

# EMPLOYMENT LAW ALERT

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INCORPORATING  
KIETI LAW LLP, KENYA

## IN THIS ISSUE

### Challenging the authority of management or merely seeking clarity: When does insubordination occur?

Insubordination is the wilful failure or refusal to obey a lawful and reasonable instruction given by a superior. This is different from insolence, which is rudeness, cheekiness or disrespectful behaviour. The Labour Court in *Independent Risk Distributors SA (Pty) Ltd v CCMA and Others* (JR 1906/19) [2022] ZALCJHB 282 (11 October 2022) dealt with an application for the review of an arbitration award in which the Commissioner found that the dismissal of the employee (Mr Ndlovu) for gross insubordination was unfair as the employee was only guilty of asking for clarity during a staff meeting.

### Trade union membership, collective bargaining and the National Labour Migration Policy

The Department of Employment and Labour issued a statement in respect of the Minister of Employment and Labour, Thulas Nxesi's, address to the Southern Africa Trade Union Coordination Council's (SATUCC) worker congress. The statement recognises that registered union membership has increased, while union representation at bargaining councils has decreased in the recent past. Furthermore, there are policy and legislative developments that will aim to regulate labour migration and the employment of foreign nationals.



## Challenging the authority of management or merely seeking clarity: When does insubordination occur?

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### FACTUAL BACKGROUND

The CEO of the company scheduled a meeting with Ndlovu and his co-workers in the sales department to discuss the underperformance of the department. The meeting culminated in the CEO issuing an instruction to all sales representatives, including Ndlovu, to go home for the day and reflect on their poor performance. Ndlovu challenged that instruction by, in a less than courteous manner, questioning why he was to go home in light of his personal performance having been above par.

Ndlovu was then charged with gross insubordination and, upon being found guilty, dismissed.

After the arbitration proceedings that then ensued, Ndlovu's dismissal was found to have been unfair, the arbitrating Commissioner concluding that the employer had failed to establish gross insubordination on Ndlovu's part. In short, the arbitrating Commissioner concluded that what Ndlovu had done was not misconduct, but merely seeking clarity from the CEO on his instruction.

The employer challenged the arbitration award on review before the Labour Court (LC).

### BEFORE THE LABOUR COURT

The LC restated the principles in relation to the test on review – the *Sidumo* test. That is, whether the arbitrating Commissioner's decision was one that a reasonable decision maker could reach having regard to the material and evidence before them. The LC then considered the principles on the misconduct of "insubordination".

Applying those principles, the LC held that "insubordination" essentially refers to a challenge to a superior's authority by failing or refusing to carry out an instruction issued by the superior. On the facts, the LC agreed with the arbitrating Commissioner that Ndlovu's conduct did not amount to gross insubordination as he had merely asked questions at the meeting with a view to obtaining clarity on the instruction issued. Moreover, after obtaining that clarity from the company's general manager,



## Challenging the authority of management or merely seeking clarity: When does insubordination occur?

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Ndlovu had then complied and left for home for the day. For these reasons, the Commissioner's arbitration award was a decision that a reasonable decision maker could have reached on the material placed before them. The review application was dismissed, with costs.

### **CONCLUSION**

This case is of particular importance in dealing with the elusive misconduct of insubordination. In short, where an employee does not deliberately and persistently refuse to comply with a superior's instruction, they can hardly be found guilty of insubordination. What is required is an unrepentant intransigence against good instruction issued by a superior, and no less.

Moreover, for such obstinacy to be dismissible, it must be gross (serious, persistent and deliberate).

The case is also an important affirmation of employees' Constitutional right to freedom of expression, which is not discounted by the fact that they are in a workplace under the direction and instruction of superiors.

**BONGANI MASUKU AND  
THATO MARUJAPULA**



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Below is an abridged version of the statement issued by the Department of Employment and Labour:

"Union membership increased from 3,5 million to over 4 million between 2013/14 and 2020/21, while the total number of registered unions increased from 203 to 220. Nxesi mentioned this...at the SATUCC worker congress in Gauteng.

According to Nxesi, 'one of the unintended consequences of the 1995 Labour Relations Act's freedom of association was the proliferation of trade unions.' When combined with prevailing 'majoritarianism,' this tends to mean that members of splinter unions are not directly represented in bargaining chambers, resulting in a weakened collective representation of workers. Nxesi stated that he has raised this issue with various unions, suggesting that they find ways to unite all workers, including those in splinter unions – as difficult as that may be, Nxesi added.

Minister Nxesi, on the other hand, stated that there appears to be fierce competition for membership, to the point where some trade unions are using collective bargaining as a recruiting turf for membership by portraying their rivals as 'sell-outs' and resorting to intransigent tactics such as long and damaging strikes.

In recent years, the Department of Employment and Labour has seen an increase in the number of 'unprotected' strikes, indicating a deterioration in respect for collective bargaining institutions. Even the most militant-sounding union leader understands the importance of registration and can be found lobbying the Minister of Employment and Labour for the implementation of certain aspects of the LRA [Labour Relations Act 66 of 1995], such as the extension of collective agreements to non-members.

The Employment and Labour Department is working with NEDLAC (National Economic Development and Labour Council) to finalise arrangements for the Labour Market and Development Chambers to collaborate on the two documents. 'We hope to complete government final consultations this year before referring both documents to Parliament,' Nxesi said.

The draft National Labour Migration Policy [NLMP] must be viewed in the international context of globalisation and cross-border migration as the norm. Minister Nxesi emphasized the importance of properly managing labour migration, which all countries do. As a result, South Africa will have a comprehensive policy and legal framework to manage labour migration for the first time.



## Trade union membership, collective bargaining and the National Labour Migration Policy

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The proposed NLMP seeks to strike a balance in four areas. The first is to address South Africans' expectations regarding access to job opportunities, given the country's worsening unemployment and the perception that foreign nationals distort labour market access. The NLMP, along with proposed legislation, will impose quotas on the total number of documented foreign nationals with work visas who can work in major economic sectors such as agriculture, hospitality and tourism, construction, and so on. The NLMP will be supplemented by Small Businesses.

The NLMP complements a proposed Employment Services Amendment Bill by providing a policy framework and legal basis for employers to regulate the extent to which they can employ foreign nationals in their establishments, while protecting migrants' rights."

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**Imraan Mahomed** ranked by  
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**Gillian Lumb** ranked by  
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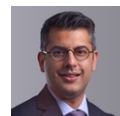
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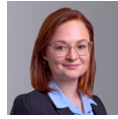
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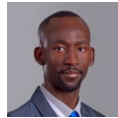
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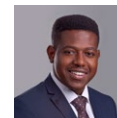
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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

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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