

13 JULY 2020

# EMPLOYMENT ALERT

## IN THIS ISSUE

### Does the failure to appoint an employee to a more senior alternative position in a restructure amount to an unfair labour practice in relation to promotion?

In the *Telkom SA Ltd V Commission for Conciliation, Mediation & Arbitration & Others* (2019) 40 ILJ 1093 (LC), the Labour Court was called upon to determine two issues: (i) whether the CCMA had jurisdiction to adjudicate a dispute of an alleged unfair labour practice (ULP) where the alleged ULP arose in the context of a retrenchment which was the subject matter of pending litigation before the Labour Court and (ii) whether the company had committed an ULP when they failed to appoint the First Respondent to a more senior position in the new structure.

## Does the failure to appoint an employee to a more senior alternative position in a restructure amount to an unfair labour practice in relation to promotion?

In 2016, the company embarked on a restructure. It is common cause there were limited positions available in the new structure, which employees were invited to apply for.

**In the *Telkom SA Ltd V Commission for Conciliation, Mediation & Arbitration & Others* (2019) 40 ILJ 1093 (LC), the Labour Court was called upon to determine two issues: (i) whether the CCMA had jurisdiction to adjudicate a dispute of an alleged unfair labour practice (ULP) where the alleged ULP arose in the context of a retrenchment which was the subject matter of pending litigation before the Labour Court and (ii) whether the company had committed an ULP when they failed to appoint the First Respondent to a more senior position in the new structure.**

In 2016, the company embarked on a restructure. It is common cause there were limited positions available in the new structure, which employees were invited to apply for. The First Respondent unsuccessfully applied for the newly created, more senior, position of Senior Specialist: Industrial Relations. The First Respondent appealed the decision, his appeal was equally unsuccessful. The First Respondent then referred an ULP dispute on the basis of promotion to the CCMA, in relation to the failure by the company to appoint him to the more senior alternative position.

In light of the fact that the company found that there was no suitable position for the First Respondent in the new structure, the First Respondent was later retrenched. At the time of arbitration, the First Respondent was already retrenched and was no longer in the employ of the company.

At the CCMA, the Commissioner found that the CCMA had jurisdiction to adjudicate the dispute notwithstanding that the dispute arose in light of a consultation process preceding contemplated retrenchments and that the fairness of the retrenchments was the subject matter of pending litigation before the Labour Court. The commissioner found that it was common cause that there was a 'hybrid' situation, in that whilst the process exhibited the hallmarks of a section 189 of the Labour Relations Act (LRA) consultative retrenchment process, it also bore some elements of section 186 of the LRA in that 'promotional opportunities' were contemplated by the company and, accordingly, the dispute fell squarely within an ULP relating to promotion. The commissioner found that the company had committed an ULP by failing to promote the First Respondent and, as he

## Does the failure to appoint an employee to a more senior alternative position in a restructure amount to an unfair labour practice in relation to promotion?...continued

On review, the Labour Court was called upon to determine whether the CCMA has jurisdiction to determine the dispute and whether the failure to place the First Respondent in a senior alternative position in the new structure amounted to an ULP on the basis of promotion.

was no longer in the company's employ, ordered the employee's reinstatement and promotion to the position of Senior Specialist: Industrial Relations.

The matter was later taken on review. On review, the Labour Court was called upon to determine whether the CCMA has jurisdiction to determine the dispute and whether the failure to place the First Respondent in a senior alternative position in the new structure amounted to an ULP on the basis of promotion.

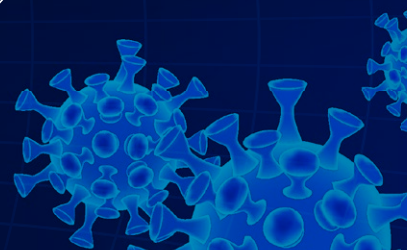
The court held that the commissioner's ruling in this regard was unassailable and, as such, the jurisdictional challenge had to fail. The court held the fact that the promotional opportunity coincided with the retrenchment process did not amount to a separate and new cause of action. The First Respondent accepted that his

position had become redundant and to avoid retrenchment, he was offered an opportunity to compete for placement in one of the two new positions.

In this regard, the court endorsed the approach of the Labour Appeal Court in *SA Breweries (Pty) Ltd v Louw*, that an employer who seeks to avoid dismissal of a dislocated employee and who invites the dislocated employee to compete for one or more of the new posts, does not act unfairly, still less transgresses section 189(2)(b) or section 189(7) of the LRA. The court further held that it was inconceivable that in a restructuring process the affected employees could harbour an expectation of promotion as opposed to restructuring and was aggrieved by his/her nonplacement consequent to a competitive placement process he/she had to challenge same in

## CDH'S COVID-19 RESOURCE HUB

Click here for more information 



## Does the failure to appoint an employee to a more senior alternative position in a restructure amount to an unfair labour practice in relation to promotion?...continued

The court found that, assuming that the commissioner could order reinstatement, his order of reinstatement could only resuscitate the position that the First Respondent occupied prior to his retrenchment.

terms of section 189. The court confirmed that in order the First Respondent to claim an ULP in relation to promotion, they must evidence that there was unfairness in their non-placement.

Applied to the facts, the court found that, assuming that the commissioner could order reinstatement, his order of reinstatement could only resuscitate the position that the First Respondent occupied prior to his retrenchment. Since that position was extinct, the commissioner's award patently fashioned a new employment contract by awarding

the First Respondent reinstatement and a promotion to a newly created position. In doing so, the court held that the commissioner exceeded his powers.

Therefore, an employee has no recourse to an ULP relating to promotion when unsuccessful in applying for new positions as an alternative to retrenchment, particularly where an employee cannot evidence that there was unfairness related to their non-placement. In such an instance, an employee may only find possible recourse in terms of the section 189.

*Aadil Patel, Riola Kok and Devon Clarke*





## COVID-19 WORKPLACE HEALTH AND SAFETY ONLINE COMPLIANCE TRAINING

Information. Education. Training.

We have developed a bespoke eLearning product for use on your learning management system, that will help you strengthen your workplace health and safety measures and achieve your statutory obligations in the face of the COVID-19 pandemic.

To purchase or for more information contact [OHsonlinetool@cdhlegal.com](mailto:OHsonlinetool@cdhlegal.com).

EMPLOYMENT

### CASE LAW UPDATE 2019



**CLICK HERE**  
to access CDH's Employment Law booklet to assist you in navigating the employment relationship during the current economic uncertainty.

CHAMBERS GLOBAL 2014 - 2020 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2020 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2020 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 in Band 3: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2020 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 as an up and coming employment lawyer.



Our Employment practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Fiona Leppan is ranked as a Leading Individual in Employment in THE LEGAL 500 EMEA 2020.

Aadil Patel is recommended in Employment in THE LEGAL 500 EMEA 2020.

Gillian Lumb is recommended in Employment in THE LEGAL 500 EMEA 2020.

Hugo Pienaar is recommended in Employment in THE LEGAL 500 EMEA 2020.

Michael Yeates is recommended in Employment in THE LEGAL 500 EMEA 2020.

Jose Jorge is recommended in Employment in THE LEGAL 500 EMEA 2020.



## 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



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



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



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



**Mohsina Chenia**  
Executive Consultant  
T +27 (0)11 562 1299  
E mohsina.chenia@cdhlegal.com



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



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



**Faan Coetzee**  
Executive Consultant  
T +27 (0)11 562 1600  
E faan.coetzee@cdhlegal.com



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



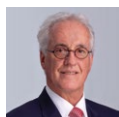
**Gillian Lumb**  
Director  
T +27 (0)21 481 6315  
E gillian.lumb@cdhlegal.com



**Avinash Govindjee**  
Consultant  
M +27 (0)83 326 5007  
E avinash.govindjee@cdhlegal.com



**Asma Cachalia**  
Associate  
T +27 (0)11 562 1333  
E asma.cachalia@cdhlegal.com



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



**Riola Kok**  
Consultant  
T +27 (0)11 562 1748  
E riola.kok@cdhlegal.com



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



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

### 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.

### PLEASE NOTE

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

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2020 9140/JULY

