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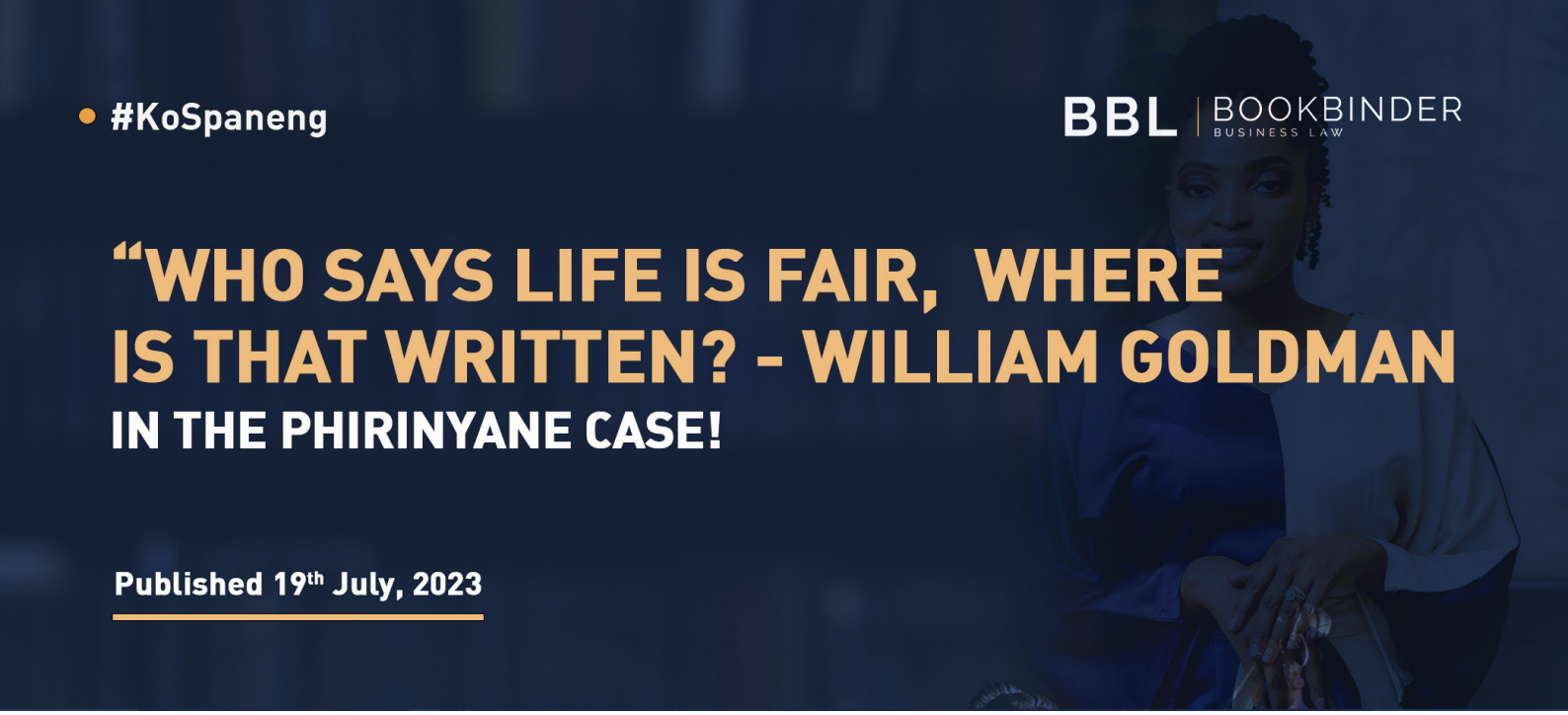

"WHO SAYS LIFE IS FAIR, WHERE IS THAT WRITTEN? - WILLIAM GOLDMAN IN THE PHIRINYANE CASE!

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Last week, we dropped the bombshell on you. The "boom" was on how every termination on notice is an act of gambling, as chances are that the employee will go to the Industrial Court where the scales of equity will weigh heavily on you. Click here if you missed our article.

At the conclusion of last week's article, we explained how termination on notice would not pass muster before the industrial court, because it would not satisfy the threshold of substantive and procedural fairness.

So, what is substantive and procedural fairness?
Substantive fairness speaks to whether there is an objectively valid reason for dismissal, be it as based on the Employment Act or company policy. In our experience, most employers usually have good reasons for terminating employment contracts.

The challenge for employers lies in procedural fairness. The rules set out in the case of **Phirinyane v. Spie Batignolles** offer the following guidance:

- an employee must be given reasonable notice of the time and place the employer intends to hold a disciplinary enquiry;
- the employee must be informed of the nature of the charge or charges against them (make sure you give the employee the particulars of the charge);
- the employee must be given the option of being assisted or represented at the enquiry by a co-employee of their choice;
- the employer should provide sufficient evidence for the alleged misconduct;
- the employee should be entitled to question any witness who testifies against them;
- the employee must be entitled to give evidence personally and call their own witnesses;
- if found guilty, the employee must be given an opportunity to put forward facts in mitigation before a sanction is decided on;
- after a sanction is decided on, the employee should be informed of his right to appeal against such findings and/or sanction; and

The enquiry should be conducted in good faith. There should be no bias or ulterior motive.

If you tick this checklist, the dismissal process will be deemed procedurally fair. Falling short will render your dismissal process likely to be impugned as being procedurally unfair.

From a risk-management perspective, we take the view that the best way to safeguard an employer's interests, even if a contract details an avenue for termination on notice, is to ensure a process that is substantively and procedurally fair; because there is a high probability that an aggrieved employee will seek to vindicate their rights before the Industrial Court.

What happens if dismissal on notice is examined by the Industrial Court and is deemed to have fallen short of these cardinal rules?

Find out in the next installment of the **#KoSpaneng Series**, as we explore this.

If you have any questions at this point, please feel free to contact Olebile Muzila at olebile@bookbinderlaw.co.bw. She is an expert in employment law in Botswana, having experience acting for a number of local and international clients on employment matters. She also assisted in private engagements to manage employment risk both locally and internationally.