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Employment Law
ALERT

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Important COIDA amendments

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Minister publishes draft sectoral numerical targets for comment and Solidarity lodges legal challenge to the setting of sectoral numerical targets

On 14 April 2023, President Cyril Ramaphosa signed the Employment Equity Amendment Act 4 of 2022 (EEA amendments) into law.

This act amends the Employment Equity Act of 1998 "*EEA*". One of the main objectives of the amendments introduced is to empower the Minister of Employment and Labour (Minister) to, among other things, identify and set employment equity numerical targets for each national economic sector.

On Friday, 12 May 2023, **the Minister published the draft five-year numerical targets for the identified national economic sectors, allowing interested parties 30 days to comment**. The numerical targets focus on top and senior management, as well as professionally qualified and skilled levels and people with disabilities. The targets are tabulated according to economic sector on the according to race and gender, with both national and provincial percentages indicated. The national targets will apply to designated employers operating nationally, while the respective provincial targets will apply to employers operating in the respective province. A designated employer may not apply both the national and provincial targets. The Minister has not published targets for the semi-skilled and unskilled levels. However, designated employers are required to take into account the economically active population demographics in respect of these levels (either nationally or provincially) in their employment equity plans in terms of section 20(2)(C) of the EEA.

To view the draft sectoral numerical targets, click here.

Some parties have concerns that the sectorial numerical targets set by the Minister may constitute a rigid quota and therefore potentially render the application of the sectorial numerical targets unconstitutional. In this regard, Solidarity, a trade union, has lodged an application in the Labour Court challenging the relevant provisions of the EEA amendments relating to identifying and setting numerical targets, as well as the extent to which designated employers are required to implement these targets and align their employment equity plans with the targets.

Solidarity argues that these amendments are inconsistent with the Constitution in that they reinforce the racial categorisation of employees and applicants for employment by imposing a quota-based regime on designated employers and for purposes of the EEA, which amount to rigid quotas and absolute barriers based on race. Furthermore, Solidarity contends that the EEA amendments confers extensive powers on the Minister to set these targets, which lack the nuanced approach to affirmative action required by the Constitution. Finally, the trade union contends that these amendments are inconsistent with South Africa's obligations under international law.

To read Solidarity's founding papers, click here.

CDH's Employment Law practice

Important COIDA amendments

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It further seeks to provide for the following:

- For the Commissioner to perform certain functions that were previously performed by the Director-General.
- For matters pertaining to the rehabilitation, re-integration and return to work of occupationally injured and diseased employees.
- To regulate the use of healthcare services.
- For the Commissioner to review pension claims or awards; to provide for administrative penalties; to regulate compliance and enforcement; and to provide for matters connected therewith.

Illustrated in today's alert are the keys aspects of the COIDA Amendment Act.

1. Amendment 16 makes provision for three new categories. The first is rehabilitation of people who have work-related injuries and occupational diseases. Second, is to provide psychosocial support subsequent to an occupational injury or occupational disease, which forms part of clinical, vocational and social rehabilitation services, and third, the prescribed remuneration of the board members, Commissioner and staff of the Compensation Fund.

2. Section 22 provides for employees' rights to claim benefits if they are involved in an accident resulting in their disablement or death at the actual workplace, in conveyance by or on behalf of their employer to or from their place of employment, or in conveyance to any place for the purposes of their employment by means of any mode of transportation in furtherance of the business of their employer.

3. The COIDA Amendment Act further provides that "*conveyance*" will be deemed to start once an employee reaches the place designated by the employer for pick-up and ceases on drop-off at the place designated by the employer. Compensation in instances where the accident is attributable to the serious and wilful misconduct of the employee will only be payable where serious disablement has resulted, or the employee dies as a consequence, leaving a dependant wholly financially dependent upon them.

Illustrated in today's alert are the keys aspects of the COIDA Amendment Act...CONTINUED

4. Section 23 outlines the manner in which accidents occurring outside of South Africa are dealt with. In the event where an employee of who is ordinarily employed in South Africa, by an employer who carries on business in South Africa, meets with an accident while temporarily employed outside South Africa, the employee will, subject to paragraph (c) of the COIDA Amendment Act, be entitled to compensation as if the accident had happened in South Africa.

5. It is important to note that in accordance with section 23, the compensation of an employee claiming from the Compensation Fund for accidents that happen outside South Africa shall be determined on the basis of the earnings which the employee, in the opinion of the Commissioner, would have received if they had remained in South Africa at the time that the accident occurred.

6. Section 25 also provides for compensation to employees who have had accidents during the training for or performance of emergency services while undergoing any work-related training in the furtherance and pursuance of the employer's business. This was not provided for before.

7. Section 30 provides for the provision of a licence to carry out business of the Compensation Fund and allows the Minister of Employment and Labour (Minister), for a period and subject to the conditions the Minister determines, to issue a licence to carry on the business of insurance of employers against their liabilities to employees in terms of this act to a licensee. This is, however, subject to the licensee depositing securities considered by the Director-General to be sufficient to cover the liabilities of the licensee in terms of the COIDA Amendment Act, as may be requested and ordered by the Minister.

8. If the Minister is satisfied that the whole or any portion of the security is no longer necessary and that the licensee concerned is not in a position to incur a liability, the Minister can have the security, or a portion thereof, returned to the licensee.

9. Section 36 provides that the employer and the Compensation Fund will be unable to recover damages or compensation paid in terms of the COIDA Amendment Act from the Road Accident Fund, as it is no longer considered to be a third party for purposes of the COIDA Amendment Act. In the event where an employee is involved in an accident on a road, not arising out of and in the course of an employee's employment at the time of the accident, the employee will not be entitled to compensation in terms of the COIDA Amendment Act.

10. Section 44 provides for a new prescription period of three years from the date in which the accident in question occurred for the accident to be brought to the attention of the Commissioner.

11. Section 48 provides that the right to compensation for temporary total or partial disablement will expire if the employee is declared medically fit to resume the work for which they were employed at the time of the accident or occupational disease, or resumes any other work at the same or greater earnings.

12. Section 91 provides that any person affected by a decision of the Commissioner may, within 12 months after the decision, lodge an objection against that decision with the Commissioner in the prescribed manner.

13. Section 99 provides that any person who does not comply with the provisions of sections 39, 40, 47, 64, 68, 81, 82 and 83 will be liable to a penalty or penalties as specified in the various sections.

Hedda Schensema, Tshepiso Rasetlola and Sophie Muzamhindo

The review test restated

In the recent judgment of *Makuleni v Standard Bank of SA (Pty) Ltd and Others* [2023] 44 ILJ 1005 (LAC), the Labour Appeal Court (LAC) reaffirmed the test for the review of a Commission for Conciliation, Mediation and Arbitration (CCMA) arbitration award. Interestingly, the LAC was critical of the arbitrator for not allowing legal representation in arbitration proceedings that became protracted and seemingly chaotic.

Background

Ms Makuleni, a branch manager, was dismissed by her employer on 12 January 2018, for misconduct. She was found guilty of communicating with her subordinates in a manner that was "*disrespectful, offensive and childish*"; shouting and directing "*inappropriate words (vulgar language)*" at her subordinates in front of colleagues and customers; and failing to "*motivate [the] team and to value the ideas raised*" by them. These offenses were alleged to have taken place over a period of two years from 2015 to 2017.

Makuleni referred an alleged unfair dismissal dispute to the CCMA. Her request for legal representation was denied by the arbitrator. A decision the LAC found the arbitrator "*might well have had reason to regret*". The resultant arbitration hearing was shambolic. It involved nine witnesses and 1,287 pages of evidence, much of it disorganised and sometimes little more than waffling. The arbitrator found amongst other things, that the employer's witnesses were not credible or reliable – given that their "*evidence … was replete with innuendo, opinion and speculation. The witnesses failed to succinctly state how or when the [appellant] treated them in a manner that is disrespectful, offensive and childish.*" Furthermore, the "*charges were drafted in vague terms because very few such episodes could be identified as to time and context*". The arbitrator found that Makuleni had been unfairly dismissed and ordered her reinstatement. The employer, unhappy with the decision, took the matter on review to the Labour Court.

On the merits the Labour Court took a different view to the CCMA arbitrator. On 22 September 2021 the Labour Court reviewed and set aside the arbitrator's decision. The Labour Court considered, amongst other things, that there was no motive for the employer's witnesses to lie about Makuleni's conduct, there was no proof of a conspiracy against Makuleni, and the arbitrator did not assess the evidence wholistically.

The review test restate

CONTINUED

Before the LAC

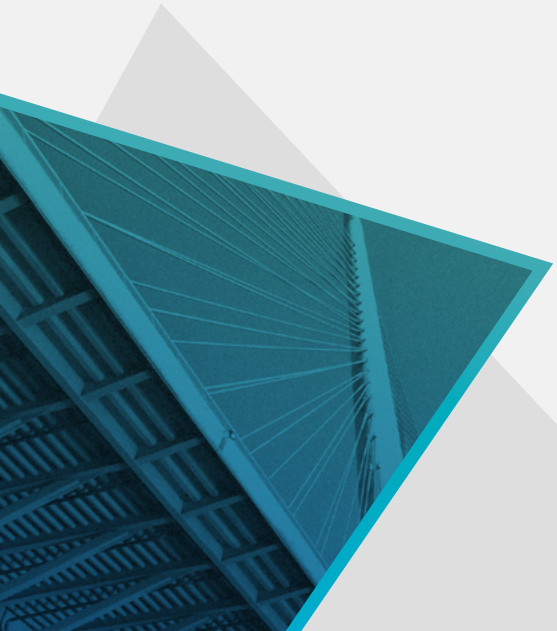
Makuleni, unhappy with that outcome, took the matter on appeal. The LAC found that the Labour Court's rationale for setting aside the award could not stand. It found that the Labour Court had misapplied the test for review and that the court had been misled into treating the case for review as if it were an appeal. The LAC inferred that the Labour Court had yielded to the seductive power of a lucid argument that the result could be different. The LAC held that even if the perspective of the Labour Court, in disagreeing with the arbitrator's findings, was plausible and reasonable, that was an insufficient reason to set aside the arbitration award. To do so would amount to an appeal and not a review. To meet the review test the result of the award has to be so egregious that, as the review test requires, no reasonable person could reach such a result.

The LAC found that at the heart of the review exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.

Quoting the judgment in Head of Department of Education v Mofokeng and Others [2015] 36 ILJ 2802 (LAC) para 31, the LAC reiterated that:

> *"... [the] court must nonetheless still consider whether apart from the flawed reasons of or irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence ... To repeat flaws in the reasoning of the arbitrator evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material facts, etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in a wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should not be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her."*

The LAC found that the court *a quo* had failed to recognise that, with the available (albeit often incoherent and often disorganised) evidence, the arbitrator had reached a reasonable decision, in that the employer had failed to discharge the onus to show that the dismissal was fair.



The review test restate

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The LAC found that just because there was evidence that Makuleni was an unpopular boss who was *"exacting, demanding, inclined to micro-manage and be authoritarian"*, it did not prove the offences. If anything, she was employed at the particular branch of the employer because it was *"in need of rehabilitation owing to it having been neglected and ill-discipline having set in"*.

In its conclusion the LAC referred to the often robust nature of CCMA arbitrations and how the evaluation of factual disputes was hard work. Different *"triers of fact"* will often have different assessments of the facts. The less coherent the evidence, the more likely it is that there will be divergences in the assessment of the fact.

Lessons from the judgment

Proceedings in the CCMA are meant to be simple and expeditious. The general provisions for arbitration proceedings require that a Commissioner must conduct arbitration proceedings in a manner that is appropriate to determine the matter *"quickly and fairly ... with the minimum of legal formalities"*. As the LAC observed, *"[the] degree of robustness which characterises the reality of CCMA arbitrations is exactly the rationale for subjecting them to a review and not an appeal. The courts must be cautious not to undermine the legislative intent."*

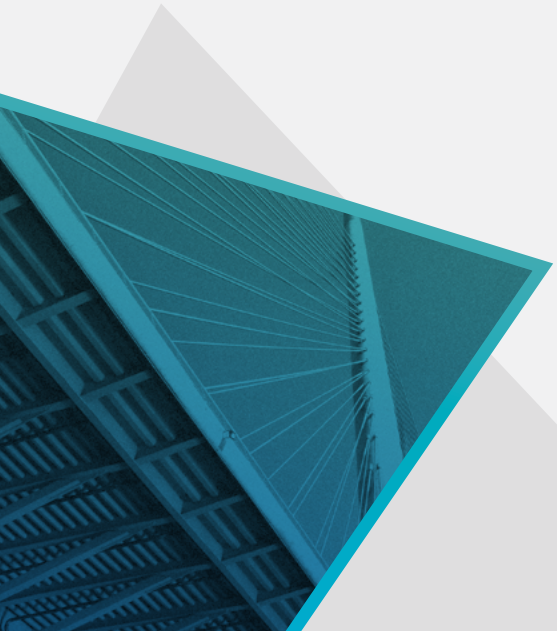
Reviews are not there simply for the taking. The threshold to meet the test for the review of a CCMA award is extremely high. The test is not that the arbitrator came to an incorrect decision. This is the basis for an appeal. The test requires that the arbitrator's decision must be a decision which no reasonable decision maker could reach on all the material that was before them.

Although the issue of legal representation being refused at the arbitration hearing was not raised as a ground in either the review or the appeal, given the chaotic nature of arbitration proceedings conducted by lay persons, the LAC nevertheless felt inclined to comment that:

> *"[Why] it is so often glibly imagined that a matter involving only disputes of facts which will require credibility findings will be more appropriately adjudicated without the utility of legal expertise to adduce the cogent evidence coherently and conduct cogent cross-examination eludes me."*

Although legal representatives are often excluded from CCMA unfair dismissal arbitrations, because they are viewed as too formalistic, procedural, and apparently divorced from the solution-driven ideals of the CCMA, this case illustrates that often the involvement of legal practitioners in these types of disputes does assist the decision maker by narrowing the issues in dispute and by presenting evidence in a logical and cogent manner leading to a rational and better informed award.

Jose Jorge, Leila Moosa and Sebastian Foster



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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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