

Employment Law

ALERT | 21 October 2024



In this issue

SOUTH AFRICA

To pay or not to pay? An employer's liability to pay severance pay where alternative employment is secured



For more insight into our expertise and services

**EMPLOYMENT LAW
ALERT**

To pay or not to pay? An employer's liability to pay severance pay where alternative employment is secured

In the recent judgment of *Khanya Cleaning Group (Pty) Ltd v South African Transport & Allied Workers Union and Others* (PR32/2023) [2024] ZALCPE 39 (2 October 2024) the Labour Court clarified the extent of an employer's duty to make payment of severance pay to an employee dismissed for operational requirements (a retrenchment) in circumstances where the employer played an active role in securing alternative employment for the retrenched employee with a new employer.

In accordance with section 41 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) an employee who is retrenched is entitled to receive severance pay unless they have unreasonably refused an offer of alternative employment.

The court, in discussing the purpose for which severance pay was established in accordance with the provisions of section 41 of the BCEA, confirmed that the purpose is to compensate employees for the loss of employment through no fault of their own and to act as a cushion from the loss of employment. The exception in section 41(4), which provides that no severance pay becomes payable where an alternative offer of employment is unreasonably refused, is to incentivise employers to ensure the employees obtain alternative employment. This notwithstanding, with reference to the Labour Appeal Court decision in *Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration and Others* [2006] 27 ILJ 935 (LAC), the court in *Khanya* confirmed that the legislature did not intend, in its enactment of section 41(4), that a retrenched employee would be able to secure severance pay and a salary for the alternative employment.

In determining whether the former employees were indeed entitled to severance pay, the court found that the employer was not a passive actor in its former employees securing new employment, in that it assisted the new employer that offered its retrenched employees' alternative employment.



**EMPLOYMENT LAW
ALERT**

To pay or not to pay? An employer's liability to pay severance pay where alternative employment is secured

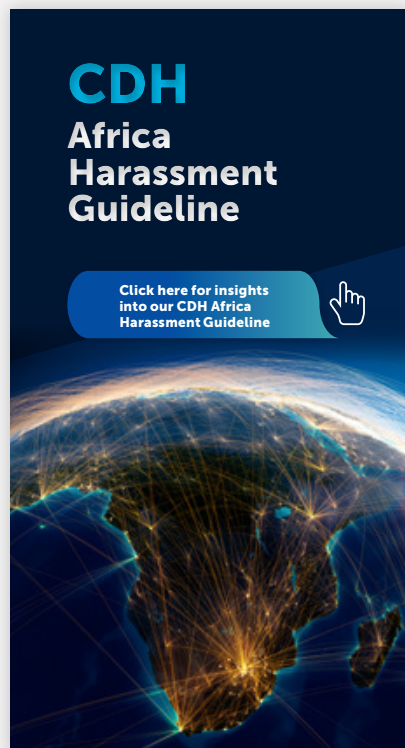
CONTINUED

The judgment confirmed that in circumstances where an employer played a part in securing alternative employment for retrenched employees with a new employer, and sought to be exempt from paying severance pay on this basis, it was not a requirement for it to have negotiated a special term with another employer to offer alternative employment to its retrenched employees.

The focus should be on whether there has not only been collaboration between the former and new employers, but also that the former employer has been swift in assisting the new employer with the information necessary to enable alternative offers of employment to be made to the retrenched employees. This enquiry will be fact dependant and each case will be assessed on its merits.

Accordingly, employers that seek to be exempt from the statutory obligation to pay severance pay on the basis that they have secured alternative employment for retrenched employees must be able to demonstrate, on the facts, that they acted swiftly and took an active role in efforts to ensure that their retrenched employees secured alternative employment.

Jean Ewang and Thobeka Kalipa



OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel

Practice Head & Director:
Employment Law
Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Anli Bezuidenhout

Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



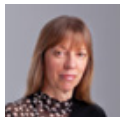
Asma Cachalia

Director:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Jose Jorge

Director:
Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



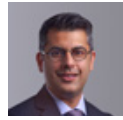
Fiona Leppan

Director:
Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Imraan Mahomed

Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com



Nadeem Mahomed

Director:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com



Yvonne Mkefa

Director:
Employment Law
T +27 (0)21 481 6315
E yvonne.mkefa@cdhlegal.com



Phetheni Nkuna

Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Hugo Pienaar

Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Mohsina Chenia

Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Jean Ewang

Counsel:
Employment Law
T +27 (0)11 562 1499
E jean.ewang@cdhlegal.com



Thabang Rapuleng

Counsel:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Ebrahim Patelia

Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patel@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Rizichi Kashero-Ondego

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



Daniel Kiragu

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E daniel.kiragu@cdhlegal.com



Jordyne Löser

Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Lee Masuku

Senior Associate:
Employment Law
T +27 (0)11 562 1213
E lee.masuku@cdhlegal.com



Leila Moosa

Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com



Christine Mugenyu

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com



Kgodisho Phashe

Senior Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com



Taryn York

Senior Associate:
Employment Law
T +27 (0)11 562 1732
E taryn.york@cdhlegal.com



Lynsey Foot

Associate:
Employment Law
T +27 (0)11 562 1429
E lynsey.foot@cdhlegal.com



Kevin Kipchirchir

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E kevin.kipchirchir@cdhlegal.com



Malesela Letwaba

Associate:
Employment Law
T +27 (0)11 562 1710
E malesela.letwaba@cdhlegal.com



Biron Madisa

Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com



Thato Makoaba

Associate
Employment Law
T +27 (0)11 562 1659
E thato.makoaba@cdhlegal.com



Thato Maruapula

Associate:
Employment Law
T +27 (0)11 562 1774
E thato.maruapula@cdhlegal.com



Sheilla Mokaya

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sheilla.mokaya@cdhlegal.com



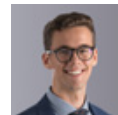
Billy Oloo

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E billy.oloo@cdhlegal.com



Sashin Naidoo

Associate:
Employment Law
T +27 (0)11 562 1482
E sashin.naidoo@cdhlegal.com



Alex van Greuning

Associate:
Employment Law
T +27 (0)21 481 6309
E alex.vangreuning@cdhlegal.com



Melisa Wekesa

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E melisa.wekesa@cdhlegal.com

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.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2024 14027/OCT

