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Employment Law ALERT

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KENYA

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RETIREMENT FOCUS

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This was a question, that arose in the recent February 2023 Pretoria High Court (the court) matter of *Municipal Workers Retirement Fund v South African Local Government Bargaining Council and Others and Other Related Matters* [2023] ZAGPPHC 98 (Municipal Workers Retirement Fund.)

Facts

On 15 September 2021, the South African Local Government Bargaining Council (SALGBC), South African Local Government Association (SALGA), Independent Municipal and Allied Trade Union (IMATU), as well as the South African Municipal Workers Union (SAMWU) concluded a Retirement Fund Collective Agreement. Its purpose was to *inter alia* establish a uniform approach to the provision of retirement fund benefits to employees in the local government sector (i.e., municipal workers). The CA affected 250 000 employees and

thousands of other retirees, so its impact was serious. The Municipal Workers Retirement Fund took issue with the CA on the basis that the agreement was not within the domain of the SALGBC, SLAGA, IMATU and SAMWU, as it sought to impose conditions for the continued operation of the retirement funds essentially by coercive force. The coercive force was the creation of an accreditation process for funds under the terms of the CA and member transfer provisions which were non-existent. The CA provided that a fund needed to be accredited under the agreement to receive member contributions.

The Law

Leaving aside the questions of whether the CA itself was impeachable on the basis that it may not have been a collective agreement as contemplated by the LRA, or the question of whether the issues covered by the CA could amount to a 'mutual interest' issue under the LRA.

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Bargaining council collective agreements and retirement fund

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It has long been South African law, as confirmed by the Supreme Court of Appeal in *Tek Corporation Provident Fund & Others v Lorentz* (1999) (4) SA 884 (SCA), that pension funds are and remain at all times separate and distinct entities from both the employer and their employees. In addition, the rules of a retirement fund provide the guiding principles upon which its trustees are required to operate.

The court in *Municipal Workers Retirement Fund* considered whether the 'accreditation terms' set out in the CA was binding upon the funds and if their implementation would impinge upon the discretion of trustees of the various funds. Another consideration was whether the effect of the CA could result (whether intended or not), on one or more or all the funds in the sector being regarded as financially unviable – this being a consideration under the Pension Funds Act, 1956.

The court found that the CA was prejudicial to the independence of the board of trustees (of a fund) and that the proposed rule changes

were also inconsistent with the PFA. This is because the CA provided *inter alia* its accreditation committee the power to change rules and compel the board of trustees to adopt those new rules. The court also found that this force of power undermined the power and authority of the entire regulatory and directory regime of the PFA by imposing a parallel supervisory regime under the purview the bargaining council.

The court again upheld the importance of the Financial Service Conduct Authority (FSCA) in the regulatory environment by confirming that any specific rule change was not a unilateral decision of the board of trustees in any event but was to be approved by the FSCA. The court stated that;

"the entire construction of the accreditation regime is inimical to the separation of identity and interests between employers and the pension funds and fundamentally amounts to a rule-based intrusion on the statutorily protected independence of the trustees of pension funds".

Conclusion

This judgment once again confirms that retirement funds are and remain at all times separate and distinct entities from both the employer, their employees (trade unions), as well as, bargaining councils.

It is the trustees of a fund who hold responsibility for the affairs of a fund and there can be no intrusion into their powers by third parties no matter how noble their intent.

So, a collective agreement which seeks to deal with retirement funds must be concluded with reference to not only employment laws but also with reference to PFA and likewise bargaining councils may never intrude into the workings of a fund where this would interfere/corrode the protections entrenched by the PFA.

Imraan Mahomed, Tshepiso Rasetlola and Sophie Muzamhindo

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The concept of menstrual leave

Inclusion in the workforce has come a long way and as inclusion and diversity increase in the workplace globally, we are beginning to understand that biological distinctions, such as menstruation, mean that men and women face different challenges in the workplace. In this article, CDH critically analyses the concept of menstrual leave.

Background

Menstrual leave, which allows women to take paid or unpaid time off from work because of illnesses and symptoms related to their menstruation cycle, has been the subject of continuous controversy. Practically speaking, each woman has a different menstrual experience; for example, some women with chronic conditions like endometriosis, polycystic ovary syndrome (PCOS), or fibroids may experience severe symptoms like nausea, diarrhea, vomiting, headaches, migraines, and pain that radiates throughout the abdomen during their menstruation cycle. For some women, periods are manageable and might only have a few cramps and symptoms in the same period.

According to a 2017 survey of 32,748 women in the Netherlands, which was published in the British Medical Journal in 2019, 14% of those surveyed had taken time off from work during their menstruation cycle,

while 86% of the surveyed women claimed they showed up to work and endured the pain, which resulted in an estimated 8,9 days of lost productivity per woman annually.

Due to the cultural and social stigma associated with menstruation, some women choose to endure the discomfort, take a paid sick day, an annual leave day, or take an unpaid day, which not everyone can afford to do. In fact, some women believe that taking a menstrual break shows weakness, detrimental in maintaining gender equality. On the other hand, some organisations and jurisdictions believe that by instituting menstrual leave, the social conditioning and shame that encourages women to conceal their periods will be undone.

Global history

Menstrual leave is a concept that was first introduced in the 19th Century. In 1922 Soviet Russia implemented a menstrual leave policy which lasted five years before it was abolished, as it resulted in discrimination against the female workforce.



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In 1947, Japan introduced menstruation leave, for female factory workers. After Japan's defeat in World War II, the country enshrined menstruation leave in its labour law as a right for all working women. To date, Japanese women who experience menstrual pain cannot be asked to be at the workplace during their menstruation cycle.

Indonesia followed suit in 1948 by enacting a menstrual leave policy, which allows female workers experiencing menstrual pain to not work on the first two days of their cycle. Other Asian countries, including Taiwan and South Korea, offer female workers a day off every month during their menstruation cycle, whilst Vietnam allows an extra 30-minute break each day during their menstruation cycle .

Commendably, in 2017, Zambia became the first African nation to offer a day's menstrual leave each month for all female workers without needing a medical certificate or explanation from the employer.

Most recently, in February 2023, Spain became the first European country to provide 3 to 5 days of menstrual leave, with a supporting note from a doctor.

Irreconcilable differences

Diverging viewpoints on various ends of the spectrum exist in the discussion of menstruation leave. On the one hand, some people think it will boost the economy, and on the other, there are those who think it will lead to violations of human rights, unpacked below.

Those opposing menstrual leave believe that:

- **It may discourage employers from employing women.** Providing paid menstrual leave to women in addition to paid maternity leave, sick leave, and vacation leave, according to some, is expensive for the company and deters employers from hiring women.

- **It can result in subtle discrimination.** Menstrual leave opponents assert that it might increase gender-based discrimination by singling out women for needing time off and implying that they are less "useful" than men, or that having periods makes one weak or less capable.
- **Cultural stigma is still prevalent, preventing effective implementation.** In a 2018 poll of 1,500 women and men in the United States, The New York Post found that 58% of women have experienced a sense of embarrassment merely because they were on their period.
- **The policy may not succeed.** A 2021 survey from Tokyo found that out of 1956 people who were offered menstrual leave, less than 10% of them took it for various reasons such as "filing for menstrual leave to a non-menstruating boss".

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The concept of menstrual leave

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- **It may infringe on a person's privacy.** It is believed that menstrual health should be private, and the fact that one is required to report to an individual may infringe on their right to privacy.

On the contrary, those that support menstrual leave believe that availing menstrual leave to employees can provide beneficial outcomes. These are unpacked below:

- Could improve the well-being of the employee as they are provided a chance to rest, in turn improving their productivity.
- May lead to better retention rates as employees are happy knowing that their well-being is of importance to their employer.
- May lead to improved employee engagement and loyalty as the employee feels like their needs are being met, which increases their willingness to give more of themselves.

- According to the International Journal of Social Science and Economic Research on paid menstrual leave and women's economic empowerment, if the emphasis is put on labour productivity and the quality of output of the female employees, it would not affect the productivity of the organisation and the economy.

What's next?

Despite being a notion that was originally established in 1922, menstruation leave is still not fully understood and embraced by governments around the world. This could be as a result of societal factors that have made it necessary for women to keep their monthly discomfort hidden, and the fact that women are now speaking out about menstruation leave is the reason we refer to the idea as "new".

On a policy level, CDH anticipates that the idea of menstruation leave will be discussed across a number of jurisdictions, undoubtedly with some opposition. For instance, the Supreme Court of India declined to consider a petition on February 24, 2023, to draft a policy allowing working women and female students to request leave if they experience menstrual pain on the grounds that it is a matter of policy and should be brought before the Ministry of Women and Child Development. However, Zomato, a multi-national organisation founded in India offers up to ten days of period leave annually to all menstruating employees.

In Kenya, a senator was recently expelled from Parliament for attending with blood-stained pants, which triggered a discussion on menstrual shame and menstrual leave. This sparked discussion and debate on social media, but no real change in terms of policy - yet.

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The concept of menstrual leave

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From an organisational standpoint, the firm is witnessing large organisations make an effort to be innovative and incorporate menstruation leave into their policy. The first private company to provide menstruation leave was Gozoop and Culture Machine, in 2017.

Modibodi, an Australian company, offers ten leave days for menstruation, menopause, and miscarriage.

Other employers, like Unilever, also provide menstrual leave benefits.

If one is interested in implementing a menstrual leave policy, the following will need to be taken into consideration:

- first, consider whether there is legislation governing menstrual leave in the applicable jurisdiction;
- if not, consider how the policy will be introduced into the organisation as menstrual leave is still a culturally sensitive matter;

- consider the parameters of the menstrual leave- offering a fixed number of leave days per month; offering a fixed number of leave days annually; determining whether a doctor's note will be required; or providing working from home as an option;
- establishing an appropriate reporting structure;
- ensuring that confidentiality is maintained; and
- ensuring that any appraisal process is fair and objective for all employees.

To read about menstruation leave from a South African perspective, please [click here](#) to access the Employment Law alert from 27 February 2023.

[Rizichi Kashero-Ondego and Njeri Wagacha](#)



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