the company, or any act of the company constitutes an “unconscionable abuse of the juristic personality of the company as a separate entity”, a court may:

*“declare that the company is deemed not to be a juristic person in respect of any right, obligation the incorporation of the company, any use of the company, or any act by or on behalf of the company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity.”*

Here, Lee Electronics and South Sound were registered as independent corporate entities with a common single shareholder (identified in the reported judgement only as the “third respondent”) and operated out of premises across the road from one another.

In March 1999, Lee Electronics, a manufacturer and distributor of radios “switched off the lights” and terminated the contracts of employment of the employees by simply paying them their salaries for the week they had worked and providing them with pay in lieu of outstanding leave.

Thereafter, according to the applicants, some of the employees were re-employed by Lee Electronics and / or South Sound, which manufactured and distributed television sets. The applicants alleged that Lee Electronics continued to operate in a clandestine manner, including operating at night and at times trading as South Sound with, *inter alia*, the employees it had re-employed.

Because of the confusion over which of the two entities – Lee Electronics or South Sound - conducted the business previously conducted by Lee Electronics prior to the dismissal, the applicants in an amended statement of case claimed that the third respondent (the common

shareholder) was an employer of the dismissed employees and sought to hold him as well as South Sound jointly and severally liable for the unfair dismissal of the employees by Lee Electronics.

Bolstered by the evidence given by one of the employees, a Mr Jackson - that he had worked for both Lee and South Sounds - and the accountant for Lee and South Sound in the court a quo, the appellants argued that it was the third respondent, through his "manipulation of the two close corporations, which he controlled", who was the employer of the individual applicants.

In addition to his reliance on the dicta in the two cases quoted above, Davis JA also had regard to a more recent matter before the Supreme Court of Appeal which adopted a narrower approach as to when the corporate veil may be pierced (**Hulse-Reutter & Others v Godde** 2001 (4) SA 1336 (SCA)). In this matter, the Court held that it had no general discretion to disregard the existence of a separate corporate identity simply whenever it considered it just or convenient to do so. As a matter of principle, that Court said:

> *"... there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter".*

Relying on additional evidence given by Jackson (whose evidence, remarked the Court, was "not a model of clarity") in the Court a quo - that his employment with Lee had never been terminated and that, at the time when the appellants lodged their amended statement of case, he was still in the employ of Lee - and in the absence of any evidence to suggest that at the time there had either been a transfer of the business from Lee to South Sound, or that Jackson had been employed by any entity other than Lee to whom he paid UIF contributions [sic], the Court decided that there was no justification for piercing the corporate veil because:

> *"... it cannot be found that there was an abuse of the distinction between the corporate entity and the person who controlled that entity, namely third respondent, which resulted in an unfair advantage being afforded to third respondent."*

# Evidential issues

Finally, in **Shell SA (Pty) Ltd v National Bargaining Council for the Chemical Industry & Others**, the CCMA was wrapped over the knuckles for refusing to allow oral evidence to be led before deciding who the employer was in an employment relationship. In this case there were two possible employers – Shell SA and Shell Sudan.

In deciding that Shell SA was the employer, the CCMA and the Court a quo relied exclusively on a letter of appointment issued by Shell SA and failed to have regard to the fact that the letter of dismissal was issued by Shell Sudan and that the employee had received a severance package from Shell Sudan. Both issues, said the Court, "begged for an explanation".

Because there was a "clear dispute of fact which the conciliator chose to decide without the benefit of oral evidence", the Court found that the conciliator had committed a material irregularity warranting the setting aside of his decision.

In coming to its decision the Court relied heavily on the views expressed by the Labour Appeal Court in **Denel (Pty) Ltd v Gerber** (2005) 26 ILJ 12 (LAC) some of which were as follows.

> *"[19]...When a court or other tribunal is called upon to decide whether a person is another's employee or not, it is enjoined to determine the true and real position. Accordingly, it ought not to decide such a matter exclusively on the basis of what the parties have chosen to say in their agreement for it might be convenient for both parties to leave out of the agreement some important or material matter or not to reflect the true position……."*

and

> *"[20] .. Indeed, were a court or tribunal faced with such a question, to decide it in accordance only with the contents of the agreement between them, then, in a case such as*

*this one, where the decision whether a person was or was not another one's employee goes to the jurisdiction of the court, the parties would in effect be able by their agreement to confer jurisdiction on a court or tribunal which it otherwise does not have or to take away from a court or tribunal jurisdiction that it otherwise has over them. That would be completely untenable and can simply not be allowed because whether or not a court or other tribunal has jurisdiction in a particular matter is, generally speaking, a matter that must be determined objectively and not be based on the say-so of any party or, indeed, of all parties to a dispute……"*

*"[21]...Irrespective of, and quite apart from, what has been said above, it is furthermore clear from the authorities not only in this country but also in England and elsewhere that the law is that whether or not a person is or was an employee of another is a question that must be decided on the basis of realities – on the basis of substance and not form or labels – at least not form or labels alone"*

and

*"[22]... Any oral or other evidence which may assist the court to conclude what the reality of the relationship is or was between such two persons is admissible and is not precluded by the parol evidence rule."*

**Ingrid Lewin**

# Settlement agreements and orders of court

## *Remedies for parties disputing compliance*

**by P.A.K. le Roux**

Settlements agreements are an everyday feature of the South African labour relations system and can take various forms. Trade unions and employers enter into collective agreements settling wage and other disputes. Employers and employees regularly settle disputes arising from dismissals or disputes arising from an allegation that an employer has committed an unfair labour practice.

But what remedies are at the disposal of a party that alleges that the other party has failed to comply with such a settlement agreement? If the settlement agreement takes the form of a collective agreement, the party will usually be able to refer the dispute to arbitration – it will usually be a dispute arising from the application or interpretation of a collective agreement. See s 24 of the Labour Relations Act, 66 of 1995 (LRA).

In many cases the provisions of the collective agreements will be incorporated into the employee's contract of employment – thus also giving him or her (or the employer) a contractual remedy. If the agreement is entered into between an individual employer and an employee a contractual remedy would also be available.

But there is another possibility; at least some of these settlement agreements may be made orders of court or arbitration awards. This means that, potentially at least, the failure to comply with the agreement could constitute contempt of court.

The relevant sections in the LRA are sections 142A, section 158(1)(c) and s 158(1A)

Section 142A reads as follows -

*"(1) The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award.*

*(2) For the purposes of subsection (1), a settlement agreement is a written agreement*

> *in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7).”*

For our purposes the important point is that s 142A(1) makes it clear that a settlement agreement can only be made an arbitration award if the dispute has already been referred to the Commission for Conciliation, Mediation and Arbitration (CCMA).

This type of settlement agreement will therefore usually be entered into at the conciliation proceedings or at the subsequent arbitration proceedings. Settlement agreements entered into prior to this occurrence do not fall within the ambit of s 142A.

But what about the situation where the matter has to be referred to the Labour Court for adjudication? Here the relevant provision is s 158 (1)(c).

This provides that the Labour Court may –

> *“ ... make any arbitration award or any settlement agreement an order of the Court;”*

This must be read with s 158 (1A) which provides that -

> *“For the purposes of subsection (1)(c), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is only entitled to refer to arbitration in terms of section 22(4), 74(4) or 75(7).”*

# Two approaches

The Labour Court has adopted two approaches to the interpretation of s 158(1A). The first is that adopted in **Bramley v Wilde t/a Ellis Alan Engineering & Another** (2003) 24 ILJ 157 (LC). The employee in this matter was dismissed on the grounds of the employer’s operational requirements. He challenged the fairness of his dismissal but prior to actually referring the dispute to the CCMA he and his employer entered into a settlement agreement in terms of which certain payments would be made to him. As a result there was no referral of a dispute to the CCMA. The employer failed to abide by the agreement and the employee then approached the Labour Court for an order making the agreement an order of court.

The employer opposed the granting of such an order on the basis that the agreement the employee was seeking to enforce was not a settlement agreement as envisaged in s 158(1)(c). This was on the basis that s 158(1)(c) only applied to a “settlement” of a dispute which had been made the subject of dispute resolution under the LRA; i.e the matter should have been referred to the CCMA as a precondition for the section applying.

Before the Court the parties argued the matter on the basis that s 158 should be applied as it was worded prior to its amendment in 2002. On this basis the Court rejected the employer’s argument. Whilst it accepted that the dispute that was to be settled had to be one between employers and employees, there was no requirement that the dispute should have been referred to the CCMA. It did so in the following terms -

> *“And it seems to me to be irrelevant to the exercise of the competence under s 158(1)(c) that the machinery of the Act had not been invoked when the dispute in question was settled. There is nothing in the Act which suggests a constraint of this type, and there appears to me to be no rational basis, whether rooted in policy or otherwise, for I ascribing to the legislature an intention to differentiate between settlements which are concluded before a dispute has, for instance, been referred for conciliation to the Commission for Conciliation, Mediation & Arbitration (the commission) and those which are only settled thereafter. On the contrary, a differentiation of the kind contended for would give rise to so high a degree of artificiality that it could never have been contemplated by the legislature. It, after all, has sanctioned legislation to resolve disputes efficiently, expeditiously and inexpensively, and I am unable to discern why it would seek*

*to treat those who resolve their disputes at an early stage differently from those who have been required to invoke the machinery of the Act before so doing." At 160H – 161A.*

The Court also dealt with the issue on the basis that the amendments introduced in 2002 did in fact apply and came to the same conclusion. It relied on the provisions of s 158 (1A ) quoted above. More particularly it considered the implications of the formulation that indicated that what was required was that the person concerned had to have a "right" to refer the underlying dispute to the CCMA.

The Court pointed out that "at first blush", and on a strictly literal and narrow construction, only a settlement agreement which has been concluded after the right to refer to arbitration or to the Court has arisen, falls within the scope of s 158(1)(c).

This would mean that the settlement agreement could not be made an order of because the employee had not referred the dispute to the CCMA. However, it rejected this approach and found that s 158(1A) should not be narrowly interpreted.

*"In short, I am of persuasion that the words 'the right to refer' in s 158(1A) are not to be construed in a narrow, literal sense so as to equate to a right which is open to immediate exercise. In my judgment, it connotes a far wider concept, such as an entitlement which may only fall to be exercised once the prerequisites for doing so have been satisfied. Thus, provided only that the dispute is of a kind which is amenable to adjudication by the commission or the court in terms of the structure of the Act, albeit not as a matter of immediacy, but once the prerequisites for such adjudication have been satisfied, a settlement in relation thereto may be made an order in terms of s 158(1)(c), irrespective of the date of its conclusion.*

*It is in this wider sense that the word 'right' is in my judgment used in s 158(1A) of the Act. It follows, in my view, that the character of the right referred to in s 158(1A) is such that it need not be open to immediate exercise, but may be invoked at some time in the future when the prerequisites therefor have been fulfilled. It nonetheless is something which is extant in the sense that, bar a subsequent resolution of the matter, the machinery of referral may be resorted to."*

The second approach is that found in **Molaba & Others v Emfuleni Local Municipality** (2009) 30 ILJ 2760 (LC). In this case a group of employees sought to enforce an alleged agreement in terms of which they had been granted certain wage adjustments by having the agreement made an order of court in terms of s 158(1)(c); this was in circumstances where they had referred no dispute to the CCMA or bargaining council. The agreement was entered into during a grievance process. The Court found that s 158(1)(c) should not be interpreted to permit such an approach.

# The Labour Appeal Court (LAC) approach

This issue has now been considered in the recent decision of the LAC in **Greeff v Consol Glass (Pty) Ltd** (2013) 34 ILJ 2835 (LAC). The employer in this matter embarked on a restructuring exercise. Whilst this process was being implemented it signed an agreement with the applicant employee in this matter in terms of which she would be paid a severance package. In circumstances which need not be discussed here the employer failed to pay the employee the agreed severance package. In these circumstances the employee could have instituted a contractual claim in order to enforce the agreement. Instead she sought to have the agreement made an arbitration award in terms of s 142A of the LRA.

The CCMA commissioner granted the application. This was then overturned on review. She then applied to the Labour Court for the agreement to be made an order of court in terms of s 158(1)(c).

The Labour Court refused to grant the application and applied the approach adopted in the

**Molaba** decision.

The employee appealed to the LAC. The LAC rejected the approach adopted in the **Molaba** decision and found that s 158(1A) should be widely interpreted.

It stated that for a settlement agreement to be made an order of court in terms of s 158(1)(c), it must be "in writing", must be in settlement of a dispute (ie it must have "as its genesis" a dispute); the dispute that gives rise to the settlement must be one that the party has a right to refer to arbitration, or to the Labour Court for adjudication, in terms of the LRA; and, must not be of the kind that a party is only entitled to refer to arbitration in terms of s 22(4), s 74(4) or s 75(7).

It then went on to state that –

> *"[24] Making settlement agreements orders of court may be regarded as important for the protection of the rights of the parties to the settlement. It not only facilitates and enables execution through court processes, but would enable an aggrieved party to institute contempt proceedings if the order of court is not complied with. If the word 'right' in s 158(1A) were to be given a strict meaning, consequences would ensue that cannot be said to be consistent with the aims and objects of the LRA. With regard to the kinds of dispute envisaged in s 191 of the LRA — the power of the Labour Court to make settlements orders of court would be limited to those settlements entered into after failed conciliation and a certificate has been issued to that effect, or in respect of which 30 days elapsed from the date the dispute was referred to the council or CCMA, but which remained unresolved. Parties would be reluctant to enter into settlement agreements before the aforementioned events have occurred, because they would not be able to make their agreements orders of court. ... The only settlement agreements that the CCMA would be empowered to make awards would be those concluded after failed conciliation and a certificate had been issued to that effect, or 30 days had elapsed since the dispute had been referred to the CCMA and the dispute remains unresolved. Giving a strict meaning to the word 'right' in s 158 (1A) would have the effect of differentiating between those settlements concluded before and those concluded after the statutory events pertaining to conciliation had occurred. Other than purporting to limit the potential number of applications to make settlements orders of court, there appears to be no rational basis for such differentiation. Moreover, any retardation, or discouragement of the early settlement of disputes is not consistent with the objects of the LRA, namely, the resolution of disputes as speedily as possible, in an efficient and cost effective manner. Lingering, unsettled disputes are not conducive to stability in the workplace and militate against the principle aims of the LRA in that respect."*

## Comment

The LAC decision is important in the sense that it provides a party who alleges that a settlement agreement has been breached a remedy in addition to those described above, even if there has been no referral of the dispute in terms of the statutory dispute resolution provisions found in the LRA. However, it should be remembered that the granting such a remedy remains a discretionary one. If there are important disputes of fact as to whether a settlement agreement has in fact been breached, the Court may refuse to utilise its powers in terms of s 158(1)(c). In these circumstances it may be preferable for the applicant to make use of other remedies.

**PAK le Roux**