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EMPLOYMENT ALERT

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Applications for new positions during a retrenchment – selection criteria or a measure to avoid retrenchment?

The latest case in determining fair and objective methods of selecting employees for dismissal during a retrenchment process has struck fear in the hearts of employers who plan on embarking on retrenchment processes. In *Mweli and Nakedi v MTN Group Management Services (Pty) Ltd*, the respondent dismissed two applicants following a restructuring process of its Group Business Risk Management division.

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The latest case in determining fair and objective methods of selecting employees for dismissal during a retrenchment process has struck fear in the hearts of employers who plan on embarking on retrenchment processes. In *Mweli and Nakedi v MTN Group Management Services (Pty) Ltd*, the respondent dismissed two applicants following a restructuring process of its Group Business Risk Management division.

In an effort to improve the efficiency of this division, a new structure with more positions available was adopted. Through a scientific tool known as competence mapping, a process which indicates knowledge and skill was used to compare old positions to new positions. If the mapping overlap was less than 60%, then the new position would be considered as a new role or vacancy.

The two applicants were the only two of the nine dislocated employees to be dismissed for operational requirements despite both of them applying for new positions, and positions being vacant at the time of the dismissal.

Section 189(7)(b) of the Labour Relations Act requires employers to select employees to be dismissed for operational requirements according to a selection criterion that is fair and objective. In making reference to the Code of Good Practice, the court held that a criterion of experience, skills and qualifications becomes an exceptional criterion which must be treated with caution as it risks being more subjective than objective.

In this case, MTN used the competence mapping tool to identify similar jobs and carry those positions over. The affected employees were advised to apply for the positions in the new structure. If they applied for the new positions and were unsuccessful, then they were dismissed for operational requirements. The court therefore was required to determine whether making employees apply for vacant positions is a fair and objective method. The court concluded that making the employees apply for new positions is part of the employer's obligation to avoid dismissal, rather than a method of selecting employees for dismissal. In other words, an employer who still has unplaced employees is obligated to use a fair and objective method to select those unplaced employees for dismissal. This method must further be fairly and objectively applied.

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The court further found that MTN led no evidence to clarify what criteria was used or why the applicants were found to be unsuitable for the positions that they had applied for.

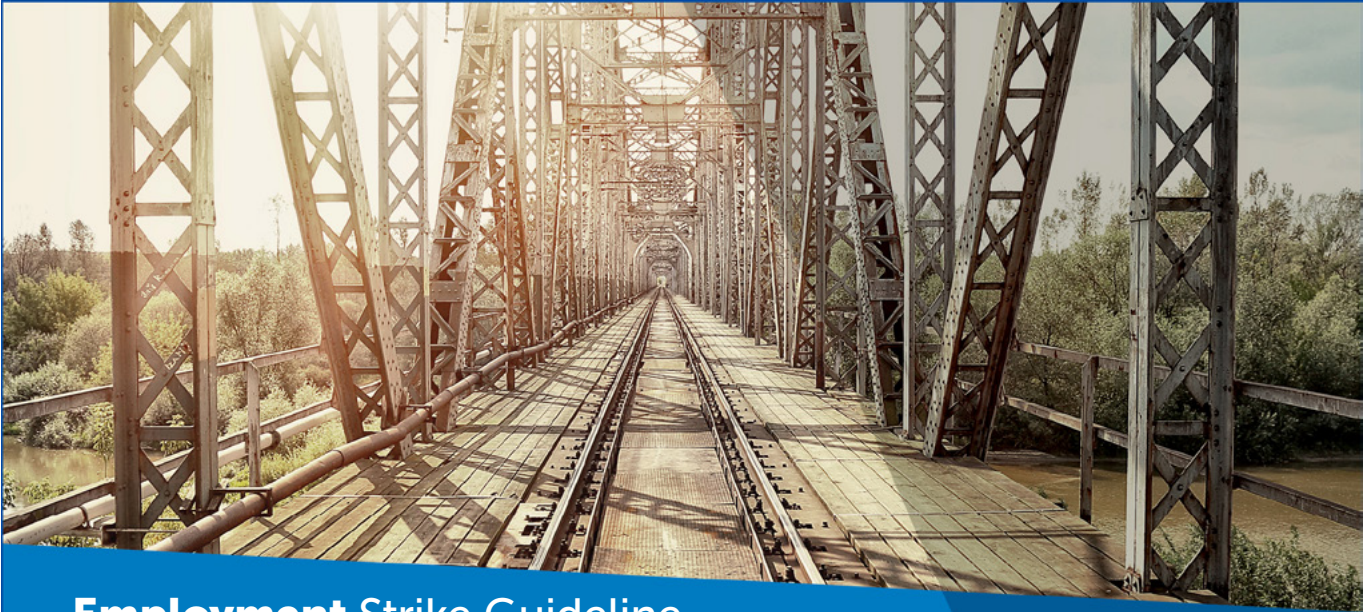
The court further found that MTN led no evidence to clarify what criteria was used or why the applicants were found to be unsuitable for the positions that they had applied for. It was clear that dismissal was not the only option as there were 22 vacant positions available when the applicants were dismissed.

It is clear from this judgment that selection criterion still has to be applied to the employees who are not placed. The effect

of this judgment is that employers may no longer adopt an approach where employees who were not placed, are subsequently dismissed and that this was the fair and objective criterion adopted. The court concluded by reminding employers that dismissal for operation requirements is a no-fault dismissal which should be avoided and only applied as a last resort. Where an employer has vacant positions at the time of dismissal, it cannot be said that the dismissal is a measure of last resort.

Aadil Patel, Anli Bezuidenhout and Dylan Bouchier





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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



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



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



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



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



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



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



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



Tamsanqa Mila
Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



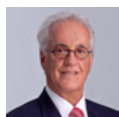
Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



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



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



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



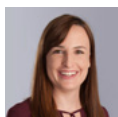
Steven Adams
Senior Associate
T +27 (0)21 481 6341
E steven.adams@cdhlegal.com



Siyabonga Tembe
Associate
T +27 (0)21 481 6323
E siyabonga.tembe@cdhlegal.com



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



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

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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