Employment Law
ALERT

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CLIFFE DEKKER HOFMEYR

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Facts

Mr. Marasi was employed by PetroSA as a teleco technician. His employment primarily entailed managing PetroSA's telecommunication system, which included overseeing telephone services and all virtual systems controlling video conferencing.

In April 2019, Marasi informed PetroSA of his intention to embark on an 18-month traditional healer training programme, which entailed him being transferred from the Cape Town branch to the Mossel Bay refinery. This was duly permitted by PetroSA on condition that he be declared medically fit.

Prior to his transfer, Marasi underwent a medical assessment, in which he disclosed his use of cannabis pursuant to his traditional healer training and subsequently tested positive for cannabis use in a drug screening. Confirmatory tests were taken after Marasi's transfer, and it was found that the levels of cannabis found in his blood exceeded the permissible threshold in terms of PetroSA's drug and alcohol policy.

In terms of the cannabis policy, Marasi was denied access to the refinery as he was deemed unfit for duty and would only be permitted to return when he tested below the threshold. Marasi was consequently away from work for a period of three months, and during this time made use of his remaining annual and sick leave credits.

Marasi was of the view that his absence from the workplace amounted to an unfair suspension, as he was obliged to make use of his remaining leave days during his period of absence. He further argued that PetroSA's cannabis policy led to unfair discrimination on the basis of culture. Lastly, he argued that PetroSA acted unreasonably in dealing with his spiritual and cultural journey and thus failed to provide him with reasonable accommodation.

The court took into account several issues regarding cannabis policies in the workplace, which are outlined below.

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Cannabis policies and unfair discrimination

The Labour Court was cognisant of the potential indirect discrimination drug and alcohol policies may cause certain cultural groups. However, the court held that whether such policies would amount to unfair discrimination requires a determination as to whether the policy seeks to address an inherent requirement of a particular job, such as the management of intrinsic risks associated with substance abuse.

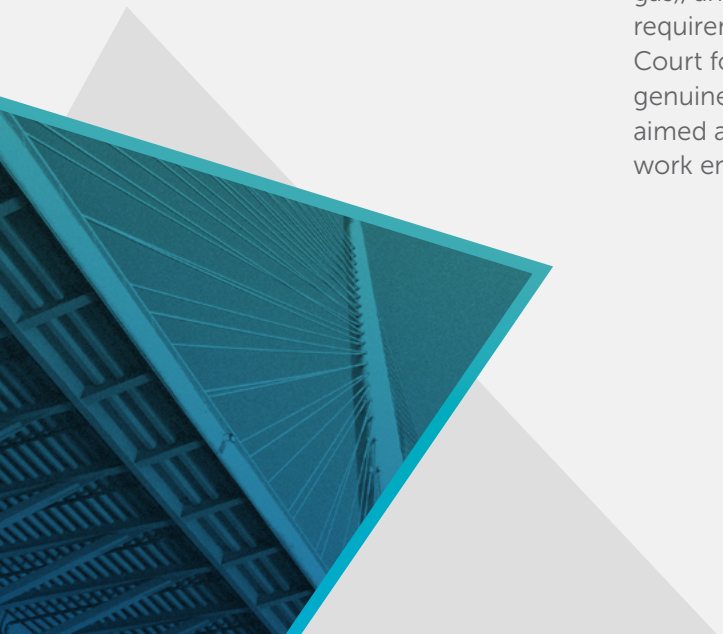
Taking into account the nature of PetroSA's work environment (the exploration of oil and gas), and the health and safety requirements in law, the Labour Court found that the policy set a genuine and reasonable requirement aimed at achieving a healthy and safe work environment.

It is therefore important to take into consideration the work environment over and above the specific position that an employee holds within an organisation. On that score the Labour Court found that all employees were bound by normal workplace rules.

Employers' duty of reasonable accommodation

From a broad perspective, the court provided that the concept of reasonable accommodation is required to promote diversity in the workplace.

The court considered that the employer took multiple steps to assist Marasi in pursuit of his traditional training, such as permitting his transfer and allowing the extension of his stay at the Mossel Bay refinery. The evidence presented also demonstrated that the employer treated Marasi's circumstances with respect and sensitivity.



Cannabis in the workplace: Clearing the air

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The Labour Court confirmed the principle that an employer would not be obliged to accommodate an employee to the extent that it would be unreasonable or cause undue hardship to the employer in doing so.

Can employees being denied access to the workplace after a positive cannabis result be regarded as suspension?

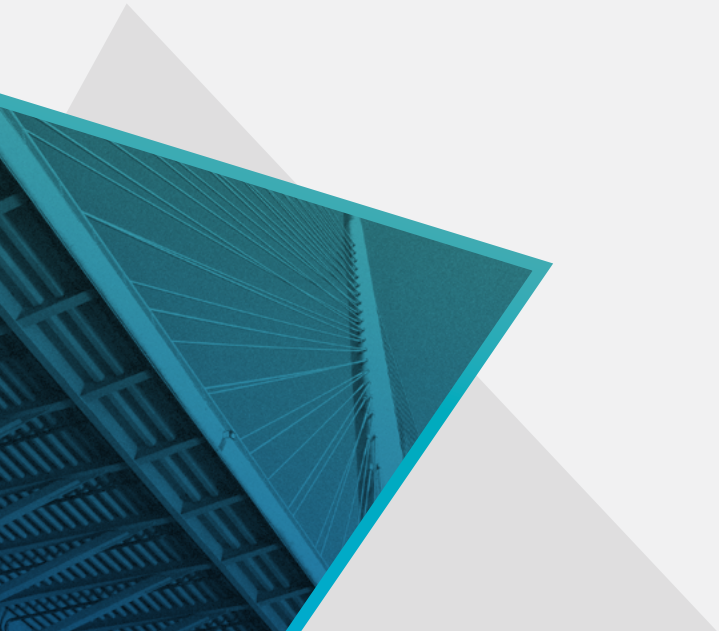
Considering the nature of the services offered by PetroSA, the court found it permissible for an employer to immediately revoke the access of an intoxicated employee to the workplace.

The court further found it absurd for a positive test to trigger the instituting of disciplinary proceedings immediately prior to requesting an employee to vacate the premises. The court accordingly found the employer's request for to Marasi vacate the workplace did not amount to an unfair suspension, but a reasonable application of company policy.

Conclusion

This is an important judgment on the question of cannabis in the workplace. It is likely that this and other matters dealing with this topic will find the attention of the appeal courts in the fullness of time. But for now, employers have a better sense of the benchmarks.

Imraan Mahomed, Sashin Naidoo and Thato Makoaba



Blowing the whistle: Informant reform in South Africa

Justice Minister Ronald Lamola has promised greater protection for whistleblowers in South Africa, with the Department of Justice and Constitutional Development releasing a discussion paper on proposed reform and opening recommendations for public comment.

The legislation applicable to whistleblower protection in South Africa, including *inter alia* the Protected Disclosures Act 26 of 2000 (PDA) and the Labour Relations Act 66 of 1995 (LRA), requires consideration. The main function of the PDA is to provide procedures for employees, both in the private and public sectors, to adopt when someone makes a disclosure regarding unlawful or irregular conduct by employers.

The decision whether to blow the whistle is significantly influenced by the legal protection afforded to a person in the aftermath. Whistleblowers face the risk of reputational and financial ruin, as well as damage to future employment prospects. Accordingly, the PDA and the LRA, as the primary pieces of legislation in the context of whistleblowing, operate in tandem, with the PDA providing legislative protection for employees against them being subjected to an *"occupational detriment"* as a consequence of making a protected disclosure.

Protected disclosure

To be classified as a protected disclosure in terms of the PDA, the disclosure must contain all four of the following elements:

1. There must be a disclosure of information.
2. It must be information regarding any conduct of an employer or an employee of the employer.
3. It must be made by an employee (or shop steward).
4. The employee must have reason to believe that the information concerned shows or tends to show one or more of the improprieties listed in the PDA.

Section 185 of the LRA provides that employees have the right not to be unfairly dismissed or to be subjected to unfair labour practices, which includes an occupational detriment as envisioned by the PDA. Effectively, this allows an employee who has made a protected disclosure to approach a court of competent jurisdiction if they have been dismissed or subjected to an occupational detriment as a result of this disclosure. The courts are then empowered to make any order which is "*just and equitable in the circumstances*" where an occupational detriment has occurred. However, in a 2021 case study it was shown that out of the 33 whistleblower cases brought under the PDA, only seven were successful, and the remaining 25 applicants failed.

While there are clear attempts by existing legislation to protect whistleblowers, the discussion paper acknowledges that each piece of legislation provides varying degrees of protection, and thus reform is necessary. In fact, the deficiency in legislative protection against whistleblowers was highlighted during the Zondo Commission, where it was found that the PDA does not provide a sufficient guarantee of protection, nor is it proactive in providing physical protection to whistleblowers.

Blowing the whistle: Informant reform in South Africa

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This is evident in the case of the late Babita Deokaran who was murdered in 2021 after reporting corruption in the Gauteng Department of Health.

Proposed reforms

In this regard, and on the back of a comparative analysis with whistleblower legislation in the US, Australia and Ghana, among other countries, the discussion paper has proposed a number of amendments to the PDA and related legislation, with protective measures including state protection to whistleblowers and family members where their lives or property are endangered and the inclusion of "*whistleblower*" in the definition of a witness in terms of the Witness Protection Act 112 of 1998. The paper has further proposed the establishment of funding mechanisms to cover whistleblowers' legal costs, as well as compensation for whistleblowers who have been dismissed or face financial detriment as a result of their *bone fide* disclosures.

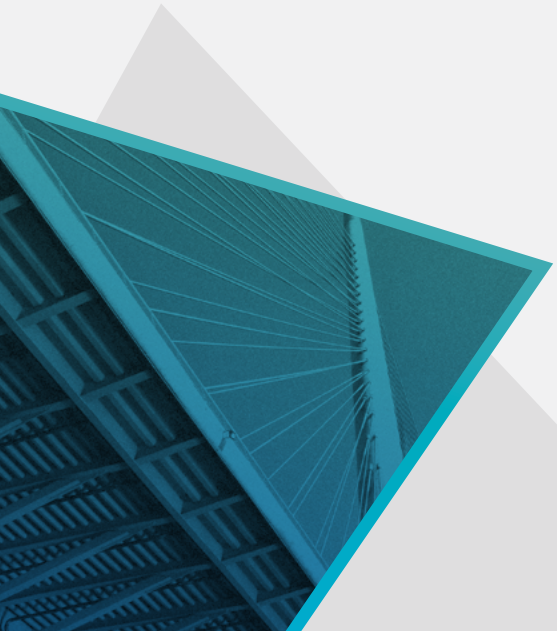
In the context of employment law specifically, the discussion paper recommends the replacement of "*occupational detriment*" in the definitions under the PDA with "*detrimental action*" to extend protection to persons who are not employees, but who have nevertheless made a protected disclosure in terms of the PDA. This would have the effect of extending the scope of the PDA to protect whistleblowers who do not fall within an employer and employee relationship.

A further noteworthy proposal is the addition to section 3 of the PDA which would place a reverse onus on employers to show with satisfactory evidence that where an employee was dismissed or suffered a "*detrimental action*", that this was due to another justifiable reason not related to whistleblowing.

These proposed amendments serve as added protection to whistleblowers who suffer harm as a result of disclosures. However, if they are given effect to, employers would be prudent to revise existing policies and disciplinary procedures to ensure compliance with the amended provisions of the PDA in due course.

The paper is open for public comment until Tuesday 15 August 2023.

Fiona Leppan and Kerah Hamilton



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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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