EMPLOYMENT LAW
ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Does the employer's duty to provide a safe working environment extend to violence emanating from inter-union rivalry?

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KENYA

Discrimination and reasonable accommodation of an employee's disability

The Supreme Court of Kenya (the Court) recently made a noteworthy decision relating to discrimination and reasonable accommodation of an employee's disability, in the *Gichuru v Package Insurance Brokers Limited* (*Petition* 36 of 2019) [2021] KESC 12 (KLR) case.

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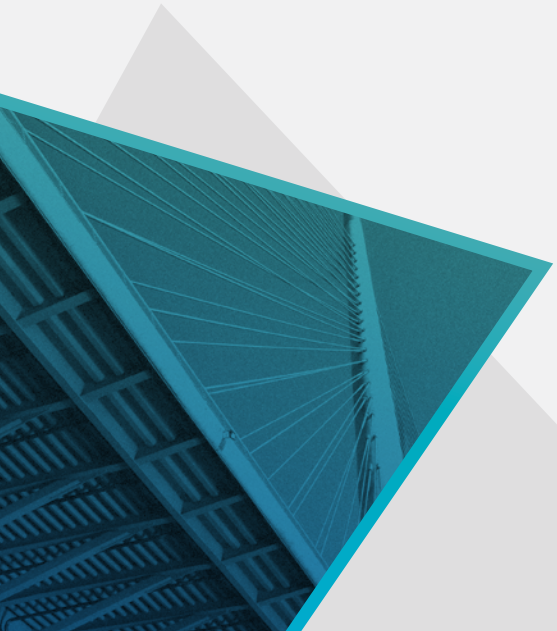

An employer's obligation to provide a safe and healthy working environment for its employees, especially during violence emanating from inter-union rivalry, recently came under the microscope before the Labour Appeal Court (LAC). The court acknowledged that the Mine Health and Safety Act 29 of 1996 MHSA) is not confined to threats or safety hazards arising at the coalface. Violence arising from inter-union rivalry is a regrettable feature of life in the mines. Whilst employees have the right to leave a workplace if the violence perpetrated by their colleagues poses a danger to their safety, requiring a mine to provide a guarantee of safety prior to returning to work went beyond the mine's duty under the MHSA.

THE VIOLENCE AT THE MINE

This matter finds its genesis in the increasing tensions and violent confrontations between members of the National Union of Mineworkers (NUM), and the Association of Mineworkers and Construction Union (AMCU) back in 2015. Members of NUM engaged in an unprotected strike, following which AMCU members who had also engaged in an unprotected strike as were instructed to vacate a hostel occupied by members of both unions. It was no longer safe for them. Tragic events unfolded with a NUM official being shot and killed 100 metres away from where AMCU was holding a meeting, an AMCU member fatally stabbed, and a car belonging to one of AMCU's officials torched.

SUSPENSION OF OPERATIONS AND DISMISSALS

The ongoing violence led to the mine suspending operations, and the Minister of Mineral Resources intervening. A security plan was compiled with the input of the SA Police Service. All workers were then required to resume work. AMCU was not appeased - it objected and demanded closure of the hostel. The demand was rejected by management, which also cautioned that employees who did not report for duty would be disciplined for desertion.

Between 15 and 24 June 2016, members of AMCU were summoned to a venue without prior or proper notice that a disciplinary hearing had been set up. A total of 292 AMCU members were dismissed in their absence, effective from 5 July 2016. AMCU tendered the service of its members *"subject to the employer guaranteeing their safety at the workplace"*. Thereafter, referred a dismissal dispute to the CCMA for conciliation. Following an investigation conducted by the mine, 12 NUM members were issued with final written warnings for their participation in an illegal protest. Those involved in and convicted of criminal activity were dismissed.

BEFORE THE LABOUR COURT

Before the Labour Court, AMCU contended that the dismissal of its members amounted to unlawful terminations of their employment contracts. In the alternative, argued that they were automatically or substantively and procedurally unfair. Consequently, sought their reinstatement.

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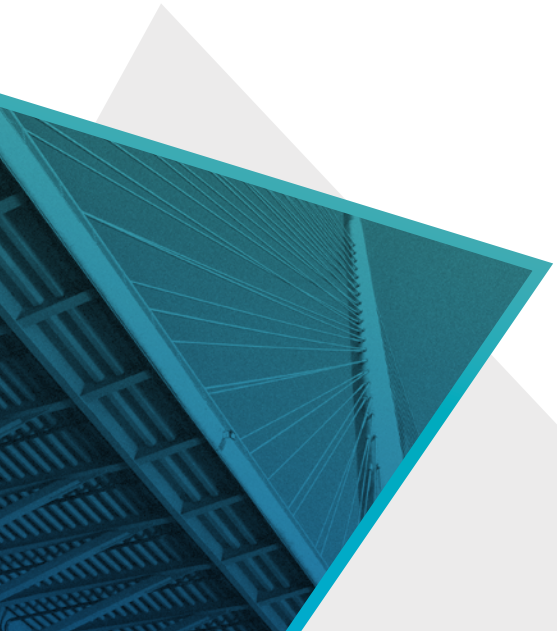

AMCU argued that its members were dismissed for exercising their rights under section 23 of the Mine Health and Safety Act (MHSA) which empowers them to leave a workplace which, with reasonable justification, appears to them to pose a danger to their health or safety. The court dismissed the argument that the termination of the employment contracts in this instance was a breach of section 82 of the MHSA.

Although AMCU's claims were dismissed, the court found found that the dismissals were substantively unfair on the basis that dismissal was not an appropriate sanction and inconsistent application of discipline. Consequently, awarded the members 12 months' compensation.

THE APPEAL

AMCU appealed against the findings, whilst the mine cross-appealed against the quantum of compensation awarded.

In relation to the MHSA, the court held that an obligation is imposed *"as far as it is reasonably practicable"*. This is linked to the availability of means to mitigate the hazard. The court also acknowledged employees' recourse to leave a workplace where the conduct of their colleagues poses a danger to their safety. In this instance, however, an employee may only exercise the right if there is reasonable justification to do so. In this instance, the Labor Court had noted AMCU had not raised its members' rights under section 23 as the reason for their absence, albeit accepting that they were entitled to exercise their rights in response to threats of violence. Whilst where concerns over safety were justified, the mine had taken reasonably practicable steps to mitigate the danger when it instructed all employees to resume duties. A comprehansive security plan had been put into place where police were patrolling the premises. There were no incidents after 6 June 2016. Accordingly, no imminent or serious danger. Their fears were subjective and not objectively sustainable.

In fact, some of AMCU's members had resumed work without incidents. The protection of the MHSA was thus not available to those who continued being absent as they had failed to bring themselves under the scope of section 23(1).

The court also considered and dismissed AMCU's argument of discrimination against its members on the basis of their union membership. It held that the union had failed to demonstrate that this was the dominant cause of their dismissal. Those members who had abided the instruction to resume work had not been dismissed.

Turning to the relief, the court concluded that reinstatement was not reasonably practicable. AMCU had imposed a condition that the mine guarantee's the safety of its members prior to them returning to work. the court held that this condition was incompetent as the mine was

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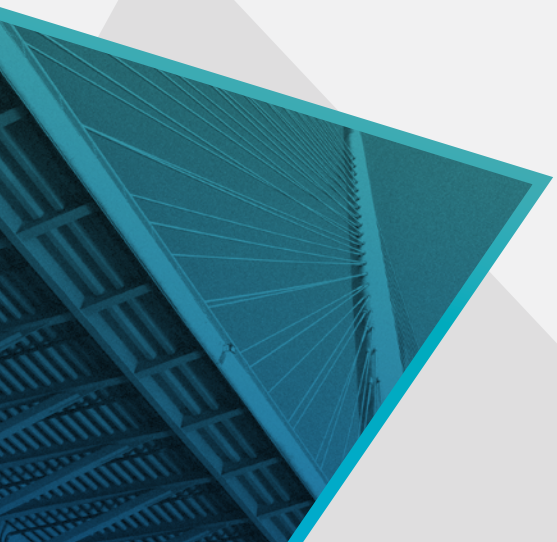
not obliged to take any more steps than it had already done. The LAC went on to recapitulate that whether reinstatement was reasonably practicable entailed a factual finding and the exercise of a discretion, which will not be lightly interfered with on appeal unless the factual finding was wrong. The court was correct in concluding that AMCU could not impose a condition on the mine which was impossible to implement. It did not err in declining reinstatement.

Finally, the LAC turned to consider the mine's cross-appeal on the quantum of compensation awarded. It held that compensation is not monetary relief for the loss of a job but for the humiliation the employee suffered at the hands of the employer. In determining the quantum, a range of factors must be considered, including the seriousness of the injuria, the circumstances in which it took place and the extent of the employee's humiliation. The compensation award was upheld.

CONCLUSION

A safe and healthy working environment is not limited to activities at the employer's premises only. Under the MHSA, employees may withhold their labour and even leave the workplace where the conduct of their colleagues poses a danger to their safety. Although an employer cannot be expected to guarantee safety, where it has taken reasonable steps to mitigate the danger, the employees' continued absence would be unjustified. The LAC also highlighted the importance of being compassionate and understanding during union rivalry violence and unprotected strikes.

PHETHENI NKUNA
AND PALESA MALOLO



KENYA

Discrimination and reasonable accommodation of an employee's disability

The Supreme Court of Kenya (the Court) recently made a noteworthy decision relating to discrimination and reasonable accommodation of an employee's disability, in the *Gichuru v Package Insurance Brokers Limited* (Petition 36 of 2019) [2021] KESC 12 (KLR) case.

FACTS

The Appellant (the Employee) was employed by the Respondent (the Company) in 2010 on a permanent and pensionable basis. In November 2013, the Employee was diagnosed with an illness that required him to seek medical attention. The Company allowed the Employee to do so and increased his salary during this period. The Employee returned to work after approximately three months, however, he was unable to move around the workplace unaided. The Company therefore requested the Employee to provide a medical report of his condition and go on sick leave until such a time as he would be able to move around unassisted.

Approximately one month later, the Company issued a notice of suspension to the Employee, because he did not provide the medical report. In response, the Employee provided the medical report, which recommended that he would be fit to resume duty within two months. Notwithstanding the report, the Company suspended the Employee and requested him to pay all of his outstanding liabilities to the Company. On this basis, the Employee alleged that the Company was constructively dismissing him, disguising this as a suspension. The Company denied the allegations but proceeded to summarily dismiss the Employee for gross incompetence, because of a separate investigation carried out by the Company.

The Employee asserted that he was subjected to undignified and discriminatory treatment, on the basis of his disability. The Employee further submitted that the Company failed to take steps to reasonably accommodate his disability in the workplace, which in turn disadvantaged him, as he was subject to the same working conditions as his colleagues.

Approximately one month later, the Company issued a notice of suspension to the Employee, because he did not provide the medical report. In response, the Employee provided the medical report, which recommended that he would be fit to resume duty within two months. Notwithstanding the report, the Company suspended the Employee and requested him to pay all of his outstanding liabilities to the Company.

KENYA

Discrimination and reasonable accommodation of an employee's disability

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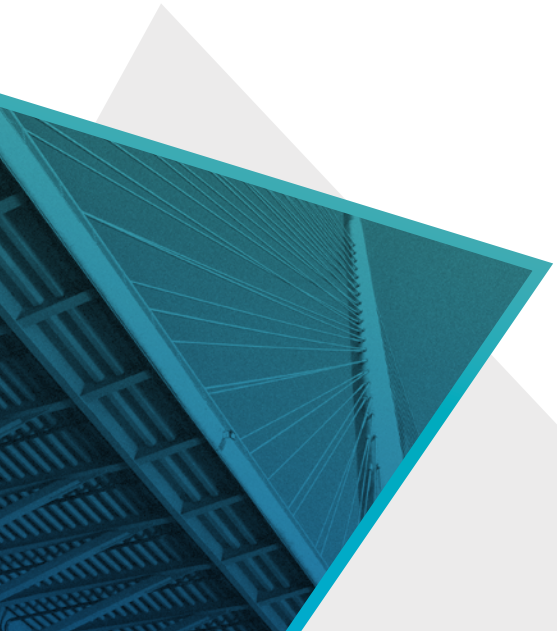

The Employee therefore petitioned the Employment and Labour Relations Court, who found that the termination was unlawful. On appeal, the Court of Appeal set aside the trial Court's award, basing its decision on the Employment Act, 2007, without specifically relying on provisions of the Constitution. The Employee appealed further, however the Employer sought to strike out this appeal, arguing that there was no constitutional question involved in the Court of Appeal's decision, to warrant an appeal to the Court. In its ruling, the Court dismissed the Employer's application, giving way to the current case heard by the Court, which we analyse below, as it was held that discrimination is a constitutional matter under Article 27(5) and the Employee would not be prohibited in his appeal, merely because the Court of Appeal did not base their decision on a provision of the Constitution.

ISSUES

Among various issues, the Court considered whether the Company's treatment of the Employee was discriminatory on account of the Employee's physical incapacity, contrary to Article 27(5) of the Constitution.

REASONING AND HOLDING

The Court held that the Company indirectly discriminated against the Employee. It was stated that *'protecting employees against discrimination in the workplace is a significant matter, and the burden placed upon an employer to disprove the allegations of discrimination is enormous.'* In the Court's opinion, the Company's behaviour indicated that they wanted to terminate the Employee. The Court considered the Company's failure to follow due procedure, in relying on the ground of gross incompetence and stated that the Company was 'conducting extraneous investigations to find fault' against the Employee, as an afterthought.

The Court relied on section 15 of the Persons with Disabilities Act 14 of 2003 and held that unless it was proven that accommodating the Employee would cause undue hardship to the Company, the Company *"had an obligation to consider the medical report and to further accommodate the Employee by devising ways that could ease his movements."* The Court reiterated that:

> *"...the law does not require employers to hire or continue to employ persons who are or have become disabled; it does however, oblige them to examine whether an appropriate and not unduly burdensome change in the work environment would allow such persons to do, or to continue doing their job."*

The Court therefore held that the Company's failure to reasonably accommodate the Employee's disability or demonstrate that they would suffer undue hardship by providing amenities, such as a ramp

KENYA

Discrimination and reasonable accommodation of an employee's disability

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for ease of access, or flexible hours for the Employee; in addition to the Company's decision to suspend and terminate him (in disregard of the medical report), the failure to carry out an investigation on the extent of his injury and incapacity, the expectation that he would continue working in the same conditions as the rest of his colleagues, as well as the Company's decision to find ways to terminate the Employee gratuitously, instead of considering possible alternatives, was "*outrightly unreasonable*" and amounted to indirect discrimination.

CONCLUSION

Employers should take note of the standards, burden of proof and obligations placed on them by the Constitution, disability laws and the Court's interpretation of these provisions. In essence, an employer is required to take steps to reasonably accommodate an employee with a disability, unless the employer can prove that such accommodation would cause undue hardship. Notably, the Court did not qualify what amounts to undue hardship; however, it is likely that this is determined on a case-by-case basis. Employers are therefore advised to analyse the circumstances of each situation, in determining what amounts to undue hardship for their organisation. Employers are further advised to investigate an employee's injury and capacity levels, as well as the possible alternatives in creating a fair and accommodating work environment.

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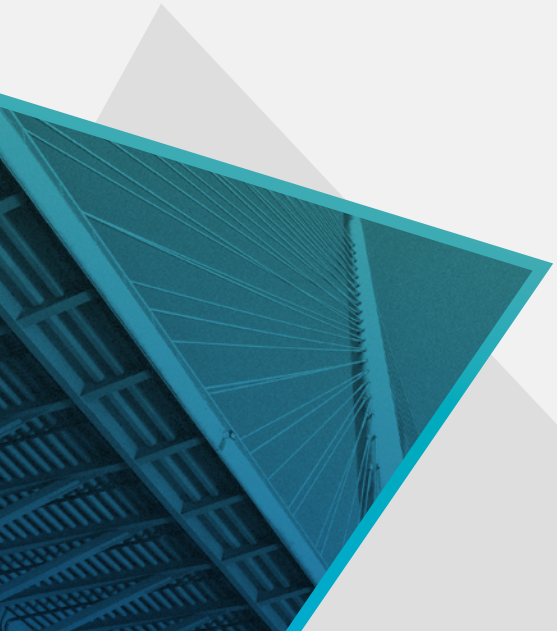

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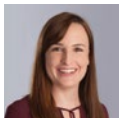

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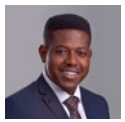

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