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EMPLOYMENT ALERT

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IN THIS **ISSUE**

THE LESSER EVIL: IMMIGRATION LAW V LABOUR LAW

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WILL THAT CLAUSE PROTECT YOU? THINK AGAIN!

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'ANYTHING GOES, OR DOES IT?' – HOW FAR CAN THE PURSUIT OF SHOP STEWARDS GO?

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CLIFFE DEKKER HOFMEYR

THE LESSER EVIL: IMMIGRATION LAW V LABOUR LAW

Sections 20(2) and 20(3) of the regulations require that an applicant for a corporate visa must provide proof at the stage of application and be able to provide proof at any point during holding the visa.

In 2014, the President and the then Minister of Home Affairs signed the new regulations to the Immigration Act, No 13 of 2002 (IA). These regulations contain various additions, but of note are certain regulations regarding corporate visas, which have been of recent public interest.

Sections 20(2) and 20(3) of the regulations require that an applicant for a corporate visa must provide proof at the stage of application and be able to provide proof at any point during holding the visa, "that at least 60% of the total staff complement that are employed in the operations of the business are citizens or permanent residents employed permanently in various positions".

Recently, the Department of Home Affairs (DHA) has stated that it will show no leniency towards companies that fail to observe the above provisions. The DHA expressed its dismay at the current wide-spread non-compliance with the regulations, especially in industries such as hospitality, construction, agriculture and mining. In several instances the DHA has indicated that the granting and renewal of corporate visas, in general, will be more heavily regulated.

This came approximately a week after the Congress of South African Trade Unions (COSATU) made a public statement demanding the deportation of a couple hundred illegal Chinese construction workers and probed the DHA to respond to their call.

The Constitution gives employees the right to fair labour practices and our courts have held that this is a fundamental and somewhat prioritised right. Therefore, one cannot take the provisions of the Labour Relations Act, No 66 of 1995 (LRA), which give effect to this fundamental right, lightly.

The LRA provides that a dismissal is presumed unfair if the reason for dismissal is unfair discrimination based on an arbitrary ground. This could potentially include immigration status and nationality. The LRA further lists grounds on which a dismissal could be legitimate, but neither immigration status nor nationality are listed grounds.

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As a result, strict compliance with the IA and ideals prescribed by the DHA could leave an employer open to unfair dismissal disputes being lodged against it, whereas exercising fair labour practices in line with the Constitution and the LRA could result in penalties being imposed on the employer by the DHA due to the IA.

This leaves many employers of foreign nationals in a precarious position, asking: "which law should I contravene?"

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THE LESSER EVIL: IMMIGRATION LAW V LABOUR LAW

CONTINUED

In summary, a hefty and complex onus is placed on the employer to strive towards compliance with conflicting laws, but compliance is ultimately possible.

The answer may lie in the efforts an employer is willing to make to uphold the provisions of the Constitution and the LRA despite those of the IA. The employer must be able show that it has made all reasonable and practical efforts to avoid dismissing the employees and that the dismissal is the last resort. This, together with the fact that the dismissal is caused directly by the IA, over which the employer has no control, should be sufficient and substantive reason to successfully justify any dismissals and sufficiently negate the "unfairness" thereof. The labour courts have shown their inclination to display sympathy to the employer where the above has been shown to a satisfactory degree.

It must be noted, however, that there is no objective, universal standard which dictates what actions qualify as reasonable and practical efforts – these efforts will be considered on a case-by-case basis. The required proof of reasonable efforts could be as hefty as an elaborate application to the DHA requesting a waiver in respect of visa-renewal requirements. Alternatively, it may be sufficient that employers simply inform employees in writing that failing their compliance with immigration laws, they may be called to disciplinary proceedings which may ultimately result in dismissal. The employer may even thereafter assist those employees in complying with immigration laws by furnishing them with required motivational letters. It is our opinion that where there is a foreign national employee whose visa is up for renewal, there must be good faith practised in assisting that employee in renewing his visa. Failing to do so may be construed as a breach of the implied duty of good faith in the employment contract.

In summary, a hefty and complex onus is placed on the employer to strive towards compliance with conflicting laws, but compliance is ultimately possible.

Michael Yeates and JD van der Merwe

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WILL THAT CLAUSE PROTECT YOU? THINK AGAIN!

The employer ultimately dismissed the employee for disobeying this instruction and the court found that her dismissal was automatically unfair.

The court found that the clause in the employee's contract of employment was in breach of the provisions of s7 of the Employment Equity Act (EEA) 55 of 1998 and found that the clause was of no legal force or effect.

Employers often rely on contracts of employment as being a watertight basis for taking what it perceives to be lawful action against employees. This may not always be the case.

In the case of *EWN v Pharmaco Distribution (Pty) Ltd* (2016) 377 ILJ 449 (LC) the employee suffering from bipolar disorder refused to undergo medical testing despite her contract of employment containing a clause which provided that she had to undergo medical testing whenever the employer deemed it to be necessary. The employer ultimately dismissed the employee for disobeying this instruction and the court found that her dismissal was automatically unfair.

In this case, senior management of the employer became aware of the employee's bipolar condition after she disclosed her bipolar status to the employer during disciplinary proceedings. The employer then required her to undergo medical testing to determine whether or not she was fit to perform her tasks as a result of her bipolar status. The employee refused to undergo medical testing and was later charged for a 'particularly serious and/or repeated wilful refusal to carry out lawful instructions or perform duties'. The instruction she failed to perform, and which ultimately led to her dismissal, was to present herself to a psychiatrist, for a medical examination. The employee claimed that the instruction was unlawful while the employer contended that the instruction was reasonable and lawful in terms of her contract of employment.

A clause in the employee's contract provided:

> *'The employee will, whenever the company deems necessary, undergo a specialist medical examination at the expense of the company, by a medical practitioner nominated and appointed by the company. The employee gives his/her irrevocable consent to any such medical practitioner making the results and record of any medical examination available to the company and to discuss same with such medical practitioner. The above shall include and apply to psychological evaluations.'*

The main issues the court had to decide on were whether the provision was enforceable; and whether her dismissal for failing to submit to a medical examination was automatically unfair in terms of s187(1)(f) of the Labour Relations Act (LRA) 66 of 1995.

In its decision, the court found that the clause in the employee's contract of employment was in breach of the provisions of s7 of the Employment Equity Act (EEA) 55 of 1998 and found that the clause was of no legal force or effect.

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CONTINUED

Employers are advised to note that where an employee's contract of employment contains clauses pertaining to the consent by the employee to undergo medical testing, that those clauses will not necessarily protect the employer.

Section 7(1) of the EEA prohibits the medical testing of an employee and aims to prevent unfair discrimination on the grounds of an employee's medical condition. Subsection (a) and (b) however provides that medical testing will be permitted when legislation permits or requires medical testing or when the testing of an employee can be justified in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job.

The court held that the section provides no exception based on the consent of the employee in an employment contract and that medical testing will only be permitted in the circumstances set out in paragraphs (a) and (b) which ultimately did not find application in this case. The court also found that the instruction to undergo psychiatric testing on account of the employee's bipolar condition amounted to unfair discrimination in terms of s6 of the EEA. The dismissal of the employee for refusing to undergo a psychiatric evaluation to determine her fitness to work was found to be an automatically unfair dismissal in terms of s187(1)(f) of the LRA.

Employers are advised to note that where an employee's contract of employment contains clauses pertaining to the consent by the employee to undergo medical testing, that those clauses will not necessarily protect the employer. It is important for employers to bear in mind that medical testing will only be permitted in the circumstances as set out in subparagraphs (a) and (b) of s7 of the EEA as exceptions.

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‘ANYTHING GOES, OR DOES IT?’ – HOW FAR CAN THE PURSUIT OF SHOP STEWARDS GO?

The employee referred his dismissal to the CCMA for arbitration, seeking reinstatement on the basis that same was procedurally and substantively unfair.

Shop stewards and union representatives play an important role advocating for the enhancement of employee rights, but what happens when their pursuit becomes heated and insubordination ensues?

In the case of the *National Union of Metal Workers of South Africa (NUMSA) obo Motloba v Johnson Controls Automotive SA (Pty) Ltd and Others* (PA6/15) [2017] ZALAC 14 (3 February 2017), a shop steward was dismissed for serious acts of misconduct. These included the intimidation and assault of his manager, following a heated exchange while carrying out his functions as a shop steward.

The employee referred his dismissal to the CCMA for arbitration, seeking reinstatement on the basis that same was procedurally and substantively unfair. The arbitrator found essentially that because the employee had approached the manager in his capacity as a shop steward, his interactions with her had occurred out of the traditional context of an employer-employee relationship. Consequently, the rules relating to insolence and insubordination that would normally apply to such a relationship had been relaxed in favour of facilitating effective negotiations between the parties.

A consequence of this finding was that the shop steward was granted immunity for all acts of misconduct purportedly performed in relation to his duties as a negotiator and on behalf of his fellow employees. The employee’s dismissal was therefore found to be substantively unfair and he was awarded compensation.

Dissatisfied with the arbitrator’s failure to order reinstatement and pursuant to a finding of substantive unfairness, the employee took the decision on review to the Labour Court where the employer filed a counter review.

The Labour Court reasoned that while a degree of immunity from disciplinary action must be granted to shop stewards and in order to allow them to effectively perform their duties, this immunity should not have the effect of placing shop stewards above reproach for all acts of misconduct committed against the employer. The Labour Court accordingly held in favour of the counter-review, finding that the employee’s dismissal was both procedurally and substantively fair.

The matter was then appealed to the Labour Appeal Court, which further analysed and clarified the extent of the immunities granted to shop stewards in the performance of their duties. While shop stewards ought to be able to perform their duties without fear of victimisation by their employers, Phatsoane AJA held that this should not be interpreted to mean that representatives have been given total license to behave in a manner that is unreasonably confrontational or fraught with unchecked aggression.

The matter was then appealed to the Labour Appeal Court, which further analysed and clarified the extent of the immunities granted to shop stewards in the performance of their duties.

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CONTINUED

The Court has therefore reaffirmed that even in the absence of strike action, the balance between a reasonable tolerance of insolence on the part of the employer, must be tempered by a minimum standard of conduct expected of an employee under all circumstances.

It is clear from this judgment that, irrespective of the employee’s status as a shop steward, interactions between employees and their employer must remain respectful and appropriate in the context of the employment relationship between them at all times. The Labour Appeal Court reaffirmed that, even when engaging in collective bargaining, threats of violence and intimidation have no place in facilitating meaningful employee-employer collaboration.

This judgment further develops the findings of the Labour Appeal Court in the case of *National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd* (2010) 31 ILJ 1779 (LAC) in which it was found that the unique dual nature of a shop steward as an employee and negotiating representative, does allow for more flexibility in their interactions with their employers and particularly in the context of strike action however, the Labour Appeal Court also stressed this flexibility is granted with the aim of encouraging healthy and productive labour relations and should not be construed as giving employees free reign to engage in wanton acts of violence and misconduct.

The Court has therefore reaffirmed that even in the absence of strike action, the balance between a reasonable tolerance of insolence on the part of the employer, must be tempered by a minimum standard of conduct expected of an employee under all circumstances.

Accordingly, employees should monitor the nature of their engagements with shop stewards, especially in the context of strike action where tensions increase, as such behaviour will not enjoy protection from the courts.

Nicholas Preston and Shikara Singh

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Our Employment practice's new EMPLOYMENT STRIKE GUIDELINE answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

CLICK HERE TO FIND OUT MORE

Michael Yeates named winner in the **2015** and **2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 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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