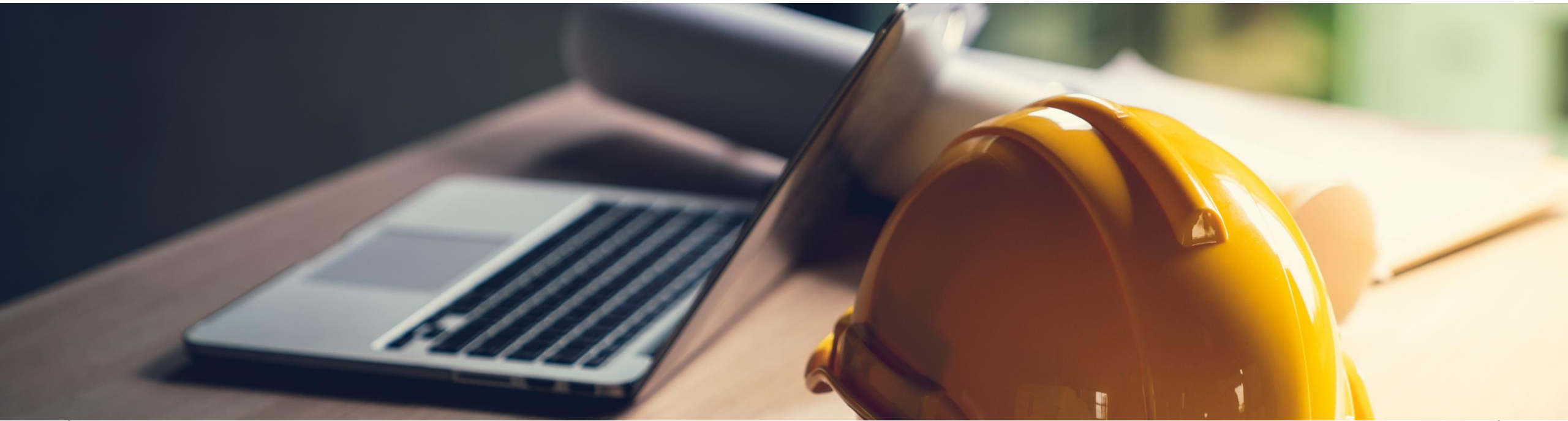




Practical insights from recent case law developments in OHS

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Practical insights from recent case law developments in OHS

- Limited area of case law – often required to discern principles from cases brought in other legal disputes (e.g. delictual, contractual or employment disputes)
- Would be of great value to the industry for jurisprudence to be developed. Principles crystallised and to be judicially considered.

Key concepts	Case law
Risk assessment procedure	<i>Mofokeng v CCMA and Others</i> [2022] JOL 54505 (LC) (27 June 2022)
Zero tolerance policies in High-risk environments	<i>Enever v Barloworld Equipment South Africa, a Division of Barloworld South Africa</i> (2024) 45 ILJ 1554 (LAC) (23 April 2024)
Breach of safety rules to be treated as serious misconduct	<i>SBX t/a DB Thermal v Nhlapo and Others</i> [2024] JOL 63692 (LC) (22 March 2024)
SHE manager duties & impact on OHS culture	<i>Sulzer Pumps (Pty) Ltd v Nomxhanya and Others</i> [2024] ZALCJHB 253 (15 July 2024)

Mofokeng v CCMA and Others

BACKGROUND

- **Assessing and responding to occupational health and safety risks**
 - The Labour Court reinstated an employee who was dismissed for voicing her dissatisfaction with the company's policy on wearing high-heeled shoes on mining premises.
 - While the judgment has been widely covered for its findings on the dismissal of an employee on grounds of insubordination and incitement for expressing dissatisfaction about a workplace rule, this judgment incorporates important principles regarding the **importance of conducting risk assessments properly to inform safety rules**.
 - The provisions of section 11 of the Mine Health and Safety Act were fundamental in the outcome of this matter. The principles are equally applicable to risk assessments conducted in OHSA environment work places.

Mofokeng v CCMA and Others

INTERESTING FACTS

- The mine in this matter implemented a rule that required “*appropriate shoes must be worn at all times. Slippers, high heels and open shoes are not allowed*”. The rule was implemented on 1 June 2015. Prior to this, high heels etc. had not been a problem.
- On 21 September 2017, the policy was revised to say “*only flat shoes may be worn on the Premises. No sleepwear is allowed.*” Prior to this, the rule was ambiguously applied and high heels had been worn in the offices with no incident.
- The complainant worked in the main office complex.
- The risk assessment dealing with this topic (the wearing of high heels) was done on 20 September 2017.
- The outcome of the risk assessment was that high heeled shoes posed a safety risk and that only flat shoes could be worn. Failure to comply could lead to disciplinary action.

RELEVANT
FINDINGS OF THE
COURT

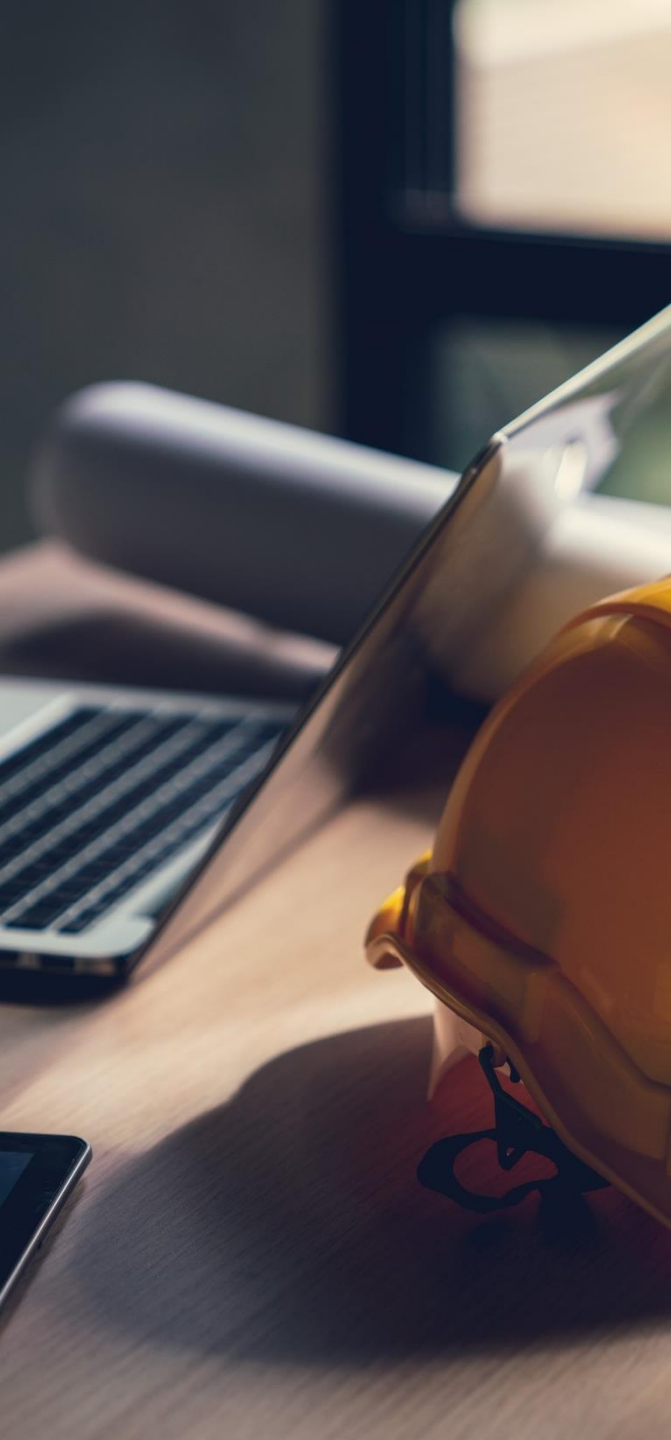
Mofokeng v CCMA and Others

- The policy was first adopted in June 2015 but the risk assessment only done in September 2017.
- Before a risk assessment informs a policy / rule, the rule was invalid and unreasonable. A rule must be valid and/or reasonable. In this case, the justification for the rule only emerged after the risk assessment was conducted two years later.
- **Key lesson:** don't assume that a rule can be imposed. Experience / common sense / best practice still needs to be relevant to the operation.
- An employee has a right to question the legality of a risk assessment: the court came to the conclusion that employees have a right to inspect risk assessments and risk assessments must form the subject of consultation with the health and safety committee. If the employee has input into the risk assessment, which is not taken into account, the risk assessment and its findings can be challenged.

Mofokeng v CCMA and Others

RELEVANT FINDINGS OF THE COURT

- **Key lesson:** employee involvement is important. Are health and safety representatives being empowered and utilized properly?
 - Policies, even if just to correct ambiguity (in this case, where the rule applied) cannot be changed unilaterally and spontaneously. Changes to safety rules without the involvement of health and safety committee are unlawful.
- [Side note:** the court did not seem to appreciate the difference between the policy and procedures / rules. Seems that this was not addressed by the parties in the matter. The Court applies the provisions of section 8 to risk assessments conducted under section 11. Although the principles discussed still hold true]
- If conduct of the employer is unlawful, employees can refuse to obey the demands.



Enever v Barloworld Equipment South Africa, A Division of Barloworld South Africa (Pty) Ltd

- **Substance use and zero tolerance policies in high-risk work environments**
 - Zero-tolerance policies relating to the use of cannabis must be operationally appropriate, necessary, and reasonable to withstand scrutiny
 - The importance of distinguishing high-risk operations is even more important considering the principles espoused in this judgment.
 - **Note:** Barloworld took the judgment on appeal to the Constitutional Court. Leave to appeal has been denied, so the judgement as it stands is the law on this topic.

****other presenters at the conference today will speak about this case in detail****

SBX t/a DB Thermal v Nhlapo and Others

BACKGROUND

- **Relevant facts and background circumstances**
 - Dismissal of an employee of DB Thermal (DBT), a contractor at Eskom's Kusile Power Station, for handling a cellular phone while operating a vehicle.
 - The employee was charged with breaching Eskom's cardinal safety rule prohibiting the handling or use of cellular phones while operating vehicles – a rule implemented to ensure the safety of approximately 10,000 personnel.
 - After his dismissal, the employee referred an unfair dismissal dispute to the relevant bargaining council where the employee was reinstated by the arbitrator. The employer challenged this decision in a review application in the Labour Court.

SBX t/a DB Thermal v Nhlapo and Others

BACKGROUND

- **Relevant facts and background circumstances**

- There was a zero tolerance approach to the rule and any employee in breach of the rule was removed from site.
- This included contractors (DBT was a contractor to Eskom in this matter at an Eskom site). In addition, DBT has its own safety campaigns and toolbox talks at which this rule had been discussed.
- The employee was well aware of the rule. The employee at first tried to deny knowledge of the rule, but later conceded to knowing the rule and having received induction training that covered this rule.
- The employee initially said that he had not been using his phone just that it was between his legs. These facts became increasingly blurry as the matter went on – but in any event the court found that the distinction between holding / having your phone with you or being on it for a call or text was of little help to the employee.



SBX t/a DB Thermal v Nhlapo and Others

COURT'S FINDINGS

- **Breach of occupational health and safety rules**
 - The Labour Court emphasised that employers are obligated to implement and enforce health and safety rules in the workplace. A breach of such rules is considered material and, in most circumstances, justifies dismissal.
- **Zero tolerance**
 - The Court noted that Eskom's zero tolerance approach to cell phone use while operating vehicles was informed by the history of accidents on site. The rule was well-disseminated through training and prominently displayed, and its breach warranted removal from site.
 - Arbitrators must accept a zero tolerance approach from employers if there is good reason to do so. In this case, they could show *“a proper operational objective relating to risk management that it was completed to achieve in enforcing and adopting a zero tolerance approach”*.

SBX t/a DB Thermal v Nhlapo and Others

KEY TAKEAWAYS

- Breaches of safety rules to be treated as serious misconduct.
- Where an employee's misconduct destroys the relationship - such as denying knowledge of a rule that had clearly been communicated and disregarding a rule that was well known while knowing the implications of the breach, dismissal is warranted.
- Even where no adverse health and safety consequences may flow from an employee's breach of a safety rule, dismissal remains appropriate in the circumstances given the importance of safety regulations in high-risk work environments.
- Employers must have safety rules in place that are adequately communicated to onsite personnel through safety campaigns (or other methods).
- There must be an operational objective connected to the zero tolerance approach.

Sulzer Pumps (Pty) Ltd v Nomxhanya and Others

BACKGROUND

- **Importance of creating and maintaining a culture of workplace safety**
 - Reinstatement, which is the primary remedy for substantively unfair dismissals, was found to be inappropriate in circumstances where the SHE manager's conduct had a detrimental impact on the culture of workplace safety.
- **Relevant facts and background circumstances**
 - Ms. Nomxhanya was employed as a SHE Manager at Sulzer Pumps and was dismissed for gross dereliction of her duties, for:
 - failing to conduct adequate risk assessments, particularly concerning the static test bay and pump testing facilities;
 - not implementing corrective and preventative action procedures; and
 - failing to manage her KPIs in line with Sulzer's standards, as evidenced by the number of lost-time injuries in 2018.

Sulzer Pumps (Pty) Ltd v Nomxhanya and Others

BACKGROUND

- **Relevant facts and background circumstances**
 - Nomxhanya referred an unfair dismissal dispute to the relevant bargaining council where the arbitrator found her dismissal to be substantively unfair but procedurally fair and ordered her reinstatement. Sulzer (the employer) reviewed the decision in the Labour Court
 - Context:
 - The employee was a SHE manager. In 2018 there were 6 LTIs, one of which was serious. The employee did the internal investigation, and the employer believed that her investigations were poor.
 - They arranged for an external review which identified many flaws in the health and safety management system.

Sulzer Pumps (Pty) Ltd v Nomxhanya and Others

COURT'S FINDINGS

- **Distinguishing between conducting risk assessments *at all* versus risk assessments that effectively identify and mitigate potential hazards**
 - The **adequacy** of risk assessments, specifically in relation to critical safety areas must be the focus of enquiry. JRAs by themselves are not sufficient as risk assessments. *“If the real extent of the risk is not appreciated or if the remedial steps were insufficient it cannot be said that the risks had been properly identified”.*
 - The arbitrator's focus on whether a direct causal link existed between the SHE managers actions and the LTIs overlooked the fundamental issue: whether the risk assessments effectively identified and mitigated potential hazards.
 - *“It is difficult to escape the conclusion that the risk assessment of these areas was seriously deficient, which is tantamount to the risk not being properly identified. [The employee's] risk evaluation and the measures adopted [in the area] would still have exposed personnel in the vicinity to a risk of serious injury...”*

Sulzer Pumps (Pty) Ltd v Nomxhanya and Others

COURT'S FINDINGS

- **Distinguishing between conducting risk assessments *at all* versus risk assessments that effectively identify and mitigate potential hazards (continued)**
 - *A simplistic JSA, although a “user friendly” form of risk assessment does not do justice to the extent of the risk and the risk mitigation required. The court must look at whether the content is adequate, not just if the document exists.*
- **The need to properly identify root causes of accidents or incidents**
 - Inadequate investigation into the root causes of the lost-time injuries (LTIs): the importance of correctly identifying and addressing root causes in preventing the recurrence of workplace incidents cannot be understated.
 - A failure to properly identify the actual causes of an incident means that the responsible person (in this case, the SHE manager) is remiss in their management of the proper identification of risk and the implementation of adequate prevention measures.

Sulzer Pumps (Pty) Ltd v Nomxhanya and Others

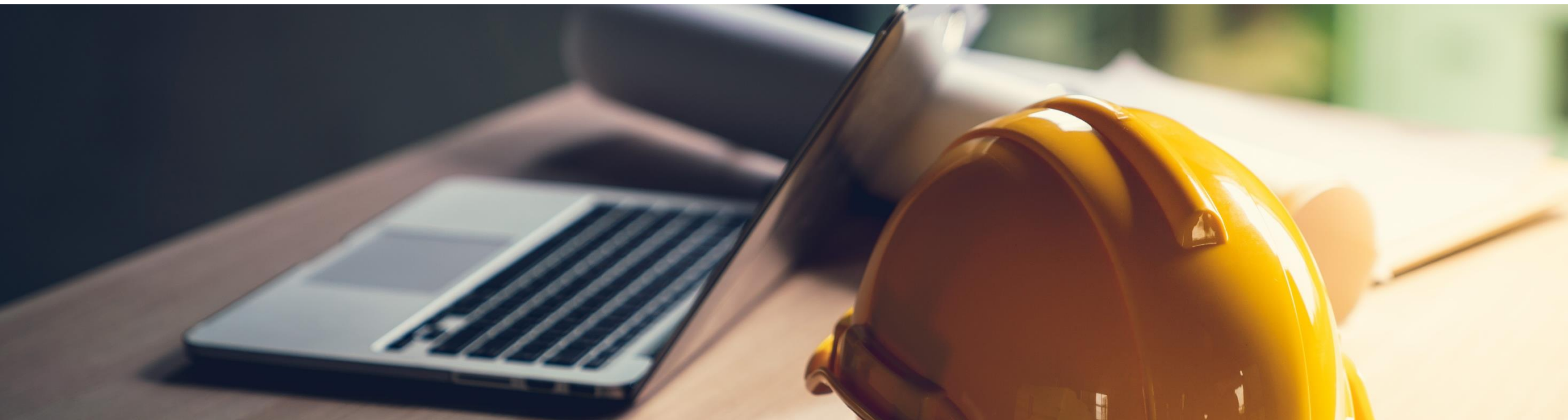
COURT'S FINDINGS

- The lack of depth in the investigation of the lathe incident, in particular, was a key oversight.
- Failing to properly identify root causes undermines the effectiveness of any subsequent safety measures.
- The failure to properly assess and address risks was seen as a significant breach of responsibilities as a SHE manager, contributing to unsafe working conditions.
- **Dismissal as the Appropriate Sanction**
 - In the normal course, dismissal would not have been an appropriate sanction, given that Sulzer had not addressed the employee's performance issues since 2016, when such issues were first identified.
 - However, **given the serious OHS implications of her failures** and considering the improvement in safety following her dismissal, the Court **concluded that reinstatement would not be appropriate.**

Sulzer Pumps (Pty) Ltd v Nomxhanya and Others

KEY TAKEAWAYS

- **Adequate** risk assessments are required for preventing workplace incidents and ensuring compliance with OHS standards, SHE managers must consult with experts, when required.
- Proper root cause analysis of workplace injuries for safety management and preventing recurrence is essential.
- Employers must proactively manage and rectify safety performance issues not only to comply with labour law standards but as a fundamental element of its health and safety framework.
- If the employer does not act where a SHE manager (or other responsible person) is not properly discharging their duties, they would themselves be negligent where ignoring the poor work has safety and liability ramifications. This is especially relevant where risk assessments and accident investigations are done poorly. The company was criticized for not properly managing her KPIs and dealing with concerns as they arose. It was for this reason that the **dismissal was found to be unfair. The company should have intervened sooner and done more.**



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