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EMPLOYMENT LAW ALERT

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KENYA

Universal health care coverage and compulsory registration

Parliament adopted the National Hospital Insurance Fund (Amendment) Bill 2021 (Bill), which was gazetted on 11 May 2021. The principal object of the Bill is to enhance the mandate and capacity of the National Hospital Insurance Fund (NHIF) to facilitate and deliver universal health care coverage.

Whose right is it anyway?

In the recently released judgement of *Multiquip (Pty) Ltd and Another v National Union of Metalworkers of South Africa D 477-20* (17 August 2021), the Labour Court reaffirmed the rights of employees to be represented by trade unions in dismissal hearings before the CCMA.

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KENYA

Universal health care coverage and compulsory registration

The Bill seeks to impose liability on an employer to make a matching contribution to an employee's fund, and it further proposes that NHIF be mandatory for all Kenyan residents over the age of 18.

Parliament adopted the National Hospital Insurance Fund (Amendment) Bill 2021 (Bill), which was gazetted on 11 May 2021. The principal object of the Bill is to enhance the mandate and capacity of the National Hospital Insurance Fund (NHIF) to facilitate and deliver universal health care coverage.

The Bill proposes that NHIF membership be ranked equal to other state services and that a person without proof of NHIF registration be denied government services. Additionally, the Bill seeks to impose liability on an employer to make a matching contribution to an employee's fund, and it further proposes that NHIF be mandatory for all Kenyan residents over the age of 18.

Currently, the law only requires employers to deduct and pay a worker's contribution from their salary, based on the worker's pay grade. Therefore, an employer is not required to contribute from its own account. For example, an employer who pays a worker Ksh100,000 is currently required to deduct Ksh1,700 out of the worker's salary every month. However, once the Bill is passed, the employer in this example would be required to match the Ksh1,700 and pay in a total of Ksh3,400 for that worker. This means that an employer who hires 10 workers on that salary will now be liable to pay a total of Ksh17,000 every month, or Ksh204,000 every year, from the employer's own account.

In sum, once the Bill is passed, employers will be required to match each worker's contribution; and perhaps continue paying for private medical insurance, should NHIF coverage be insufficient to meet internal standards of health care provision for workers.



**2
WEEKS
TO GO**

ANNUAL WEBINAR
**THE NEXT NORMAL AND THE FUTURE
 OF THE EMPLOYMENT RELATIONSHIP**

KEYNOTE SPEAKER:
Cameron Sello Morajane, Director of the CCMA
DATE: 16 September 2021 TIME: 09h00–13h00 (CAT)

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KENYA

Universal health care coverage and compulsory registration...*continued*

In a parliamentary committee report it was reasoned that if the Bill were to be enacted, the amendments would hurt the wage bill and limit an employer's ability to create jobs, in an already challenging pandemic economy.

Fiercely contested

The Bill has been fiercely contested, as aggrieved employers have petitioned Parliament over the proposals. The parliamentary committee for health has also rejected the contents of the Bill. In a parliamentary committee report it was reasoned that if the Bill were to be enacted, the amendments would hurt the wage bill and limit an employer's ability to create jobs, in an already challenging pandemic economy. The report further rejected the mandatory registration requirement, stating that it was "not feasible".

In 2018, the proposed amendments were piloted and launched in four counties as part of the Government's Big Four agenda. Since the launch, the President has appealed to lawmakers to pass the amendments, maintaining that it offers the best chance for the government to provide affordable health care for all. It is key to note that the Big Four agenda was intended to be achieved by 2022, which may explain the government's push towards swift implementation.

The Bill is intended to make health care more accessible and less of a private good across Kenya. However, as parliamentarians highlighted, the cost of this access is set to fall heavily on Kenyan employers. We foresee employers opting out of private medical health care schemes and choosing to only offer their workers NHIF cover, in order to mitigate the cost of the proposed amendments. It is, however, questionable whether NHIF will provide the same standard of health care as private medical insurers.

Employers need to be aware of the proposed changes and prepare to comply with them should Parliament decide to enact the Bill. However, the Bill must still go through the Kenyan legislative process, which involves a first, second and third reading in Parliament, followed by presidential assent and enactment. At present, the Bill has been tabled before Parliament for a second reading to discuss the health committee's recommendations.

We are keeping a keen eye on the Bill and will regularly update you on any developments.

Rizichi Kashero-Ondego and Tyler Hawi Ayah, overseen by Njeri Wagacha

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Whose right is it anyway?

The Labour Court has previously held that a distinction between these two options is based on whether the rights being exercised are those of the union or the individual.

In the recently released judgement of *Multiquip (Pty) Ltd and Another v National Union of Metalworkers of South Africa D 477-20 (17 August 2021)*, the Labour Court reaffirmed the rights of employees to be represented by trade unions in dismissal hearings before the CCMA.

In unfair dismissal disputes before the Commission for Conciliation, Mediation and Arbitration (CCMA), a trade union representative can appear at the table (or on the screen of a MS Teams call) in one of two ways:

The first is where an employee has elected to have the trade union represent them in terms of CCMA Rule 25(1)(a)(ii). This rule stipulates that a person who is a party to a dispute may be represented in CCMA proceedings by of office bearer, official, or member of that person's registered trade union.

The second is where the trade union has exercised its entitlement in terms of section 200 of the Labour Relations Act 66 of 1995 to be a party to the proceedings by virtue of the fact that one or more of its members are party to the proceedings.

The Labour Court has previously held that a distinction between these two options is based on whether the rights being exercised are those of the union or the individual.

This distinction was germane in *Multiquip* where the Labour Court was called upon to determine whether two of its orders should be declared nullities and set aside. The first order confirmed a settlement

agreement entered into between *Multiquip and the National Union of Metalworkers of South Africa* (NUMSA) acting on behalf of 45 employees. The second held *Multiquip* to be in breach of the first. *Multiquip* argued that, in light of the recent findings of the Constitutional Court case in the matter of *NUMSA v Lufil Packaging* [2020] BLLR 645 CC, NUMSA's constitution prevented it from admitting 46 employees and, as such, NUMSA lacked legal standing before the CCMA when the settlement agreement was struck.

Where a union representative appears as a representative of an employee (i.e. in terms of Rule 25 of the CCMA rules), the Labour Appeal Court has previously held in *McDonalds Transport Upington (Pty) Limited v Association of Mineworkers and Construction Union and Others* [2016] 37 ILJ 2593 LAC that an employer cannot seek to exclude the union by relying on the employee's (poor) standing with the union in question, or indeed the trade union's constitution itself. *McDonalds* had in turn relied on *NUM obo Mabote v CCMA and Others* [2013] 34 ILJ 3296 LC in which the Labour Court had held that "When an individual applicant wants a particular union to represent him in a dismissal proceeding, the only relevant question is that worker's right to choose that union."

The judgment in *Multiquip* reaffirmed this position. Judge Benita Witcher held that the right to representation being exercised when a trade union represents an employee under the CCMA rules is the right of the employee and not the trade union.

Whose right is it anyway?

Whilst the constitutional provisions of NUMSA were deleterious to its cause in *Lufil*, in *Mulitquip* the court held that *"the contents of the constitution are irrelevant when the union is doing nothing more than providing representation in furtherance of the employee's right to be represented."*

This, so the court held, differentiated the *Multiquip* facts from those in *Lufil*, whereby a trade union was denied standing in the CCMA because it had sought to confirm its organisational rights through employees whom it was not entitled to approach in terms of its own constitution.

Whilst the constitutional provisions of NUMSA were deleterious to its cause in *Lufil*, in *Mulitquip* the court held that *"the contents of the constitution are irrelevant when the union is doing nothing more than providing representation in furtherance of the employee's right to be represented."*

*Aadil Patel and
Alistair Dey-van Heerden*

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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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