

# EMPLOYMENT ALERT

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### THINK TWICE BEFORE YOU PROSECUTE: CAN EMPLOYERS BE HELD LIABLE FOR MALICIOUS PROSECUTION CLAIMS ARISING FROM INTERNAL DISCIPLINARY PROCEEDINGS?

This question arose in the judgment of *Mahlangu v Minister of Police* (66326/2010) [2017] ZAGPPHC 13.

### BE WARY OF INCORPORATING DISCIPLINARY CODES AND PROCEDURES INTO EMPLOYMENT CONTRACTS

In the case of *Steven Motale v The Citizen 1978 (Pty) Ltd and Others* LC (J2819/16) [2017] ZALCJHB 22, the employee, a newspaper editor, was suspended after allegedly breaching the employer's policy by publishing a potentially sensitive article as an exclusive story without receiving prior approval from the employer's lawyers before publication. The employer alleged in the suspension letter that the employee failed to act in a trustworthy manner and failed to implement agreed procedures and that this conduct ultimately led to the breakdown of the employment relationship.

# THINK TWICE BEFORE YOU PROSECUTE: CAN EMPLOYERS BE HELD LIABLE FOR MALICIOUS PROSECUTION CLAIMS ARISING FROM INTERNAL DISCIPLINARY PROCEEDINGS?

*The employer laid charges of assault with intent to do grievous bodily harm against Mahlangu, which resulted in his suspension for approximately four months pending an investigation.*

*The Court held that the fact that these proceedings were not instituted in a court of law should not be a decisive factor and that South African law adopts a flexible approach in this regard.*



**This question arose in the judgment of *Mahlangu v Minister of Police* (66326/2010) [2017] ZAGPPHC 13.**

In this case, the employer laid charges of assault with intent to do grievous bodily harm against Mahlangu, which resulted in his suspension for approximately four months pending an investigation. The charges were subsequently withdrawn.

Ordinarily, this would be the end of the matter and the employee would return to work with no disciplinary record. However, this was not the case for Mahlangu, who claimed that the dubious charges proffered against him by his employer constituted malicious prosecution. Mahlangu instituted a claim for damages against the employer in the High Court for compensation in the amount of R625,000.00.

There is no automatic right to claim compensation in a malicious prosecution claim in South African law. The claimant is first required to prove the damages suffered before any right to claim compensation accrues. Prior to dealing with the merits of the claim, however, the parties agreed that the Court must first determine whether a claim of malicious prosecution may arise from internal disciplinary proceedings or whether such a claim is limited to civil or criminal proceedings instituted in a court of law.

The employer, relying on English case law, argued that internal disciplinary proceedings are excluded from the law of malicious prosecution and such a claim is limited to malicious criminal or civil proceedings. However, the Court indicated that while foreign law may have a persuasive value, courts should "avoid an uncritical adoption of foreign law principles".

In dismissing the English law relied upon by the employer, the Court focused its analysis on the requirements of the South African law of delict, its flexibility and the South African Constitutional order. In doing so, the Court held that the fact that these proceedings were not instituted in a court of law should not be a decisive factor and that South African law adopts a flexible approach in this regard.

The Court went on to state that the charge against Mahlangu, albeit in the forum of internal disciplinary proceedings, nevertheless impaired the good name and dignity of Mahlangu and, according to the Court, it was difficult to see how this type of harm could only manifest itself in the form of criminal proceedings.

The Court, therefore, ruled that the charges proffered against Mahlangu constituted a cause of action for malicious prosecution. However, what is crucial is the Court's comments and seeming differentiation regarding the fact that Mahlangu was charged under regulations promulgated in terms of the South African Police Services Act, No 68 of 1995, which governed the disciplinary procedures of the employer. The Court held the following:

"There can be no doubt that the plaintiff was charged departmentally in terms of a (statutory) law promulgated in the form of subordinate legislation as opposed to, for instance, a domestic code of conduct which came into existence by agreement only"

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*The Court's focus on this differentiation leaves us with a level of uncertainty regarding the position of non-state, private employers whose disciplinary proceedings are not regulated under statute.*

The Court's focus on this differentiation leaves us with a level of uncertainty regarding the position of non-state, private employers whose disciplinary proceedings are not regulated under statute. The Court essentially stated that it is dependent on the facts of each case. The Court held:

"It is important to bear in mind that not all disciplinary proceedings are of a similar nature. It should, therefore, be pointed out that I have attempted to apply the law as it is found to be, or should be, in the case before me, without suggesting that it should necessarily also apply to all other cases of disciplinary proceedings"

Employers with disciplinary procedures regulated by statute/regulations may, therefore, be subjected to malicious prosecution claims, depending on the

circumstances of each case. Where non-state, private employers are concerned, the Court's position is unclear and as such, it seems that it may also be possible for these employers to similarly be exposed to claims for malicious prosecution. Accordingly, both state and private employers are advised, as should always be the case, to first ensure that any disciplinary proceedings instituted against employees are founded upon reasonable and probable cause, along with the necessary evidence, in order to avoid the risk of malicious prosecution claims.

*Nicholas Preston and Sean Jamieson*



# BE WARY OF INCORPORATING DISCIPLINARY CODES AND PROCEDURES INTO EMPLOYMENT CONTRACTS

*The employer alleged in the suspension letter that the employee failed to act in a trustworthy manner and failed to implement agreed procedures and that this conduct ultimately led to the breakdown of the employment relationship.*

*The employment relationship has broken down between the parties. It was apparent from this letter that the employer had already decided that the employee was guilty of misconduct.*



**In the case of *Steven Motale v The Citizen 1978 (Pty) Ltd and Others* LC (J2819/16) [2017] ZALCJHB 22, the employee, a newspaper editor, was suspended after allegedly breaching the employer's policy by publishing a potentially sensitive article as an exclusive story without receiving prior approval from the employer's lawyers before publication. The employer alleged in the suspension letter that the employee failed to act in a trustworthy manner and failed to implement agreed procedures and that this conduct ultimately led to the breakdown of the employment relationship.**

A few days after the employee was suspended, the employer addressed a second letter to the employee formulating the alleged misconduct committed by the employee and calling him to make representations in respect thereto.

In response, the employee wrote a letter to the effect that he regarded himself innocent until proven guilty and that he wished to exercise his right to have the matter determined through a disciplinary enquiry before an independent chairperson as prescribed by the employer's own disciplinary code and procedure. The employee was insistent that in terms of his employment contract, he was entitled to have a disciplinary enquiry in accordance with the employer's disciplinary code since that code was incorporated into his employment contract. The code entitled the employee to have his dispute heard where witnesses could be called and cross-examined.

The employer responded with a third letter stating that the employee's letter was factually incorrect. In this letter, it appeared as though the employer was no longer relying on the allegation of misconduct on the part of the employee, but rather on the fact that the employment relationship has broken down between

the parties. It was apparent from this letter that the employer had already decided that the employee was guilty of misconduct, but what was left to be determined was the impact of the misconduct on the employment relationship, namely the breakdown of trust.

The employer insisted that the employment relationship had been broken and gave the employee a deadline to make written submissions as to why he thought the employment relationship had not broken down. The employee refused to make written submissions and insisted on his right to be heard at a disciplinary inquiry. The employer served the employee with a notice of dismissal after he failed to present written submissions. The employee approached the Labour Court on an urgent basis and sought an order declaring his suspension null and void and declaring the termination of his employment a breach of his employment contract. The employer argued that the termination of the employment relationship was not based on misconduct, but rather based on the employer's view that the employment relationship had broken down, while the employer argued that it was not obliged to follow the disciplinary code but to dismiss the

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*The Court held that it was clear that in the absence of an enquiry the employer had already decided that the employee was guilty of misconduct resulting in the break of the trust relationship between the parties.*



employee summarily. The Court held that it was clear that in the absence of an enquiry the employer had already decided that the employee was guilty of misconduct resulting in the break of the trust relationship between the parties. The Court held that it appears as though the employer has conveniently ignored the fact that what led to the alleged breakdown of trust relationship was the alleged misconduct of the employee and that the employee disputed being guilty of misconduct and requested a hearing which requests the employer ignored and unjustifiably considered the employment relationship irretrievably broken. The employer, the Court held, denied the employee his contractual right to have his misconduct dispute heard at an enquiry.

The Court concluded that the disciplinary code was incorporated into the contract of employment which mandated that disciplinary enquiries be held in cases of alleged misconduct, and in this case

it was clear that the employer failed to comply with the disciplinary code when it terminated the employee's contract without affording him an opportunity to be heard at a disciplinary enquiry. The Court concluded that this constituted a breach of the employee's employment contract entitling the employee to be reinstated. The Court ordered the employer to comply with its disciplinary code.

This case confirms the position that employers must follow their disciplinary code and procedures, particularly where they form part of an employee's employment contract. A failure to do so may result in a breach of the employment contract which may have significant financial implications for the employer.

*Gavin Stansfield and Zola Mcaciso*



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## OUR TEAM

For more information about our Employment practice and services, please contact:



**Aadil Patel**  
National Practice Head  
Director  
T +27 (0)11 562 1107  
E aadil.patel@cdhlegal.com



**Gillian Lumb**  
Regional Practice Head  
Director  
T +27 (0)21 481 6315  
E gillian.lumb@cdhlegal.com



**Kirsten Caddy**  
Director  
T +27 (0)11 562 1412  
E kirsten.caddy@cdhlegal.com



**Jose Jorge**  
Director  
T +27 (0)21 481 6319  
E jose.jorge@cdhlegal.com



**Fiona Leppan**  
Director  
T +27 (0)11 562 1152  
E fiona.leppan@cdhlegal.com



**Hugo Pienaar**  
Director  
T +27 (0)11 562 1350  
E hugo.pienaar@cdhlegal.com



**Nicholas Preston**  
Director  
T +27 (0)11 562 1788  
E nicholas.preston@cdhlegal.com



**Thabang Rapuleng**  
Director  
T +27 (0)11 562 1759  
E thabang.rapuleng@cdhlegal.com



**Samiksha Singh**  
Director  
T +27 (0)21 481 6314  
E samiksha.singh@cdhlegal.com



**Gavin Stansfield**  
Director  
T +27 (0)21 481 6313  
E gavin.stansfield@cdhlegal.com



**Michael Yeates**  
Director  
T +27 (0)11 562 1184  
E michael.yeates@cdhlegal.com



**Ndumiso Zwane**  
Director  
T +27 (0)11 562 1231  
E ndumiso.zwane@cdhlegal.com



**Anli Bezuidenhout**  
Senior Associate  
T +27 (0)21 481 6351  
E anli.bezuidenhout@cdhlegal.com



**Steven Adams**  
Associate  
T +27 (0)21 481 6341  
E steven.adams@cdhlegal.com



**Samantha Bonato**  
Associate  
T +27 (0)11 562 1134  
E samantha.bonato@cdhlegal.com



**Sean Jamieson**  
Associate  
T +27 (0)11 562 1296  
E sean.jamieson@cdhlegal.com



**Zola Mcaciso**  
Associate  
T +27 (0)21 481 6316  
E zola.mcaciso@cdhlegal.com



**Anelisa Mkeme**  
Associate  
T +27 (0)11 562 1039  
E anelisa.mkeme@cdhlegal.com



**Prinoleen Naidoo**  
Associate  
T +27 (0)11 562 1829  
E prinoleen.naidoo@cdhlegal.com



**Bheki Nhlapho**  
Associate  
T +27 (0)11 562 1568  
E bheki.nhlapho@cdhlegal.com

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### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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