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EMPLOYMENT LAW ALERT

IN THIS ISSUE

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Draft Amendments to the National Road Traffic Regulations: Will they steady or derail the transport industry?

The proposed Draft Amendments have sparked much debate in the industry with some proponents coming out strongly in support of the proposal and with opponents stating that this will make foreign drivers unemployable and in fact penalises the victims of the violence and unrest in the country.

It is no secret that the transport industry has been plagued with numerous issues. One of the core concerns addressed almost annually is that of driver safety and the violent attacks on foreign truck drivers. On 23 April 2021, the Minister of Transport published for comment the Draft Amendments to The National Road Traffic Regulations 2000 (Draft Amendments). The Draft Amendments are government's proposed solution to the ongoing violence and unrest between South African and foreign truck drivers.

The Draft Amendments propose the insertion of regulation 116A:

> *116A. Authority of a Professional Driving Permit issued in a foreign Country*
>
> *(1) the Authority provided by a professional driving permit issued in a foreign country shall apply in respect of a vehicle registered in the country that issued any such permit.*
>
> *(2) A permit referred to in sub-regulation(1), shall not apply to a vehicle registered in the republic.*

The Draft Amendments will therefore effectively ban drivers who hold a Public Drivers Permit (PDP) issued by a foreign country from operating vehicles registered in South Africa.

The proposed Draft Amendments have sparked much debate in the industry with some proponents coming out strongly in support of the proposal and with opponents stating that this will make foreign drivers unemployable and in fact penalises the victims of the violence and unrest in the country.

It should further be kept in mind, that such a move could not only jeopardise the Africa Free Trade Agreement and sour relationships with other African countries who might, in turn implement similar regulations, but will also present a challenge to employers currently employing and utilising the services of foreign drivers.

A further consideration that should not be overlooked is that the vast majority of South Africa's regional exports are transported by road and many of the transport companies employ foreign drivers due to their familiarity with the foreign country as well as the language, people, customs and regulations associated with such countries.

It remains to be seen who will have the final comment on this matter, but what can be said for now, is that the industry seems stalled at a critical point. Whilst everyone agrees that decisive action is definitely and urgently needed, one cannot forget that we operate in an increasingly globalised economy and the Free Trade Agreement and African Union relations might be an unintended casualty of this decision.

From an employment law perspective, employers within the industry will need to start thinking about how to handle their internal operations if they are one of the employers who employ foreign truck drivers and engage in regional import and export via road.

Hedda Schensema and Jaden Cramer

Attention employers: The Occupational Health and Safety Amendment Bill of 2020

Although the Occupational Healthy and Safety Bill 2020 will not be an entirely new Act, these substantial changes will without a doubt affect all employers.

Minister of Employment and Labour, Thembelani Nxesi, has given notice for his intention to introduce an Occupational Health and Safety Amendment Bill of 2020. The Occupational Health and Safety Amendment Bill is intended to amend the Occupational Health and Safety Act 85 of 1993. However, the Bill does not yet allow for public comment at this stage.

According to the General Explanatory Summary and Note, the Amendment Bill intends to delete, substitute and insert certain definitions, effect certain technical corrections, make further provisions in respect of the health and safety of persons at work and the health and safety of persons in connection with the use of plant and machinery, further regulate the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work and further regulate the composition of an advisory council for occupational health and safety. Although the Occupational Healthy and Safety Bill 2020 will not be an entirely new Act, these substantial changes will without a doubt affect all employers.

The most relevant example out of the many amendments, insertions and substitutions made in terms of the Amendment Bill for employers relates to non-compliance with the Principle Act in terms of occupational health and safety. It is notable that non-compliance can have a negative impact, including death, loss of income and disability, to mention but a few. It is therefore of utmost importance for employers to comply with occupational health and safety legislation to reduce work-related injuries. In line with this, the Bill seeks to increase penalties in respect of fines for employers who are guilty of an offense in terms of the Principle Act. The fines seek to be increased from R50,000 to R100,000 in terms of the substitution made in terms of Section 38(2) of the of the Principle Act. The Bill also seeks to clarify and introduce new administrative fines and legal liabilities for non-compliance in terms of newly introduced sections 37A-37F.

More information on the Occupational Health and Safety Amendment Bill may be found here or here. It is important to note, however, that the Bill still needs to undergo the relevant approval processes and the above intended changes may not be final.

Michael Yeates and Shanna Eeson

Consequences of poor handling of sexual harassment cases in the workplace

In this article, we examine the recent sexual assault case that was before the High Court in *P-A-E v DR Beyers Naudes Local Municipality and Another* (13 April 2021).

Sexual harassment in the workplace has become prevalent and has had devastating effects. The LAC remarked in *Campbell Scientific Africa (Pty) Ltd v Simmers & Others* that by its nature, sexual harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim, and creates a barrier to substantive equality in the workplace. It is the most heinous misconduct that plagues a workplace.

In this article, we examine the recent sexual assault case that was before the High Court in *P-A-E v DR Beyers Naudes Local Municipality and Another* (13 April 2021).

The plaintiff, a 23-year-old female, was employed as a Registry and Archives Clerk at Ikwezi Municipality. The Municipality was disestablished and replaced by Dr. Beyers Naude Local Municipality. She was sexually assaulted by her immediate supervisor. When she could no longer cope with her work situation owing to Post Traumatic Stress Disorder, she resigned.

On 16 March 2011, the plaintiff brought an action for damages for past and future medical related expenses, past and future loss of income, and general damages and contumelia, in the sum of R4,028,416.80 jointly and severally from the first and second defendant arising out of the sexual assault committed upon her by the second defendant during the course of his duties with the first defendant at the offices of the first defendant in Jansenville on Monday 16 November 2009.

At the outset of the trial before the High Court during October 2015, the issues of liability and quantum were separated in terms of Rule 33(4) of the rules of court and the trial proceeded on the merits only. On 31 March 2016 the court found the Defendants jointly and severally liable to pay the plaintiff such damages as she may be able to prove she suffered in consequence of the sexual assault upon her. The judgment of the court has been reported as *PE v Ikwezi Municipality and Another* 2016 (5) SA 114 (ECG) (First judgment).

Following the decision of the court in the first judgment, the court was then required to adjudicate on the issue of quantum. At the trial on quantum the court considered the nature of the offence of sexual assault and the effect of the assault on the plaintiff.

The court observed that the scourge of workplace sexual harassment is more often than not gender specific. Sexual assault by a male superior on a female subordinate is a deplorable abuse of power and a terrifying vehicle utilised by the superior to sexualise his control over the victim in a show of pernicious patriarchal dominance. The court also criticised the Municipality for the unsatisfactory manner in which it handled the matter. The Municipality on contentious legal advice, and without any satisfactory reason, took a decision not to suspend the second defendant. Furthermore, elected to instruct the second defendant to rather remain at their Klipplaat office and not have any contact with the plaintiff who was based in the Jansenville office.

In addition to failing to ensure that the second defendant did indeed not have contact with the plaintiff, the Municipality also failed to prioritise disciplinary proceedings against the second defendant. A hearing was only held more than half a year after the assault. The enquiry

Consequences of poor handling of sexual harassment cases in the workplace...*continued*

The LAC reiterated the reasoning of the court a quo's judgment that the Municipality had clearly abdicated its responsibilities to protect the plaintiff. Instead, it adopted a supine approach of bovine resignation.

chairperson recommended a sanction of two weeks' unpaid suspension. Expressing its disapproval, the Court held that the Municipality, as an organ of State, was entitled and obliged given its obligation stipulated in Section 195 of the Constitution to challenge the recommended sanction which was, on the face of it, indefensible. Instead, the Municipality "*washed its hands of the matter*" when it informed the plaintiff that- "*with the best will in the world there was nothing that [the Municipality] could do to prevent the second defendant returning to work or to prevent second defendant from coming into contact with her in the course of his duties.*"

The LAC reiterated the reasoning of the court a quo's judgment that the Municipality had clearly abdicated its responsibilities to protect the plaintiff. Instead, it adopted a supine approach of bovine resignation. The message portrayed by its conduct was that victims of sexual assault who were brave enough to come forward would not receive redress. The unrepentant perpetrator was allowed to roam free in the workplace with unfettered access to the plaintiff. There was no corporate repentance.

One of the main issues to be determined was whether the plaintiff should forfeit her claim for future loss of earnings because of her refusal to accept the Municipality's 10 July 2020 offer of reinstatement to a position commensurate with that which she occupied prior to the end of her tenure in November 2010. The question was whether the reservation of a post on the organogram for the plaintiff intended to settle her claim for future loss of earnings would contravene the Municipality's recruitment policies and thus be unlawful.

The court found that there was no statutory authority to base the offer. Furthermore, just as it would be impermissible for the Road Accident Fund to offer a job to a litigant who has suffered injuries pursuant to a motor vehicle accident and who has put in a claim for future loss of earnings with the aim of extinguishing that claim, so too would it be unlawful for the Municipality to offer plaintiff a job with a view to non-suiting her in respect of her claim for future loss of earnings. Fundamentally, an [employer] is required to fill vacancies on its staff establishment according to its operational requirements and in terms of applicable procedures and not for an ulterior purpose such as the settling of litigation. Therefore, the offer was unlawful and *ultra vires* as it would contravene those policies and undermine legislation which require the recruitment, selection and appointment of persons as staff members to be done in a fair and transparent manner. Furthermore, as an organ of state, the Municipality had no authority to disregard its own policies when it suits it and to make an appointment which would be inconsistent with legislation.

The Municipality raised a special plea in terms of section 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) which states that no action shall lie by an employee for recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of the employee against the employer and no liability for compensation arises except under the provisions of the Act. The relief sought by the plaintiff was not competent in that the claim was not brought under COIDA.

Consequences of poor handling of sexual harassment cases in the workplace...*continued*

Sexual harassment may give rise to a claim under the EEA, LRA (constructive dismissal), as well as delict.

The court held that exposure to sexual harassment is not an inherent or necessary risk of employment. It would be averse to the interest of employees injured by rape or sexual harassment to restrict them to COIDA. This would be sending an unacceptable message to employees, especially women, namely that you are precluded from suing your employer for what you assert is a failure to provide reasonable protective measures against rape and sexual assault because rape and sexual assault directed against women is a risk inherent in employment in South Africa, and this would not be countenanced by the Constitution. Therefore, the special plea in terms of section 35 of COIDA was not upheld.

Ultimately, the court concluded that the Municipality had failed in its legal duty to protect plaintiff from further trauma occasioned by any interaction with second defendant pending the disciplinary enquiry. The Court, referring to the dictum in *Ntsabo v Real Security CC* 2003 24 ILJ 2341 (LC) where it was held that the employer had effectively supported the harasser by not sanctioning him, found that the stance adopted by the Municipality demonstrated a disturbing lack of appreciation of its legal obligation to have provided the plaintiff with a safe working environment. The court found the First and Second Defendants jointly and severally liable, the one paying the other to be absolved, to pay the plaintiff an amount of R4 Million in damages.

Key take away

Sexual harassment may give rise to a claim under the EEA, LRA (constructive dismissal), as well as delict.

Employers have a duty to show courtesy and respect victims of sexual assault which occur in the workplace or in the course of performing their duties in furtherance of the employer's interests. Furthermore, provide a safe working environment. Recently, in *McGregor v Department of Health, Western Cape & others* (2021), the LAC held that employers: "*...have a duty to provide a safe and healthy work environment for their employees and students, including protection from senior employees of predatory disposition.*"

Section 5 of the Employment Equity Act 55 of 1998 requires an employer to take steps to eliminate unfair discrimination which would include putting in place a sexual harassment policy. The Code of Good Practice for the Handling of Sexual Harassment Cases encourages and promotes the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, their privacy, and their right to equity in the workplace. Item 7.1 requires employers to adopt a sexual harassment policy which takes cognisance of the provisions of the Code.

An employer cannot rely on COIDA to absolve itself from liability for compensation for its failure to protect its employees from exposure to sexual harassment in the workplace. Sexual harassment is not an inherent or necessary risk of employment.

Phetheni Nkuna and Mthokozisi Zungu

KENYA

Returning to work: Opportunities and challenges

Not only did the COVID-19 pandemic restrict the freedom of movement of employers and employees alike, but it enhanced protocols and policies in the workplace.

Following the reporting of the first COVID-19 case in Kenya in March 2020, employers were encouraged to allow their employees to work from home. More than a year on, Kenyan employers have endured lockdown restrictions and an on-going curfew and emerged to find a different employment landscape, one that presents both opportunities and challenges for employers going forward.

Obligations

Not only did the COVID-19 pandemic restrict the freedom of movement of employers and employees alike, but it enhanced protocols and policies in the workplace. The Occupational Health and Safety Act, 2007 places an obligation on employers to ensure the safety, health and welfare of their employees. Following the declaration of COVID-19 as a pandemic in Kenya, the Government issued the Occupational Safety and Health Advisory on Coronavirus which issued various recommendations to employers for them to apply various hygiene measures at the workplace. These recommendations were later codified into law by the passing of Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules 2020.

In addition, the Memorandum of Understanding (20 April 2020) signed by the Tripartite Social Partners - Ministry of Labour and Social Protection, the Central Organisation of Trade Unions and the Federation of Kenya Employers sought to address emerging labour and employment issues during the COVID -19 pandemic by requiring employers to provide adequate protective clothing and protective equipment at no cost to the employees.

Further, it is now mandatory for employers to ensure that there are permanent social distancing measures of at least 1.5 metres at the workplace. All these new obligations have made it vital for employers to review their employment infrastructure and make alternative and feasibly costly arrangements thereto.

Opportunities

For some employers and for some industries however, the pandemic has demonstrated that work can still be done, and results achieved without the confines of an office set up.

During the two lockdowns and the continuous curfew that Kenya has experienced, employees working from home have demonstrated a new normal to employers and businesses. Businesses have been able to keep their operational costs low and stay afloat. Employees have not been required to come into the office – saving transportation costs and time spent in traffic, employers have not been required to provide "*lunch*" or other social amenities or catered to social events, thus saving on those costs and emptier offices have meant a reduction in utility bills overall. Employers have taken full advantage of these changes and looked further at how to increase productivity while not compromising quality. Flexible working arrangements, shift work and moving from permanent to consultancy arrangements have slowly crept into company policies, and employment handbooks as employers try to embrace this new employment landscape. While Kenyan labour laws do not expressly deal with part-time employees and flexible working arrangements, employers have

KENYA

Returning to work: Opportunities and challenges...*continued*

During the two lockdowns and the continuous curfew that Kenya has experienced, employees working from home have demonstrated a new normal to employers and businesses.

been seeking advice on how to amend HR policies and individual employment contracts in a jurisdiction that is very employee friendly.

Challenges: Employers' liability

These *"opportunities"* are however doubled edged swords. The obvious and first challenge for employers during this pandemic has been - Can an employer be held liable when an employee is infected at the workplace? The Work Injuries and Benefits Act (WIBA) expressly provides that injuries covered and subject to compensation by an employer are those that are sustained in the course of employment. Injuries includes *"any other disease that arose out of and in the course of the employee's employment"*.

While COVID-19 is not expressly provided for under WIBA it can be argued that if an employee contracts COVID-19 while at the workplace or while carrying out their work then they are entitled to compensation. The burden rests on the employer to demonstrate that they took all the reasonable precautions to reduce or minimise the risk of infection. Associated with this challenge is the concept of *"whilst in employment"* and this is especially the case where policies and handbooks have extended employment to working at home.

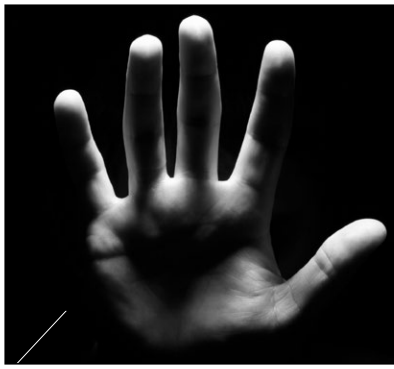
In implementing return to work policies, employers are faced with the additional challenge of how to allow employees to return to work. Lying dormant are potential discrimination claims for those coerced into vaccinations or worst still those refusing to wear masks. Open and transparent communication with employees will be key in this regard.

Conclusion

All in all, we anticipate that employers will embrace the changes brought by the pandemic and the shift from the traditional employment approach to a more flexible employment landscape in Kenya. We can only await with anticipation to review the jurisprudence that may emanate from the employment challenges brought about by the COVID-19 pandemic and the precedents they will form in the future.

The above alert is meant for general information and does not constitute legal advice. In case of any inquiries or if you require any further information or advice, please feel free to contact Desmond Odhiambo and Njeri Wagacha.

Njeri Wagacha and
Christine Mugenyu



SEXUAL HARASSMENT IN THE WORKPLACE

Including the virtual world of work

A GUIDE TO MANAGING SEXUAL HARASSMENT

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A CHANGING WORK ORDER

CASE LAW UPDATE 2020

CLICK HERE to access CDH's 2020 Employment Law booklet, which will assist you in navigating employment relationships in the *"new normal"*.

EMPLOYMENT REVIVAL GUIDE

Alert Level 1 Regulations

On 28 February 2021, the President announced that the country would move to Alert Level 1 (AL1) with effect from 28 February 2021. AL1 of the lockdown is aimed at the recommencement of almost all economic activities.

CLICK HERE to read our updated AL1 Revival Guide.
Compiled by CDH's Employment law team.

2021 RESULTS

Our Employment Law practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.
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2021 RESULTS

CHAMBERS GLOBAL 2014 - 2021 ranked our Employment practice in Band 2: Employment.
Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2021 in Band 2: Employment.
Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2021 in Band 2: Employment.
Gillian Lumb ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Employment.
Imraan Mahomed ranked by CHAMBERS GLOBAL 2021 in Band 2: Employment.
Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2021 in Band 2: Employment.
Michael Yeates ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming employment lawyer.

TOP RANKED Chambers Global 2021

POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

CLICK HERE to read our updated guide.

AN EMPLOYER'S GUIDE

TO MANDATORY WORKPLACE VACCINATION POLICIES

FOR A COPY OF THE CDH EMPLOYMENT PRACTICE GUIDE, CLICK HERE

EMPLOYMENT

RETRENCHMENT GUIDELINE

CLICK HERE for the latest thought leadership and explanation of the legal position in relation to retrenchments, temporary layoffs, short time and retrenchments in the context of business rescue.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
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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