Employment Law

Case Law Update 2022

I Know My Place: Obligations and liabilities

CDH
CLIFFE DEKKER HOFMEYR

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Foreword

Dear All

Imagine being the most decorated female track and field athlete in Olympic history. Imagine being asked by your very high-profile footwear sponsor to take a 70% pay cut because you are pregnant and told to "*know your place, that runners have to run.*" The elite athlete in question is Allyson Felix who holds an extraordinary roll of honours in women's athletics including breaking Usain Bolt's world record when she received her 12th gold medal at the World Athletics Championships, one more than Bolt received during his exemplary career. Are you still with me, or does your mind keep flicking back to the "*know your place*" instruction to the GOAT?

In November 2018 Felix gave birth to her daughter following complications. Negotiations between her and the sponsor subsequently came to a standstill, and ultimately Felix's contract was not renewed. What came next in Felix's journey is nothing short of awe-inspiring as she started her own brand, Saysh, designing and developing products for and by women, including the creation of spikes which she wore during the Tokyo Olympics. Felix's sponsor later announced a new maternity policy for all sponsored athletes guaranteeing an athlete's pay and bonuses for 18 months around pregnancy. Three other athletic apparel companies added maternity protections for sponsored athletes. Although welcome, the policies were too late to retain the GOAT and caused significant reputational damage for the sponsor.

Felix's experience resonated with me on so many levels – as a human being, as a husband, as a father to a young girl, and as an employment law lawyer. It also provided inspiration to me when, together with my esteemed colleagues in CDH's Employment Law practice, we set about developing the strategy and aligned content for the 2022 annual Employment Law Conference. Top of mind was how does CDH's Employment Law practice - as an enabler of organisational success and talent management - help you to "*know your place*" so that you do not run (pun intended) into challenges relating to outdated policies and procedures that ultimately either land you in hot water or cause you to lose your talent.

Our annual Employment Law Conference is positioned and structured to help you to productively "*know your place*" as you are kept up to speed on the latest legislation to help you to guide your organisation in a future-focussed and future-fit manner. We want you to be the GOAT in today's evolving workplace. And wow, it is evolving at the speed of light. That is why our annual conference and case law booklet are your go-to platforms to enable you to lead from the front with the latest information and updates. The case law booklet explores the position of employers in relation to their legal obligations and expectations regarding the safety, health, collective bargaining, protection of propriety information, and the management of employees. We have also structured the booklet to be interactive enabling you to click on links to videos or podcasts that we have done that relate to topics within the booklet. Overall, we ensure that you are up to date with the latest legislative amendments, recent case law and trends in immigration, harassment, employment equity, strikes and dismissals.

Thank you for your support during 2022. I wish you a happy, healthy, and productive 2023. I look forward to continue accompanying you on your journey as an informed leader, and a champion in your organisation.

AADIL PATEL
Practice Head: Employment Law

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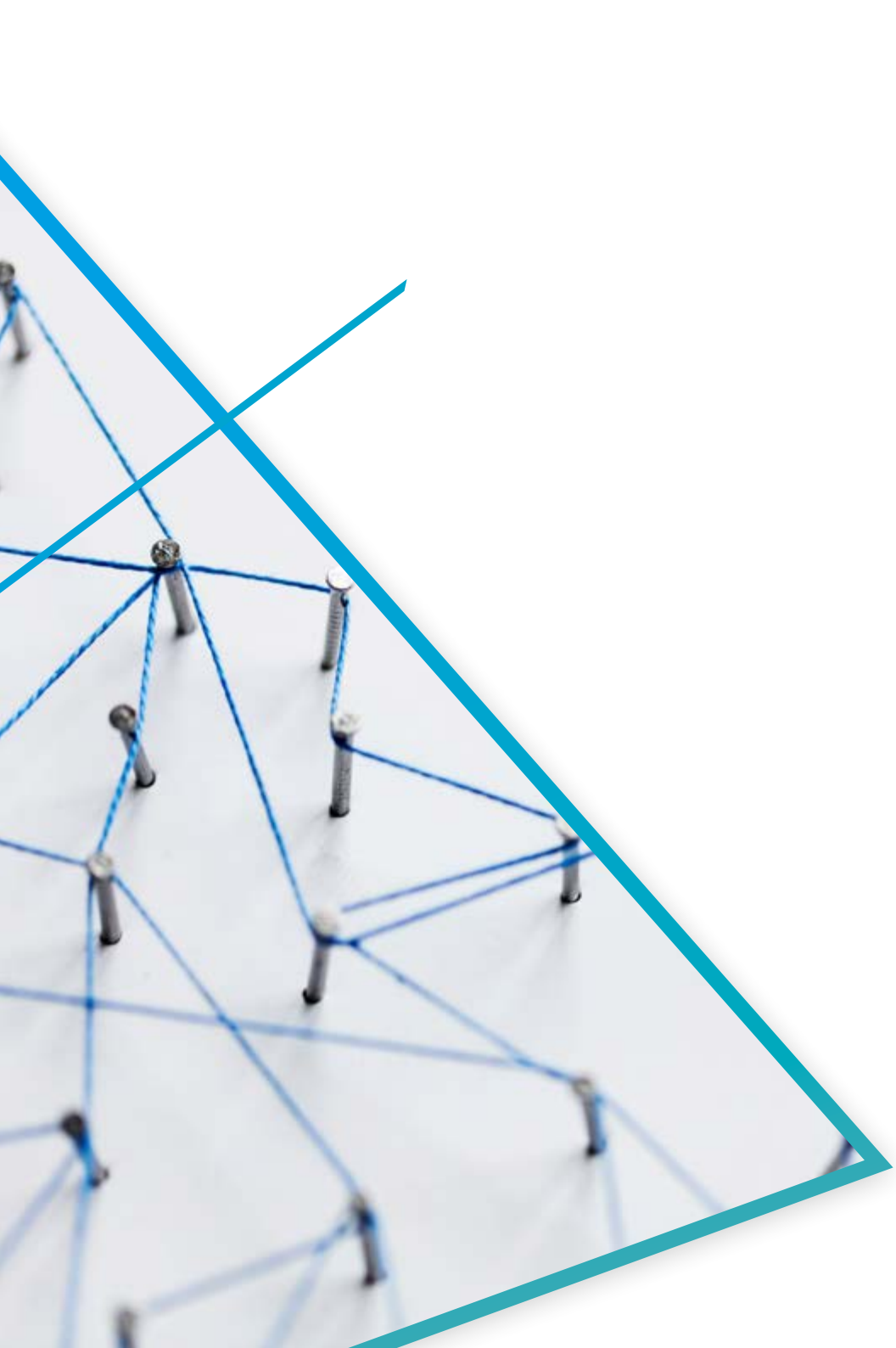

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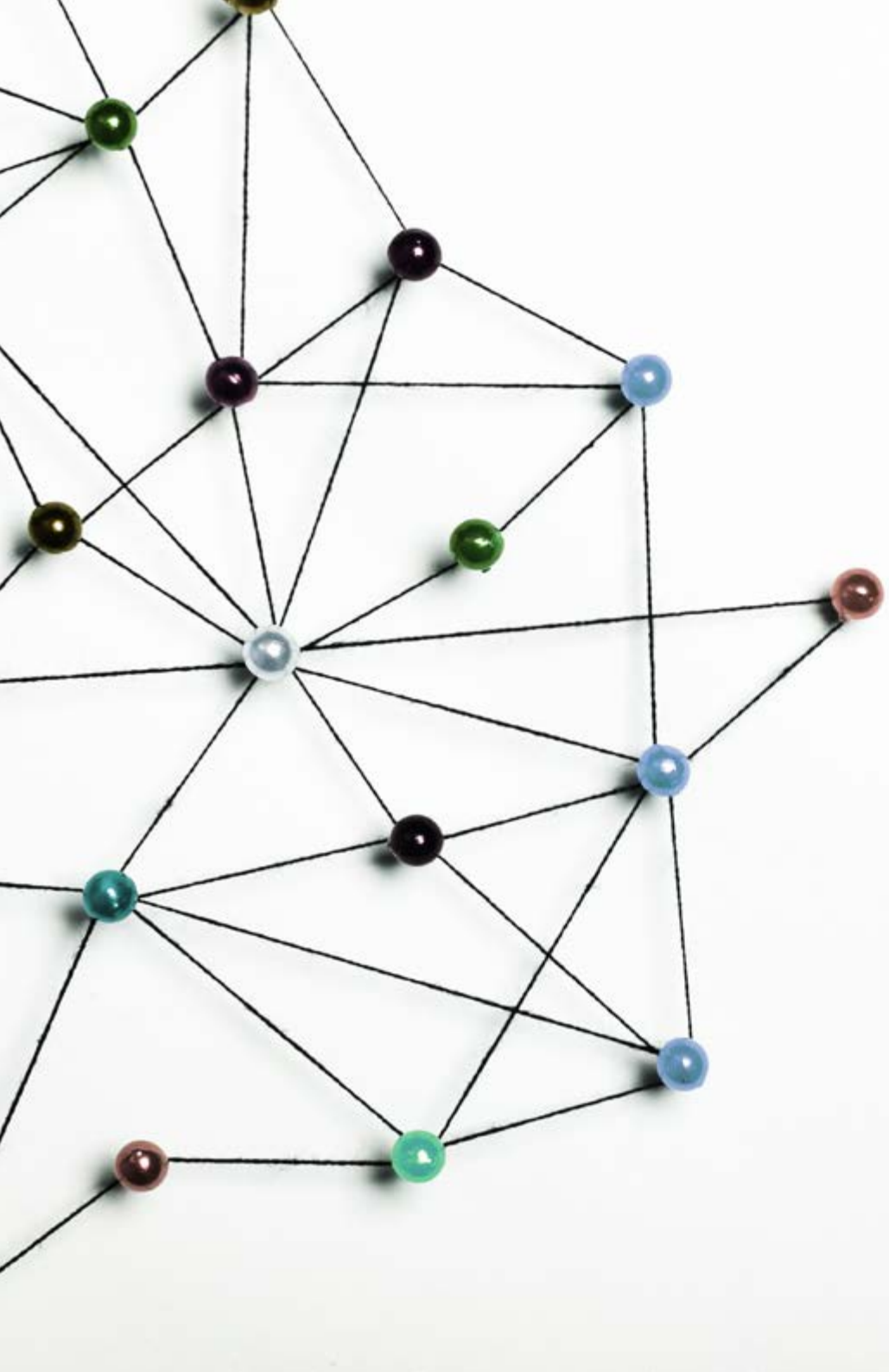

Definitions

Abbreviation	Full reference
B-BBEE	Broad Based Black Economic Empowerment
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
the Constitution	The Constitution of the Republic of South Africa Act 108 of 1996
Department	Department of Employment and Labour
DHA	Department of Home Affairs
EEA	Employment Equity Act 55 of 1998
HC	High Court
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
Minister	Minister of Employment and Labour
NMWA	National Minimum Wage Act 9 of 2018
OHSA	Occupational Health and Safety Act 85 of 1993
President	President of the Republic of South Africa
SCA	Supreme Court of Appeal


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01
Strikes

Strike law

Can just and equitable compensation for losses attributable to a strike, lock-out or conduct be awarded by the LC in the instance of a protected strike?

Massmart Holdings Ltd and Others v SACCAWU (2022) 43 ILJ 2051 (LC)

Summary of the facts

During 2021, the union called for and embarked on a protected strike at the employer's premises.

Pursuant to the strike, the employer brought proceedings against the union in the LC, claiming compensation in the amount of R9,383,454.57 for alleged losses sustained as a result of the union and its officials, members and supporters committing various offences during the protected strike. These included conduct in breach of the LRA; failure to strike peacefully; failure to comply with the OHSA and COVID-related regulations, protocols and directives; and failure to comply with the CCMA-established picketing rules.

The employer's claim found its basis in section 68(1)(b) of the LRA, which provides that: "*the Labour Court has exclusive jurisdiction to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct*", having regard to various factors.

In this matter the LC was called on to determine an exception, which was brought by the union in relation to the employer's statement of claim. The exception was brought on five grounds. For the purposes of this summary, we highlight the two grounds of the exception which provide key take-aways in managing the consequences of a strike, protected or otherwise:

- The union contended that the LC lacked jurisdiction to entertain the employer's claim, because claims arising out of protected strikes fall outside the ambit of section 68 of the LRA and must be pursued as delictual claims in the HC. Otherwise understood, the union alleged that claims for compensation under section 68(1)(b) of the LRA extend only to loss attributable to an unprotected strike or lock-out.
- The union argued that the employer's statement of claim was excipiable as the conduct by union members on which the employer based its claim occurred outside of designated picketing areas.

Summary of the findings of the court

The union relied on the case of *Stuttafords Department Stores Ltd v SACTWU* [2001] 22 ILJ 414 (LAC), which considered whether the LC has jurisdiction in terms of section 68(1)(b) to entertain a claim for compensation arising from a protected lock-out.

In *Stuttafords*, the LAC held that the LC does not have jurisdiction to award compensation for loss attributable to a protected lock-out, in that the reference in section 68(1)(b) is explicitly linked to an unprotected lock-out (or strike).

Conversely, the employer relied on the finding in *National Union of Metalworkers of South Africa and Others v Dunlop Mixing & Technical Services (Pty) Ltd and Others* [2021] 3 BLLR 221 (SCA), where it was held that conduct in

Strike law*...continued*

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contemplation or in furtherance of a protected strike which constitutes an offence and fails to comply with Chapter IV of the LRA is capable of founding a claim for compensation under section 68(1) of the LRA.

Notably, in respect of the protection afforded to a strike or lock-out which complies with the provisions of the LRA, the SCA in *Dunlop Mixing* stated:

"Such protection is, however, lost in the event that any act, constituting an offence, is committed in furtherance of a strike ... this must mean that conduct committed during the course of an otherwise lawfully convened picket which constitutes an offence, renders the person or persons or organisation responsible for such conduct liable to such orders as may be made pursuant to section 68 of the LRA."

The exception was dismissed by the LC, which favoured reliance on the *Dunlop* case, in part because the SCA's approach was based on the wording of section 68 after its amendments by section 17 of the Labour Relations Amendment Act 12 of 2002, whereas *Stuttafords* was not. This amendment broadened the section to include the words *"or conduct"* in addition to reference to a strike or lock-out.

In addition, the court noted that it would be anomalous if an aggrieved employer or union was entitled to pursue a claim for compensation under section 68 for a breach of Chapter IV of the LRA in instances where the strike was unprotected, and not where the strike was protected, in so far as the breach arises in either event.

Conduct occurring outside of the picketing area

The LC's determination on this point was clear. The union submitted that it had no duty in law to take steps or precautions in relation to protestors outside designated picketing areas, and the employer's statement of claim was therefore excipiable to the extent that it relied on conduct by protestors which occurred outside these areas.

This ground of exception was dismissed by the LC on the basis that the employer's compensation claim was based, *inter alia*, on the union's failure to comply with picketing rules, which included ensuring that protestors remained in designated picketing areas, and which claim falls squarely under the ambit of section 68(1)(b).

The LC dismissed the exception in its entirety and ordered each party pay its own costs.

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Strike law*...continued*

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Key take-aways

The key take-away from the LC's judgment is that just and equitable compensation may also be claimed as a result of unlawful conduct in furtherance of a strike or lock-out, irrespective of whether the strike or lock-out is protected. Notably, as per *Dunlop Mixing*, where claims for damages arise out of strike or protest action, such claims are governed by the LRA and as such, a claim for damages cannot be made, and should rather be one for compensation.

In addition, it affirms the onus on unions and their members and officials, to ensure compliance with picketing rules by striking employees, and arguably extends liability for unlawful conduct arising outside of demarcated picketing areas.

Hugo Pienaar, Asma Cachalia, Abigail Butcher and Sasha Schermers

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Strikes

Common purpose in industrial action

Did the LAC create new rules on proof of common purpose and, if it did, do these new rules comply with the substantive fairness requirement of dismissals?

NUMSA obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd (2022) 43 ILJ 2269 (CC)

Summary of the facts

In July 2017, a wage agreement was reached under the auspices of the Metal and Engineering Industries Bargaining Council. Pursuant to which, members of the National Union of Metalworkers of South Africa (NUMSA) embarked on an unprotected strike at the property of the employer on the morning of 14 July 2017.

During the strike, several striking employees surrounded and severely assaulted the head of human resources. The company convened a disciplinary process, and 148 employees were dismissed after having been found guilty by an independent chairperson of two counts of misconduct, one being the assault, and the other, participation in the unprotected strike. Of the 148 employees, there were 136 employees who were convicted of assault on the basis of the doctrine of common purpose.

The LC upheld the dismissals as substantively fair. Three categories of employees were identified by the court: (i) the 12 employees who were directly involved in the physical assault; (ii) 95 employees who were placed at the scene by way of various other forms of evidence, such as clocked-in job cards used at workstations, and photographic and video material; and (iii) 41 employees who were not identified as present at the scene of the assault. Categories (ii) and (iii) of employees were given an opportunity to indicate through Dropbox or WhatsApp Messenger that they had not participated in the acts of misconduct.

The LC found that the employees who were identified as being on site had acted with common purpose in associating themselves with the events on the day. With reference to the decision of the CC in *NUMSA obo Nganezi & Others v Dunlop Mixing and Technical Services (Pty) Ltd*, it was noted that it was unnecessary to place each employee on the scene to prove common purpose, which can be established by inferential reasoning having regard to the conduct of the workers before, during and after an incident of violence.

NUMSA thereafter unsuccessfully appealed to the LAC in respect of only the 41 employees who were not identified by means of the evidence discussed above. Regarding common purpose, the LAC held that there was no evidence that any of the employees in question distanced themselves from the actions of the group; none of the employees intervened to stop the assault, nor did they disassociate in any way from the assault. The

> ...[M]embers of NUMSA embarked on an unprotected strike... During the strike, several striking employees surrounded and severely assaulted the head of human resources.

Common purpose in industrial action*...continued*

Did the LAC create new rules on proof of common purpose and, if it did, do these new rules comply with the substantive fairness requirement of dismissals?

NUMSA obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd (2022) 43 ILJ 2269 (CC)

inference drawn from the above was that all employees were involved in or associated themselves with the assault, and common purpose had been established.

Both the substantive fairness of the dismissals, as well as the LAC's application of the doctrine of common purpose, were taken on appeal to the CC.

Summary of the findings of the court

The CC took issue with the development of the doctrine of common purpose by the LAC in that it found that to escape liability for the assault, employees should intervene to stop an assault and should dissociate themselves in some way from the assault before, during or after it.

The court reaffirmed that the requirements to prove common purpose are: (i) the employee must have been present at the scene where the violence was being committed; (ii) the employee must have been aware of the assault; (iii) the employee must have intended to make common cause with those who were perpetrating the assault; (iv) the employee must have manifested their sharing of a common purpose with the perpetrators of the assault by performing some act of association; and (v) the employee must have had the required intention.

In other words, for liability to attach, there must be proof of an employee's complicity in the acts of violence i.e. an intention in relation to the violence is required. Alleging mere presence at or the watching of unlawful conduct does not satisfy this requirement as there must be evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended.

Despite expressing its sympathy for employers who are seeking to prove individual complicity in collective acts, the CC reverted to established rules of common purpose to ensure that employees who are mere spectators when other employees are committing acts of violence, are not unfairly disciplined. In doing so, it held that the 41 employees who were the subject of the appeal were found not guilty of assault, it set aside the orders of the LC and LAC in relation to the findings of guilty, and it remitted the matter back to the LC to determine sanctions afresh on the charge of participation in an unprotected strike.

Hugo Pienaar, Asma Cachalia, Abigail Butcher and Oliver Marshall

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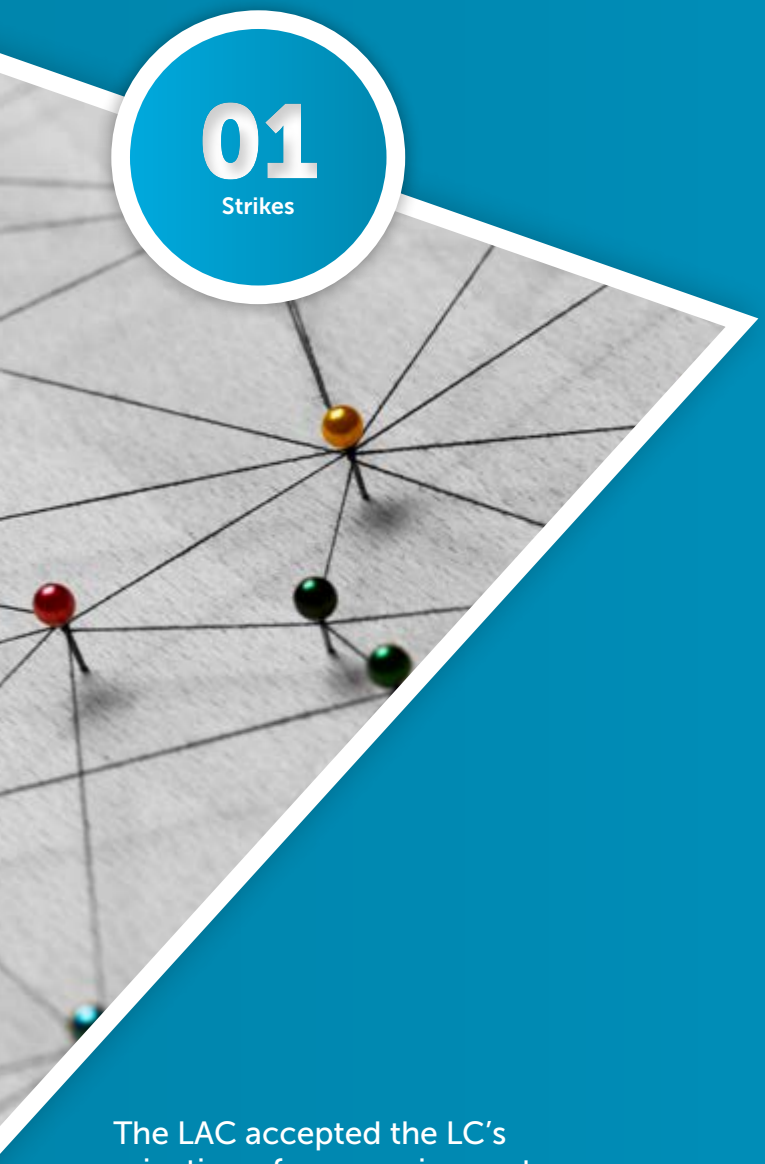

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Strikes

The LAC accepted the LC's rejection of any requirement to establish a link between the individuals who were interdicted and the impugned conduct, and upheld the final interdict.

Strike law

Can an employer, faced with unlawful conduct committed during a strike, interdict all employees participating in that strike without linking each individual employee to the unlawful conduct?

Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another 2022 (7) BCLR 787 (CC)

Summary of the facts

On 6 May 2019, a protected strike called by the union commenced at the premises of the employer. Prior to the commencement of the strike, the CCMA established a set of picketing rules which allowed gathering and picketing in a designated area and prohibited various forms of unlawful conduct.

The strike triggered incidents of intimidation, damage to property, unlawful interference with the employer's business operations, and numerous breaches of the picketing rules. The employer sought interim, and against certain parties, final interdictory relief in relation to the unlawful conduct, which relief was obtained in the LC.

On appeal to the LAC, the union contended that the employer had failed, in the court *a quo*, to identify or sufficiently link any of the unlawful conduct complained of to the employees that it had cited. On this point, the LAC accepted the LC's rejection of any requirement to establish a link between the individuals who were interdicted and the impugned conduct, and upheld the final interdict.

Relevantly, in doing so, the LAC reasoned that: "*to insist in the fraught context of an industrial relations dispute that an employer can only gain relief against those employees it can specifically name from a group which was involved in an unlawful activity is surely a bridge too far.*"

The complaint by the union, on appeal to the CC, was that the final interdict upheld by the LAC was not competently granted, owing to an alleged failure to establish the link between each employee and the actual or threatened conduct.

Summary of the findings of the court

On the question of establishing a link, the CC undertook the following enquiry.

First, it considered whether the law as it stands requires an applicant seeking a final interdict to establish a factual link between the employees against whom the interdict is sought and the actual or reasonably anticipated unlawful conduct. On this, it determined that if the evidence is insufficient to establish a link with the unlawful conduct, then the apprehension of injury cannot be reasonable.

Second, it considered whether mere participation in a strike, protest or assembly in which there is unlawful conduct is sufficient to establish a link. To this enquiry the court answered no. It noted that should mere presence at the strike be

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Strike law*...continued*

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considered sufficient to establish a link, "*innocent bystanders*" would suffer prejudice from the prima facie imputation that they had committed unlawful conduct. According to the CC, this prejudice could not be remedied by the fact that these "*bystanders*" may, after interim relief has been granted, be excluded from later litigation after having refuted any involvement and this may in turn have a chilling effect on the constitutional right to strike.

Off the back of this enquiry, the CC established two important principles. First, for interdictory relief, mere participation in a strike, protest or assembly in which there is unlawful conduct does not meet the "*sufficient link*" requirements. Second, the link can, however, be established where the protestors or strikers commit the impugned unlawful conduct as a cohesive group. On this issue, the CC noted that where strikers deliberately conceal their identities – through the wearing of masks, for example – then a court may be entitled to conclude a reasonable apprehension in respect of otherwise 'unlinked' respondents.

The CC held that interdictory relief can only be competently granted if a respondent can be rationally linked to the unlawful conduct.

In concluding on this issue, the CC paid cognisance to the LAC's point that naming individual strikers may be "*a bridge too far*", noting that the law reports are replete with examples of strike-related misconduct, which represents a "*blight that has come to characterise the South African industrial relations landscape*". It was, however, commented that without due process, interdictory relief has the power to become an engine of oppression against workers and unions. According to the CC, the requirement of a link balances these competing interests.

It is important to consider the above in line with the implications of the doctrine of common purpose and derivative misconduct in the matters of *Marley Pipe* and *Dunlop*, in so far as each of these judgments has an implication on the management of unlawful conduct during a strike.

Hugo Pienaar, Asma Cachalia, Abigail Butcher and Oliver Marshall

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02

Collective labour law and privacy

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02
Collective labour law and privacy

The LC held that GABS' right to pursue economic activity, and its right to freedom of association to the extent that it may be applicable, cannot trump the union's right to engage in collective bargaining and to strike.

Collective bargaining

Does an employer have the right to freedom not to associate in terms of the LRA?

Golden Arrows Bus Services (Pty) Ltd v National Union of Metalworkers of SA and Others [2022] 43 ILJ 844 (LC)

Summary of the facts

In March 2020, Golden Arrows Bus Services (GABS) took a unilateral decision to resign from COBEO, one of the employer organisation members of the South African Road Passenger Bargaining Council (SARBAC), in an effort to address its wage disparity problems. Not satisfied with the decision, the National Union of Metalworkers of South Africa (the union) referred a dispute to the CCMA requesting that GABS re-register with SARBAC. An attempt to resolve the dispute was unsuccessful. The union's contention was that the issue in dispute was the refusal to bargain. Following an advisory award from the CCMA, GABS, fully aware that the next procedural step would have been the issuing of a strike notice, approached the LC on an urgent basis seeking an interim order to interdict the union from embarking on a strike. The LC granted an interim order subject to a return date. On the return date the LC had to determine whether GABS had a clear right to the relief it sought and whether it was entitled to a final interdict.

GABS argued that it had the right in terms of the LRA to freedom not to associate, which stems from its right to freedom of association. Therefore, the union could not force it to join an employers' organisation, and this could not be the subject of a protected strike. The union argued that the issue in dispute was the refusal to bargain and that its members would be exercising their rights to collective bargaining by raising their dissatisfaction with the unilateral resignation by GABS from the SARBAC.

Summary of the findings of the court

The LC found that in South Africa, and indeed internationally, there is no recognised negative right to freedom of association. The LC relied on a judgment from the European Court of Human Rights and held that GABS' right to pursue economic activity, and its right to freedom of association to the extent that it may be applicable, cannot trump the union's right to engage in collective bargaining and to strike because the purpose of collective bargaining is to bring about a balance of power between employers and employees. The LC further held that the union had the right to strike and to collectively bargain, and it would not limit these rights.

Collective bargaining*...continued*

Does an employer have the right to freedom not to associate in terms of the LRA?

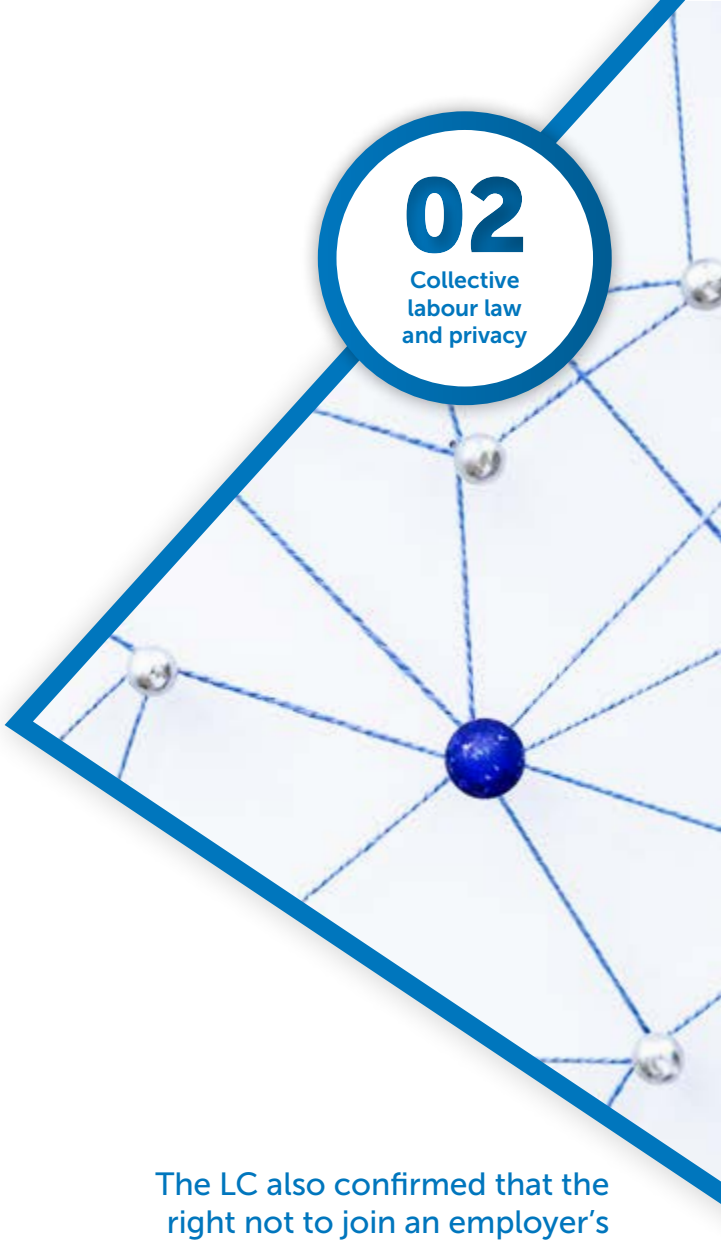
Golden Arrows Bus Services (Pty) Ltd v National Union of Metalworkers of SA and Others [2022] 43 ILJ 844 (LC)

The LC also confirmed that the right not to join an employer's organisation was not provided for in the legislation and concluded that GABS had failed to establish a right not to associate in terms of the provisions of the LRA. The LC held that it would not deny the union and its members the right to collectively bargain and the right to strike in order to advance GABS' commercial interests and held that "*the right to strike is protected as a fundamental right in the Constitution without any express limitation*".

The LC stated that the best way to deal with the matter is for a proper balancing of the two interests – an employer electing not to join an employers' organisation and employees striking in order to advance their right to collectively bargain – taking into account that employers are less vulnerable without membership to an employers' organisation than employees are without a trade union. The LC, in applying the legal principles, stated that the union's demand in relation to GABS re-joining COBEO did not call for a limitation of GABS' right to freedom of association, but for balancing the already qualified right against the union's entrenched right to engage in collective bargaining.

The LC held that GABS was not entitled to a final interdict as it did not have a clear right for the relief sought, which was the right to unilaterally resign from a collective bargaining unit.

Fiona Leppan, Biron Madisa and Karabo Nemudibisa



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02
Collective labour law and privacy

Privacy

Did the respondent discharge the burden of establishing that "*the refusal of a request for access complies with the provision of the Promotion of Access to Information Act*"?

Mani v The Information Officer Mintek and Another (26728/2019) [2021] ZAGPJHC 430 (22 January 2021)

The HC stated that the information officer should have taken all reasonable steps to find the records requested and filed an affidavit setting out a full account of all steps taken to locate the records in question or to determine whether the records existed.

Summary of the facts

Ms Nozuko Mani (the employee) was appointed and employed by Mintek in October 2018. On 25 October 2018, she was made aware of an email that had circulated within Mintek. The contents of the email alleged that the employee was appointed to her position as a result of fraud and impropriety and, moreover, that it was a result of a romantic relationship that she had with her immediate supervisor. The email address that was used to circulate the email belonged to a person by the name of Tshepo Mokgatle. However, there was no one by that name at Mintek. The employee then embarked on an internal process to establish the true source of the email. Having exhausted the internal processes (grievances and appeals, some of which were ignored) in her request for access, she approached the HC seeking information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) to compel Mintek's information officer to release the identity of the person to whom a specific IP address belonged. The information officer and the head of information technology systems (ITS) at Mintek alleged that they could not release the identity of the person identified in the IP address simply because their systems made use of a temporary dynamic IP address whenever a person logged on or logged off.

The HC had to determine whether Mintek had discharged the burden of establishing that the refusal of a request for access complied with the provisions of PAIA.

Summary of the findings of the court

The HC held that the information officer had failed to explain why she did not respond to both the employee's applications in terms of PAIA and the appeal thereof. The HC held further that the fact that the employee had been invited to examine Mintek's servers did not excuse Mintek and the information officer from providing the information sought in terms of PAIA.

The HC stated that the information officer should have taken all reasonable steps to find the records requested and filed an affidavit setting out a full account of all steps taken to locate the records in question or to determine whether the records existed. The HC found that the answering affidavit of the

Privacy*...continued*

Did the respondent discharge the burden of establishing that "*the refusal of a request for access complies with the provision of the Promotion of Access to Information Act*"?

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information officer as well as the confirmatory affidavit of the head of ITS at Mintek contained only generalisations about Mintek's IT processes and no details.

The HC referred to a judgment handed down by the SCA in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* [2014] 1 All SA 22 (SCA) which emphasised the principle that affidavits in motion proceedings fulfil the dual role of pleadings and evidence and that "*they serve to define not only the issues between the parties but also to place the essential evidence before the court*". They must contain the factual averments that are sufficient to support the cause of action or defence sought to be made out. If a party wants to successfully rely on the defence in section 23 of PAIA, it is insufficient to make generalised allegations about IT processes. Sufficient and detailed information is required.

The HC concluded that Mintek and the information officer failed to discharge the onus, on a balance of probabilities, that the record did not exist or that it could not be found and failed to comply with section 23 of PAIA. The HC issued an interim order instructing Mintek and the information officer to either furnish the employee with identity information and the IP address details relating to this matter, or to show why a final order should not be made ordering them to do so.

Fiona Leppan, Biron Madisa and Karabo Nemudibisa

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02
Collective labour law and privacy

Privacy

Can recordings of private conversations that were obtained without the consent of the participants be admitted as evidence in arbitration proceedings?

Naicker and Others v Discovery Health (Pty) Ltd [2022] 43 ILJ 471 (CCMA)

Summary of the facts

The employee was recording the proceedings of an internal disciplinary hearing. She exited the room for a short comfort break on two occasions. Both times, her recording device was left on inside the room, and that device recorded conversations to which she should not have been privy to as these had taken place in her absence. At the CCMA, the employee sought to admit transcripts constructed from these recordings as evidence of the procedural unfairness of her dismissal. The employer objected, claiming that the recordings had been obtained in breach of the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA).

Summary of the findings of the CCMA

An employee is entitled to record disciplinary proceedings, but the arbitrator found that the conversations recorded by the employee in this case were never part of the disciplinary hearing. Therefore, she did not have the same entitlement in those circumstances. The employee was not a participant in those conversations, and she did not have the consent of the individuals involved to record their private communications. Consequently, the recordings were made in violation of RICA, and the participants' rights to privacy.

However, with reference to section 36(1) of the Constitution and the judgment of *Harvey v Niland and Others* [2016] 37 ILJ 1112 (ECG), the arbitrator found that he retained a discretion to admit the recordings and considered the following factors:

- whether the recordings were *"material and relevant"* to the employee's claim of procedural unfairness;
- whether the conversation concerned the employee's disciplinary enquiry and was this within the context where transcripts should not be kept concealed by way of an expectation to privacy;
- whether the recordings were made "*intentionally, clandestinely and deceitfully*";

At the CCMA, the employee sought to admit transcripts constructed from these recordings as evidence of the procedural unfairness of her dismissal.

Privacy*...continued*

Can recordings of private conversations that were obtained without the consent of the participants be admitted as evidence in arbitration proceedings?

Naicker and Others v Discovery Health (Pty) Ltd [2022] 43 ILJ 471 (CCMA)

- whether the employee had requested to record the proceedings before those proceedings commenced, and was this request denied;
- whether the employee should have known that inappropriate conversations would take place once she had left the room; and
- section 138 of the LRA requires the CCMA not to permit its proceedings to be over-burdened by formalities – the proceedings should rather be guided by what is fair and equitable.

The Commissioner found that these factors when properly applied weighed in favour of the transcript, which had been constructed from the recordings, being admitted into evidence.

Employers and employees alike must take note that because an arbitration is a fact finding exercise which should be dealt with minimal formalities, evidence that is obtained in violation of the right to privacy, or even in contravention of RICA, can still be admitted in arbitration proceedings after a consideration of the factors dealt with in this case.

Fiona Leppan, Kgodisho Phashe and Keagan Hyslop

Employers and employees alike must take note that because an arbitration is a fact finding exercise which should be dealt with minimal formalities, evidence that is obtained in violation of the right to privacy, or even in contravention of RICA, can still be admitted in arbitration proceedings after a consideration of the factors dealt with in this case.

02
Collective labour law and privacy

Collective bargaining

Should the proportionality principle be taken into account when determining the reasonableness of a secondary strike in terms of section 66 of the LRA?

AMCU and Others v Anglo Gold Ashanti and Others [2022] 43 ILJ 291 (CC)

Summary of the facts

During November 2018, there was a wage strike by the Association of Mineworkers and Construction Union (the union) at Sibanye Gold Limited t/a Sibanye Stillwater (the company) which lasted almost five months (primary strike). During the primary strike, the union served notices of secondary strike action on several other entities within the mining industry, calling on its union members in these entities to embark on a secondary strike action. Given the severe negative impact these secondary strikes would likely cause, Lonmin Platinum, as it was then known, and other affected secondary employers brought separate urgent applications in the LC to interdict these secondary strikes and declare them unprotected on the basis that such strikes would be unreasonable.

All of the respondents argued that the secondary strikes would have no direct or indirect impact on the business of the company, who was the primary employer.

Summary of the findings of the court

The LC accepted that the procedural requirements in section 66(2)(a) and (b) of the LRA had been fulfilled. The LC held that the test for reasonableness was ultimately a proportionality assessment to determine whether the harm caused by the secondary strike on the secondary employers was proportional to the impact on the business of the primary employer.

The LC granted the interdicts sought. Aggrieved, the union approached the LAC. However, by then, the primary strike had been resolved and on this basis the LAC dismissed the appeal.

The union applied to the CC for leave to appeal. The CC held that section 66 of the LRA requires that the "*nature and extent of the secondary strike be reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer*". The CC also found that the principle of proportionality is part of the test for reasonableness envisaged by section 66.

The LC held that the test for reasonableness was ultimately a proportionality assessment to determine whether the harm caused by the secondary strike on the secondary employers was proportional to the impact on the business of the primary employer.

Collective bargaining*...continued*

Should the proportionality principle be taken into account when determining the reasonableness of a secondary strike in terms of section 66 of the LRA?

AMCU and Others v Anglo Gold Ashanti and Others [2022] 43 ILJ 291 (CC)

When balancing the potential harm that may be caused to the secondary employer against the potential harm that may be caused to the primary employer, certain factors must be considered. These include the duration and form of the strike, the number of employees involved, the membership of trade unions, the conduct of the strikers (including whether the primary strike is peaceful or violent), and the sector involved in the primary and secondary strikes.

The CC held that strikes that become violent could lose their protected status. Consequently, the potential for violence during a secondary strike is a factor in assessing its reasonableness. However, the CC indicated that it would be preferable to interdict the strike to stop the violence rather than to allow a naked challenge to the protected nature of the secondary strike.

In contrast to primary strikes, the right to participate in a secondary strike is limited by the test of proportionality. This assists to balance the interests of primary and secondary employers when dealing with sympathy strikes.

Fiona Leppan, Kgodisho Phashe and Keagan Hyslop

The CC held that strikes that become violent could lose their protected status. Consequently, the potential for violence during a secondary strike is a factor in assessing its reasonableness.

03

Employment equity, employment equity act amendments and discrimination

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03

Employment equity, employment equity act amendments and discrimination

The EEA and unfair discrimination

The principle of reasonable accommodation and its application where a defence of inherent requirements of the job is raised.

Damons v City of Cape Town (2022) 43 ILJ 1549 (CC)

Summary of the facts

Mr Damons was employed by the City of Cape Town (City) as a firefighter. In 2005 he completed the relevant firefighter courses and by 2008 was eligible to apply for advancement to the position of senior firefighter. On 1 April 2009, the City introduced its fire and rescue advancement policy (Policy), aimed at standardising the process for advancement of firefighters. In terms of the Policy, advancement to senior firefighter was subject to a fitness assessment, and fulfilment of the physical fitness requirement was an inherent requirement of the job of an operational firefighter. With effect from the implementation of the Policy, no firefighter had been advanced without having successfully completed the necessary practical assessment set out in the Policy, which included a physical assessment.

Damons was injured on duty as a result of safety measures having been disregarded by his superior during a fire drill. The injuries sustained by Damons resulted in his no longer being able to undertake strenuous physical activities, which in turn meant that he was unable to fulfil the function of an operational firefighter.

Pursuant to an incapacity enquiry, Damons was found to be permanently incapacitated and was transferred to an alternative position in which he performed administrative and educational duties. Notwithstanding the transfer, Damons retained his designation as a firefighter and his salary level.

Damons applied for advancement to the position of senior firefighter. He required the City to relax the physical fitness requirement given his disability. The City declined to relax the requirement and Damons was not advanced as a result of his not fulfilling the inherent requirements of the position.

Aggrieved by the City's decision, Damons referred an unfair discrimination dispute to the CCMA in terms of section 6(1) of the EEA, which provides that no person may unfairly discriminate directly or indirectly against an employee in any employment policy or practice, on any listed ground, or any other arbitrary ground. Damons claimed that the City had unfairly discriminated against him by refusing to waive the physical fitness requirement. In response, the City raised a defence under section 6(2) of the EEA, which provides that it is not unfair discrimination to distinguish, exclude or prefer any person based on an inherent requirement of a job.

Damons' dispute was adjudicated by the LC. The LC defined the issue to be determined as whether the application of the Policy to Damons in a way that prevented him from advancement given his disability, amounted to unfair discrimination. The LC held that applying the Policy in the way that the City did

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The EEA and unfair discrimination*...continued*

The principle of reasonable accommodation and its application where a defence of inherent requirements of the job is raised.

Damons v City of Cape Town (2022) 43 ILJ 1549 (CC)

amounted to unfair discrimination in terms of section 6(1) of the EEA. In arriving at this conclusion, and while the LC considered the City's defence of inherent requirements of the job, it weighed heavily on the LC that Damons' disability was as a result of non-compliance with safety requirements and was not caused by Damons. The LC directed the City to reconsider Damons' application for advancement.

The City launched an appeal before the LAC against the LC's decision. The LAC focused on the City's defence in terms of section 6(2) of the EEA and the inherent requirements of the job. The LAC referred with approval to the judgment in *Independent Municipal and Allied Workers Union and Another v City of Cape Town* (2005) 26 ILJ 1404 (LC) in which the court held that physical fitness is an inherent requirement for the position of firefighter. The LAC also endorsed the decision in *TFD Network Africa (Pty) Ltd v Faris* [2019] 40 ILJ 326 (LAC) which held that a requirement for a particular job is inherent if it is rationally connected to the performance of the job and necessary for the fulfilment of a legitimate work-related purpose. The LAC also considered items 6.5.1 and 7.5.1(b) of the Code of Good Practice on Employment of Persons with Disabilities (Code), which provide that employers should reasonably accommodate the needs of persons with disabilities and may not retain persons with disabilities on less favourable terms and conditions than employees doing the same work, for reasons connected with disability.

The LAC overturned the LC's decision and held that "*To the extent that there is a differentiation between Damons and active firefighters, who are considered for promotion, this is justified both by the rational requirements contained in the policy and by the inherent requirements for the position of a senior firefighter.*" The LAC reasoned that since it was not possible for Damons to perform the essential duties of an active firefighter, and as it was not in the public interest for the City to have firefighters who were incapable of dealing with outbreaks of fires, there was no basis on which it could conclude that the content of the Policy or its application to the dispute constituted unfair discrimination. The LAC accepted that (i) physical fitness is an inherent requirement of the job, (ii) Damons could not meet the physical fitness requirement, and (iii) the application of the City's Policy which prevented him from advancement was justified by the defence of the inherent requirements of the job.

Damons appealed the LAC's decision before the CC.

03

Employment equity, employment equity act amendments and discrimination

The LAC accepted that (i) physical fitness is an inherent requirement of the job, (ii) Damons could not meet the physical requirement, and (iii) the application of the City's Policy which prevented him from advancement was justified by the defence of the inherent requirements of the job.

03

Employment equity, employment equity act amendments and discrimination

Inherent requirements of the job refer to elements of a job that are essential to its outcome and part of its core activities. The requirement of physical fitness to be advanced into the position of senior firefighter was without a doubt an essential requirement of the job of an operational firefighter.

The EEA and unfair discrimination*...continued*

The principle of reasonable accommodation and its application where a defence of inherent requirements of the job is raised.

Damons v City of Cape Town (2022) 43 ILJ 1549 (CC)

Summary of the findings of the court

Before the CC, the issue for consideration was whether the City unfairly discriminated against Damons by refusing to relax or waive the physical assessment requirement contained in the Policy, and by failing to advance Damons. In the majority judgment, the CC remarked that the circumstances surrounding Damons' injury, although emotionally compelling, were not logically connected to the central issue in the case, i.e. whether the Policy discriminated unfairly against Damons.

Damons argued that in terms of the Code, the City must accommodate him because of his disability. The City denied that its obligation under the Code applied to Damons because it was common cause that he was incapable of fulfilling the essential functions of the job of a firefighter. The City asserted that its defence regarding the inherent requirements of the job absolved it of any duty to accommodate Damons. On the facts, no adjustment or modification could be made to render Damons physically fit for the job of firefighter.

The majority judgment first addressed Damons' reliance on the fact that he had retained the designation of firefighter after being transferred to the non-operational sphere and so, he argued, had thus retained the right to advancement under the Policy, and the allegation that he accepted transfer to the non-operational sphere on condition that it would not prejudice his prospects for future promotion. The majority found these arguments to be ill-conceived as the "*condition*" was not included in the outcome of the incapacity enquiry, and it could not have been intended for Damons to be free to advance to any position he chose, irrespective of whether he could meet the inherent requirements of the job. In addition, the Policy only applied to operational firefighters. The CC also recognised that Damons had been retained as a firefighter in name only given that he had been working in non-operational posts in which he was not required to do any physically demanding work. The CC concluded in this regard that in all the circumstances (including the permanent nature of Damons' disability, the core functions of a firefighter and the reasons for and content of the Policy), it could never have been the policy maker's intention or any party's intention to either withdraw the requirement of physical fitness and ability in the Policy, or to create exceptions to the Policy which would entitle Damons to advancement as an operational firefighter.

In relation to the inherent requirements of the job, the CC noted that the principle that physical fitness is an inherent requirement for the post of senior firefighter played a crucial role in the case. Inherent requirements of the job refer to elements of a job that are essential to its outcome and part of its core activities. The requirement of physical fitness to be advanced into the position of senior firefighter was without doubt an essential requirement of the job of an operational firefighter. The CC held that to require a firefighter to be physically fit to be operational was not unfair discrimination. The inherent requirement of the job was a complete defence to Damons' claim of unfair discrimination. The CC concluded in

The EEA and unfair discrimination*...continued*

The principle of reasonable accommodation and its application where a defence of inherent requirements of the job is raised.

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this regard that section 6(2) of the EEA and its application – in this instance requiring an operational firefighter to be physically fit – did not amount to unfair discrimination.

While the finding of the majority regarding the complete defence brought the matter to a close, the majority went on to consider the matter of reasonable accommodation. It did so because of the finding of the minority in relation to reasonable accommodation.

The minority found that the claim raised a novel enquiry, namely, whether the defence of inherent requirements of a job and unfair discrimination in section 6 of the EEA co-exist, or are mutually exclusive when reasonable accommodation is an issue.

Reasonable accommodation includes any modification or adjustment of a job or the working environment that will enable a person from a designated group to have access to participate or advance in employment. The City argued that reasonable accommodation only applies if the person can perform the essential functions of the job, which Damons could not. The City submitted that the defence of the inherent requirements of a job protected it absolutely from a claim for unfair discrimination. Reasonable accommodation would relate to accommodating Damons to be a firefighter. The nature of his disability rendered this impossible.

The minority judgment invoked the principle of reasonable accommodation to find that Damons' claim of unfair discrimination was good in law. The majority disagreed. The majority held that the principle of reasonable accommodation applied to affirmative action and that it is aimed at enabling employees with disabilities to do the job that they were employed to do, i.e. aimed at placing an employee with disabilities on an equal footing with employees without disabilities as far as the operational requirements and performance of their job are concerned. The obligation to reasonably accommodate thus applies if such reasonable accommodation will make it possible for the employee to fulfil the inherent requirements of the job. Accommodation beyond this would cease to be reasonable because it would effectively require an employer to employ someone who cannot possibly perform the inherent requirement of the job. In this case, it was common cause that Damons could not meet the inherent requirements of the job of senior firefighter. It was also not contested that no amount of reasonable accommodation would enable Damons to meet the inherent requirements of physical fitness.

The majority concluded that the question of reasonable accommodation fell away once the City had successfully raised the defence that physical fitness is an inherent requirement of the job of senior firefighter.

The CC accordingly upheld the City's section 6(2)(b) defence as a complete defence against Damons' claim of unfair discrimination.

Gillian Lumb, Taryn York and Alex van Greuning

The obligation to reasonably accommodate thus applies if such reasonable accommodation will make it possible for the employee to fulfil the inherent requirements of the job ... It was also not contested that no amount of reasonable accommodation would enable Damons to meet the inherent requirements of physical fitness.

03

Employment equity, employment equity act amendments and discrimination

Unfair discrimination

Whether pay progression dependent on period of service for newly appointed public service employees constitutes unfair discrimination justiciable under section 6(1) the EEA.

Minister of Justice and Correctional Services and Others v Ramaila and Others [2021] 42 ILJ 339 (LAC)

Summary of the facts

In 2015 Mr Ramaila, an attorney, left private practice to join the Department of Justice and Constitutional Development (Department) as a state law adviser. Two additional state law advisers (the comparators) commenced employment with the Department at the same time, both of whom had previously been employed within the public service.

All three state law advisers were appointed on the same minimum salary notch, had similar job requirements and signed similar performance agreements which contained identical key results areas.

Ramaila's contract of employment provided that an employee is required to successfully complete a compulsory induction programme within 24 months of employment in the public service before the employee can qualify for an annual pay progression. This eligibility requirement was founded in three instruments: (i) a collective agreement concluded in the Public Service Coordinating Bargaining Council, (ii) the Department's performance management policy, and (iii) the incentive policy framework issued by the Minster of Public Service and Administration. All three provided that first-time appointees in the public sector would only qualify for a pay progression upon completion of a 24-month period of service.

Ramaila's performance was assessed for the period 1 April 2015 to 31 March 2016. He achieved an overall performance rating of 100%. Despite this, he did not receive an annual pay progression. The Department confirmed that the reason for this was that as a new appointee to the public service he had not yet completed a period of 24 months on his current salary level. Conversely, the two comparators who achieved the same performance rating as Ramaila were awarded an annual pay progression. They had both previously been employed in the public service and were not subject to the requirement to work 24 months before becoming eligible for a pay progression.

Ramaila referred an unfair discrimination claim to the CCMA, and thereafter the LC. Ramaila's main contention was that the disparate treatment which first-time public servants, as set out in the above three instruments, was arbitrary, irrational and constituted unfair discrimination against such new appointees in the public service. Ramaila based his claim on *"any other arbitrary grounds"* in terms of section 6(1) of the EEA.

The LC was of the view that the differentiation in treatment had to be rationally connected to the purpose or the object which it was designed to achieve, namely to "*develop and professionalise the public service*". It reasoned that the annual pay progression was aimed at rewarding employees who met an expected standard of performance and was not in recognition of their length of service. The LC concluded that the fact that Ramaila was defined as a newcomer in the public service triggered the differentiation. This attribute, while appearing to be

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Unfair discrimination*...continued*

Whether pay progression dependent on period of service for newly appointed public service employees constitutes unfair discrimination justiciable under section 6(1) the EEA.

Minister of Justice and Correctional Services and Others v Ramaila and Others [2021] 42 ILJ 339 (LAC)

neutral, had the potential to affect him adversely in a comparably serious manner in the award of pay progression. What distinguished Ramaila from his comparators was where he acquired his legal experience, namely private practice. As the differentiation was not rationally connected to the object sought to be achieved, it unfairly discriminated against Ramaila and new appointees in the public service.

Summary of the findings of the court

On appeal, the LAC identified the crux of the case as being whether Ramaila's unfair discrimination on *"any other arbitrary ground"* was justiciable under section 6(1) of the EEA.

In interpreting the meaning of *"any other arbitrary ground"*, the LAC considered the judgment in *Naidoo and Others v Parliament of the Republic of South Africa* (2020) 41 ILJ 1931 (LAC) in which the court held that the phrase *"any other arbitrary ground"* should be interpreted narrowly and be a ground analogous or of a similar kind to the grounds listed in section 6(1), and that it was not meant to be a self-standing ground. The LAC endorsed the narrow interpretation.

As Ramaila's claim of unfair discrimination was based on *"any other arbitrary ground"*, the onus was on him to prove that the period of eligibility for pay progression in relation to newly appointed employees to the public service was irrational and constituted unfair discrimination in terms of section 6(1) of the EEA.

Ramaila testified that he had been treated differently for not having been associated with the public sector environment prior to his appointment. The LAC held that the prohibition at which the EEA is directed is the differentiation which impairs the fundamental dignity of human beings or in some way affects persons adversely in a comparably serious manner. The LAC highlighted that inequality is established not simply through group-based differential treatment, but through differentiation which perpetuated disadvantage and led to the scarring of the sense of dignity and self-worth associated with membership of the group. Being newly appointed to the public service was far removed from any of the specified grounds or any grounds analogous to them.

The LAC concluded that whilst it was not surprising that the three instruments created a considerable degree of despondency because they resulted in a disparity in payment in circumstances in which Ramaila and his comparators held the same position, at the same grade and level; had the same key results areas; and achieved the same performance rating, not all wrongful conduct is justiciable under section 6(1) of the EEA as there was no self-standing ground of arbitrariness or capriciousness.

Gillian Lumb, Taryn York and Alex van Greuning

The LAC concluded that ... not all wrongful conduct is justiciable under section 6(1) of the EEA as there was no self-standing ground of arbitrariness or capriciousness.

03
Employment equity, employment equity act amendments and discrimination

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Employment Equity Amendment Bill

Key amendments to the EEA which will be effected when the Employment Equity Amendment Bill [B14-2020] is passed.

B14-2020

Summary of the proposed amendments

The Department has indicated that the signing of the Bill by the President is imminent and that the amendments will come into effect on 1 September 2023.

Designated employer

The definition of "*designated employer*" will be amended by the deletion of subparagraph (b) of the existing definition (i.e. an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to the EEA). This amendment is intended to alleviate the regulatory burden imposed by Chapter III (the provisions of the EEA relating to affirmative action, including development and implementation of employment equity plans and reporting to and submission of employment equity reports to the Department) of the EEA on small employers, irrespective of their annual turnover.

The repeal of section 14 of the EEA which deals with voluntary compliance with Chapter III of the EEA. This amendment will reduce the regulatory burden imposed by Chapter III on small employers, since all employers will be entitled to obtain a certificate of compliance under section 53 of the EEA without having to submit an employment equity report.

People with disabilities

The definition of "*people with disabilities*" will be substituted in line with the definition in the United Nations Convention on the Rights of Persons with Disabilities, 2007 namely, "'*people with disabilities' includes people who have a long-term or recurring physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially limit their prospects of entry into, or advancement in, employment, and 'persons with disabilities' has a corresponding meaning*".

Requirement in relation to psychological testing

The removal of the requirement that psychological testing and similar assessments of employees be certified by the Health Professionals Council of South Africa (HPCSA), since the HPCSA does not have capacity to fulfil this requirement.

Sectoral numerical targets and employment equity plans

The insertion of section 15A, which will deal with the determination of sectoral numerical targets. This amendment will empower the Minister to identify national economic sectors for purposes of administration of the EEA, and in turn set numerical targets for each sector, which must be done in consultation with the Employment Equity Commission. All proposals in regard to identifying sectors and setting numerical targets for sectors will have to be published to allow interested parties a period of at least 30 days to comment on the proposal.

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Employment equity, employment equity act amendments and discrimination

Employment Equity Amendment Bill*...continued*

Key amendments to the EEA which will be effected when the Employment Equity Amendment Bill [B14-2020] is passed.

B14-2020

An amendment to section 20 of the EEA dealing with the employment equity plan. The amendment will link the sectoral employment equity targets to the numerical targets set by designated employers in their respective employment equity plans.

An amendment to section 21 of the EEA dealing with the employment equity report to be submitted by a designated employer annually. The amendment will empower the Minister to make regulations in regard to the requirements of employers in submitting their employment equity reports.

An amendment to section 42 of the EEA dealing with assessment of compliance with employment equity in terms of the EEA. The amendment will align the section with the proposed new section 15A, in order for a designated employer's compliance to be measured against the sectoral numerical targets set by the Minster.

An amendment to section 53 of the EEA dealing with state contracts. The amendment will add subsection (6) to align with the proposed new section 15A, stating that the Minister may only issue a compliance certificate if the employer has complied with the sectoral targets set by the Minister for the relevant sector, or has demonstrated a reasonable ground for non-compliance.

Consultation with employees

An amendment to section 16 of the EEA which deals with consultation with employees. The amendment clarifies the consultation process between a designated employer and its employees. The aim of the amendment is that where there is a representative trade union, the designated employer must only consult with that trade union, and not with the employees. This applies to, for example, consultation in relation to the preparation and implementation of an employment equity plan, the conduct of the analysis in terms of section 19 of the EEA and the report in terms of section 21 of the EEA.

Discrimination relating to income differentials

An amendment to section 27 of the EEA dealing with income differentials and discrimination. The amendment will transfer the functions of the Employment Conditions Commission to the National Minimum Wage Commission in regard to reporting and monitoring disproportionate income differentials, in order to align the EEA with the NMWA.

Undertakings to comply and compliance orders

An amendment to section 36 of the EEA dealing with an undertaking to comply in the instance of a designated employer. The amendment will allow a labour inspector to secure a written undertaking from a designated employer to prepare an employment equity plan in terms of section 20 of the EEA.

An amendment to section 37 of the EEA dealing with compliance orders, which may be issued by a labour inspector to a designated employer. The amendment will empower the Minister to make regulations regarding the manner of service of compliance orders on employers.

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04
Immigration

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Immigration

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Immigration Act

Whether the prohibition against non-South African citizens from being admitted and authorised to be enrolled as non-practising legal practitioners is unconstitutional.

Relebohile Ceclilia Rafoneke and Others v Minister of Justice and Correctional Services and Others [2022] ZACC 29

Summary of the facts

The applicants are citizens of the Kingdom of Lesotho who studied and obtained their LLB degrees from a South African university. After graduating, they completed their articles of clerkship and practical training in South Africa, following which they passed all the required exams that placed them in a position to be admitted as attorneys of the HC in South Africa. They submitted their applications for admission. However, their applications for admission were dismissed as they were neither South African citizens nor permanent resident holders in terms of section 24(2)(b) of the Legal Practice Act 28 of 2014 (LPA).

Section 24(2)(b) of the LPA restricts the right to be admitted and enrolled as a legal practitioner in South Africa to citizens and permanent residents.

The applicants, both of whom were in possession of temporary work permits that entitled them to work in South Africa (but who are not permanent residents), sought to have section 24(2)(b) and (3) of the LPA, read with section 115, declared unconstitutional in the HC.

They argued that section 24(2)(b) violates their right to equality because it differentiates between South African citizens and permanent residents on the one hand and foreigners on the other. They contended that there is no rational relationship between the differentiation and a legitimate governmental purpose. They further argued that even if the court found that there is a nexus between the differentiation and a legitimate governmental purpose, it still amounts to discrimination on the grounds of social origin or nationality and that the discrimination is unfair and does not withstand constitutional scrutiny.

It was also contended by the applicants that section 115 of the LPA discriminates against them because foreign legal practitioners from designated countries may be admitted and enrolled to practice in South Africa without being citizens or permanent residents, whereas they, who studied and trained here, may not.

It is important to note that both applicants had met all the requirements to be eligible for admission in terms of the LPA except for the requirement that they be citizens or permanent residents.

In defence of the provisions, the three ministers who were joined as respondents (the Minister of Justice and Constitutional Development, the Minister of Home Affairs and the Minister of Labour) averred that there is a rational connection between the differentiation and a legitimate government purpose.

Immigration Act*...continued*

Whether the prohibition against non-South African citizens from being admitted and authorised to be enrolled as non-practising legal practitioners is unconstitutional.

Relebohile Ceclilia Rafoneke and Others v Minister of Justice and Correctional Services and Others [2022] ZACC 29

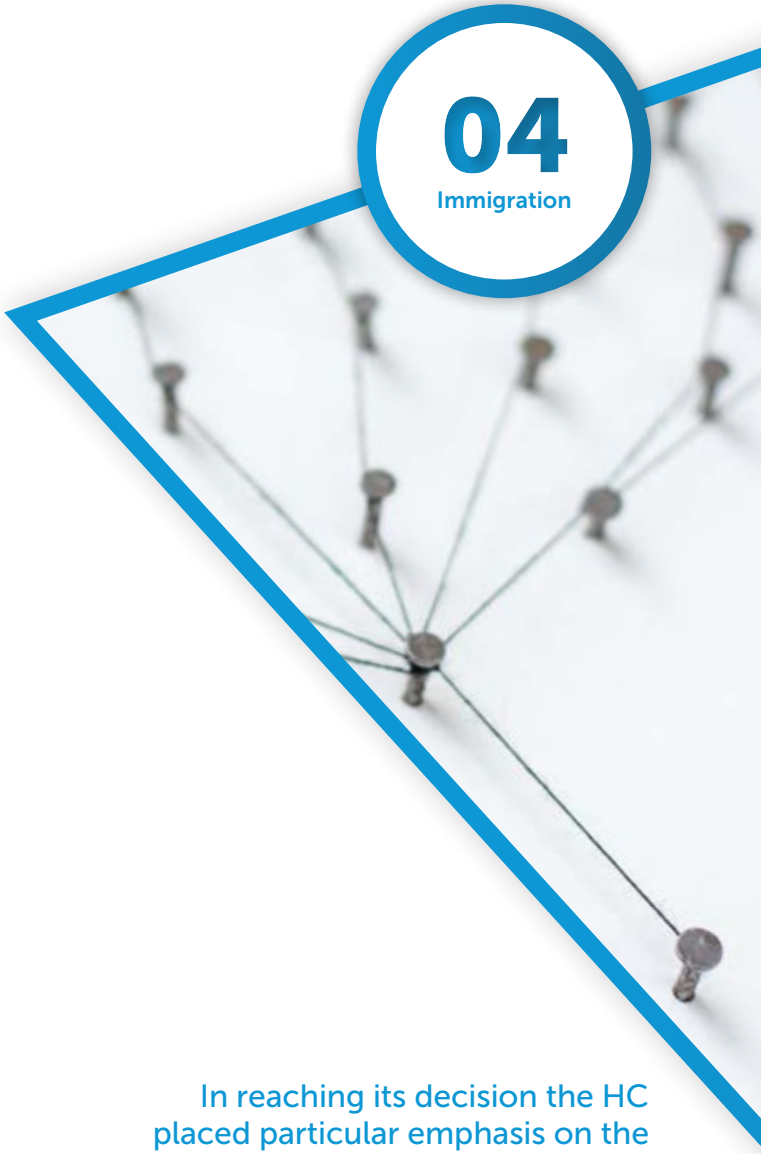
They contended that the applications should be dismissed "*because the applicants want to circumvent the employment and immigration laws*" of South Africa. The ministers referred extensively to the provisions of the Immigration Act 13 of 2002 (IA) and the Employment Services Act 4 of 2014 (ESA) to show the alleged rational connection between the impugned provisions and the Government's purpose.

High Court's findings

In reaching its decision the HC placed particular emphasis on the wording of section 24(b) of the LPA and the distinction drawn between admission by a court and enrolment to practice by the LPC. In this regard, it asked the parties to address it on the question of whether a person – citizen, permanent resident or non-citizen – could be admitted as a practitioner without being allowed to practice.

Relying heavily on the submission by the ministers, it found that the LPA should not be viewed in isolation and that the impugned provisions must be considered in conjunction with the IA and the ESA. In applying the three-stage equality clause analysis set out in *Harksen v Lane* [1997] ZACC 12, which in summary refers to: whether the provision differentiates between people or categories of people, and if it does, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation. If it does, it may amount to discrimination. The second stage refers to whether the differentiation amounts to unfair discrimination. In order to determine the second stage, a 2-stage analysis must be made which takes into account a consideration of whether the differentiation amounts to discrimination. If it is on a listed ground, discrimination is established. If not, whether there is discrimination depends on whether the ground is based on attributes and characteristics with the potential to fundamentally impair human dignity. If the differentiation amounts to discrimination it would need to be determined whether the discrimination is unfair. If the discrimination is found to be unfair, a determination would need to be made on whether the discrimination can be justified by the limitations clause. In this matter, the HC found that it was "*rational for the then LSSA and the LPC to take a stance that is in favour of catering for young South Africans or permanent residents to enter the legal profession without competition from foreigners from the rest of the world.*"

Apparently persuaded by the ministers' submissions that the applicants sought to circumvent the employment and immigration laws of the country, it found that if foreign nationals were allowed to practice in this country both the Government's objectives and these laws "*would be rendered nugatory.*"



In reaching its decision the HC placed particular emphasis on the wording of section 24(b) of the LPA and the distinction drawn between admission by a court and enrolment to practice by the LPC.

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Immigration

The HC accordingly found that section 24 of the LPA is unconstitutional to the extent that it prohibits non-citizens from being admitted and being authorised to be enrolled as non-practising legal practitioners.

Immigration Act*...continued*

Whether the prohibition against non-South African citizens from being admitted and authorised to be enrolled as non-practising legal practitioners is unconstitutional.

Relebohile Ceclilia Rafoneke and Others v Minister of Justice and Correctional Services and Others [2022] ZACC 29

Going on to apply the second and third stages of the Harksen test, it found that although section 24(2)(b) contains a prohibition against foreigners being enrolled to practice in South Africa, the discrimination was not unfair because they were entitled to work in the country and only prohibited from work that required admission as an attorney.

Possible dispensation

However, in an attempt to find an appropriate balance, the HC went on to find that there may be benefits derived by both citizens and non-citizens from a dispensation that allows applicants (including foreigners) who meet all the (other) criteria to be admitted as *"non-practising"* legal practitioners. For example, some non-citizens may want to be admitted as non-practising legal practitioners and work in South Africa as legal advisors or for non-governmental or community-based organisations. Alternatively, they may desire admission as non-practising legal practitioners while waiting to be admitted as permanent residents. On obtaining permanent resident status they could then apply for conversion from non-practising to practising legal practitioners. Moreover, the HC found that this would promote one of the objectives of the LPA – to remove unnecessary or artificial barriers for entry into the legal profession.

Having considered the statistics of unemployed graduates, the HC found that an indiscriminate and blanket bar against non-citizens who find themselves in similar positions to the applicants being admitted in the Republic of South Africa served no governmental purpose and was irrational. This is because the rate of unemployed graduates is low. The HC accordingly found that section 24 of the LPA is unconstitutional to the extent that it prohibits non-citizens from being admitted and being authorised to be enrolled as non-practising legal practitioners. However, it was fair to prohibit foreigners from being admitted and enrolled as practising legal practitioners.

Summary of the findings of the court

Unsatisfied with the HC's extent of the declaration of invalidity in that it was not the exact relief sought, the applicants sought leave to appeal to the CC. The respondents opposed leave to appeal.

Immigration Act*...continued*

Whether the prohibition against non-South African citizens from being admitted and authorised to be enrolled as non-practising legal practitioners is unconstitutional.

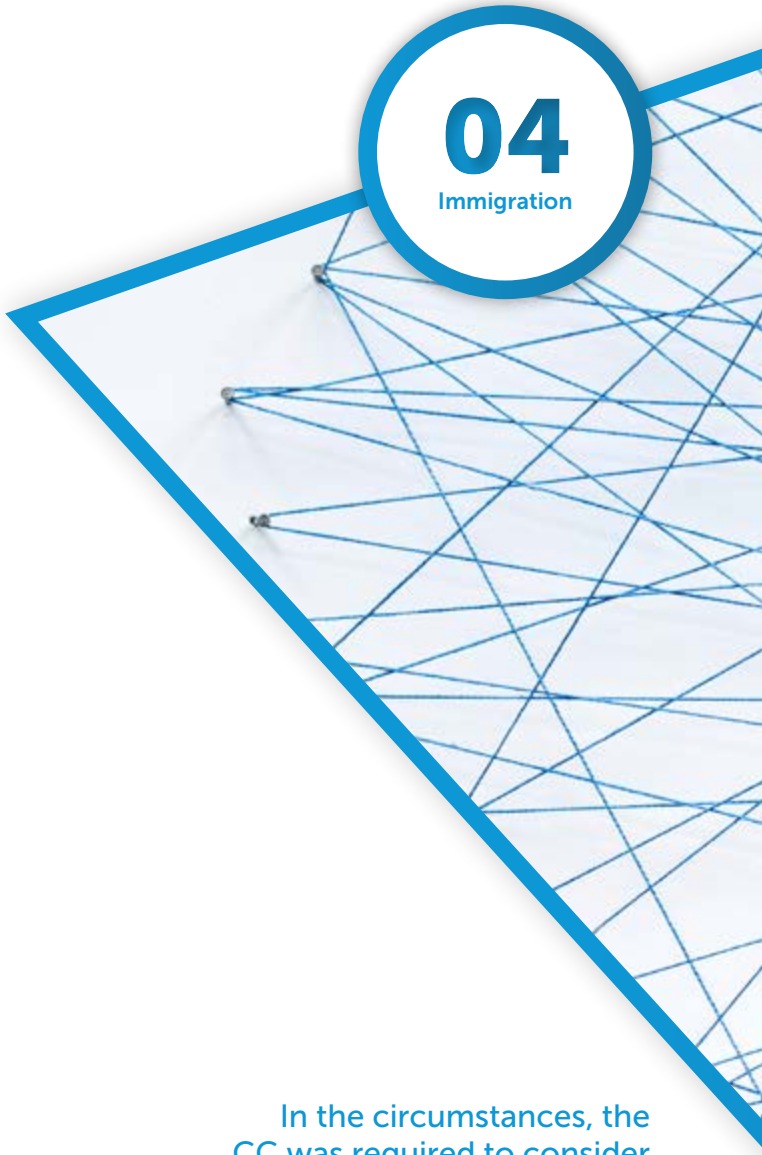
Relebohile Ceclilia Rafoneke and Others v Minister of Justice and Correctional Services and Others [2022] ZACC 29

In dealing with the applicants' leave to appeal, the CC considered the issues raised by the Minister of Justice and Correctional Services (Minister). The Minister argued that the differentiation imposed by the impugned section reserved access to the legal profession for South African citizens and permanent residents and protected the public against unqualified legal practitioners through the administration of justice. In the circumstances, the CC was required to consider whether this differentiation had a rational connection to its purpose. If the answer to this question was no, then there would be a violation in terms of section 9(1) of the constitution (equality). However, even if there was a rational connection, the limitation could still be discriminatory, and as such, the CC was also required to determine whether discrimination had taken place, and if so, whether the discrimination was unfair.

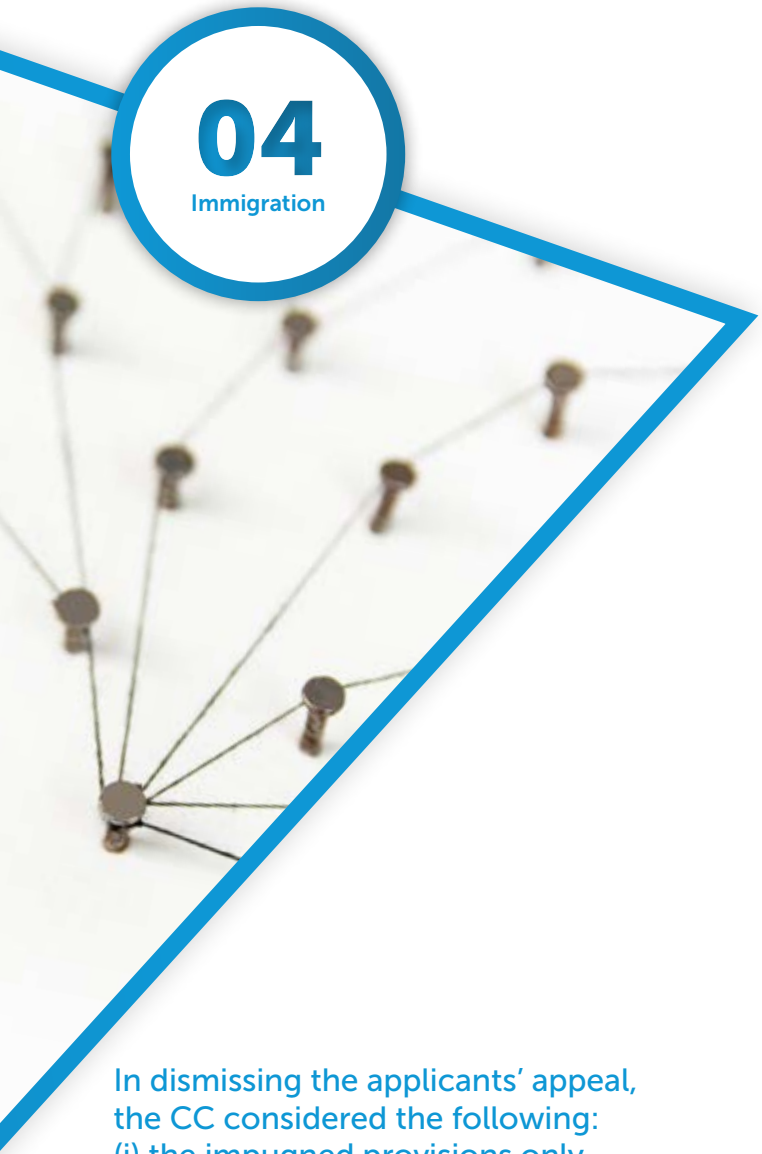
In their respective submissions, the applicants contended, *inter alia*, that an absolute bar was created against foreign nationals to the legal profession notwithstanding that they were permitted to live and work in South Africa by means of a visa or permit. This had no rational connection to the purpose sought to be achieved because even if they were allowed to work in South Africa in accordance with the IA, they were still not eligible for admission as attorneys due to the requirements set out in the LPA. The relief sought by them was therefore not one of requiring all foreign nationals' authorisation to be admitted as attorneys, but for those foreign nationals who were legally authorised to live and work in South Africa but who could not do so due to not qualifying for permanent residency. The applicants contended that this amounted to direct discrimination on the listed ground of social origin, and on an analogous ground based on their nationality and citizenship (with attributes and characteristics that have the potential to impact their dignity). This limitation was therefore not justifiable.

Minister's submission

In the Minister's submissions, he contended, *inter alia*, that no blanket ban was created against foreign nationals to admission, as the prohibition only applied to foreign nationals who were not permanent residents, and that the LPA should be read with the IA and ESA, which regulate the employment of foreign nationals. The limitation is therefore in line with the Government's obligations to ensure that employment and immigration laws are not flouted by foreign nationals. The Minister further argued that the applicants should have been alive to the admission requirements for the attorney's profession, and as such,



In the circumstances, the CC was required to consider whether this differentiation had a rational connection to its purpose.



04
Immigration

Immigration Act*...continued*

Whether the prohibition against non-South African citizens from being admitted and authorised to be enrolled as non-practising legal practitioners is unconstitutional.

Relebohile Ceclilia Rafoneke and Others v Minister of Justice and Correctional Services and Others [2022] ZACC 29

they accepted the risk of not meeting these requirements. The limitation imposed on foreign nationals is accordingly fair, consistent, and justifiable in terms of section 9 of the Constitution. In addition, the Minister contended that the applicants failed to meet the test outlined in *Harksen* and failed to show that they were a vulnerable group (they were employed and suffered no hardship).

Constitutional Court's findings

The CC found that section 9(3) and (4) of the Constitution had not been violated and in dismissing the applicants' appeal, the CC considered the following: (i) the impugned provisions only restricted the applicants from being admitted as attorneys in South Africa, but did not restrict them from providing legal services that did not require admission; (ii) the applicants were eligible for employment in other capacities and were not left destitute; (iii) they could enjoy the use of their legal education; and (iv) this limitation did not amount to unfair discrimination as this right was not constitutionally afforded to foreign nationals.

In addition to dismissing the applicants' application for leave to appeal, the CC also refrained from confirming the HC's order of constitutional invalidity.

Hedda Schensema and Taryn York

In dismissing the applicants' appeal, the CC considered the following: (i) the impugned provisions only restricted the applicants from being admitted as attorneys in South Africa, but did not restrict them from providing legal services that did not require admission ...

04
Immigration

Immigration Act

Was the Minister of Home Affairs' decision not to uplift a foreign national's status as a prohibited person reasonable?

Mukonga v Minister of Home Affairs and Another [2022] JOL 54422 (GP)

Summary of the facts

This is a review application in which the applicant, Mr Mukonga, sought an order to set aside the DHA's decision prohibiting him from remaining in the Republic of South Africa.

Mukonga is a Congolese male who arrived in South Africa on an asylum seeker permit. In March 2013, he married a South African citizen and applied for a relative's or spousal visa. His application was granted, and he was issued with a relative's visa that was valid until May 2015. Mukonga applied for the renewal of his visa, which was granted until March 2017. During 2016, Mukonga once again applied for the renewal of his visa, but his application was rejected as he committed a criminal offence in 2013.

Mukonga was accordingly declared a prohibited person under the Immigration Act 13 of 2002 (Act) by the DHA and was ordered to leave South Africa. In 2020, Mukonga was once again ordered to leave South Africa. He refused to leave, and subsequently challenged this order. Mukonga then procured another visa (which was found to be fraudulent) and departed and re-entered South Africa by way of immigration documentation that was either fraudulently or irregularly procured.

Mukonga tried to uplift his status as a prohibited person, but the DHA refused his request. The DHA also ordered Mukonga to leave South Africa. Disgruntled with this decision, Mukonga lodged an appeal with the Minister of Home Affairs (Minister). His appeal was dismissed.

Unsatisfied with the Minister's decision, Mukonga lodged a review application in the HC, firstly seeking to review his status as a prohibited person in terms of the Act, and secondly to review the decision wherein he was required to leave South Africa. Mukonga submitted numerous facts in support of his application, which included but were not limited to the fact that he was married to a South African citizen (and had a family in South Africa), he was the victim of a fraudster in the procurement of his visa, and the fact that his criminal record had not been expunged was not a valid reason for his deportation.

Mukonga tried to uplift his status as a prohibited person, but the DHA refused his request.

Immigration Act*...continued*

Was the Minister of Home Affairs' decision not to uplift a foreign national's status as a prohibited person reasonable?

Mukonga v Minister of Home Affairs and Another [2022] JOL 54422 (GP)

Summary of the findings of the court

The HC specifically dealt with each of Mukonga's grounds of review and, in summary, held that no error was committed by the Minister in that:

- the Minister applied the law correctly in terms of section 29(1)(f) of the Act;
- Mukonga did not deny that he was found in possession of a fraudulent visa or identity document. Mukonga also failed to provide any evidence in support of his allegation that he was the victim of a fraudster; and
- there was no merit in his claim that the failure to have his criminal record expunged was not a valid reason to deport him as section 29(1)(b) of the Act makes it clear that: *"anyone against whom a conviction has been secured in the Republic is a prohibited person"*.

The HC further considered whether, in dismissing Mukonga's appeal, the Minister was required to take the Constitution into account. In this regard, the HC held that the Minister had provided reasons for his decision and had therefore complied with the judgment of *National Lottery Board v South African Education and Environment Project* [2012] (4) SA 504 (SCA).

In conclusion, the HC held that in light of Mukonga's criminal record, he was regarded as a prohibited person in terms of the Act. In addition, Mukonga was previously ordered to leave South Africa, which order he failed to comply with, and he continuously contravened section 49(1)(a) and (b) of the Act. Based on these factors, there were no valid grounds upon which to find fault with the Minister's decision to dismiss Mukonga's appeal. His application was therefore dismissed.

Mukonga's status as a prohibited person was therefore upheld and, as such, his continued presence in South Africa was unlawful.

Hedda Schensema and Taryn York

The HC further considered whether, in dismissing Mukonga's appeal, the Minister was required to take the Constitution into account.

04
Immigration

In considering the constitutionality ... , the HC considered the right to dignity, the rights of children to parental care and protection against neglect, and the right to equality.

Immigration Act

Whether the provisions contained in the Immigration Act 13 of 2002 and the Immigration Act Regulations are unconstitutional insofar as they require foreign nationals who are parents and caregivers of South African children to cease working and leave South Africa when their spousal relationship ends.

RA and Others v The Minister of Home Affairs and Others [2022] 3 All SA 918 (WCC)

Summary of the facts

This matter related to various applications in terms of which the applicants sought orders declaring certain sections of the Immigration Act 13 of 2002 (Act), read together with the Immigration Regulations, to be inconsistent with the Constitution and therefore unconstitutional to the extent that they require foreigners who are parents and caregivers of South African children to cease working and leave South Africa when their spousal relationships with their South African spouses no longer subsist.

Extensive background information was provided to the HC in relation to each applicant's personal circumstances and history in South Africa, which information is set out in the judgment. What was common to all the applicants was that they had parental responsibilities in relation to children born out of their relationships with South African spouses. Furthermore, the spousal relationships of all the parties, with the exception of one party, had all terminated.

Summary of the findings of the court

In considering the constitutionality of the above, the HC considered the following: the right to dignity, the rights of children to parental care and protection against neglect, and the right to equality.

In relation to the right to dignity, reference was made to *S v Makwanyane* [1995] (3) SA 391 (CC) where the CC recognised the importance of the right to dignity and life as foundational to the Constitution. Likewise, in *Minister of Home Affairs and Others v Watchenuka and Ano* [2004] (4) SA 326 (SCA), the SCA held that because dignity has no nationality and is inherent in all persons, both citizens and non-citizens alike, whilst a foreigner is in South Africa, their dignity is to be protected and respected.

In respect of the rights of children, reference was made to section 28 of the Constitution, which provides that every child has the right to parental (or family) care. In addition, this section also protected children from maltreatment and neglect. In every matter concerning the child, their best interests should be held to be of paramount importance. The legislative framework governing children also maintains the inherent right to dignity of children and their parents.

Immigration Act*...continued*

Whether the provisions contained in the Immigration Act 13 of 2002 and the Immigration Act Regulations are unconstitutional insofar as they require foreign nationals who are parents and caregivers of South African children to cease working and leave South Africa when their spousal relationship ends.

RA and Others v The Minister of Home Affairs and Others [2022] 3 All SA 918 (WCC)

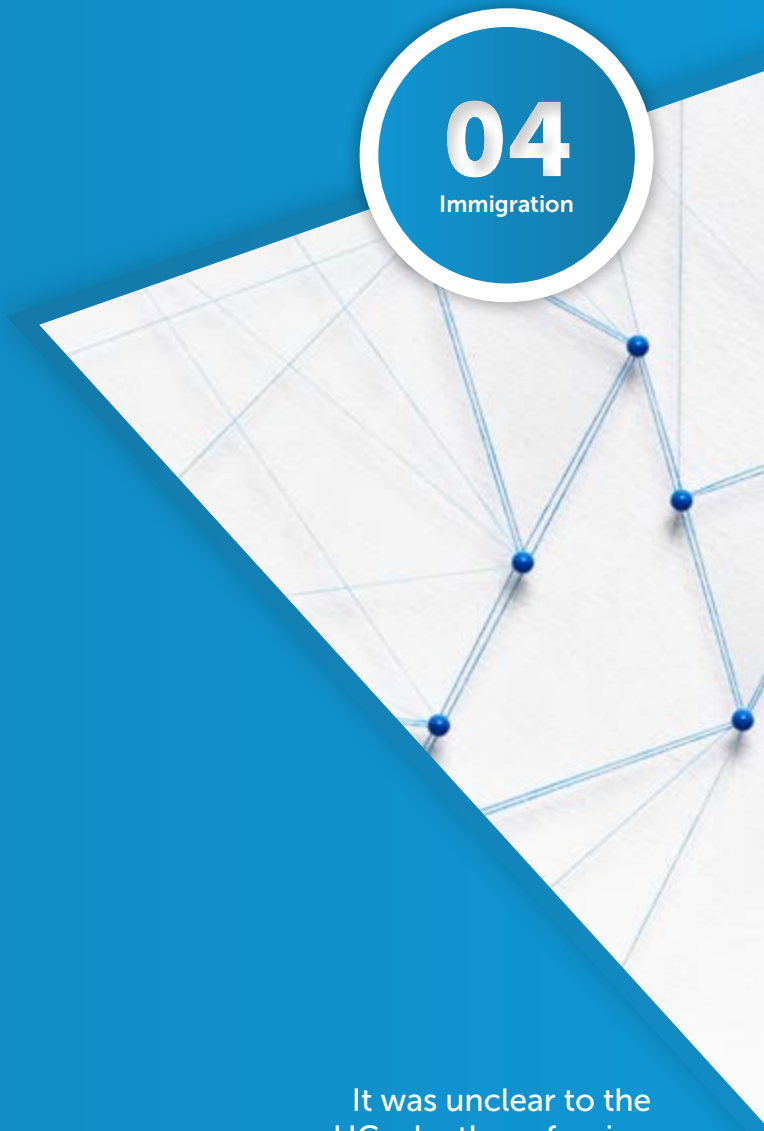
Accordingly, the HC held that the effect of the legislative provisions in the Act resulted in a violation of the applicants' constitutional rights to dignity as well as those of their children.

Further challenges were raised in terms of the right to equality. In this regard, the applicants raised grounds of unfair discrimination based on their marital status. The DHA and the Minister of Home Affairs, amongst other parties connected to the DHA, denied that there was any form of unfair discrimination and argued that there is a legitimate legislative purpose to section 11(6)(a) of the Act. In terms of this section, a spousal visa (issued to a foreigner) would only be valid during the existence of a good faith spousal relationship. According to the DHA, this provision was accordingly aimed at preventing the abuse of the immigration system by foreigners with the intention to enter into sham marriages with South African citizens. The HC was not persuaded that the applicants had made out a separate case that they had been unfairly discriminated based on their marital status as their challenge ultimately related to their parental status.

The HC further considered the limitation analysis and, in this regard, relied on the CC judgment of *Nandutu v Minister of Home Affairs* [2019] (5) SA 325 (CC) where the CC considered the factors which are set out in the limitation clause in some detail. In adopting the CC's reasoning, the HC considered the limitations placed on the applicants' right to dignity. The HC ultimately concluded that the DHA failed to demonstrate why it is necessary for foreign parents (such as the applicants) to leave South Africa (leaving behind their children) to regularise their status. It was unclear to the HC why these foreign nationals could not apply for a change of their status from within South Africa.

Inconsistent with the Constitution

Since the DHA failed to show that the limitations concerned were reasonable and justifiable, it follows that insofar as the Act, (and the limitations in issue), are inconsistent with the Constitution, they should be declared to be unconstitutional.



It was unclear to the HC why these foreign nationals could not apply for a change of their status from within South Africa.

... sections 10(6), 11(1)(b) and 18(2) of the Act, read together with Regulations 9(5) and 9(9), were held to be inconsistent with the Constitution ... The above declaration of invalidity was suspended for a period of 24 months from the date of the order (7 June 2022) to allow Parliament to remedy the inconsistencies.

Immigration Act*...continued*

Whether the provisions contained in the Immigration Act 13 of 2002 and the Immigration Act Regulations are unconstitutional insofar as they require foreign nationals who are parents and caregivers of South African children to cease working and leave South Africa when their spousal relationship ends.

RA and Others v The Minister of Home Affairs and Others [2022] 3 All SA 918 (WCC)

In arriving at its order, the HC held that the proper principle to be adopted is a "'*less is more*' *i.e. curative approach*" which was aimed at adopting a minimal reading-in to render the Act constitutionally compliant. In the circumstances, sections 10(6), 11(1)(b) and 18(2) of the Act, read together with Regulations 9(5) and 9(9), were held to be inconsistent with the Constitution, and invalid to the extent that they:

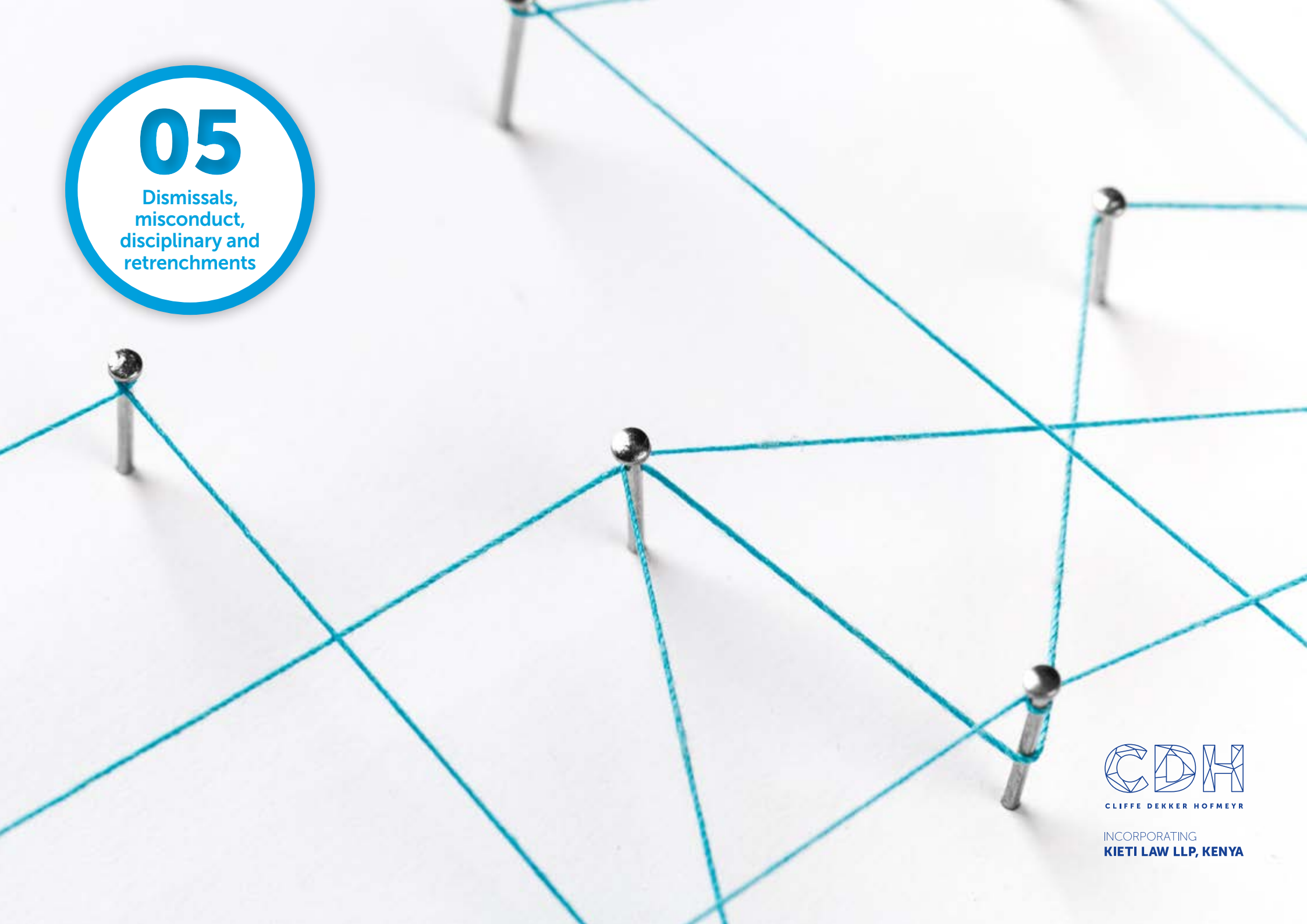
- require a foreigner (holder of a spousal visa in terms of section 11(6) of the Act) who still has parental responsibilities and rights in terms of the Children's Act 38 of 2005 (Children's Act) (after the termination of a spousal relationship), to stop working in and leave South Africa;
- require such a foreigner to submit an application for a change in their status from their country of origin; and
- do not allow such a foreigner, who may be eligible for either a visitor's or relative's visa, to conduct work in South Africa in order to discharge their parental responsibilities and rights in terms of the Children's Act in terms of a child who is a South African citizen or permanent resident.

The above declaration of invalidity was suspended for a period of 24 months from the date of the order (7 June 2022) to allow Parliament to remedy the inconsistencies.

Hedda Schensema and Taryn York

05

Dismissals, misconduct, disciplinary and retrenchments



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05

Dismissals, misconduct, disciplinary and retrenchments

The LAC noted, an employee cannot be silenced in instances of wrongdoing: *"If permission is to be obtained first, any dishonest conduct will never see the light of day."*

Misconduct

Can an employee be charged with misconduct for breaching a confidentiality agreement by disclosing wrongdoings of their employer?

Jacobs v KwaZulu-Natal Treasury [2022] 3 BLLR 269 (LAC); [2022] 43 ILJ 1286 (LAC)

Summary of the facts

The employee was required to form part of a selection panel to recommend a candidate for the position of assistant manager. All members of the panel were required to sign a disclosure and confidentiality agreement pertaining to the selection process.

During the selection process, the selection panel verbally agreed to recommend a particular candidate for the position, however, the selection panel minutes reflected another candidate. The employee signed the minutes even though she knew that they did not reflect the correct status of what happened during the deliberations of the selection panel.

Years later, the employee was approached to give evidence at an arbitration relating to the selection process. In the form of an affidavit, the employee testified that the minutes were amended and were not a true reflection of what was discussed during the interview deliberations.

The employer charged the employee with misconduct for disclosing confidential information without authorisation and for submitting a false statement.

The employee was dismissed and referred an unfair dismissal dispute, where it was found that the dismissal was procedurally and substantively fair. The arbitrator found that the employee was dishonest when she stated that the minutes were amended. The arbitrator further found that the employee breached the confidentiality agreement when she did not seek permission to disclose the information attested to in the affidavit. The arbitrator's decision was upheld upon review in the LC. The matter then went on appeal to the LAC.

Summary of the findings of the court

In the LAC, it was found that the employee did not make a false statement when she said that the minutes were amended.

Furthermore, the court found that the employee did not breach the confidentially agreement by tendering evidence at the arbitration. According to the court, it would be a great travesty of justice if it were to be found that the employee breached the confidentiality agreement by disclosing irregularities that were committed by the selection panel. The court also held that an employer cannot invoke a confidentiality agreement to conceal wrongdoings in the workplace and that an employee who has signed such an agreement does not require their employer's permission to reveal wrongdoings in the workplace if required to do so in legal proceedings.

As the LAC noted, an employee cannot be silenced in instances of wrongdoing: *"If permission is to be obtained first, any dishonest conduct will never see the light of day."*

Jean Ewang, Thato Makoaba and Imraan Mahomed

05

Dismissals, misconduct, disciplinary and retrenchments

Retrenchments

What constitutes a reasonable alternative to retrenchment?

Reeflords Property Development (Pty) Ltd v De Almeida [2022] 6 BLLR 530 (LAC)

Summary of the facts

The employee was employed in the position of operations co-ordinator in the sales department. Upon her return from maternity leave, the employee was called to a meeting where her seniors proposed that she be transferred from the sales department to the development department. In a subsequent meeting, the employee was advised that some of her work functions were allocated to the new head of the sales department. The employee was further advised that despite her lack of marketing experience, she was to be removed from operations and was to undertake marketing functions.

The employee filed a grievance, complaining that the proposed transfer would amount to a demotion. The employee proposed that she be reinstated into her position in operations on the same terms and conditions as she had enjoyed prior to her maternity leave. The grievance was not resolved.

The employer proceeded to issue a section 189(3) notice, informing the employee of her possible dismissal due to operational reasons, as the new structure would render her current position redundant. The notice further provided that to avoid her retrenchment, the employee could be employed in the position of marketing executive.

At the second consultation meeting, an agreement was reached where the employee would be employed as a marketing executive subject to two conditions, namely; that the employee received training in marketing and that she be paid a transport allowance.

An employment contract for the marketing executive position was drawn up and provided to the employee. The contract, however, did not contain any of the conditions agreed to during the second consultation meeting. On this basis, the employee addressed a letter to the employer, refusing to accept the alternative position. The employer did not respond to the letter.

The employee was ultimately retrenched. Aggrieved with her dismissal, she referred an automatically unfair dismissal dispute, alternatively an unfair dismissal dispute. The LC found that the employee did not prove the claim of an automatically unfair dismissal. With respect to the retrenchment claim, the court found that, on the probabilities, if the training and travel

The LAC agreed with the LC, holding that consultations in the context of a contemplated retrenchment must be genuine and the parties must engage with the purpose of seeking alternatives to avoid dismissal.

Retrenchments*...continued*

What constitutes a reasonable alternative to retrenchment?

Reeflords Property Development (Pty) Ltd v De Almeida [2022] 6 BLLR 530 (LAC)

allowance had been included in the written terms and conditions of the marketing executive post offered, it would not have been rejected as an alternative to retrenchment and there would have been no need to retrench the employee. The employee's retrenchment was found to be substantively unfair, as the employer had failed to establish that the employee had unreasonably refused to accept alternative employment and accordingly her dismissal could have been avoided.

The employer proceeded on appeal to the LAC.

Summary of the findings of the court

The LAC agreed with the LC, holding that consultations in the context of a contemplated retrenchment must be genuine and the parties must engage with the purpose of seeking alternatives to avoid dismissal. At the second consultation meeting, the employer presented an alternative, which was accepted by the employee, but on condition that training was provided and that the travel allowance was paid. The LAC similarly reasoned that if the position had been offered to the employee, it would have constituted a reasonable alternative to retrenchment. The dismissal was found to be both procedurally and substantively unfair.

Imraan Mahomed, Jean Ewang, Mbulelo Mango and Mu'aaz Badat

The LAC similarly reasoned that if the position had been offered to the employee, it would have constituted a reasonable alternative to retrenchment. The dismissal was found to be both procedurally and substantively unfair.

05

Dismissals, misconduct, disciplinary and retrenchments

Retrenchment

Employment equity considerations and a meaningful retrenchment consultation process.

Solidarity obo Members v Barloworld Equipment Southern Africa and Others [2022] 43 ILJ 1757 (CC)

Summary of the facts

The company embarked on a section 189A process as result of factors occasioned by the COVID-19 pandemic. Various consultation meetings were held, and parties were unable to reach consensus regarding the selection criteria used by the company, particularly the consideration of transformation as a criterion. The company proceeded to retrench employees in line with the discussed selection criteria, notwithstanding the unions' objections.

Two unions approached the LC for relief in terms of section 189A(13) of the LRA, arguing that the company failed to meaningfully consult regarding selection criteria and thus did not comply with a fair procedure. The LC held that the issue of selection criteria was a substantive issue rather than a procedural one, thus rendering the relief sought under section 189A(13) inappropriate.

Summary of the findings of the court

Solidarity, one of the unions, petitioned the LAC for leave to appeal, which was refused. The case was eventually heard by the CC, which held that the power of the LC to adjudicate the procedural fairness of retrenchment consultations is limited to the "*fair procedure*" that is prescribed in sections 189 and 189A of the LRA, which give effect to section 188.

The CC also reaffirmed that the purpose of consultations is to seek consensus and there is no requirement that the parties should reach agreement. The court confirmed that for a consultation process to be meaningful, the employer must show willingness to respond to requests for information; seriously consider proposals made by consulting parties; and provide adequate reasons for the rejection of proposals. Approaching the consultation with a pre-determined outcome and failure to provide reasons for rejecting representations will render the consultation process not meaningful.

The CC found that meaningful consultations were held between the parties and that the failure to reach consensus/agreement did not necessarily render the consultation process unmeaningful. Furthermore, since the issue of transformation as a selection criterion is a part of employment equity in the workplace and it was disclosed that this would form part of the selection criteria, the consultations were indeed meaningful.

What the case did not address is whether employment equity as a selection criterion is fair in section 189 proceedings. This is a debate which has been left to be determined on another day.

Imraan Mahomed, Jean Ewang and Thato Makoaba

Since the issue of transformation as a selection criterion is a part of employment equity in the workplace and it was disclosed that this would form part of the selection criteria, the consultations were indeed meaningful.

06

New harassment code

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06

New harassment code

Harassment in the workplace

Evaluating the various forms of harassment and understanding the nature and application of the new Code of Good Practice on the prevention and elimination of harassment in the workplace.

Code of Good Practice on the prevention and elimination of harassment in the workplace in terms of section 54(1)(b) of the EEA, 18 March 2022

The Code also extends an employer's obligation to ensure, insofar as reasonably practicable, a safe working environment, which includes an environment free from all forms of harassment, including violence and psychological harm.

Summary of the Code

The Code of Good Practice on the prevention and elimination of harassment in the workplace (Code) aims to eliminate all forms of harassment in the workplace by providing guidance on the policies and procedures to be implemented if harassment occurs.

The Code recognises various forms of harassment that may amount to unfair discrimination and, unlike its predecessor (the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace) issued in 2005 (2005 Code), the Code ventures beyond the prevention of only sexual harassment.

The scope and ambit of the Code is broad, and employers must understand the nature and application of the Code to mitigate the risk of vicarious liability in terms of section 60 of the EEA.

The Code also extends an employer's obligation to ensure, insofar as reasonably practicable, a safe working environment, which includes an environment free from all forms of harassment, including violence and psychological harm.

Below, we highlight various forms of harassment recognised by the Code, as well as the obligations placed on employers and employees to eliminate harassment in the workplace.

The Code applies to employers, employees, volunteers, interns, job applicants and seekers, contractors, clients, suppliers, and/or anyone that engages with a business. The definition of a workplace is also broad and includes any location where an employee is expected to conduct work or is within a space that the employer has control over or has arranged, including public and private spaces at the employer's workplace, work travel and accommodation, virtual and electronic platforms, employer arranged transport, and workspaces outside of the employer's premises.

The Code defines harassment as:

- unwanted conduct that impairs dignity;
- unwanted conduct that creates a hostile working environment for one or more employees or is calculated to or has the effect of inducing submission by actual or threatened adverse consequences; and
- Unwanted conduct that is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA, including both listed grounds and arbitrary grounds.

As alluded to above, the Code deals with a broader spectrum of harassment than was the case previously. The Code recognises the following types of harassment:

- physical harassment, which includes physical attacks and violence, simulated or threatened violence, and gestures;

Harassment in the workplace*...continued*

Evaluating the various forms of harassment and understanding the nature and application of the new Code of Good Practice on the prevention and elimination of harassment in the workplace.

Code of Good Practice on the prevention and elimination of harassment in the workplace in terms of section 54(1)(b) of the EEA, 18 March 2022

- intimidation, which means intentional behaviour that would cause a person of ordinary sensibilities to fear injury or harm;
- mobbing, which means harassment by a group of persons targeted at one or more individuals;
- psychological abuse, which includes emotional abuse and behaviour having serious negative psychological consequences for a complainant; and
- covert/passive aggressive harassment, which includes:
  - negative gossiping or joking at someone's expense;
  - sarcasm;
  - condescending eye contact, facial expressions or gestures;
  - mimicking to ridicule;
  - deliberately causing embarrassment or insecurity;
  - invisible treatment and marginalisation;
  - social exclusion and professional isolation;
  - deliberately sabotaging someone's happiness, dignity, well-being, success or career performance;
  - verbal bullying, which include threats, shaming, hostile teasing, insults, constant negative judgement, constant criticism, language that is considered racist, sexist, or LGBTQIA+ phobic language;
  - online harassment, which is harassment committed, assisted or aggravated in part or fully by the use of communications technology; or
  - bullying, which is the abuse of coercive power by an individual or group of individuals in the workplace.

The above is a non-exhaustive list of forms of harassment that are recognised by the Code.

Sexual harassment

In terms of sexual harassment, the 2005 Code explains that sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

- whether the harassment was on prohibited grounds of sex and/or gender and/or sexual orientation;
- whether the sexual conduct was unwelcome;
- the nature and the extent of the sexual conduct; and
- the impact of the sexual conduct on the employee.

CDH Conversations

CLICK HERE
to listen to our podcast on the Code of Good Conduct on the Elimination of Harassment in the Workplace.

06

New harassment code

The Code also includes racial, ethnic and social origin harassment.

Harassment in the workplace*...continued*

Evaluating the various forms of harassment and understanding the nature and application of the new Code of Good Practice on the prevention and elimination of harassment in the workplace.

Code of Good Practice on the prevention and elimination of harassment in the workplace in terms of section 54(1)(b) of the EEA, 18 March 2022

The expanded test for sexual harassment takes into account the following factors while still retaining the core test of the 2005 Code:

- unwanted/unwelcome conduct of a sexual nature, whether direct or indirect, that the perpetrator knows or ought to have known was not welcome;
- offensive to the complainant;
- made the complainant feel uncomfortable or caused harm or inspired the reasonable belief that the complainant may have been harmed;
- may have interfered with the work of the complainant, although it need not necessarily have done so;
- violated the rights of an employee;
- the unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual; and
- whether the sexual conduct was unwanted or unacceptable.

Racial harassment

The Code also includes racial, ethnic and social origin harassment. Racial harassment is defined as a form of unfair discrimination prohibited by section 6(1) of the EEA, which relates to a person's membership or presumed membership of a group identified by one or more of the listed grounds of discrimination or a characteristic associated with a group.

The test for racial harassment is assessed objectively, with reference to a reasonable test in keeping with the values of the constitutional order. An employer must assess on a balance of probabilities, whether conduct complained of relates to race, ethnicity or social origin.

Racial harassment can take various forms: language (e.g. racist jokes/ comments), written (e.g. racially offensive written or visual material), behaviour (e.g. hostility towards a racial group), spatial (marginalisation) and physical (e.g. threatening behaviour that intimidates a person or creates a hostile working environment).

What steps should employers take?

In light of the introduction of the Code, employers are advised to take the following steps:

- Undergo the necessary risk assessment, in order for the employer to identify the historical and current risks for harassment in the workplace and identify the manner in which the business will address the risks identified.
- Review policies and update company policies, which includes harassment policies, disciplinary codes and procedures and workplace relationship policies to ensure that they align with the Code.

Harassment in the workplace*...continued*

Evaluating the various forms of harassment and understanding the nature and application of the new Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace.

Code of Good Practice on the prevention and elimination of harassment in the workplace in terms of section 54(1)(b) of the EEA, 18 March 2022

- Provide employees with training and create awareness, ensure that employees are educated about their rights and obligations in terms of the Code and make reporting mechanisms clear.
- Establish resources to provide the business with the necessary support, such as a committee that will investigate claims of harassment and ensure that the committee has sufficient capacity and training.

In terms of the Code, employers are required to establish procedures for dealing with harassment. The procedures can be both formal and informal.

Informal procedures may be appropriate in cases of less serious harassment, and the complainant may prefer to remain anonymous. Formal procedures should include processes for the submission of a grievance when a complaint is lodged. Formal procedures should also include timeframes and the right to approach the CCMA if the complainant is not satisfied with the outcome of the internal process.

In terms of the Code, an employer is obliged to act immediately after becoming aware of harassment. The employer should inform the complainant of the procedures available to them to deal with the harassment. This includes explaining the procedures (formal or informal) and informing the complainant that there will be no adverse consequences if they choose a particular process.

The employer should also offer advice, counselling and assistance where reasonably practicable and in accordance with the Code. The Code encourages employers to provide employees with additional paid sick leave and to refer them for medical trauma counselling in cases of harassment, and where the harassment results in the employee being ill for longer than two weeks, they may be entitled to benefits in terms of section 20 of the Unemployment Insurance Act 63 of 2021.

Employers should adopt a harassment policy that complies with the Code. If an employer fails to take the necessary steps to eliminate harassment, they will be deemed to be in contravention of the EEA and can be held liable to pay damages or compensation to the victim. An employer that fails to act can be held liable for secondary harassment or held vicariously liable (on the part of the person who committed the harassment). An employer will not be liable if they can prove that they did all that was reasonably practicable to ensure that there was no harassment in the workplace and took adequate steps to respond to and eliminate harassment when a complaint has come to its attention.

Bongani Masuku, Fezeka Mbatha and Katekani Mashamba

The employer should also offer advice, counselling and assistance where reasonably practicable and in accordance with the Code.

07

Section 197, restraints and unlawful competition

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07

Section 197, restraints and unlawful competition

Restraint of trade agreements

Protection of confidential information from competitors.

Kiron Interactive (Pty) Ltd v Netshishivhe (11014/2022) [2022] ZAGPJHC 328 (13 May 2022)

Summary of the facts

Kiron Interactive (the Company) was established in 2001 and claims to be a tier-one provider in the virtual sports betting industry. The employee was employed by the Company on 31 August 2018 as an East Africa account manager. As part of the employee's contract of employment, the parties agreed that the employee would use the Company's confidential information only in the interests of the Company and only in the proper course and scope of his duties, as contained in the employment agreement.

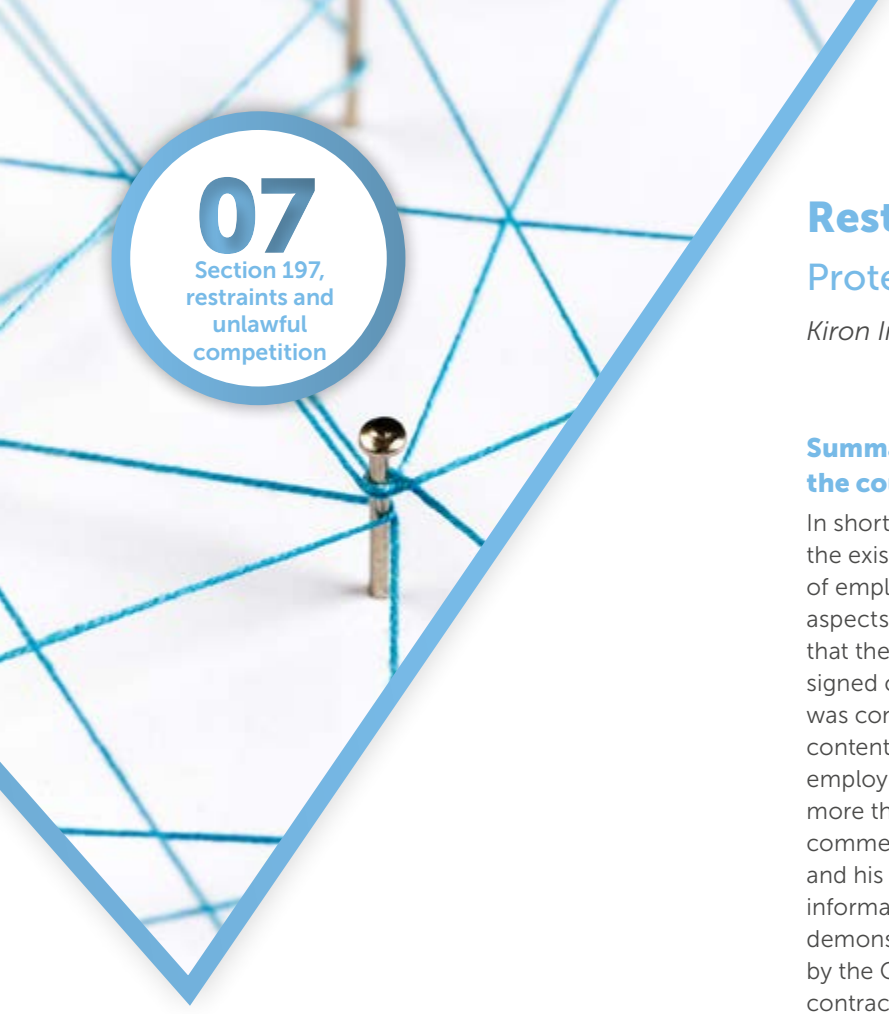
The Company argued that the employee bound himself for a period of 12 months from the termination date of employment to not directly or indirectly be employed by any person or entity within the virtual sports industry, or have an interest, either directly or indirectly, in any capacity in any trade or business within the industry.

On 26 January 2022 the employee resigned with effect from 28 February 2022. The employee subsequently took up employment with Global Bet, a business in the same industry as his former employer. Upon discovering this, the Company requested an undertaking from the employee that he would resign from Global Bet and comply with his restraint of trade agreement in regard to any future employment. The employee failed to furnish such an undertaking, which resulted in the initiation of urgent proceedings in the HC.

The Company held that if a rival competitor came into possession of the information, it may be used to unlawfully compete with the Company and the employee's employment with Global Bet would give rise to this scenario.

The employee, however, denied having signed the contract containing the restraint of trade and averred that his stance during employment negotiations was that the Company either employ him without any applicable restraint of trade or not employ him at all. The employee further denied that he signed the contract and tried to point out discrepancies insofar as the dates in the contract were concerned. Lastly, he denied that his new employment at Global Bet posed a risk to the Company as he would not be in a position to use the information of the Company. The employee was situated in account management, which had no connection to the position he occupied at the Company and no relation to the information of the Company that he previously had access to.

The Company held that if a rival competitor came into possession of the information, it may be used to unlawfully compete with the Company and the employee's employment with Global Bet would give rise to this scenario.



07
Section 197, restraints and unlawful competition

Restraint of trade agreements*...continued*

Protection of confidential information from competitors.

Kiron Interactive (Pty) Ltd v Netshishivhe (11014/2022) [2022] ZAGPJHC 328 (13 May 2022)

Summary of the findings of the court

In short, the dispute concerned the existence of the contract of employment and/or certain aspects thereof. The HC held that the employee's denial of the signed contract of employment was contrived. The employee's contention that because the employment contract was signed more than two months after he commenced permanent employment and his surname was misspelled, with informal insertions to correct it, this demonstrated a fraud committed by the Company in relation to the contract of employment. The HC rejected these contentions.

The HC further held that there was a plausible explanation for why the permanent contract was only signed two months after the employee's commencement of permanent employment. The employee was coy when questions were put to him about whether he was aware of the restraint clause in his employment contract and did not provide responses. The HC therefore held that the Company established a clear right.

Insofar as *"sensitive and confidential"* information was concerned, the HC held that such evidence requires a proper and fuller examination through oral evidence by the HC or other mechanisms agreed to by the parties for dispute resolution where the process will not prejudice any of the parties. Such a process would resolve any dispute as to whether the employee's position at Global Bet was identical to the one he held at the Company and whether the information referred to was confidential and therefore protectable. The HC held the view that a mediation, or an arbitration, process should be proceeded with expeditiously.

The HC enforced the restraint of trade for a period of 12 months, alternatively granting the Company relief pending mediation or arbitration proceedings.

Aadil Patel, Nishan Pillay and Hanelle Vrey

The HC enforced the restraint of trade for a period of 12 months, alternatively granting the Company relief pending mediation or arbitration proceedings.

07
Section 197, restraints and unlawful competition

Restraint of trade agreements

Does a restraint of trade agreement entered into between an employee and an old employer transfer to the new employer?

Slo Jo Innovation (Pty) Ltd v Beedle and Another (J 737/22) [2022] ZALCJHB 212 (10 August 2022)

Summary of the facts

In 2007, Ms Beedle commenced employment with Slo-Jo Trading (Pty) Ltd (Slo-Jo) in the capacity of a sales representative. In April 2007, Beedle and Slo-Jo entered into a written contract of employment, which contained a restraint of trade undertaking.

From 2010 onwards, Slo-Jo's business grew, and Beedle played an instrumental role in this growth and development. Beedle also assisted with introducing new products into Slo-Jo's business. During 2015, Slo-Jo formally established a research and development team, which was headed by Beedle, who was integral in forming a relationship with one of Slo-Jo's key and primary manufacturers.

During 2018, Slo-Jo underwent an internal restructuring as part of a transformation initiative. Pursuant to achieving these objectives, Slo-Jo established three new companies, namely Slo-Jo Innovation (Pty) Ltd, Slo-Jo Distribution (Pty) Ltd and Slo-Jo International (Pty) Ltd. Each of the companies was responsible for a separate element of Slo-Jo's overall business and were wholly owned subsidiaries of Slo-Jo.

Following the establishment of the entities, certain employees were transferred by way of section 197 of the LRA to the respective entities. Beedle was transferred to Slo-Jo Innovation (Pty) Ltd (the Company). Save for the change in name of the employer, all other terms and conditions of employment remained unchanged. This included Beedle's salary, duties and responsibilities, her years of service, her leave entitlement and all other benefits and entitlements.

Beedle subsequently resigned from the Company's employ and took up employment with Flavourpro, a direct competitor of the Company. Following her employment with Flavourpro, the Company instituted urgent proceedings in the LC to enforce the restraint of trade agreement.

Beedle argued that the Company had no clear right to enforce the restraint of trade agreement or to obtain the relief sought as the contract was concluded between Beedle and Slo-Jo and not Beedle and the Company. Beedle therefore argued that the Company had no right, either contractually or otherwise, to seek relief against her.

Save for the change in name of the employer, all other terms and conditions of employment remained unchanged. This included Beedle's salary, duties and responsibilities, her years of service, her leave entitlement and all other benefits and entitlements.

Restraint of trade agreements*...continued*

Does a restraint of trade agreement entered into between an employee and an old employer transfer to the new employer?

Slo Jo Innovation (Pty) Ltd v Beedle and Another (J 737/22) [2022] ZALCJHB 212 (10 August 2022)

Summary of the findings of the court

The LC had to determine whether a restraint of trade agreement existed between the Company and Beedle following the subsequent transfer of employment from Slo-Jo to the Company.

The Company relied on section 197 of the LRA for the continuation of the initial contract that Beedle signed in 2007.

Beedle, on the other hand, argued that the contract was unenforceable because there was no contract of employment that transferred from Slo-Jo to the Company and therefore there was no restraint. Beedle argued that the 2007 restraint was concluded between Beedle and Slo-Jo, which was a separate juristic person from the Company, and Beedle never agreed to the transfer of the restraint. According to Beedle, the 2007 restraint was superseded by the transfer of employment in 2018, including the new 2018 employment agreement, which Beedle never signed. There was never any indication from either Slo-Jo or the Company, at any time, that the 2007 restraint continued to apply or had been transferred from Slo-Jo to the Company. Lastly, Beedle argued that the terms of a restraint of trade agreement do not, as a matter of law, pass from one party to another.

The LC held that Beedle did not sign a new contract and, in terms of section 197(2)(a) of the LRA, the new employer (the Company) was automatically substituted in the place of the old employer (Slo-Jo), in respect of contracts of employment in existence immediately before the date of the transfer. If the provisions of section 197 of the LRA apply, the new employer is automatically and by operation of law substituted with the new employer on the date of the transfer. The transfer occurs by operation of law and independent from the intentions of the parties. Beedle's consent was not required. In short, a contract of employment is transferrable under the provisions of section 197 of the LRA, including all the terms agreed to between the parties. Consequently, a restraint of trade agreement concluded between an employer and employee and included in a contract of employment, will also be transferable under section 197 of the LRA.

The LC referred to *Bonfiglioli SA (Pty) Ltd v Panaino* [2015] 36 ILJ 947 (LAC) in which the LAC confirmed that a restraint of trade agreement is one that prevents an employee from exercising his or her trade, profession or calling, or engaging in the same business venture as the employer for a specified period, and within a specified area after leaving employment. The restraint agreement therefore aims to protect the employer's proprietary interest,

A restraint of trade agreement concluded between an employer and employee and included in a contract of employment, will also be transferable under section 197 of the LRA.

07
Section 197, restraints and unlawful competition

Restraint of trade agreements*...continued*

Does a restraint of trade agreement entered into between an employee and an old employer transfer to the new employer?

Slo Jo Innovation (Pty) Ltd v Beedle and Another (J 737/22) [2022] ZALCJHB 212 (10 August 2022)

goodwill or trade secrets after the employee has left the employer's employment. The restraint of trade accordingly remains effective for a specified period after the employment relationship has come to an end.

Beedle entered into the restraint by virtue of her employment. Beedle had access to and knowledge of the Company's business and confidential information and the Company needs to protect that information.

An employer cannot be expected to enter into a new contract every time an employee is promoted or when their role changes. As such, the LC found that Beedle's access to and knowledge of the Company's business and confidential information was not limited to her position as a sales representative.

The Company was successful in enforcing the restraint of trade agreement that was entered into between Beedle and Slo-Jo on the basis that the agreement transferred from Slo-Jo to the Company by way of the section 197 transfer of employment and the proprietary interests of the Company.

Aadil Patel, Nishan Pillay and Hanelle Vrey

The Company was successful in enforcing the restraint of trade agreement that was entered into between Beedle and Slo-Jo on the basis that the agreement transferred from Slo-Jo to the Company by way of the section 197 transfer of employment and the proprietary interests of the Company.


08
General practice in labour law
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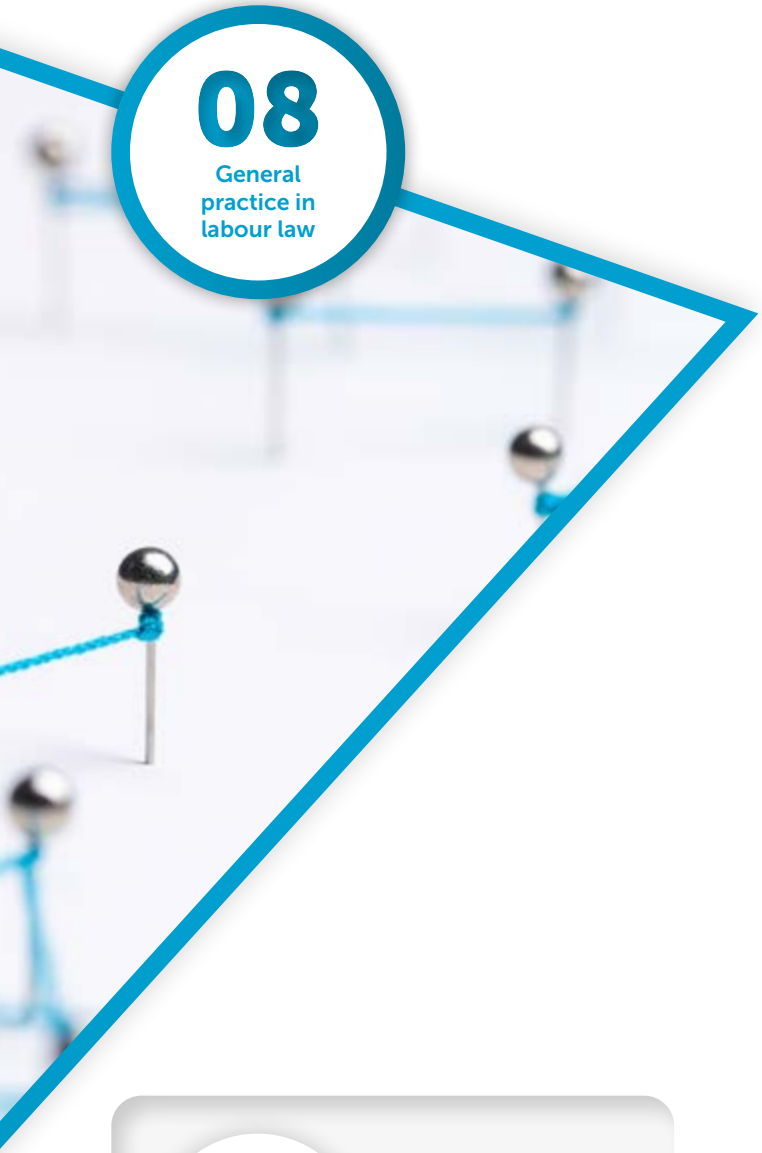


08

General practice in labour law

Review applications in the LC

Once a record is archived and regarded as withdrawn, does it remain in the archive until the court on application reinstates the review where good cause is shown? The answer is – yes.

Mnguni v Volkswagen SA (Pty) Limited and Others [2022] JOL 54294 (LC)

Summary of the facts

On 23 July 2019, the applicant, a former employee of Volkswagen SA (Pty) Ltd, Mr Natashe Ignatia Mnguni (Mnguni), launched an application for the review of a decision of the CCMA.

The CCMA dispatched the record of the proceedings (the record) to the Registrar of the LC and in a cover letter alerted Mnguni to the relevant provisions of the Rules regulating the Conduct of Proceedings in the LC (Rules).

On 19 August 2019, the Registrar of the LC served Mnguni with a Rule 7A(5) notice advising her of the availability of the record and drawing her attention to clauses 11.2.2 and 11.2.3 of the Practice Manual. Clause 11.2.2 of the Practice Manual reads: "*For the purpose of Rule 7A(6), records must be filed within 60 days of the date on which the applicant was advised that the record became available.*"

Accordingly, the record became due on 12 November 2019. The applicant served the record on the respondents on 15 November 2019 and filed the record at court on 18 November 2019. Clause 11.2.3 offers a remedy to an applicant who is confronted with a threat of the 60 days running out before filing the record; namely, to either seek consent for an extension of the 60-day deadline from their opponent and if the opponent does not oblige, to then approach the Judge President for such consent. This was not done by Mnguni.

Accordingly, in terms of clause 11.2.3 of the Practice Manual, because the record was not filed within the 60-day period, and in the absence of the necessary consent, Mnguni's review application was deemed to have been withdrawn.

On 13 December 2019 and 18 December 2019 respectively, the first and second respondents delivered notices of objection to the prosecution of the review application and to the Rule 7A(8)(a) notice stating that at that point the review was deemed to have been withdrawn and as the review was not alive, the respondents were not obliged to file answering papers. They sought a directive from the Judge President confirming that Mnguni's review was deemed withdrawn.

Three months later, on 11 March 2020, the registrar issued a directive archiving the review. This meant that the review was regarded as having lapsed.

CDH Conversations

CLICK HERE
to listen to our podcast on whether the the Labour Court has the jurisdiction to dismiss a review application that is deemed withdrawn.

Review applications in the LC*...continued*

Once a record is archived and regarded as withdrawn, does it remain in the archive until the court on application reinstates the review where good cause is shown? The answer is – yes.

Mnguni v Volkswagen SA (Pty) Limited and Others [2022] JOL 54294 (LC)

Summary of the findings of the court

The LC had to consider the effect of the matter having been archived.

The LC held that the deeming provisions of clauses 11.2.3, 11.2.7 and 16.3 of the Practice Manual had been dealt with fully in the case of *Overberg District Municipality v IMATU obo Spangenberg and Others* [2021] 42 ILJ 1283 (LC) where the court held that it was debatable whether the Practice Manual has reduced protracted ancillary litigation relating to reviews which have not been prosecuted expeditiously. However, the court has clarified those time periods, which are not contained in the Rules, within which certain steps in the prosecution of the review must be taken.

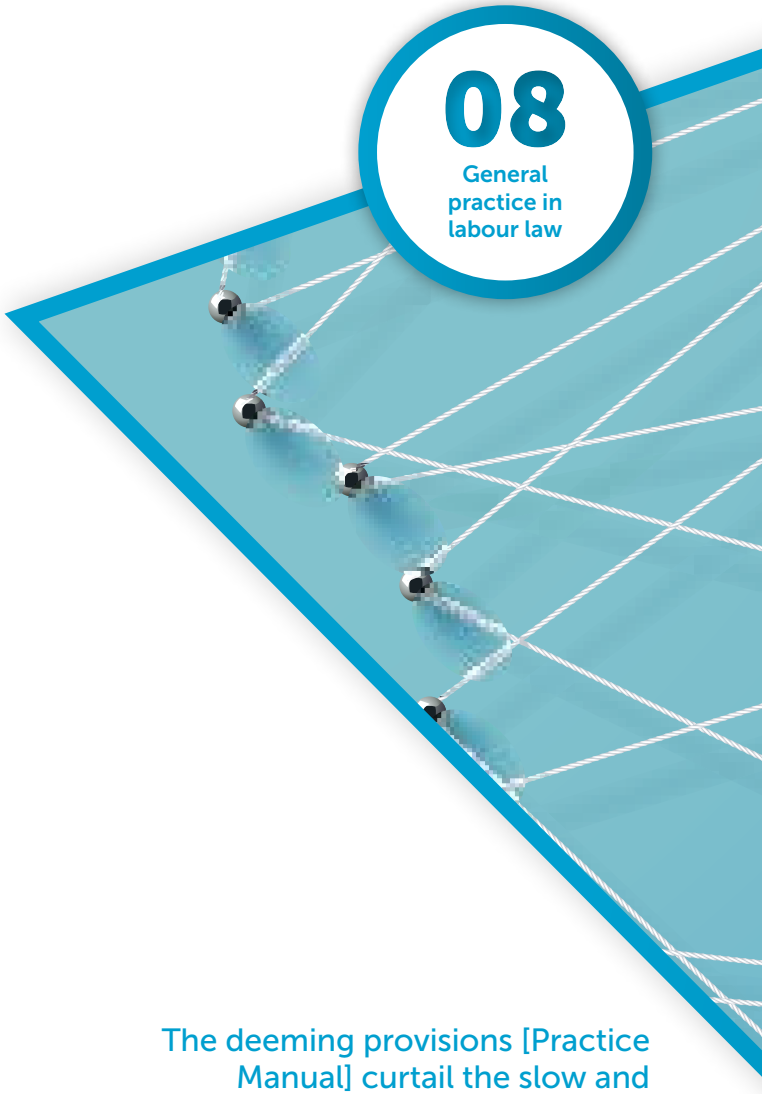
The deeming provisions curtail the slow and unpunctual prosecution of a review and ought to make it unnecessary for a respondent party to launch an application to dismiss the review as it is automatically deemed withdrawn.

Ovenberg follows the clarity provided in *Macsteel Trading Wadeville v Francois van der Merwe NO and Others* [2019] 40 ILJ 789 (LAC) where the LAC held that the underlying objective of the Practice Manual was the promotion of the statutory imperative of expeditious dispute resolution and that the Practice Manual was binding on the parties and the court.

In *Maloisane v Judge President of the Labour Court and Other* (J2024/19) [2022] ZALCJHB 219 the court held that clause 11.2.3 of the Practice Manual does not undermine section 33(1) of the Constitution and there is no basis to declare the clause unconstitutional.

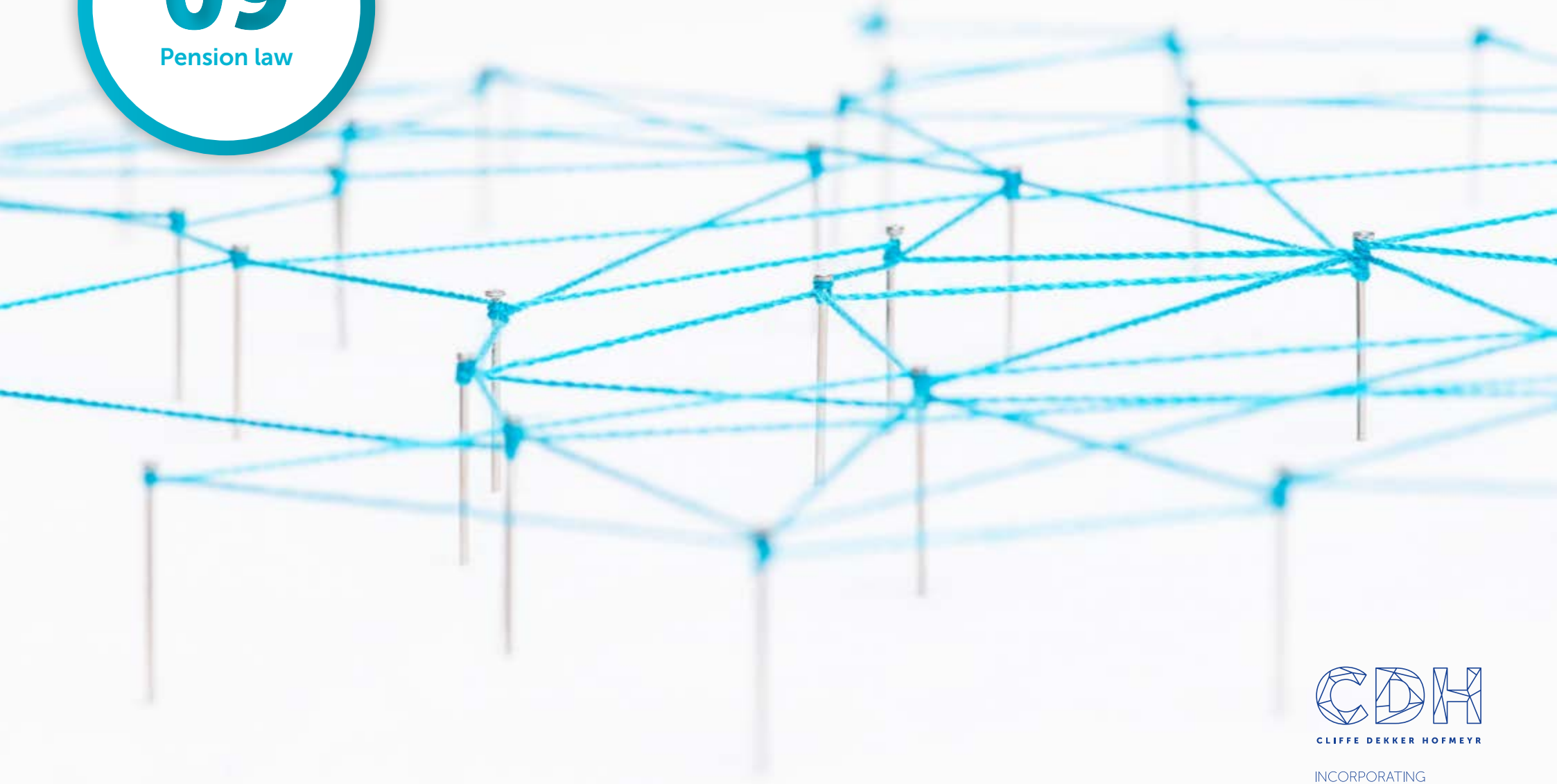
Mnguni's application to reinstate the review application was dismissed.

Faan Coetzee and Hanelle Vrey



The deeming provisions [Practice Manual] curtail the slow and unpunctual prosecution of a review and ought to make it unnecessary for a respondent party to launch an application to dismiss the review as it is automatically deemed withdrawn.

09
Pension law



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09
Pension law

Pension and retirement law

Can the Pension Funds Adjudicator hear a complaint by a person erroneously granted membership to a pension fund, and if so, what relief can the Pension Funds Adjudicator grant?

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

In September 2015 the Municipality notified the Fund that all Mongwaketse's contributions to the Fund had been made by her alone and that she had joined the Fund in error.

Summary of the facts

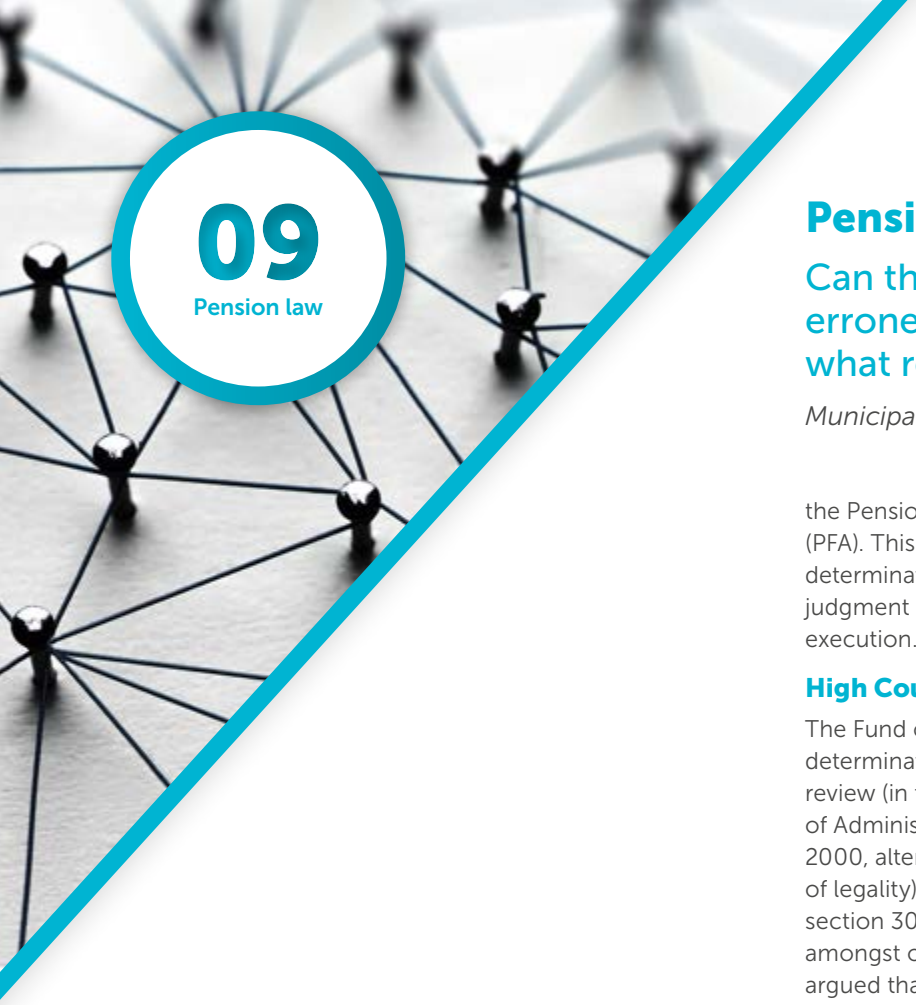
In February 2012, Ms Mongwaketse was appointed as the Chief Audit Executive of the Ngaka Modiri Molema District Municipality (Municipality) on a five-year fixed-term contract. Her appointment was on a "*total cost to company*" basis. On her appointment, Mongwaketse became a member of the Municipal Employees Pension Fund (Fund). In accordance with the Fund rules the contributions payable by her and the Municipality were 7,5% (employee contribution) and 22% (employer contribution) of her monthly pensionable emoluments respectively. Both the employee and employer contributions derived from the "*total cost to company*" package.

In November 2014, Mongwaketse received a benefit withdrawal statement indicating that on withdrawal from the Fund, her benefit would be calculated only with reference to the 7,5% contribution. In the process of querying this, she discovered that the Fund's rules did not allow fixed-term employees to be members. Accordingly, she instructed the Municipality to stop deducting pension fund contributions from her remuneration. In September 2015 the Municipality notified the Fund that all Mongwaketse's contributions to the Fund had been made by her alone and that she had joined the Fund in error. The Municipality requested that she be withdrawn from the Fund and that all contributions be refunded to her with interest. The Fund refused to refund the total contributions. It maintained that Mongwaketse had become a member of the Fund.

Mongwaketse's employment with the Municipality terminated in January 2017. In March 2017, she lodged a grievance with the Pension Funds Adjudicator (Adjudicator). She asked that the Fund be ordered to refund all contributions made that were deducted from her remuneration and contributed to the Fund, together with interest (the value of the total contributions made on behalf of Mongwaketse was quantified as R856,489.94 by the Municipality). In June 2017 the Fund paid Mongwaketse a sum of R237,422.67 (supposedly her net withdrawal benefit, after tax, and based only on her 7,5% contribution). This calculation was based on clause 37(1)(b) of the Fund rules.

The Adjudicator's determination

In November 2017, the Adjudicator issued her determination. She found that Mongwaketse had not satisfied the criteria for membership of the Fund, had not become a member, and accordingly was not bound by the Fund's rules. Factually, all the contributions were deducted from the employee's salary. The Adjudicator ordered the Fund to refund the total contributions made on the employee's behalf, including those deemed to have been made by the Municipality, since the Fund had not been entitled to receive the contributions, less the amount already paid to her. This determination was filed with the HC in terms of section 30M of



09
Pension law

Pension and retirement law*...continued*

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Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

The majority held that Mongwaketse qualified as a *"complainant"* and that her grievance fell within the statutory definition of a *"complaint"*.

the Pension Funds Act 24 of 1956 (PFA). This has the effect that the determination is deemed to be a civil judgment of the HC, and capable of execution.

High Court proceedings

The Fund challenged the determination in the HC by way of review (in terms of the Promotion of Administrative Justice Act 3 of 2000, alternatively on the principle of legality) and appeal (in terms of section 30P of the PFA). On review, amongst other things, the Fund argued that since Mongwaketse contended that she had not become a member of the Fund, and because the Adjudicator agreed, her grievance could not be a *"complaint"* by a *"complainant"*, but was simply a dispute by a private party outside of the rules of the Fund. The Adjudicator therefore did not have jurisdiction to deal with the grievance. The Fund further argued that the findings of the Adjudicator were irrational and a product of errors of law.

On appeal, the Fund argued that the findings of the Adjudicator that Mongwaketse's employment contract did not make it compulsory for her to join the Fund, that she was not a member of the Fund, and that the Fund was obliged to refund the 22% employer contributions on the basis of unjustified enrichment, were wrong.

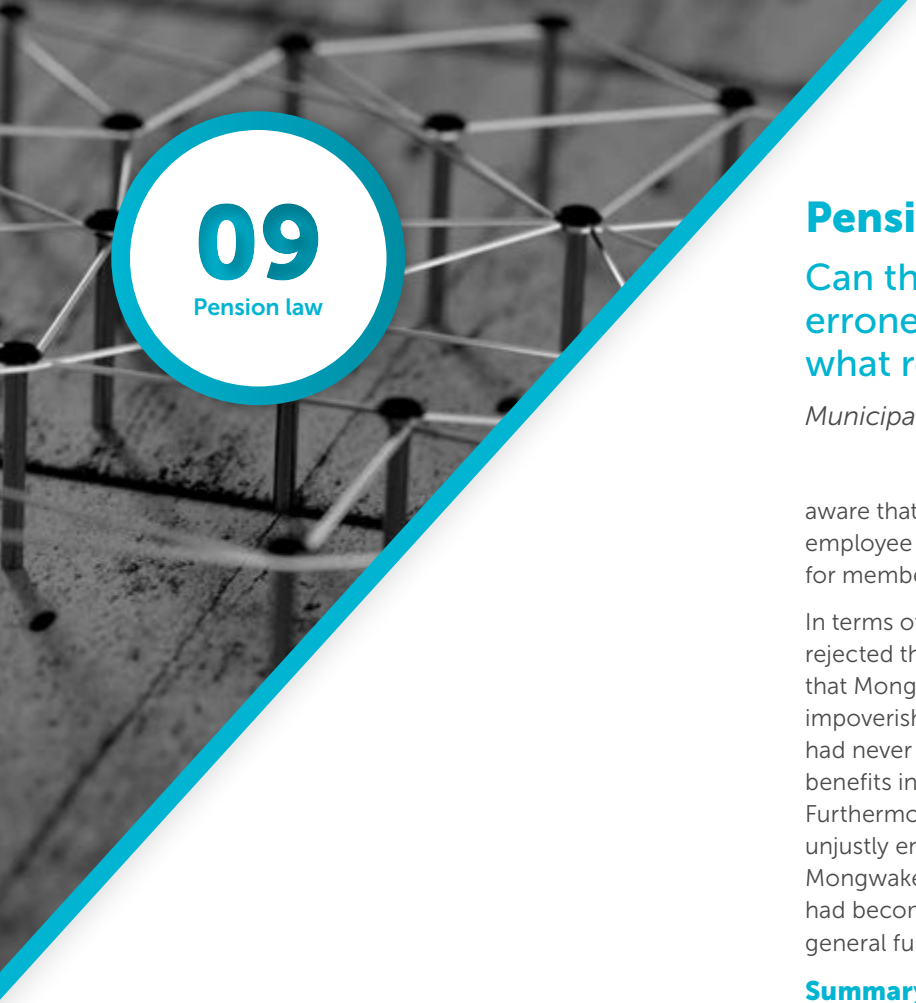
The HC dismissed the Fund's application. On the jurisdictional issue it held that Mongwaketse was a *"complainant"* and that her grievance was a *"complaint"* as defined in the PFA. The HC also dismissed the appeal and found that the Adjudicator was correct in her findings. As to relief, the HC found that the PFA empowered the Adjudicator to make any order which a court of law could make. This included an order to repay contributions on the basis that they had been owing.

Supreme Court of Appeal

The HC granted the Fund leave to appeal to the SCA. The appeal to the SCA was similarly dismissed.

The majority held that Mongwaketse qualified as a *"complainant"* and that her grievance fell within the statutory definition of a *"complaint"*. The court found that Mongwaketse was not a stranger to the Fund as she had been accepted into the Fund and the Fund was seeking to enforce its rules against her.

The majority found that there are two legal routes to the conclusion that Mongwaketse had not become a member of the Fund. The first was through the application of the *ultra vires* doctrine – a pension fund has only such powers as are conferred on it by its rules. The second was through the contract law principle of common mistake – Mongwaketse was unaware that the rules did not entitle her to become a member of the Fund, while the Fund was not



09
Pension law

Pension and retirement law*...continued*

Can the Pension Funds Adjudicator hear a complaint by a person erroneously granted membership to a pension fund, and if so, what relief can the Pension Funds Adjudicator grant?

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

aware that she was a fixed-term employee and therefore ineligible for membership.

In terms of relief, the SCA rejected the Fund's argument that Mongwaketse had not been impoverished, given that she had never acquired a right to any benefits in terms of the Fund rules. Furthermore, the Fund had been unjustly enriched to the extent that Mongwaketse's 22% contributions had become part of the Fund's general funds.

Summary of the findings of the court

The Fund appealed to the CC. It contended, amongst other things, that Mongwaketse had become a member of the Fund and that a waiver and estoppel barred her from disputing her membership. In the alternative, if she did not become a member of the Fund, the Adjudicator did not have the jurisdiction to entertain the claim.

The CC found that, in terms of the rules of the Fund, only permanent employees were eligible for membership. Since she was not eligible for membership to the Fund, the Fund did not have the power to admit her as a member and her purported membership was a nullity. It also rejected the estoppel argument based on the well-established principle that estoppel is impermissible where its effect is to give indirect validity to conduct by a corporate body which is beyond the body's power to perform.

The CC then considered the alternative argument that if Mongwaketse had never become a member of the Fund, the Adjudicator did not have jurisdiction to determine the dispute as she could not be a *"complainant"* as defined in the PFA. The court considered the correct approach to statutory interpretation, that words in a statute should be given their ordinary grammatical meaning (unless this resulted in an absurdity), taking into account that the statutory provisions should be interpreted purposively, properly contextualised and consistent with the Constitution.

The CC, as with the HC and the SCA before it, adopted a wide interpretation of the term *"complainant"*. It held that, for so long as a grievance submitted to the Adjudicator relates to *"the administration of a fund"*, *"the investment of its funds"* or *"the interpretation and application of its rules"* and makes one or more of the allegations contemplated in the definition of the term *"complaint"*, it will fall within the scope of the definition and the person who lodged the grievance will be a *"complainant"* as defined, due to them having an interest in the complaint.

The CC, as with the HC and the SCA before it, adopted a wide interpretation of the term *"complainant"*.

09
Pension law

Pension and retirement law*...continued*

Can the Pension Funds Adjudicator hear a complaint by a person erroneously granted membership to a pension fund, and if so, what relief can the Pension Funds Adjudicator grant?

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

The CC found that the admission of persons to a fund and the receipt of contributions with a view to providing retirement benefits is the core activity of a pension fund. Conducting this work was at the heart of pension fund *"administration"*. This type of *"administration"* can go awry and be done unlawfully or badly, in which case one is dealing with a complaint relating to a fund's administration, alleging either *ultra vires* or maladministration. The admission of Mongwaketse to the Fund and the receipt of her contributions were *ultra vires*. It was their de facto character, not their legality, which brought them into the scope of *"administration"*. The Adjudicator accordingly had the jurisdiction to deal with Mongwaketse's complaint.

Having the jurisdiction to determine the dispute and having found that Mongwaketse was not a member of the Fund, the Adjudicator was entitled to make an order which a court of law could make. In principle, a court of law could order the Fund to repay Mongwaketse her contributions provided the elements for unjust enrichment were present.

The CC found that in respect of the relationship between Mongwaketse and the Municipality, there was an agreement that the Municipality in law was liable for the employee's full salary. She in turn authorised the Municipality to pay part of it to the Fund (this included the 22% contribution). The CC concluded that the Adjudicator's order against the Fund for the repayment of all contributions was not reviewable.

Jose Jorge and Tshepiso Rasetlola

Having the jurisdiction to determine the dispute and having found that Mongwaketse was not a member of the Fund, the Adjudicator was entitled to make an order which a court of law could make.

09
Pension law

Pension and retirement law

Rule amendments and accrued benefits: Can an amendment of a fund's rules to reduce a member's withdrawal benefits apply with retrospective effect?

Municipal Employees Pension Fund and Another v Pandelani Midas Mudau and Another (1159/2020) [2022] ZASCA 46 (8 April 2022)

By making the amended rule retrospective, the Fund sought to prevent a *"run"* on the fund of members resigning in their numbers to avoid the impending reduction of their withdrawal benefits.

Summary of the facts

Mr Mudau was a permanent employee of the Vhembe District Municipality (Municipality) and was a member of the Municipal Employees Pension Fund (Fund). On 31 May 2013, Mudau resigned and his membership of the Fund terminated on the same date.

At the time of Mudau's resignation, Rule 37(1)(b)(ii) of the Fund rules provided that a member who joined the Fund after June 1998, upon resignation, would be entitled to withdrawal benefits calculated as follows: the member's contributions, plus interest, multiplied by three (the original rule).

The Fund's actuaries had warned that this rule provided for unsustainably high returns which could operate to the financial detriment of the Fund. The Fund resolved on 21 June 2013 to amend the original rule, with effect from 1 April 2013.

The amendment provided for membership withdrawal benefits of the member's contribution, plus interest, multiplied by 1,5 (the new rule). The rationale for the new rule was to reduce the risk of the Fund not meeting its future liabilities. By making the amended rule retrospective, the Fund sought to prevent a *"run"* on the fund of members resigning in their numbers to avoid the impending reduction of their withdrawal benefits. The Fund applied for the registration of the new rule on 22 July 2013. The Registrar approved the new rule and registered it on 1 April 2014.

Mudau had applied for his withdrawal benefits, which were paid to him by the Fund on 18 October 2013, in terms of the new rule, not the rule that was in place at the time of his resignation.

Pension Funds Adjudicator

Aggrieved by the reduced pay-out, Mudau lodged a complaint with the Pension Funds Adjudicator (Adjudicator) arguing that his withdrawal benefits should have been calculated in terms of the original rule. He argued that in terms of section 12(4) of the Pension Funds Act 24 of 1956 (PFA), the new rule could only take effect after it had been registered.

The Adjudicator agreed. In July 2014, the Adjudicator determined that the new rule could not be applied to Mudau's withdrawal benefits since it had not yet been approved by the Registrar when the benefits became due to him. Furthermore, the new rule could not be applied to benefits which accrued before the amendment became effective.

Pension and retirement law*...continued*

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High Court

The Fund launched an application in the HC challenging the Adjudicator's ruling on the basis that it was *ultra vires* her powers – beyond the scope of the position's authority – and incorrect on the merits. It sought an order setting the determination aside, replacing it with an order dismissing the complaint.

The HC upheld the Adjudicator's determination on the basis that she did not commit a reviewable irregularity and consequently dismissed the application, with costs. The Fund's subsequent appeal to the full bench of the HC was also dismissed.

The Fund appealed on two grounds: firstly, that the complaint fell outside the scope of the Adjudicator's powers as set out in sections 30H and 30M of the PFA, read with the definition of a "*complainant*" in terms of section 1 of the PFA; and secondly, that the Adjudicator erred as a matter of law in finding that the amended rule could not be applied to withdrawal benefits which accrued before it came into effect on 1 April 2014, despite its retrospective operation.

Summary of the findings of the court

The SCA dismissed the first ground of appeal. It found that the complaint fell within the definition of a complaint as defined in the PFA as the complaint related to the administration of the Fund, the investment of its funds, or the interpretation and application of its rules. The Adjudicator was therefore empowered to investigate and make a determination in respect of a complaint lodged by an aggrieved member. The SCA held further that it was evident from the Adjudicator's reasoning that she did not purport to rule on the validity of the amended rule, but rather its interpretation and application to benefits which accrued prior to its approval by the Registrar. The complaint related to the interpretation and application of the Fund rules and accordingly fell within the scope of the powers vested in the Adjudicator in terms of the PFA.

The SCA, however, upheld the second ground of appeal. It found the arguments made by the Fund in respect of the retroactive application of the new rule legally sound and compelling. Rule 48(1) of the Fund rules authorises the Fund to amend its rules, subject to section 12 of the PFA. Section 12 provides that a pension fund may alter or rescind any rule or make any additional rule, provided that it does not affect any right of a creditor (other than a member or shareholder of the fund), and it has been approved and duly registered by the Registrar. In

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Pension law

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terms of section 12(4) of the PFA, the Registrar shall register the amended rule if he or she is satisfied that the proposed amended rule is consistent with the PFA and is financially sound. The amended rule would then take effect from the date as determined by the fund concerned, and if the fund has not determined a date, the rule becomes effective on the date of registration.

In the SCA's view, it is manifest that these provisions unequivocally authorise the Fund to amend its rules and to determine the effective date of the amendment. The SCA accepted that there was a strong presumption in our law against legislation operating retrospectively. However, if the wording of the statute is unambiguous and the intention of the legislature (in this case comparable to the Fund) is clearly to interfere with vested rights retrospectively, then the provisions of the retrospective instrument must be given effect to. The enquiry, in every case where the issue of retroactive application arises, must be in respect of the language of the statute and the intention of the legislature emerging from that.

The SCA found that properly construed in accordance with the established canons of legal interpretation, namely: the language used in the context of the rule; the circumstances in which it was adopted; and the purpose of the rule and the factors considered by the Fund when the rule was formulated, the intention was for the rule to operate retrospectively and to reduce members' benefits from 1 April 2013.

The SCA rejected Mudau's argument that his benefits were due and in fact were paid before the new rule was registered and therefore the new rule would not be applicable. It found that the new rule explicitly stated that it operated retrospectively and thus reduced pension benefits due to members with effect from 1 April 2013. Furthermore, there was no statutory impediment to the Registrar approving and registering a rule which sought to impair rights that accrued before its registration.

Jose Jorge and Tshepiso Rasetlola

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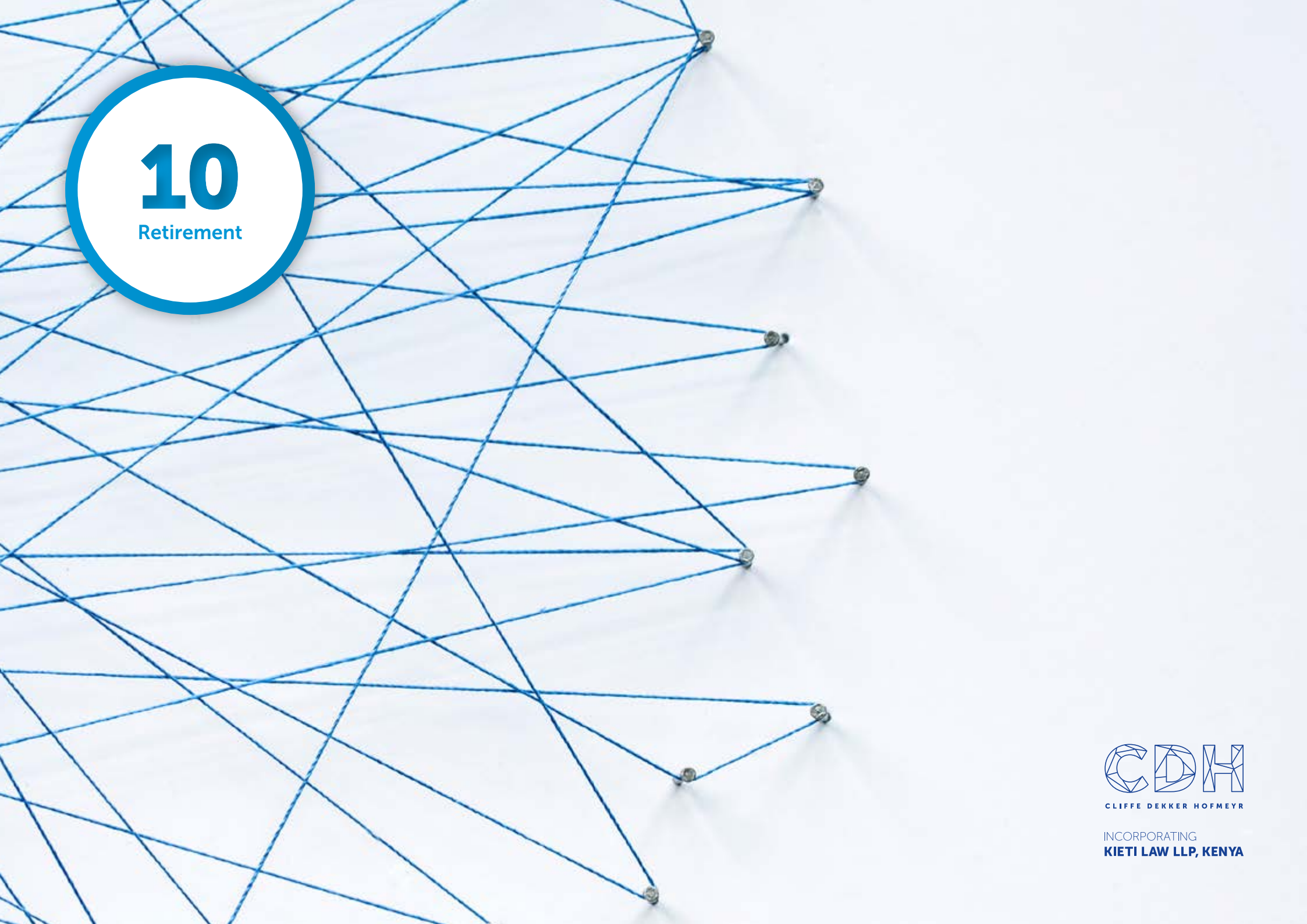

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Retirement

Do employers have the right to fairly dismiss employees after they have reached their agreed or normal retirement age, even where the employee continues to work?

Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panel Beaters (JA68/2021) [2022] LAC

Summary of the facts

Mr Landman (the employee) was employed by Great South Panel Beaters (the employer) in 2007. In 2008, the employee and the employer entered into a written contract of employment which indicated that the employee's retirement age would be 60. On 15 March 2018 the employee turned 60. The employer did not terminate the employment relationship based on the retirement age of the employee, and the employee continued to work for the employer and receive his usual salary.

On 14 January 2019, the employer informed the employee that his services would terminate on 12 February 2019 as he had reached the agreed age of retirement. It was common cause that the employer dismissed the employee on the basis of his age.

The employee referred an automatically unfair dismissal dispute to the LC, alleging that his dismissal constituted unfair discrimination on the basis of age in terms of section 187(2)(b) of the LRA. The LC held that dismissals on the basis of age are not automatically unfair where the employee has reached the normal or agreed retirement age. The LC found that dismissals based on age occurring after an employee has reached the age of retirement are insulated against any assertions of unfairness.

Dissatisfied with the LC's ruling, the employee applied for leave to appeal at the LAC.

Summary of the findings of the court

The LAC identified that this dispute warranted an investigation into the interpretation of section 187(2)(b) of the LRA, which states that: *"a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."*

According to the LAC, this provision is clear and unambiguous. In line with the established approach to statutory interpretation of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2012] 2 All SA 262 (SCA), the ordinary meaning of section 187(2)(b) is that where an employer proves that an employee has reached the agreed or normal retirement age, their dismissal is deemed fair.

The LC held that dismissals on the basis of age are not automatically unfair where the employee has reached the normal or agreed retirement age.

Retirement*...continued*

Do employers have the right to fairly dismiss employees after they have reached their agreed or normal retirement age, even where the employee continues to work?

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The LAC made reference to the approach adopted by the LC in *Schweitzer v Waco Distributers (A Division of Voltex (Pty) Ltd* [1998] 19 ILJ 1573 (LC) as an approach that is still good law. In *Schweizer*, the LC held that for a dismissal in terms of section 187(2)(b) of the LRA to be fair, three conditions must be present:

1. the dismissal must be based on age;
2. the employer must have an agreed or normal retirement age for employees employed in the capacity of the employee concerned; and
3. the employee must have reached the normal or agreed retirement age.

The LAC highlighted that these three conditions were indeed evident in the employer's case.

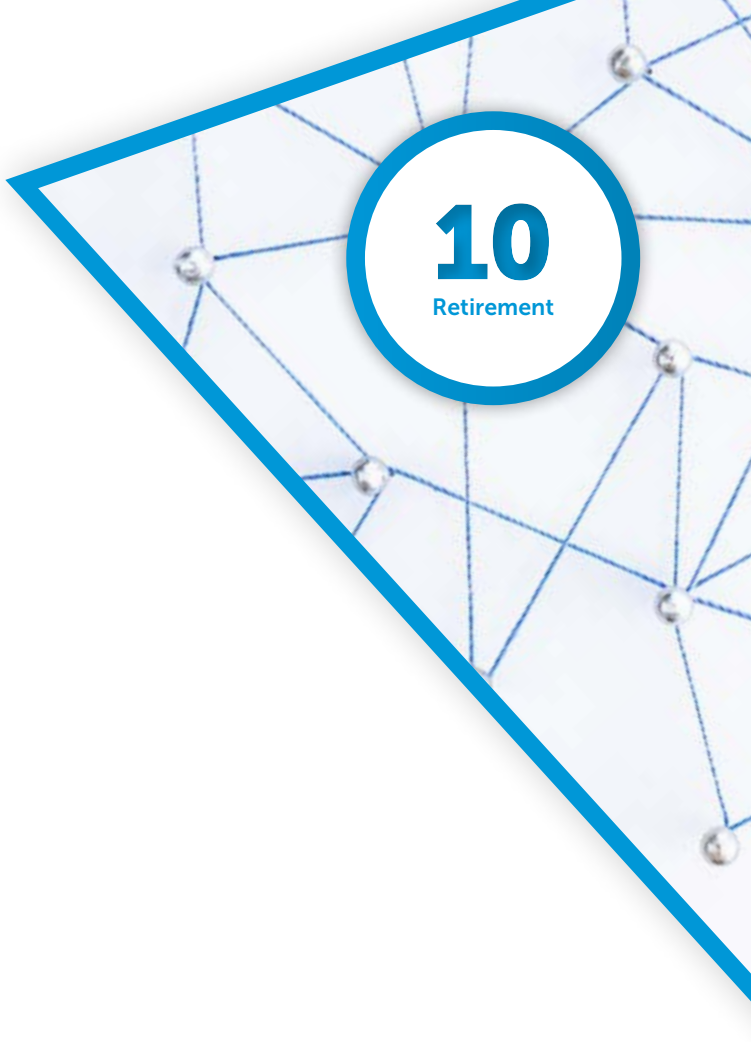
In addition, the LAC rejected the employee's argument that by allowing him to continue working uninterrupted, the employer tacitly agreed to a new contract of an indefinite period. In this regard, the LAC made reference to the case of *Road Accident Fund v Mothupi* [2000] (4) SA 38 (SCA) and stated that:

> "*Where an employer expressly permits an employee to work beyond the agreed or normal retirement age, this does not constitute a waiver of the right to dismiss that employee in terms of section 187(2)(b) of the LRA, unless waiver of that right can be inferred from the clear and unequivocal conduct of the employer.*"

Notably, the LAC commented that the interpretation which is afforded to section 187(2)(b) of the LRA is consistent with its purpose: "*to allow the employer to dismiss employees who have passed their retirement age to create work opportunities for younger members in society*".

Accordingly, the LAC found that in terms of section 187(2)(b) of the LRA, the employer was entitled to dismiss the employee on the grounds that he had passed his agreed retirement age, and accordingly, the employee's dismissal was not unfair.

Sasha Schermers and Abigail Butcher



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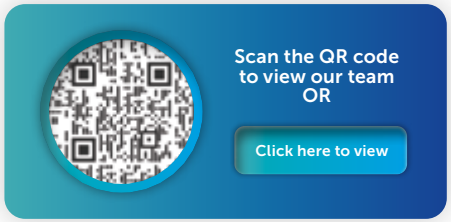

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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