EMPLOYMENT LAW
ALERT

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CLIFFE DEKKER HOFMEYR

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IN THIS ISSUE

Are whistleblowers immune from disciplinary action?

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Promoting diversity and inclusivity in the workplace: The implications of the proposed amendments to the Employment Equity Act on industry targets

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FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

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In South Africa, whistleblower protection is based in the Protected Disclosures Act 26 of 2000 (PDA). Allied to the world of work, the PDA provides that in the workplace employees may, without fear of reprisal, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers (both in the private and public sector). It is the Labour Relations Act 66 of 1995 (LRA) which then renders a dismissal automatically unfair if it constitutes a contravention of the PDA by an employer, and which attempts to protect employees from being victimised through disciplinary and other processes where the whistle has been blown.

BEFORE THE CCMA

Section 188A(11) of the LRA was introduced into law in 2015 as an amendment to the provisions dealing with pre-dismissal arbitrations by the Commission for Conciliation, Mediation and Arbitration (CCMA).

Section 188A(11) provides that if an employee alleges in good faith that the holding of a disciplinary inquiry contravenes the PDA, the employee or the employer may require that such enquiry be conducted by a CCMA arbitrator instead. The CCMA arbitrator is to enquire into the allegations of misconduct or incapacity of the employee. So, instead of having an internal disciplinary inquiry, there would be an inquiry conducted by a CCMA arbitrator. Historically, parties in cases involving claims of protected disclosure would get drawn into urgent applications in the Labour Court. Section 188A(11) was aimed at reducing such litigation.

However, closing down one avenue of complication has created in practice another, because section 188A(11) is so easily open to abuse by employees.

Are whistleblowers immune from disciplinary action?

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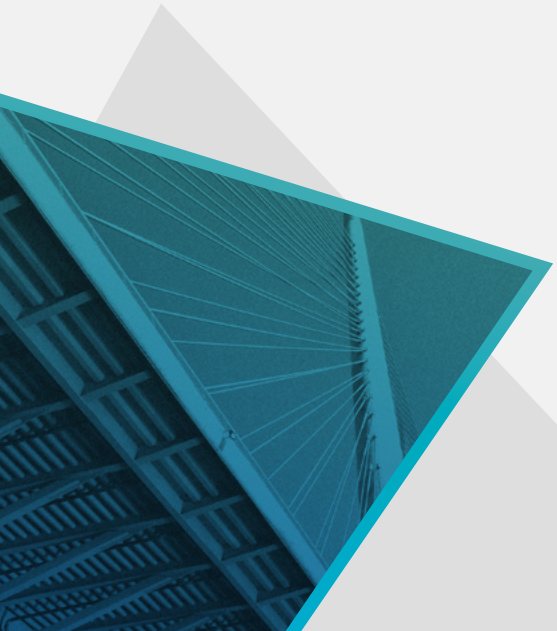

An employee, in an attempt to avoid disciplinary action or to delay an ongoing internal disciplinary enquiry, may allege that they have made a protected disclosure and therefore, relying on section 188A(11), require that the disciplinary inquiry be terminated and referred to the CCMA for a pre-dismissal arbitration. There are conflicting Labour Court judgments on the correct interpretation and effect of section 188A(11), two of which are considered below.

LABOUR COURT JUDGMENTS

In *Nxele v National Commissioner: Department of Correctional Services and Others* [2018] 39 ILJ 1799 (LC), a senior employee of the department disclosed to the Public Service Commission and the Public Protector that the respondent's national commissioner was involved in irregular and unlawful appointments and corrupt activities. After the alleged protected disclosure, the employee was charged with several counts of fraud relating to travel claims and the loss of a firearm. When the disciplinary enquiry commenced, the employee requested that the enquiry be conducted by an arbitrator under section 188A(11). The chairperson of the disciplinary enquiry ruled that, in the absence of the consent of the employer, the disciplinary hearing must proceed. The employee was found guilty in respect of the travel claims. Before a sanction could be imposed, the employee launched an urgent application to interdict the continuation of the disciplinary hearing. The Labour Court held that when an employee alleges that they have made a protected disclosure and makes a request for a pre-dismissal arbitration, the employer is obliged to refer the matter to the CCMA for a pre-dismissal hearing and terminate the internal disciplinary hearing.

In contrast, the Labour Court in *Tsibani v Estate Agency Affairs Board and Others* [2021] JOL 51625 (LC) found differently. In *Tsibani*, the employee, relying on section 188A(11) sought to interdict her disciplinary inquiry. She contended that she had made a protected disclosure, consisting of allegations of impropriety against the CFO and other officials of the Estate Agency Affairs Board. The Labour Court held that section 188A(11) does not envisage the holding of two parallel hearings, it provides for an inquiry into allegations relating to an employee's conduct or capacity and for such an inquiry to be conducted by an arbitrator. The arbitrator will make findings on the conduct of the employee and must, in light of the evidence presented and considering the criteria of fairness, rule as to what action, if any, may be taken against the employee. Further, it found that the provisions of section 188A(11) are not intended

Are whistleblowers immune from disciplinary action?

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or designed to compel an employer (or an employee) to be subjected to two simultaneous and parallel disciplinary processes. It was further held that section 188A(11) is not designed or intended to determine whether the facts constitute a protected disclosure as contemplated by the PDA or not, and if not, for an internal disciplinary hearing to proceed. The section merely provides for an inquiry into allegations pertaining to the conduct or capacity of an employee by the CCMA.

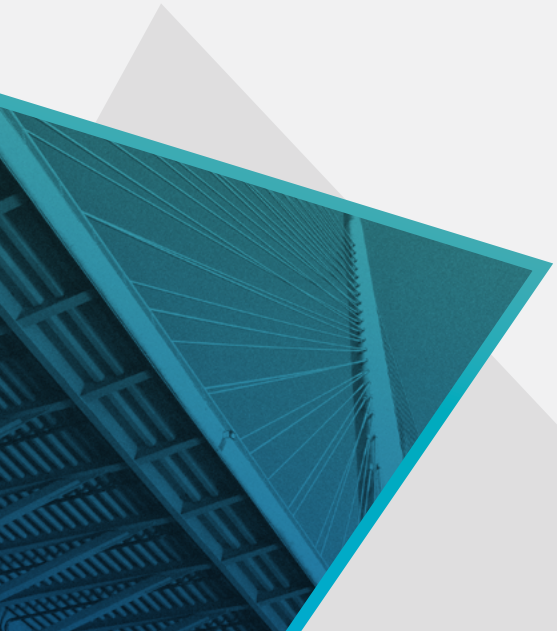
In our view, the judgment in *Tsibani* is more sensible and would likely be followed in time.

Employers should be cognisant of employees who, in an attempt to halt or delay internal disciplinary enquiries, rely on section 188A(11). Even in instances where an employee has indeed made a protected disclosure, that employee is not immune from facing disciplinary action, where some other conduct of the employee (that is not related to the protected disclosure) constitutes misconduct in the view of the employer.

So, unlike other countries which provide rewards for whistleblowers, in South Africa workplace whistleblowers can still face discipline where they have misconducted themselves or performed poorly. Employers, on the other hand, are easily hamstrung by charlatans who abuse section 188A(11) to delay disciplinary processes and at the same time remain on the payroll. An unnecessary frustration created by section 188A(11).

At the end of the day, our laws on whistleblower protection need to be beefed up and employer protection against charlatans also need to be recognised to stem the rising tide of abuse. We are a long way off from the protectionist position provided in many other countries like the US to whistleblowers.

IMRAAN MAHOMED AND
MBULELO MANGO



Promoting diversity and inclusivity in the workplace: The implications of the proposed amendments to the Employment Equity Act on industry targets

The Employment Equity Amendment Bill (Bill) was passed by Parliament (the National Assembly and National Council of Provinces) on 17 May 2022 and is waiting to be signed into law by the President. The amendments are expected to be effected by 2023.

The main objective of the amendments introduced by the Bill is to empower the Minister of Labour and Employment (Minister) to, amongst other things, identify and set employment equity numerical targets for each national economic sector. The purpose of the numerical targets is to ensure equitable representation of suitably qualified people from historically disadvantaged groups based on race, gender, and disability at all occupational levels in the workplace. This is provided for in section 15A of the amendments to the Employment Equity Act 55 of 1998 (EEA).

The Bill also seeks to introduce an amendment to section 20 of the EEA, which deals with the preparation and contents of employment equity plans. The amendment seeks to align the designated employer's employment equity plan with the sectoral targets set by the Minister.

The Minister will be required to, and prior to implementing the sectoral targets, publish the proposed numerical targets to provide relevant stakeholders an opportunity to comment thereon for a period of 30 days.

Once the numerical targets are finalised and published, designated employers would have toensure that the numerical targets, as reflected in their employment equity plans, are in line with the applicable sectoral targets.

Compliance will, therefore, be measured by considering whether a designated employer has met the sectoral targets established by the Minister. This is outlined in terms of the proposed amendment to section 42 of the EEA.

Promoting diversity and inclusivity in the workplace: The implications of the proposed amendments to the Employment Equity Act on industry targets

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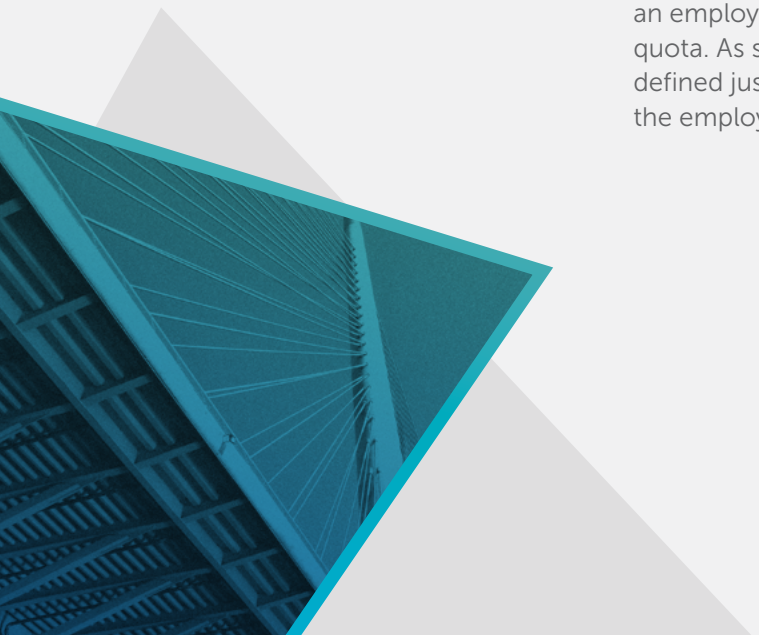
It is unclear from the Bill whether an employer has the discretion to deviate or seek an indulgence from the Minster in instances where it was unable to meet the sectoral numerical targets, despite its various efforts to do so. This may be as a result of a scarcity of skills required within a specific designated group or having no vacancy in which to appoint a person from a designated group to be able to meet its targets.

However, guidance from the prevailing legal position informs that both the formulation and the implementation of the employment equity plan can never render any target – whether determined by an employer or the Minister – a quota. As such, and for example, defined justifiable deviations from the employment equity plan's numerical target and proof that such deviations were, in fact, applicable can assist employers in justifying, and defending, non-compliance. Likewise, enforcement cannot force an employer to apply numerical targets as quotas lest be faced with a compliance order and ultimate fine.

It remains to be seen how compliance officers and inspectors will approach this in practice pursuant to the amendment being enforced into law.

HEDDA SCHENSEMA,
TSHEPISO RASETLOLA AND
JJ VAN DER WALT



OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Aadil Patel
Practice Head & Director:
Employment Law
Joint Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Anli Bezuidenhout
Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Jose Jorge
Sector Head:
Consumer Goods, Services & Retail
Director: Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Fiona Leppan
Joint Sector Head: Mining & Minerals
Director: Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

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

Imraan Mahomed
Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

Bongani Masuku
Director:
Employment Law
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com

Phetheni Nkuna
Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Hugo Pienaar
Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

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

Hedda Schensema
Director:
Employment Law
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com

Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

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

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

Jean Ewang
Consultant:
Employment Law
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com

Ebrahim Patelia
Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patelia@cdhlegal.com

Nadeem Mahomed
Professional Support Lawyer:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Asma Cachalia
Senior Associate:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

Jordyne Löser
Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com

Tamsanqa Mila
Senior Associate:
Employment Law
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

Christine Mugenyu
Senior Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com

JJ van der Walt
Senior Associate:
Employment Law
T +27 (0)11 562 1289
E jj.vanderwalt@cdhlegal.com

Abigail Butcher
Associate:
Employment Law
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com

Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com

Biron Madisa
Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com

Mbulelo Mango
Associate:
Employment Law
T +27 (0)11 562 1742
E mbulelo.mango@cdhlegal.com

Thato Maruapula
Associate:
Employment Law
T +27 (0)11 562 1774
E thato.maruapula@cdhlegal.com

Fezeka Mbatha
Associate
Employment Law
T +27 (0)11 562 1312
E fezeka.mbatha@cdhlegal.com

Kgodisho Phashe
Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

Tshepiso Rasetlola
Associate:
Employment Law
T +27 (0)11 562 1260
E tshepiso.rasetlola@cdhlegal.com

Taryn York
Associate:
Employment Law
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com

BBBEE STATUS: LEVEL ONE 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.

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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

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

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

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA