

3 JUNE 2019

# EMPLOYMENT ALERT

## IN THIS ISSUE

### South Africa's rising unemployment tide: An alternative model

According to the most recent figures released by Stats SA, the unemployment rate rose to 27.6% in the first quarter of 2019, up from 27.1% in the previous period. This is the highest jobless rate recorded since Q3 2017, as the number of unemployed went up by 62,000, to 6.2 million, and the number of jobs fell by 237,000, to 16.29 million. These distressing statistics are indicative of the inadequacies of the current labour model in combatting the ever-present battle against unemployment.

### Escape route: "Resignation with immediate effect"

The latest case in the 'disciplining employees who have resigned with immediate effect' saga has brought about more uncertainty as to whether an employee who resigns with immediate effect shortly before a disciplinary hearing can avoid disciplinary action and subsequent dismissal.

## South Africa's rising unemployment tide: An alternative model

The number of unemployed went up by 62,000, to 6.2 million, and the number of jobs fell by 237,000, to 16.29 million.

According to the most recent figures released by Stats SA, the unemployment rate rose to 27.6% in the first quarter of 2019, up from 27.1% in the previous period. This is the highest jobless rate recorded since Q3 2017, as the number of unemployed went up by 62,000, to 6.2 million, and the number of jobs fell by 237,000, to 16.29 million. These distressing statistics are indicative of the inadequacies of the current labour model in combatting the ever-present battle against unemployment.

Given the overt failure of our current labour market scheme, our country is dutybound to revisit its internal policies and take inspiration from the successes of other industrialised or semi-industrialised nations' efforts to address their rising unemployment rates. In doing so we must understand the role of government, business and labour (commonly referred to as the "Dunlop Triangle") in creating much-needed jobs and stimulating an ailing economy.

One international model that serves as a useful example is that of Ireland, where government, business and labour formed a Social Accord during the 1990s. This Social Accord yielded positive results for job creation. Lessons can also be learned from Germany where government imposed labour market reforms between 2003 and 2004 to quell rising unemployment rates. These were aimed at increasing labour market flexibility, improving the matching of unemployed workers and job vacancies, and, even, the lowering of unemployment benefits.

Similarly, Spain introduced labour market reforms and witnessed a significant drop in their unemployment rate from approximately 27% to 15%. This labour market reform was modelled on flexible wage rate settings and reduced employment protection.

It would, however, be erroneous to simply apply the international labour markets or trends in South Africa as each country has their own unique labour market climate. Nevertheless, it is important for the three parties to the "Dunlop Triangle" to be mindful of the workings of the international labour markets as their current practices and policies are not achieving the desired results.

Having regard to the successes of the international models, it is suggested that government, labour and business consider the following non-exhaustive factors.

### Government

First and foremost, government must ensure the seamless operation of basic infrastructure such as water and electricity. Disruptions in infrastructure is injurious to business which has a direct impact on employment.

World trends have shown that the growth in the creation of employment does not necessarily lie in the formal sector. Employment-friendly legislation is, therefore, important to reduce protection such legislation may entail no-fault termination of employment whereby an employee may be dismissed for a reason through no fault of their own during their first six months of being employed.

## South Africa's rising unemployment tide: An alternative model...*continued*

It is suggested that government, labour and business enter into some form of social accord, based on the lessons learned from other countries.

### Business

When it comes to retrenchments, business must undergo a paradigm shift in that retrenchments should be regarded as a last resort instead of being utilised as an opportune mechanism to significantly cut operational costs. Drawing parallels to practices in Japanese companies, employers should not retrench whilst the managers doing the retrenching derive financial benefit or other dividends from that retrenchment.

Furthermore, employers should ideally allow for broadening their employees' skill sets and provide mechanisms for productivity bargaining. This is a trade-off in labour negotiations whereby, in return for the employer offering more pay, the employee agrees to changes that will increase their productivity. Another consideration would be wage freezes, pay cuts and bonus reductions for top earners and executives.

### Labour

Although trade unions members consist of the employed population, trade union's actions impact the unemployment rate

directly as their demands determine access to the job market. It is therefore pertinent that the workplace is democratised by introducing ballots before employees embark on strikes. Moreover, it is important for employees to avoid limiting themselves to restricted job titles and rather focus on offering a broader skill set. In other words, job flexibility is required from employees.

Lastly, wage freezes must be considered whilst still ensuring that employees receive a living wage. Additionally, wage cuts must be appraised with due regard to productivity bargaining increases and the like.

### Conclusion

Overall, although the above is by no means exhaustive, the "Dunlop Triangle" would do well to consider these initial points. It is suggested that government, labour and business enter into some form of social accord, based on the lessons learned from other countries. For a successful relationship to exist amongst the "Dunlop Triangle", it is crucial for there to be mutual trust and integrity between all parties.

*Hugo Pienaar and  
Ashlyn Quenet-Meintjes*

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

## Escape route: “Resignation with immediate effect”

In *Standard Bank* the Labour Court ruled that an employer has no power to discipline employees who have been charged with acts of misconduct and dishonesty but who have resigned with immediate effect before the date of their disciplinary hearings.

The latest case in the ‘disciplining employees who have resigned with immediate effect’ saga has brought about more uncertainty as to whether an employee who resigns with immediate effect shortly before a disciplinary hearing can avoid disciplinary action and subsequent dismissal. In *Naidoo and Another vs Standard Bank SA Ltd and SBG Securities (Pty) Ltd* (Case No: J1177/190 [Delivered 24 May 2019]), the Labour Court ruled that an employer has no power to discipline employees who have been charged with acts of misconduct and dishonesty but who have resigned with immediate effect before the date of their disciplinary hearings. The correct way to proceed, according to the court, is to hold the employee to his or her contract by seeking an order for specific performance.

### The Coetzee judgment

The ruling in the *Standard Bank* matter goes directly against the decision in *Coetzee v Zeitz MOCCA Foundation Trust and Others* (2018) 39 ILJ 2529 LC where the Labour Court held that an employer may proceed with a disciplinary hearing even where the employee has resigned. The court in *Coetzee* emphasised that resignation with immediate effect is only permissible where there is a preceding material breach of contract by the employer or where the employer accepts the resignation with immediate effect. The court further held that statutorily and contractually, an employee is bound to give at least four weeks’ notice of his or her resignation and that there is no legal impediment to the prosecution of

disciplinary proceedings and subsequent dismissal during an employee’s notice period. What the judgment in *Coetzee* ultimately says, is that an employee’s employment contract only comes to an end through resignation and at the end of the notice period.

### The KPMG judgment

The judgment in *Coetzee* however, came hot on the heels of *Kalipi Mtati v KPMG Services (Pty) Ltd* (2017) 38 ILJ 1362 (LC) where the Labour Court had a different view to that in *Coetzee*, but one that is more in line with the latest judgment in the *Standard Bank* case. In the *KPMG* matter, an employee first submitted a resignation with notice after she was informed of an investigation regarding allegations of serious misconduct against her. The employer informed her that it would nonetheless continue with the disciplinary proceedings against her and as a result, the employee submitted a second resignation but this time, with immediate effect. The employer proceeded with the disciplinary hearing in her absence, finding her guilty and subsequently dismissing her. This caused the employee to approach the court on an urgent basis on the contention that the employer could not discipline her as she had resigned and that the chairperson’s decision was as a result, null and void.

The court in *KPMG* distinguished between situations where there is resignation with notice, in which case the employer may discipline the employee during the notice period, and situations where there is resignation with immediate effect,

## Escape route: “Resignation with immediate effect”...*continued*

If following the latest case law, the position is that an employer may not discipline employees post resignation with immediate effect. Employers who insist on taking disciplinary action where an employee has resigned with immediate effect, will have to resort to the common law remedies available and seek orders for specific performance to hold such an employee to his or her notice period.

in which case the employer may not discipline the employee by virtue of the employment contract being terminated by the employee’s resignation with immediate effect. The court therefore concluded that the employer’s decision to dismiss the employee was a nullity as the employee could not be disciplined after resigning with immediate effect.

### **The *Standard Bank* judgment**

In the *Standard Bank* matter the employees sought to challenge the employer’s jurisdiction to continue with their disciplinary hearings relating to charges of gross misconduct and dishonesty, post their resignation with immediate effect. Upon receipt of the employees’ resignation with immediate effect, the employer responded by stating that it did not accept the resignations and sought to hold them to their notice periods. The employees then approached the court on an urgent basis.

In looking at the effect of the resignation in this matter, the court held that where an employee resigns without giving notice, the employee is in breach of the employment contract, as was the scenario in this case. In concluding that there was in fact a contractual breach by the employees by resigning without notice, the court referred to the matter of *Vodacom (Pty) Ltd v Motsa and Another* (2016) 5 BLLR 523 (LC) which states that in such an instance, an employer may hold the employee to the contract by seeking an order for specific

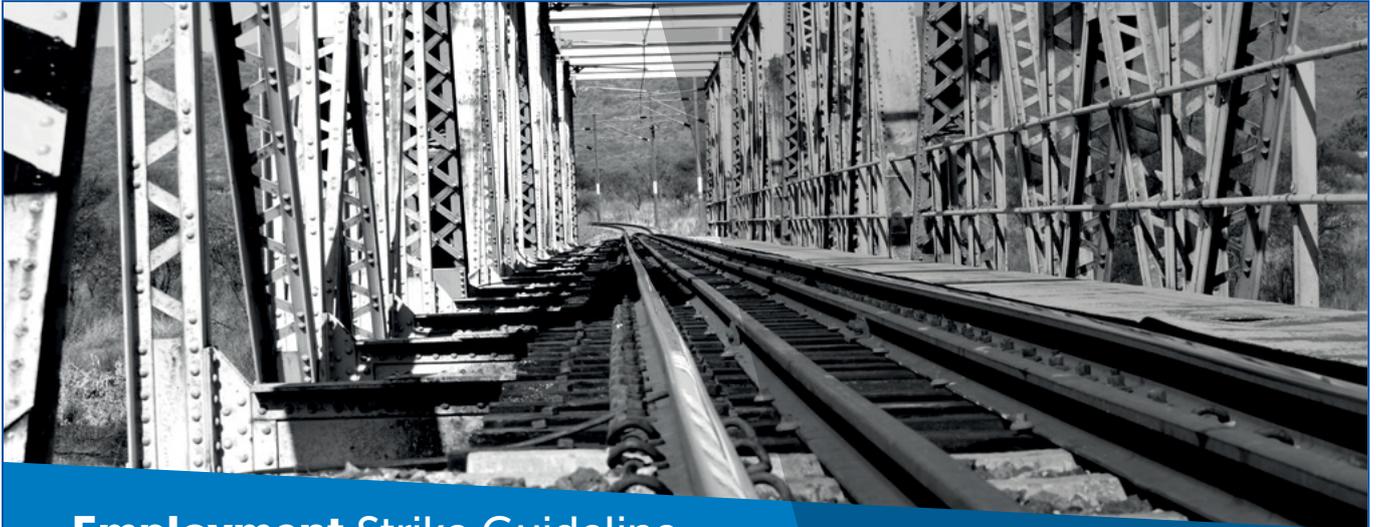
performance. The court in *Standard Bank* then went on to state that there is no legal basis for an approach whereby an employer may proceed with a disciplinary hearing without first approaching the court for an order for specific performance, as was followed in the *Coetzee* judgment.

In concluding its analysis, the court in the *Standard Bank* matter held that resignation with immediate effect brings about an end to the employment relationship, albeit in breach of the termination clause. The result was thus that the employer has no power to discipline the employees after their resignation with immediate effect. The employer was consequently interdicted from continuing with the intended disciplinary enquiries against the employees.

### **Conclusion**

The position on whether an employer may continue disciplining an employee post resignation with immediate effect is at this point uncertain considering the three conflicting judgments discussed above. However, if following the latest case law, the position is that an employer may not discipline employees post resignation with immediate effect. Employers who insist on taking disciplinary action where an employee has resigned with immediate effect, will have to resort to the common law remedies available and seek orders for specific performance to hold such an employee to his or her notice period.

*Michael Yeates and Kirstin Swanepoel*



## Employment Strike Guideline

Find out when a lock-out will be protected.

 [Click here to find out more](#)

Hugo Pienaar was named the exclusive South African winner of the **ILO Client Choice Awards 2017 and 2019** in the Employment & Benefits category.



CHAMBERS GLOBAL 2014 - 2019 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2019 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2019 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2019 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2017 - 2019 in Band 4: Employment.

Gavin Stansfield ranked by CHAMBERS GLOBAL 2018 - 2019 in Band 4: Employment.



 **CLICK HERE**  
FOR THE LATEST SOCIAL  
MEDIA AND THE WORKPLACE  
GUIDELINE



## 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



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



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



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



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



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



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



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



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



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



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



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



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



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



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



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



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

### BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### 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

©2019 7972/JUNE

