

**LANDMARK COURT OF APPEAL DECISION ON DAMAGES FOR UNLAWFUL DISMISSAL –
Moemedi Tafa (Partner)**

In a landmark decision, in the case of ***Chakalisa & Others vs Barclays Bank of Botswana Limited - CACGB-013/16*** (argued by Moemedi Tafa, Partner at Armstrongs) a panel of five Court of Appeal Judges, recently delivered a judgment which put to rest an issue that has bedevilled our Courts for decades. The Court was called upon to determine, the measure of damages due to employees whose contracts have been unlawfully terminated.

For many years, different Courts (including the Court of Appeal) have used different principles to measure such damages.

In its judgment, the Court of Appeal in ***Chakalisa*** has drawn a distinction between four types of employment contracts; namely:

- Fixed Term Contracts with a notice period;
 - Fixed Term Contracts without a notice period;
 - Indefinite Period Contracts with a notice period; and
 - Indefinite Period Contracts without a notice period.
- Crucial for consideration were Sections 22, 19 and 18 of the Employment Act.

Barclays Bank of Botswana Limited argued, primarily, that Section 22 (with regard to Indefinite Period Contracts) as read with Section 19, provided a codification of the common law position on damages. The position being that such damages were to be limited to the notice period, where a notice period had been provided for in the employment contract.

Where, however, a notice period had not been provided for in the employment contract, Section 18 aided the parties to the extent that it provided minimum notice periods for Indefinite Period Contracts.

The Court confirmed this argument in respect of Indefinite Period Contracts i.e. that damages are to be limited to the notice period in Indefinite Period Contracts.

In respect of Fixed Term Contracts, the Court held that damages would also be limited to the notice period, if the contract provided for such a notice period.

In the absence of a notice period, in a Fixed Term Contract, damages for unlawful dismissal would be equivalent to the remainder of the contracted period between the parties.

This, we believe, is the correct position and reflection of our law in Botswana. This means that aggrieved employees are to now think long and hard before instituting proceedings out of the High Court in seeking damages for unlawful dismissals, as the measure of damages is limited in most cases to the notice period.

This does not affect actions (as opposed to damages) instituted out of the Industrial Court, which has no limit on the amount of compensation it may award, and where fairness and equity are taken into account in the award for compensation.

The manner, in which employment contracts are therefore drafted, is of utmost importance, particularly as one can never exclude the potential of litigation arising at some future point after the termination of the employment relationship.