EMPLOYMENT LAW
ALERT

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CDH
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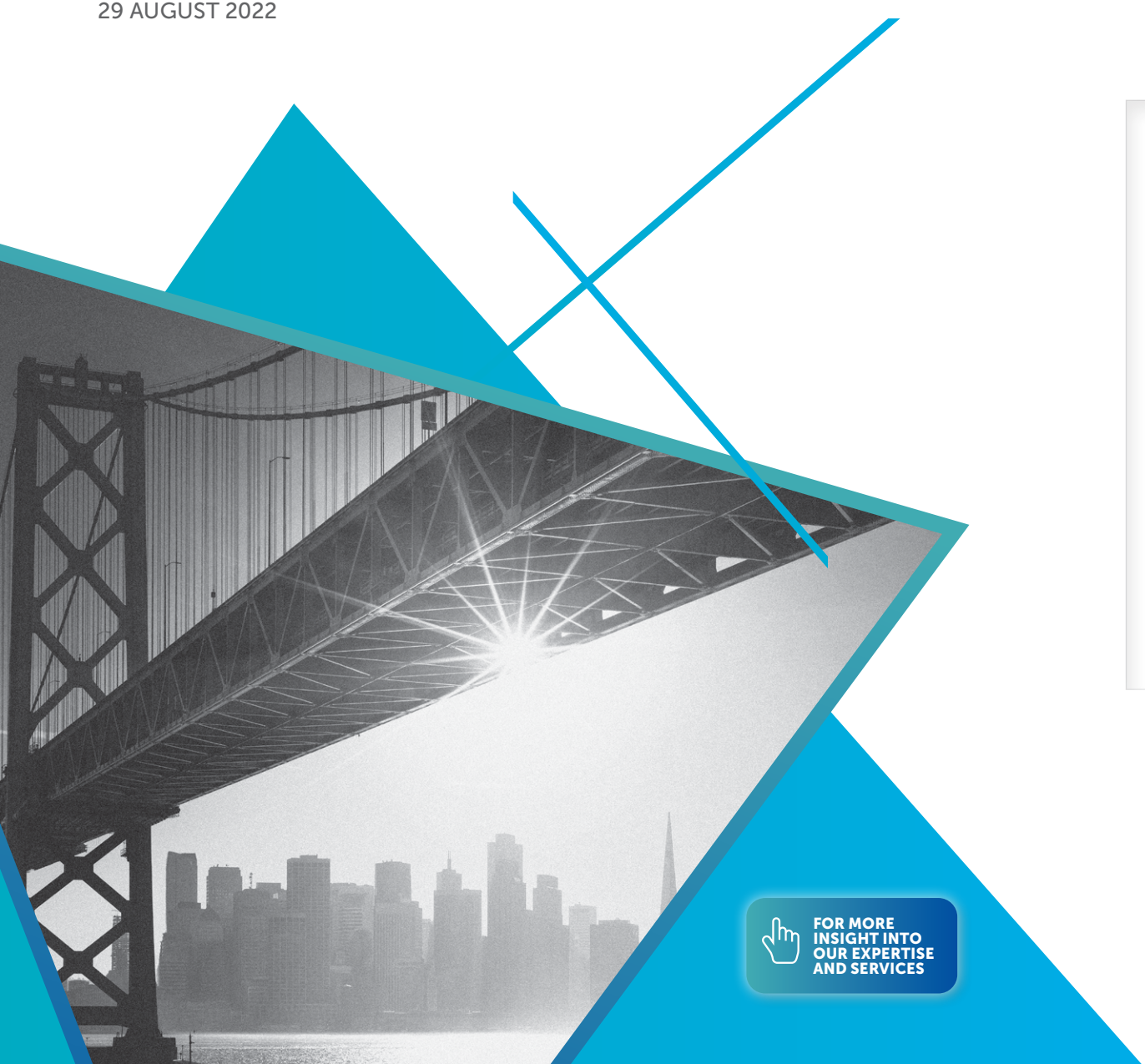

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IN THIS ISSUE

Can an employee get dismissed for participation in an assault without being identified?

According to the Constitutional Court in the recent case of *NUMSA obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd* [2022] ZACC 30, the answer to the aforementioned question is no. The judgment of the Constitutional Court follows the judgments of both the Labour Court and the Labour Appeal Court, wherein it was found that employees could, in fact, get dismissed for their participation in an unprotected strike action and assault without being identified.

In January 2020, the Labour Court, in the case of *NUMSA obo Aubrey Dhludhlu & Others and Marley Pipe Systems (SA) (Pty) Ltd*, case number JS878/17 had to assess if 148 employees of the Employer acted with common purpose when they assaulted the head of human resources. The employer argued that all the employees directed their disgruntlement in the form of a heinous crime; those that were able to confront the head of human resources in person, physically assaulted him, and those that could not, incited the others to assault him and rejoiced at the outcome.

According to the Labour Court the employees who were identified as being on site, had acted with common purpose in associating themselves with events on the day. The Labour Court referred to the matter of *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* (Dunlop). In Dunlop it was held that it was unnecessary to place each employee on the scene to prove common purpose, as this could be established by inferential reasoning having regard to the conduct of the employees before, during and after the incident of violence.

Unhappy with the decision of the Labour Court, the National Union of Metalworkers of South Africa (the Union) took the matter on appeal and in *NUMSA obo Aubrey Dhludhlu & Others and Marley Pipe Systems (SA) (Pty) Ltd*, case number JA33/20 the Labour Appeal Court had to determine whether 41 of the 148 dismissed employees, who had not been identified by either photographs and video evidence as having been on the scene when the assault had taken place, could have been associated with the assault. The Labour Appeal Court found that the Labour Court did not err in finding that the 41 unidentified employees had acted with common purpose, as it was clear, according to the Labour Appeal Court, that all the employees, including the 41 unidentified employees, were associated with the actions of the group before, during and after the misconduct. The 41 unidentified employees further took no steps to distance themselves from the misconduct either at the time of, during or after the assault but instead, they persisted with the denial, that any assault had occurred and refused the opportunity to explain their own conduct in relation to it.

Can an employee get dismissed for participation in an assault without being identified?

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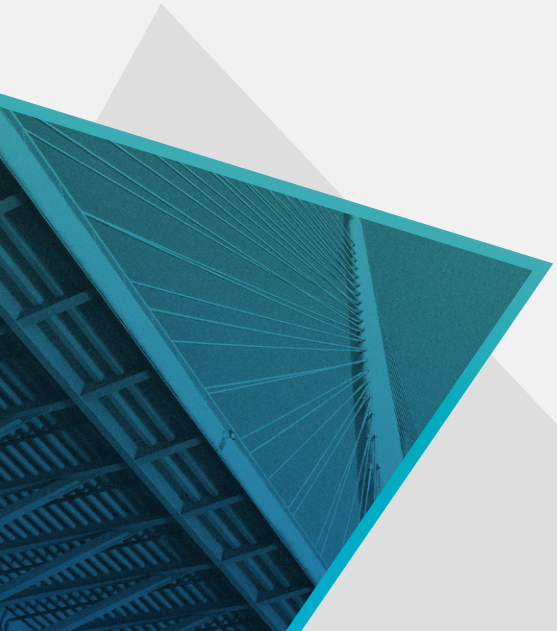
Once again unhappy with the outcome of the Labour Appeal Court, the Union referred the matter to the Constitutional Court. The Constitutional Court found that only 12 of the 148 employees were identified to have engaged in the actual physical assault of the head of human resources wherein another 95 employees were placed on the scene by the one or other form of evidence referred to above. That leaves the 41 unidentified employees. The Constitutional Court accepted the Labour Appeal Court's finding that the probability is that the unidentified employees were at the scene when the head of human resources were assaulted, however by not having been identified, they were never seen doing anything. The Constitutional Court further held that the Labour Appeal Court never explained on what basis employees are obligated to intervene and stop the assault or dissociate themselves in some way from the assault. As such, the mere presence and watching of the assault does not satisfy the requirements set by Dunlop as there must be evidence, direct or circumstantial, that the individual employees in some form associated themselves with the assault. The individual employees further must have manifested their sharing of a common purpose with the perpetrators of the assault by themselves performing some act of association with the conduct of the others. As there was no evidence of such association, the Constitutional Court found that the 41 unidentified employees were not guilty of the assault on the head of human resources. Finally, the Constitutional Court held that an employee's failure to give an explanation or disassociate themselves does not equal complicity as employees may choose silence for fear of ostracism and – worst still – animosity.

Consequently, the Constitutional Court set aside both the judgments of the Labour Court and Labour Appeal Court and remitted the matter back to the Labour Court to consider a sanction afresh on the charge of participation in an unprotected strike.

The Constitutional Court restated the rules on proof of common purpose.

FAAN COETZEE AND HANELLE VREY



An employer who is responsible for setting the rules in the workplace, must also abide by them

That is the lesson from the Labour Court's ruling in *Mahonono v National Heritage Council and Others* (J742/2022) 2022 ZALCJHB 188 (18 July 2022). In the workplace employers assume the responsibility of putting policies in place to regulate the relations between that employer and its employees. However, what happens when the employer decides not to follow the provisions of its own policies?

In the recent case of *Mahonono v National Heritage Council and Others* (J742/2022) 2022 ZALCJHB 188 (18 July 2022), the matter involved Ms. Mahonono (employee), who had been charged by the National Heritage Council (employer) for non-compliance with its supply chain management policy, and breach of the Public Service Act, of 1994. The employee was placed on unpaid suspension pending the finalisation of a disciplinary inquiry.

Following various delays in the disciplinary inquiry, which the employer attributed to the employee, the employer, through its CEO, issued a letter to the employee alleging that her behaviour at the disciplinary inquiry amounted to a repudiation of the employment contract and that the employer was entitled to circumvent its policies to conclude the disciplinary inquiry in an expedited manner. Furthermore, that the employee's legal representative made allegations which implied that the employee no longer trusted the employer. In terms of the latter, the employee was given an opportunity to provide written submissions as to why her repudiation should not be accepted. The employee, in her submissions, alleged that the employer was attempting to establish a process parallel to the disciplinary inquiry in conflict with its own policies and that this amounted to a breach of the provisions of her contract of employment. The employee was dismissed and approached the Labour Court on an urgent basis.

PROCEEDINGS IN THE LABOUR COURT

The Labour Court found that the matter should be treated as urgent. On the merits, it found that the employer was not entitled to bypass its own disciplinary policy and procedure and cancel the contract of employment based on the common law principle of repudiation. The court held that the employer's decision to circumvent the ongoing disciplinary inquiry and its own policies, which were incorporated in the employee's contract of employment, constituted a breach. The court ordered, amongst other things, that the employer reinstate the employee (who had not acted in a manner that indicated that she was not interested in taking part in the disciplinary inquiry) and that the employer must comply with its own policies. The court granted the order for specific performance and went further to show its disapproval of the employer's conduct by ordering the employer to pay the employee's costs.

TAKE HOME POINTS?

Employers are required to abide by and follow their own policies, more so when such policies have been incorporated in their employees' contracts of employment. A failure by the employer to follow its own policies may very well amount to a breach, giving employees a remedy of specific performance and being awarded a cost order against the employer.

FIONA LEPPAN, BIRON MADISA, AND KEAGAN HYSLOP

Union representation in litigation disputes

Can a union represent its members in a sector outside its constitution in litigation with an employer or former employer? We discussed this topic on a podcast in July 2022 themed: "*Union representation: It's my union and I'll cry if I want to*", which can be accessed here.

In South Africa, unions have extensive rights. The right of a union to bargain was, however, curtailed in 2020 by the Constitutional Court when the court found that a union was restricted to organising within the scope of its constitution. But what is the case in other forms of litigation?

In *National Union of Metal Workers of South Africa v Lufil Packaging* (Lufil Packaging), the Constitutional Court held that a trade union cannot recruit members who fall outside the scope of its constitution and seek to exercise organisational rights in relation to those members. This begs the question of whether a trade union can represent employees who are employed in a sector which falls outside the scope of a union's constitution in individual dispute proceedings (as opposed to organisational rights disputes). In the recent 2021 judgment of *NUMSA & Others v Afgri Animal Feeds (Ltd)* (Afgri Animal), discussed below, the Labour Appeal Court (LAC) was called upon to determine this question.

The employer, Afgri Animal Feed (Afgri), conducts business in the agricultural sector, which sector falls outside the scope of the National Union of Metal Workers of South Africa's (NUMSA) constitution. Notwithstanding this, NUMSA sought organisational rights from Afgri. In line with the Constitutional Court's judgment in Lufil Packaging, Afgri refused to grant organisational rights to NUMSA. As a result, 137 employees participated in an unprotected strike. An internal disciplinary hearing was conducted, wherein the employees were initially represented by an official from NUMSA, until the chairperson directed that the official leave the hearing apparently due to his disruptive behaviour. The employees were eventually dismissed.

Aggrieved by their dismissals, the employees referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Thereafter, NUMSA, on behalf of the dismissed employees, proceeded to file an unfair dismissal claim at the Labour Court. In the Labour Court, Afgri raised an objection that because the employees were employed in a sector outside the scope of NUMSA's constitution, NUMSA had no standing to refer the claim, or to represent the employees in the court proceedings.

In response to the objection, NUMSA provided powers of attorney signed by the employees recording NUMSA to be their "*lawful trade union and agent*". The question before the court was thus, given that the dismissed employees were employed in a sector which falls outside the scope of NUMSA's constitution, were the employees still entitled to be represented by NUMSA in the Labour Court?

Placing reliance on Lufil Packaging, the Labour Court found in favour of Afgri. The Labour Court held that membership of a union by an employee who is employed in a

Union representation in litigation disputes

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sector which falls outside of the scope of the union's constitution, is invalid and void *ab initio*; and that any act said to have been taken as a consequence of such purported membership would be invalid. Since the employees were employed in a sector which fell outside of the scope of NUMSA's constitution, its act of referring the matter to the Labour Court was invalid. Thus, the Labour Court found that NUMSA had no standing to institute the claim.

IN THE LAC

The LAC disagreed with the Labour Court and reasoned that it is not the business of the employer to concern itself with the relationship between individual employees and their union as the employees enjoy the right to choose their own representatives in unfair dismissal or unfair labour practice disputes.

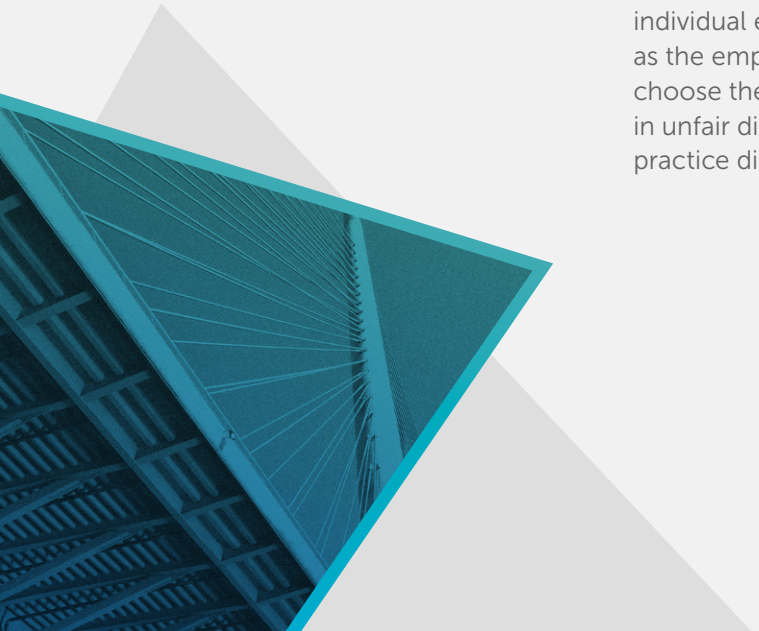
The LAC further reasoned that it is for the trade union to decide whether or not to accept an application for membership and whether or not that member is covered by its constitution. It could not have been the intention of the legislature to unduly restrict the right to representation by a trade union to the extent that it is up to a third party, such as an employers' organisation, to deny a worker that right, based on the trade union's constitution.

The LAC noted that CCMA rules read together with the Labour Relations Act 66 of 1995, grant an employee and their chosen trade union *"an unfettered right for the union to represent the employee in arbitration proceedings"*, noting that this right accorded with the constitutional right to freedom of association and access to justice.

With reference to Lufil Packaging and the Afgri Animal judgments, the legal position with respect to union representation can be summed up as follows: employees may be represented by trade unions of their choice in both arbitration and Labour Court proceedings. This right of union representation is unfettered. However, with respect to bargaining rights, the principle in Lufil Packaging applies in that where an employee obtains membership of a union, the scope of operation of which does not include the industry in which the employee is employed, that union will not be entitled to bargain collectively with the employer.

The LAC decision is heading to the Constitutional Court and thus the position may change in time.

IMRAAN MAHOMED AND MBULELO MANGO



KENYA

How companies may mitigate claims for unfair termination by non-executive directors

What happens when a company does not define the type of engagement of a director? Can a director claim to be an employee of the company? How can companies mitigate against claims from non-executive directors for employee benefits, and protection?

Companies often distinguish directors that render an advisory role, from those that work full time as independent or non-executive directors.

The expectation being that non-executive directors would devote only part of their time for the affairs of the company. In addition, these independent or non-executive directors are not expected to claim employee benefits or protection from dismissal under the Employment Act of 2007 (Employment Act).

What happens though when a company does not define the type of engagement of a director? Can a director claim to be an employee of the company? How can companies mitigate against claims from non-executive directors for employee benefits, and protection?

FIVE KEY ELEMENTS OF AN APPOINTMENT LETTER

Claims for employee benefits and protection may be mitigated through the appointment letter. There are five key elements that may be discerned from the recent Court of Appeal case of *Rift Valley Water Services Board & 3 Others vs Geoffrey Asanyo & 2 Others* (Civil Appeal No. 60 of 2015). These include that the appointment letter:

- should clearly stipulate that the type of engagement is as a non-executive director;
- it should expressly provide that it is not an employment contract but a contract for services;
- it should clearly define the roles and duties of the non-executive director;
- it should provide that the appointment is subject to confirmation by the shareholders at a general meeting as provided by the company's articles of association; and
- it should provide that continued appointment is subject to re-election by the shareholders, the company's articles of association and any provisions of the Companies Act 2015 relating to removal of a director.

CASE SUMMARY

Geoffrey Asano, the first respondent, was appointed as a director of by the first appellant, Rift Valley Water Services Board (the company). Geoffrey had been appointed to the Board for a term of three years, which was subsequently extended by a further three years. The appointment

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How companies may mitigate claims for unfair termination by non-executive directors

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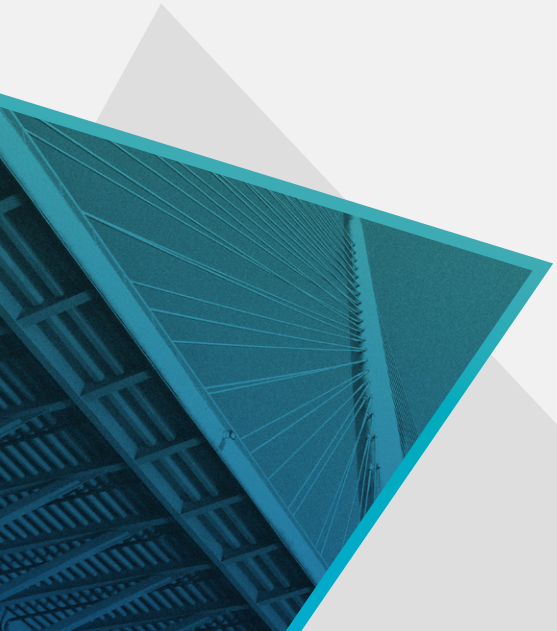

letter indicated that his duties as a director would be restricted to the common law duties of a director but, he would be required to attend quarterly board meetings. The company subsequently amended its memorandum and articles of association to enable it to reconstitute its board. Geoffrey was not appointed to the new board, effectively terminating his membership before the end of his extended term. He was aggrieved by this new turn of events and proceeded to file a suit before the Employment and Labour Relations Court (Employment Court) alleging that the company had unfairly terminated his employment.

The Employment Court heard the matter and held that Geoffrey was an employee of the company and that he was terminated without following the requisite procedure under the Employment Act. The company was dissatisfied with the judgment of the Employment Court and filed an appeal.

The crux of the appeal was whether the Court of Appeal was right in finding that Geoffrey was an employee of the company. The appellate court started by identifying who is defined as an employee according to the Employment Act. It noted that under the Employment Act, an employee is a person employed for wages or a salary and includes an apprentice and indentured learner. The Court of Appeal further noted that Geoffrey was not employed for wages or salary by the company and in addition, he was neither an apprentice nor an indentured learner of the company. The Employment Court held that since his appointment was governed by both the Companies Act of 2015 and the Memorandum and Articles of Association of the Company, the Employment Act did not apply to this employer-employee relationship.

Further to this, the court held that since there was no employment contract, in terms of which a director is engaged as a full-time employee, he was merely an officeholder of the company and not an employee. It relied on the English case of *McMillan vs Guest* (1942) AC p.561 (UKHL J0427-4) which held that unless a director is engaged full-time by a company, they are not a company employee.

In view of the above, the appellate court held that Geoffrey Asano was not an employee of the Rift Valley Water Services Board.

CONCLUSION

It is prudent for companies to follow the practical guidelines discussed above in preparing appointment letters for non-executive directors to reduce the chances of such claims. This would save the company time and resources spent in litigation in ascertaining the type of engagement and applicable remedies in the event of removal from office.

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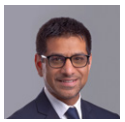

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