

# Employment Law ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING  
KIETI LAW LLP, KENYA

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An award won by a dismissed employee for re-employment or reinstatement after an unfair or unlawful dismissal would generally have different effects on past retirement fund contributions. Typically, the rules of a retirement fund would provide for the termination of membership on the dismissal of the employee. Also, the obligation of the employer for payment of contributions would cease from the date of dismissal.

### Mental Health in the workplace- Constructive dismissal based on mental ill health?

In the post covid landscape there has been a warranted increased awareness on mental health in the workplace. In *Sanlam Life Insurance Ltd v Mogomatsi and Others* (CA 12/2022), the Labour Appeal Court (LAC) considered the interplay between a claim for constructive dismissal and mental health.



## Re-employed or re-instated after a dismissal: Who is liable for the arrear retirement fund contributions

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Should the employee be re-employed typically the contributions from the date of dismissal to the date of re-employment would not need to be paid to the fund. The case is generally different in the case of reinstatement where arrear contributions will need to be made to the fund.

The facts in the recent decision of the Supreme Court of Appeal in *South African Municipal Workers' Union National Provident Fund (Pty) Ltd v Diklabeng Local Municipality and others* [2023] 7 BLLR 626 (SCA), are interesting as the court had to consider a claim by the provident fund for arrear contributions from the employer for the period between the employee's dismissal and their return to employment in terms of a settlement agreement. There was a dispute on whether the agreement provided for re-employment or reinstatement. The facts of the case are briefly as follows:

- On 6 April 2009, various employees of the Municipality engaged in an unprotected strike resulting in 75 employees being dismissed on 31 July 2009.


- The employees were members of the South African Municipal Workers' Union National Provident Fund (Pty) Ltd (Fund).
- The employees challenged their dismissals in the High Court. However, the Municipality and employees concluded a settlement agreement on 8 October 2009, in terms of which the employees would return to the workplace and were also afforded the opportunity to elect a new medical aid fund and a new pension fund. In around 2013, the Fund sought to claim payment of arrear pension fund contributions from the Municipality from the date of dismissal up until 2013. The basis of the claim was that the employees were reinstated and not re-employed.


We know that re-instatement amounts to the resumption of employment on the same terms and conditions that prevailed at the time of dismissal. In such circumstances, there would be no conclusion of a new employment contract. Employment would rather be regarded as 'suspended' during



SAVE THE DATE

## Annual Employment Conference 2023

 Wednesday, 25 October 2023

 09h00 – 13h00

Further information to follow soon.

## Re-employed or re-instated after a dismissal: Who is liable for the arrear retirement fund contributions

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the period of absence from the workplace. Whereas, re-employment, entails the conclusion of new terms and conditions of employment, with benefits from past employment not extending to the new employment relationship. Re-employment therefore implies a break in continuous employment.

With this definition in mind, based on an interpretation of the settlement agreement and rules of the Fund the court concluded that the employees were re-employed. The effect thereof being that the Fund was not entitled to claim any arrear contributions for the period between the dismissal and the re-employment.

An award for reinstatement has serious consequences for an employer. This applies equally to a deed of settlement which simply provides for reinstatement without more. So, employers should be alive to the full effects of an award for reinstatement or an open-ended agreement for reinstatement to avoid any surprises for arrear contributions arising soon after the ink is dry.

**Imraan Mahomed and  
Thato Makoaba**



### Employment 2023 Rankings

**Employment Law practice is ranked in Tier 1.**

**CDH Kenya's Employment Law practice is ranked in Tier 3.**

**Leading Individuals:**  
Fiona Leppan | Aadil Patel

**Recommended Lawyers:**  
Anli Bezuidenhout | Jose Jorge  
Rizichi Kashero-Ondego | Gillian Lumb  
Imraan Mahomed | Phetheni Nkuna  
Hugo Pienaar | Thabang Rapuleng  
Njeri Wagacha

## Mental Health in the workplace: Constructive dismissal based on mental ill health?

In the post covid landscape there has been a warranted increased awareness on mental health in the workplace. In *Sanlam Life Insurance Ltd v Mogomatsi and Others* (CA 12/2022) , the Labour Appeal Court (LAC) considered the interplay between a claim for constructive dismissal and mental health.

Briefly, Mr Mogomatsi was a Senior Penetration Tester: IT Infrastructure Shared Services at Sanlam Life Insurance Limited. He alleged having experienced various incidents with his colleagues that left him no option but to resign. He then referred a constructive dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Dissatisfied that the incidents pointed out made out a case for constructive dismissal, the CCMA dismissed the claim.

### The Labour Court

Mogomatsi took the matter on review before the Labour Court. The Court found that the arbitrator gave no weight to Mogomatsi's mental health during the arbitration. Save for Sanlam making an attempt to try and show Mogomatsi that his conduct was not acceptable, no mention was made of his anxiety and depression. There was no evidence the employer considered an ill health process rather than a disciplinary process in the build up to Mogomatsi's resignation. In the Court's view, an assessment of Mogomatsi's claim correctly

made, should have incorporated the common cause fact of the mental ill health he suffered from during the material period. The Court found that Mogomatsi had shown that the employment relationship became intolerable and had been constructively dismissed.

Sanlam appealed the decision on the principal basis that no evidence was presented regarding Mogomatsi's mental health issues during the arbitration proceedings. Therefore, the Labour Court erred in deciding the matter on that basis. Furthermore, Sanlam was never called upon to defend case that it had failed to treat Mogomatsi with the necessary sensitivity due to his mental illness, thus rendering his employment intolerable.

### The Labour Appeal Court

The LAC held that in relation to mental illness and constructive dismissal, the facts of the matter needed to point to the employer having been aware or that they ought to have been aware of the negative mental health of the employee.



Cliffe Dekker Hofmeyr

### 2023 RESULTS

**Chambers Global 2014 - 2023**  
ranked our Employment Law practice in  
Band 2: Employment.

**Aadil Patel** ranked by  
**Chambers Global 2015 - 2023**  
in Band 2: Employment.

**Fiona Leppan** ranked by  
**Chambers Global 2018 - 2023**  
in Band 2: Employment.

**Imraan Mahomed** ranked by  
**Chambers Global 2021 - 2023**  
in Band 2: Employment.

**Hugo Pienaar** ranked by  
**Chambers Global 2014 - 2023**  
in Band 2: Employment.

**Gillian Lumb** ranked by  
**Chambers Global 2020 - 2023**  
in Band 3: Employment.



# Mental Health in the workplace: Constructive dismissal based on mental ill health?

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Only when an employer was aware of an employee's mental health issues and was indifferent or showed no concern, thus making continued employment intolerable, might a proper case for constructive dismissal be made. This was not so in this case. Accordingly, the Labour court misdirected itself when it adjudicated the review based on evidence that was not before the commissioner i.e. the mental illness. There was insufficient evidence to conclude that Sanlam made continued employment intolerable. Sanlam's appeal therefore succeeded.

## Conclusion

What the LAC emphasized is the importance of an employer, once becoming aware of mental illness or vulnerabilities suffered by

an employee, showing concern. Employers have a general obligation to ensure a safe and healthy working environment and prevent and/or eliminate harassment. Failure to fulfil this obligation may result in employers being held vicariously liable under section 60 of the Employment Equity Act, 1998. In the context of a constructive dismissal, this however, does not result in a free pass to employees suffering from mental health concerns to allege a constructive dismissal - the employee would still need to prove that the employer was aware or ought to have been aware of their mental health issues/illness and that such employer was indifferent.

**Jean Ewang, Iva Babayi and Phetheni Nkuna**



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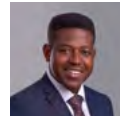
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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

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.

**PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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