

EMPLOYMENT ALERT

IN THIS ISSUE

WHEN CULTURE AND LAW CLASH

With 11 official languages and nearly 56 million citizens, South Africa is a true melting pot of diverse cultures, traditions and beliefs. Our country's rich diversity raises interesting and complex questions from an employment perspective. Although the Constitution protects diversity, it is often difficult for employers to align their business needs with the cultural, religious and traditional beliefs of their employees. Fortunately, our courts have begun to provide guidance as to how to deal with this potential conflict in the workplace. We deal with two such cases below.

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The employee who sought to become a sangoma: *Kievets Kroon Country Estate (Pty) Ltd v Mmoledi and others* [2014] 1 All SA 636 (SCA)

The employee in question sought one month of unpaid leave to attend a ritual ceremony for sangoma training. She submitted a certificate from a traditional healer (and other supporting documents) to substantiate her request. The employee also informed the employer that this was a calling from her ancestors and that if she did not fulfil the request, she would die. The employer refused the request.

Nevertheless, the employee went on the training without permission and she was subsequently charged with insubordination and absence from work and thereafter dismissed.

The employee did not argue that she was sick in the conventional sense. She said that, owing to her cultural beliefs, her ancestors had called her to undergo training to become a sangoma. The interesting question before the court: Was the employee's absence from work justifiable?

This case shows how employer and employee interests often conflict. On the one side, you have an employer who is trying to run a business while on the other, you have an employee who believed that her ancestors were summoning her to become a sangoma.

The Supreme Court of Appeal confirmed that South Africans have different belief systems which form part of their culture (that is, customs, ideas and social behaviour). A court, in general, is not equipped to evaluate the acceptability or consistency of a belief – it can only scrutinise the sincerity (or reasonableness) of an employee's belief. In this case, the court found the employee's belief to be reasonable.

Traditional dispute resolution practices verse disciplinary codes: *Harmony Goldmine Company Limited v Raffee N.O. and Others* (JR1205/15) [2018] ZALCJHB 169 (8 May 2018):

An employee (Mr Ndele) was assaulted by a fellow employee (Mr Ndabeni) at a hostel bar. Mr Ndele fractured his leg during the assault. Although this case is related to Mr Ndabeni's assault by of Mr Ndele, it concerns a different employee: Mr Puzi. Mr Puzi was a colleague and friend of Mr Ndabeni and from a cultural perspective, Mr Puzi formed part of Mr Ndabeni's "delegation".

After being released from hospital, Mr Ndele informed the employer's mine governor about the assault. Mr Ndabeni (and his delegation) then, in terms of the Mpondomise tradition, visited Mr Ndele to ask for forgiveness and to offer monetary compensation.

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However, the parties could not agree on the amount of compensation. Mr Ndele then formally reported the assault incident to the employer.

Due to his involvement in what the employer viewed as behind-the-scenes negotiations, the employer charged Mr Puzi with bribery and dishonesty, and the employer later dismissed him.

The matter posed two interesting questions:

- In a culturally diverse workplace, to what extent should the employer embrace employees' individual cultural norms and traditions?
- Would the practice of those cultural norms and traditions prohibit the employer from disciplining employees?

An expert (on African norms) submitted, in court, that the practice of traditions cannot be used to defeat the ends of justice or conceal a transgression.

However, the court considered the Ubuntu approach to conflict resolution and stated that "ubuntu societies place a high value on communal life, and maintaining positive relations within the society is a collective task in which everyone is involved... if an individual is wronged, he or she may depend on the group to remedy the wrong".

In this matter Mr Ndabeni (and his delegation) sought to make peace, through methods of cultural conflict resolution, with Mr Ndele following the assault. However, the employer viewed the actions of the employees as constituting dishonesty and attempted bribery.

The court disagreed, holding the claims to be unfounded. The following extract from the judgment is worth noting:

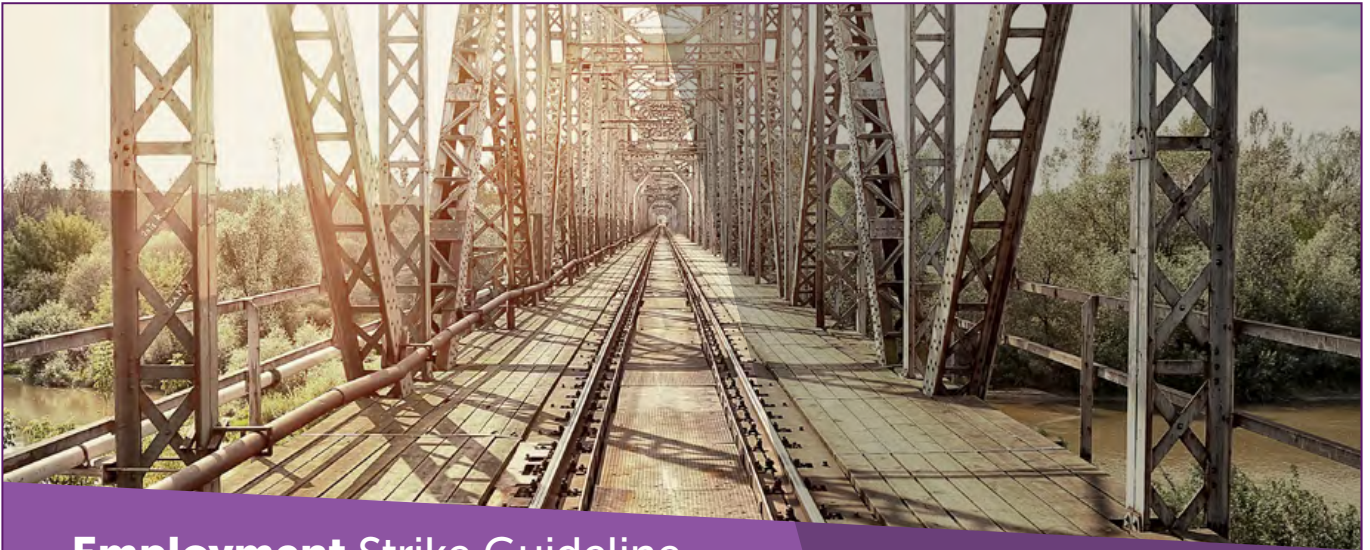
Even though employers may not be bound by the cultural traditions, they cannot simply ignore the reality of their existence, especially in instances where the cultural traditions are aimed at achieving societal good and are not in conflict with the Constitution... where the perpetrator showed true remorse and was willing to promote peace with the victim in accordance with their norms and traditions, the employer would be expected to earnestly consider same in good light.

These cases provide two overarching lessons for employers:

- If employees provide reasons for absence from work that relate to cultural, religious and/or traditional beliefs, employers should carefully consider these requests and, where possible and reasonable, accommodate such employees; and
- Employers must be cautious in applying disciplinary codes in a blanket manner, without taking cognisance of cultural methods of conflict resolution (if these are used by employees).

At the end of the day, employers must be cognisant of the fact that employees have their own unique religious and cultural belief systems. Implementing an approach that is blind to this reality may result in employers treating their employees unfairly.

Aadil Patel and Shane Johnson



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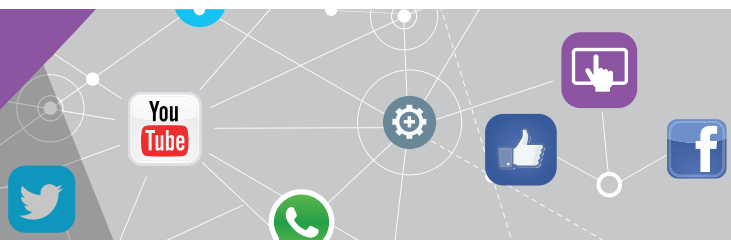
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