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Employment Law
ALERT

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In today's fast-paced and competitive world, employers are often faced with the challenge of managing employees who are not meeting their performance expectations. Poor performance constitutes one of the valid reasons for an employer to terminate the service of an underperforming employee.

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

SOUTH AFRICA

Two for one: The splitting of charges in disciplinary notices

The criminalisation of our employment law has met the ire of our judiciary. South Africa's courts have warned parties not to seek to frustrate and prolong the disciplinary process.

Irrelevant preliminary points, ill-timed submissions of medical certificates and inopportune applications for postponement have become the norm for those who seek to delay their disciplinary proceedings. This sort of conduct enhances what our courts have termed the creation of a "*kitchen industry*".

As a rule of practice, the splitting of charges should always be avoided. In the application of the rule, common sense and fairness ought to prevail.

The splitting of charges can be described as a situation where an employee is required to respond to numerous charges which vary in name but are in fact borne out of a single act of misconduct.

In recent years, the wording of charges in the disciplinary context has become subject to scrutiny by various labour dispute resolution forums. Our courts have repeatedly stated that employers cannot be expected to frame charge sheets in the same manner that a charge sheet would be prepared for a criminal matter.

In disciplinary proceedings, the role of a charge sheet is to set out the allegations levelled against an employee so that the employee is aware of the case for which a defence is required.

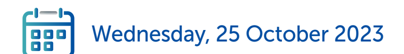
Mogane v Standard Bank

To this end, South Africa's courts have pronounced on the vexed questions arising from the issue of the drafting of charges, especially considering the position in which employers find themselves.

In the recent case of *Mogane v Standard Bank (Pty) Ltd* [2023] 32 CCMA 7.17.2 the Commissioner was required to determine whether the funds which the applicant had received amounted to a loan, as claimed by the applicant, or a gift, as contended by the respondent.

SAVE THE DATE

Annual Employment Conference 2023



Further information to follow soon.

SOUTH AFRICA

Two for one: The splitting of charges in disciplinary notices

CONTINUED

The Commissioner correctly noted that the only dispute between the parties pertained to the characterisation of the loan, and that the difference was academic as "*borrowing*" money from clients was listed in the bank's disciplinary code as an offence punishable by dismissal.

In arriving at his decision, the Commissioner referred to the two Labour Appeal Court (LAC) judgments of *EOH Abantu (Pty) Ltd v CCMA and Others (JA4/18) [2019] ZALAC 57* (LAC) [reported at 2019] 12 BLLR 1304 (LAC) and *National Police Commissioner v Myers and others* [2012] 7 BLLR 688 (LAC). The Commissioner stated that whether the charges were cast in multiple counts or a single count did not matter, as all that was required was for an employee to understand the charges which invited a defence.

The LAC cases reinforce the principle that the duplication of charges, and omission of alternative charges, are inconsequential as all that is required is for an employee to be aware of and understand the charges which warrant a defence without the employee being unfairly prejudiced. This is aligned with what our courts have sought to do – decriminalise our employment law. Fairness is the standard. Simplicity is the aim.

Aadil Patel and Malesale Letwaba

The LEGAL 500
EMEA

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

KENYA

Why employers should consider grievances provided by underperforming employees before termination

In today's fast-paced and competitive world, employers are often faced with the challenge of managing employees who are not meeting their performance expectations. Poor performance constitutes one of the valid reasons for an employer to terminate the service of an underperforming employee.

Despite this, the Employment and Labour Relations Court at Nairobi, has recently elucidated the tenets that govern termination based on poor performance. The court in the case of *Namai vs National Bank of Kenya* [2023] indicated that employers need to consider any valid grievances raised by underperforming employees before terminating their employment.

In this alert, we will analyse how this new jurisprudence may affect the way in which an employer relies on poor performance as a reason for termination.

Background of case

Mr Vincent Namai (petitioner) was employed by the National Bank of Kenya (respondent) in 1995 and served at the bank for 27 years until his termination in 2022. During his employment, the petitioner worked in different roles, including as a branch operations manager in 2013, a position which he also held at one of the respondent's top performing branches.

In 2020, the respondent instituted a performance policy entailing a semi-annual review for all its employees. The petitioner was taken through performance reviews in 2020 where he scored 2.15, and 2021 where he scored 2.1. After the completion of both reviews, he was informed that he achieved a moderated score of 2.16, which was below the required target of 3.00. The petitioner was issued with a first warning letter and put under a six-month performance improvement plan (PIP) to improve his performance in line with expected targets.

On completion of the PIP, his performance had not improved. Consequently, the petitioner's employment was terminated in 2022 after he had been taken through a capability hearing to discuss why he was unable to improve his performance despite receiving PIP support.

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.

KENYA

Why employers should consider grievances provided by underperforming employees before termination

CONTINUED

The petitioner appealed against the respondent's decision and set out multiple reasons that contributed to his continued poor performance. Some of the reasons included staff participating in fraudulent activities, lack of business due to poor client relationships and lack of sufficient support mechanisms. Despite the petitioner setting out these issues, the respondent informed him that his appeal had no merit and upheld his termination.

Findings by the court

The court examined the procedures followed during the capability hearings held by the respondent. In line with this, the court perused all the exhibits provided by the parties, including the minutes of the capability hearings. From the minutes, the court identified that the petitioner had raised pertinent issues in his capability hearings and that these were not taken into consideration by the respondent. The court was of the view that the grievances raised were well-grounded, as envisaged by section 46 of the Act. The respondent was consequently found to have acted unreasonably by failing to consider the petitioner's grievances on the reasons for his poor performance.

The effect of this judgment on employer-employee relationships

Through this judgment, the court has highlighted the unsavoury practice of employers terminating underperforming employees despite the employees raising valid grievances. The court identified that this practice constitutes unfair termination and is in violation of section 45 the Act.

In order to prove fair and procedural termination, employers will be required to provide evidence of all necessary steps taken to mitigate any valid grievances raised by an underperforming employee before termination. An employer's failure to provide this would constitute unfair termination even if due procedure was followed during the termination.

Conclusion

We encourage employers to adapt their practices and realign their policies to incorporate mechanisms that can help mitigate valid grievances raised by underperforming employees before a decision to terminate is made.

Desmond Odhiambo,
Daniel Munsiro, and Stefani Wanjeri

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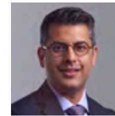

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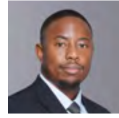

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

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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