12 JUNE 2019

EMPLOYMENT ALERT

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A win for domestic employees in South Africa

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Domestic workers in South Africa have been identified as one of the vulnerable groups of employees. Over the years, the Government has endeavoured to develop labour laws in line with the need to provide much needed protection to vulnerable employees.

Although much has been done to include domestic workers in the scope of the Labour Relations Act, the Basic Conditions of Employment Act and the Unemployment insurance Act, they have not had protection against occupational injuries and diseases.

The Compensation for Occupational injuries and Diseases Act (COIDA) excludes domestic workers employed in private households. This exclusion has further been reaffirmed in Sectoral Determination 7: Domestic Worker Sector of 15 August 2002.

Recently in *Sylvia Mahlangu and Another v The Minister of Labour & Others,* the High Court was called upon to determine the constitutionality of this exclusion in COIDA.

The applicants sought two-fold relief from the Court. First, a declaration that the s1(xix)(v) in COIDA making such exclusion is unconstitutional to the extent that it excludes domestic workers employed in private households from claiming benefits under COIDA. Second, an order severing the offending exclusion from s1 of COIDA.

The applicants' case on the unconstitutionality of the exclusion in COIDA was premised on the contention that same was irrational and further an infringement of constitutional rights afforded to that class of workers, specifically the right to equality, access to social security and dignity.

Although the respondents defended the application, they conceded to the fact that the exclusion of domestic workers from the definition of employee in terms of s1 of COIDA was unconstitutional. However, they argued that the application brought before the High Court was frivolous and vexatious as the Department of Labour (department) was already in the process of amending the CIODA to include domestic workers under the scope of Act.

The respondents submitted that the delay in providing domestic workers protection under COIDA was to provide the department an opportunity to develop its institutional capacity to administer coverage of domestic workers within the dispensation of COIDA, given the unique challenges inherent in the sector.

A win for domestic employees in South Africa...*continued*

The question of whether the High Court ought to make any order that is just and equitable and in terms of s172(2)(b)(i) and (ii) of the Constitution was postponed to a future date.

Accordingly, it was the respondents' view that the matter did not need to be determined.

The applicants opposed the position adopted by the respondents and submitted that as a matter of law and in terms of s172(1)(a) of the Constitution, the proper process to be followed was to have the offending section declared inconsistent with the Constitution and therefore invalid. This inconsistency would otherwise remain and continue to adversely affect domestic workers.

In response to the reasons for this delay to initiate the process of including domestic workers under COIDA, the applicants contended that the department's reasons were illogic and, even-if true, were not valid defences against a challenge of unconstitutionality.

The High Court in an order handed down on 28 May 2019, declared that s1(xix)(v) of COIDA is unconstitutional and invalid to the extent that it excludes domestic workers in private households from the definition of "employee", and directed that the offending section be severed from s1 of COIDA. The question of whether the High Court ought to make any order that is just and equitable and in terms of s172(2)(b)(i) and (ii) of the Constitution was postponed to a future date.

In all probabilities, considering that the department is engaged in a legislative process to amend COIDA, the High Court may determine that the appropriate order is a declarator and suspend same for a period of time to allow the department an opportunity to conclude the process of amending the legislation. This is in line with the established precedent of the judiciary to affording the executive sufficient time to correct the offending part of an Act of Parliament whenever a court declares an aspect of legislation unconstitutional.

Fiona Leppan and Mayson Petla

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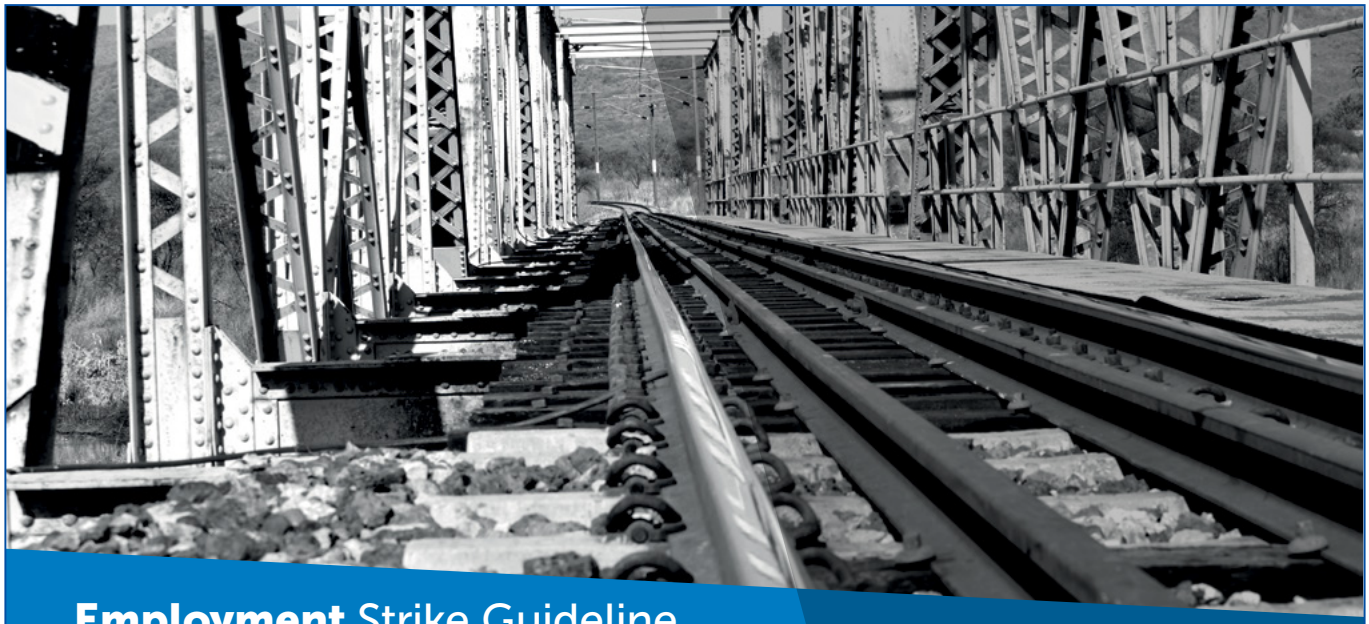

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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