EMPLOYMENT LAW

CASE LAW UPDATE 2021

The Next Normal and the Future of the Employment Relationship

CDH

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FOREWORD

Dear All

This year's CDH annual Employment Law webinar and case law booklet has particular resonance as South Africa emerges from an especially brutal and tragic third wave of COVID-19, amongst other challenges facing us a nation. The pandemic has in itself provoked new challenges in the employment relationship accelerating us into the 'next normal' of this paradigm. Much has been said about the emergent changes in work practices, and for employers and employees, but what does that really mean for the future of the employment relationship?

As part of our value-add to you, we have developed this 'Case Law Update 2021' that delves into impactful cases that have formed the bedrock of the employment relationship over the past year, providing clarity and a way forward. As we join our nation in working to stabilise our economy and our workplaces, we take this opportunity to look at the 'next normal', and our priorities in creating safe workplaces, and improved employee experiences.

It goes without saying that not only has the employer-employee relationship changed irrevocably, so too has the working environment. Within this Case Law Update we consider various cases such as whether the 10 days for self-isolation pursuant to a COVID-19 test is sufficient for recovery; assessing the risks around face-to-face or virtual hearings; the impact of the national lockdown affecting the availability of public transport and the subsequent failure to report to duty; as well as the extent to which employers are required to consider family circumstances amidst COVID-19. We also look at a where an employee was charged with misconduct that related to his failure to disclose to his employer that he had taken a COVID-19 test and continued to attend the office. He was further charged with gross negligence, in that after receiving a positive test result, he failed to self-isolate and continued working at the office for another three days. The judge provided a stern warning that all employers must enforce their COVID-19 workplace policies and the national regulations to avoid employees being given the opportunity to flagrantly disregard the rules, placing others' lives at risk.

Separate to the relationship with employees, the 'next normal' carries with it a newly shaped working environment. The hybrid work model is quickly becoming the global norm, carrying with it significant dialogues around rethinking and reshaping the employment relationship, corporate culture, mental health, OHS, the attraction and retention of talent, ergonomics, change management, the role of technology, and much more. Change starts with us!

Are we ready to embrace this model in South Africa? What are the employment law implications around this new way of working? How do we reset the future employee experience? How are we planning on up-skilling our workforces? What is the role of technology in reimagining the workplace? How important is EQ to the successful workplace? Has equality, diversity, and inclusiveness being overrun by events of the past two years and how do we progress if we are not focussed on these drivers?

Although COVID-19 dominated and reshaped conversations around the employment relationship, it was not the only driver of change. The country was witness to social unrest resulting in a significant economic and psychological toll on the nation. Gender-based violence sky-rocketed, with the government's GBV and Feminicide Command Centre recording more than 120,000 victims in the first three weeks of the lockdown. In the matter of *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* [2021] ZACC the CC confirmed that sexual harassment is the most heinous misconduct that plagues a workplace. It confirmed the Code of Good Practice's finding that sexual harassment's persistence and prevalence poses a barrier to the achievement of substantive equality in the workplace and is inimical to the constitutional dream of a society founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

I have only touched on a few cases that are contained within this update. I encourage you to consider the update in its entirety to guide you in managing the employment relationship, both now and in the future. The future is after all now.

The pandemic has come at a very high and tragic cost for many if not all of us. My hope is that we will continue to do whatever we can to fight this virus and secure a better future for ourselves and our loved ones. Please take care of yourself, and one another.

AADIL PATEL
Practice Head: Employment Law

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COVID-19 IN THE WORKPLACE

CAN EMPLOYERS ISSUE FINAL WRITTEN WARNINGS TO SYMPTOMATIC EMPLOYEES WHO FAIL TO RETURN TO THE OFFICE DESPITE DEMAND?

Mehlala v Cybersmart (Pty) Ltd [2021] 7 BALR 749 (CCMA)

SUMMARY OF THE FACTS

The employee, a call centre agent, was issued with a final written warning for absenteeism and insubordination for failing to attend work for three days, despite an instruction from the employer to return to work following sick leave.

The employee sought to have the final written warning set aside by the CCMA. The employee tested for COVID-19 at a clinic on 20 January 2021. A medical note provided on 20 January 2021 suggested isolation for at least 10 days. On 21 January 2021 the test returned positive. On 1 February 2021 (10 days after the test) the employer required the employee to return to work. The employee still had symptoms and did not return to work. On 3 February 2021, the employee went to a clinic and was booked off for a further five days. The employer issued a final written warning with respect to the employee's absence from 1 February to 3 February 2021.

SUMMARY OF THE FINDINGS OF THE CCMA

The arbitrator considered that the 10 days for self-isolation pursuant to a COVID-19 test should not be cast in stone. Each case should be approached independently on the basis of an individual's recovery. It was clear to the arbitrator that a recovery period may be longer than 10 days. The relevant regulations also did not include a clause stating that an extension could not be suggested by a medical doctor. The arbitrator held that it is widely accepted that COVID-19 is a deadly disease, and no chances should be taken to expose others to it. In the circumstance, the final written warning was overturned.

Anli Bezuidenhout and Alistair Dey-van Heerden

Each case should be approached independently on the basis of an individual's recovery. It was clear to the arbitrator that a recovery period may be longer than 10 days.

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COVID-19 Cases/Related Information

COVID-19 CASES

WAS IT FAIR TO DISMISS AN EMPLOYEE FOR FAILING TO COMPLY WITH AN INSTRUCTION TO REMAIN AT THE EMPLOYER'S PREMISES DURING THE COVID-19 LOCKDOWN?

Mango v St Mary's Children's Home [2021] 2 BALR 181 (CCMA)

SUMMARY OF THE FACTS

The employee was employed as a Child and Youth Care Worker (Care Worker) from 3 June 2019. On 26 March 2020, employees were informed that Care Workers were not allowed to leave the employer's premises, due to the lockdown restrictions and the fact that vulnerable children were left in the employer's care. Care Workers were allowed days off from work. On their days off, a cottage on the premises was made available to them.

On 1 June 2020, the employee requested to go home to attend to family business. The request was denied because the employer had many abandoned, ill, HIV-positive and vulnerable children in its care and could not risk their health and safety in the face of the COVID-19 pandemic.

The employer attempted to explain its reasons to the employee but she refused to listen and instead insisted on returning home. While being spoken to the employee left the meeting. The employer called her back to the meeting but she refused to return and continued walking away.

According to the employee, she had been promised that she could take leave (away from the the employer's premises) during Alert Level 3 of the national lockdown. On the employee's return on 4 June 2020, she was asked to attend a disciplinary hearing on the charge of insubordination. According to the employee, her version was not considered. She further averred that the instruction by her employer did not take into account her personal circumstances.

SUMMARY OF THE FINDINGS OF THE CCMA

The commissioner noted that the aim of the nationwide lockdown was to prevent massive loss of life as well as to prevent the economy from collapsing. At the centre of it all was ensuring that vulnerable groups were protected (in particular the children in the employer's care).

The employee knew that she was not allowed to go home to her family except in extreme circumstances. That was reiterated by both her supervisors. She was further accommodated in that her daughter was allowed to stay with her at the cottage on her leave days.

On 26 March 2020, employees were informed that Care Workers were not allowed to leave the employer's premises, due to the lockdown restrictions and the fact that vulnerable children were left in the employer's care.

COVID-19 CASES

WAS IT FAIR TO DISMISS AN EMPLOYEE FOR FAILING TO COMPLY WITH AN INSTRUCTION TO REMAIN AT THE EMPLOYER'S PREMISES DURING THE COVID-19 LOCKDOWN?

Mango v St Mary's Children's Home [2021] 2 BALR 181 (CCMA)*...continued*

Most of the homes in the Gauteng region had to apply the same standard to ensure consistency. The employer was registered under the Department of Social Development (DSD) and had to comply with the standard rules set out by the DSD. Any deviation would result in non-compliance which could possibly compromise the employer's funding.

For these reasons, the CCMA agreed that the employee refused a reasonable instruction by taking unauthorised leave. The commissioner further held that the employer's evidence was proof enough that the employee was determined to take her leave with or without a reasonable explanation and that she deliberately disobeyed the rule set during the meeting of 26 March 2020.

The commissioner also considered *NUM obo Selemela v Northern Platinum Ltd* [2014] 9 BLLR 870 (LAC), in which the LAC confirmed the dismissal of an employee who persistently displayed insubordinate behaviour, commenting that an employer should not be expected to tolerate such conduct. The insubordination was sufficiently serious and deliberate and therefore constituted gross misconduct, justifying dismissal.

The instruction given was reasonable and lawful and the employee refused to obey it, which wilfully disregarded authority and compromised the health of those in the care of the employer. The dismissal was held to be substantively and procedurally fair.

Mariam Jassat and Anli Bezuidenhout

The instruction given was reasonable and lawful and the employee refused to obey it, which wilfully disregarded authority and compromised the health of those in the care of the employer.

COVID-19

COVID-19 AND COURT PROCEEDINGS: FACE-TO-FACE OR VIRTUAL HEARINGS DUE TO COVID-19 RISKS?

Union-Swiss (Pty) Ltd v Govender and Others [2021] (1) SA 578 (KZD)

SUMMARY OF THE FACTS

The applicant sought an order that a trial set down for 10 days should be conducted remotely via an electronic platform, subject to any further court directives. The case concerned the seizure of trade marked goods, loss of royalties and production of counterfeit products. The Judge President of the Kwa-Zulu Natal Local Division of the HC had issued directives discouraging open hearings at the time, indicating that they should be a *"last resort"*. The applicant accordingly proposed a *"virtual trial"*, and offered its own premises to lessen any internet connectivity challenges on the part of the respondents. Witnesses would testify from their own offices in various cities across the country, preventing any need for travel during the pandemic. The proposal contained further details on matters such as lighting, contingency arrangements in the event of a break in connectivity and when participants should switch their computer cameras on or off. Pre-trial documentation would be exchanged in both digital and hard copy. The proceedings could be recorded on the online platform on a daily basis, and the recording circulated to all the parties. The first respondent's legal representative opposed the application, on the basis that this was not typical court practice, would constitute an infringement of the *audi alteram partem* principle, and could potentially advantage evasive witnesses.

SUMMARY OF THE FINDINGS OF THE COURT

Everyone has the right to have any dispute resolved in a fair public hearing before a court. Chetty J confirmed that the pandemic has changed the way in which courts have operated following the declaration of a national state of disaster. Directives may be issued (also by Judge Presidents) to address, prevent and combat the spread of COVID-19 in all courts and court precincts in the country. Heads of courts retain the discretion to authorise the hearing of matters through teleconference or videoconference or any other electronic mode, which dispenses with the necessity to be physically present in a courtroom.

In this case, the Judge President concerned (KwaZulu-Natal) had issued a directive indicating that any party who deemed it *"urgent"* that their trial proceed should communicate this to the Judge President, who would direct the further conduct of the matter. The plaintiff argued that it would suffer severe prejudice if the trial were to be adjourned, placing reliance on the Supreme Court in Western Australia's decision of *JKC Australia LNG (Pty) Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38.

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Chetty J held that:

- a party is not entitled to demand a normal hearing in open court;
- procedural fairness requires that a party be provided with an adequate opportunity to properly present its case;
- the use of technology could be a proportionate alteration to the normal practice and procedure of the court consistent with the due administration of justice;
- courts in SA have embraced internet technology to discharge their constitutional obligation of ensuring that justice is dispensed;
- in some jurisdictions where technology has been used, the results have not necessarily been positive for the users (see https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf);
- courts should be hesitant to order litigants to conduct their legal "*warfare*" in a manner that is a departure from the rules as they know it;
- the position would be different if both parties consented to a virtual trial and if the court was satisfied that the matter was sufficiently urgent to warrant it being heard;
- the court was not swayed by the respondents' protestations against a virtual trial due to issues of internet connectivity or the difficulty of assessing a witness's demeanour on a video screen; and
- the critical issue that the applicant could not overcome was to demonstrate why its trial, and the outcome thereof, was of such urgency that it should be recognised as urgent in terms of the Judge President's practice directive.

The application was dismissed with each party ordered to pay its own costs.

Avinash Govindjee

The court was not swayed by the respondents' protestations against a virtual trial due to issues of internet connectivity or the difficulty of assessing a witness's demeanour on a video screen.

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COVID-19 Cases/Related Information

COVID-19 CASES

FAILURE TO REPORT FOR DUTY: DOES THE FAULT ALWAYS LIE WITH THE EMPLOYEE?

Mthsweni v Smollan Sales & Marketing (Pty) Ltd [2021] 1 BALR 66 (CCMA)

SUMMARY OF THE FACTS

The employee failed to report for duty from 31 March to 16 April 2020. She claimed that she was unable to attend work due to the national lockdown in force at the time which was implemented to mitigate the COVID-19 pandemic, and consequently affected the availability of public transport.

On 27 March 2020, the employee sent pictures and videos via WhatsApp to her manager of the bus pick-up point as proof that the transport systems were not operating. She relied on this transport system to get to work. Her manager did not respond.

Instead, on 17 April 2020, the employee received a notice to attend a disciplinary hearing to answer the following charges:

1. misrepresentation to management that she would be reporting for duty; and
2. unauthorised absenteeism and failure to communicate with her manager from 31 March to 16 April 2020.

At the disciplinary hearing, the employee pleaded not guilty to the first charge. However she pleaded guilty to the second charge in that she admitted to not attending work for the days in question. The employee did not plead guilty to the element of not reporting. It was the employee's version that there was never an intention of not coming to work. She did not come to work due to lack of transport.

At the hearing, the employee explained her reason for not reporting for duty during that period. The employer's response was that she had no evidence to substantiate her explanation. The employee explained that she had sent WhatsApp messages to her manager on 27 March 2020 but did not have her phone with her at the hearing. Again, the employer argued that the employee had no evidence to substantiate this allegation. The manager, however, did not specifically deny that he had received the said WhatsApp messages.

The employee was subsequently found guilty of the second charge and summarily dismissed.

The employee referred an unfair dismissal dispute to the CCMA. The employee was represented by her union official whereas the employer, despite being notified of the arbitration, did not appear. The arbitration proceeded in the employer's absence.

On 27 March 2020, the employee sent pictures and videos via WhatsApp to her manager of the bus pick-up point as proof that the transport systems were not operating.

COVID-19 CASES

FAILURE TO REPORT FOR DUTY: DOES THE FAULT ALWAYS LIE WITH THE EMPLOYEE?

Mthsweni v Smollan Sales & Marketing (Pty) Ltd [2021] 1 BALR 66 (CCMA)*...continued*

SUMMARY OF THE FINDINGS OF THE CCMA

The commissioner stated that the charge of *"unauthorised absence and failure to report"* encompasses two workplace rules. Firstly, there is the rule that an employee must report for duty on the dates and times that they are supposed to work. The second is that an employee must contact their employer if they are unable to report for duty.

The crucial question was whether or not the employee communicated with her employer to inform them of her absence, and the reason for such absence. In this respect, the commissioner was of the view that the chairman of the disciplinary hearing appeared to be confused because in his outcome, and in respect of the first charge, he found that *"she did communicate that she was not able to report on 27 of April 2020 due to transport problems"*. (April is clearly an error here and should be March). However, the chairman also found that she did not *"exhaust all reasonable measures to ensure that her manager was aware of her transport problems"*, and that the employee *"failed to provide substantive evidence to corroborate that she had no transport to report for work"*.

The commissioner confirmed that the messages on the employee's phone were shown to him and he was therefore satisfied that the employee did notify the employer of her absence and the reason for her absence.

The commissioner confirmed that the messages on the employee's phone were shown to him and he was therefore satisfied that the employee did notify the employer of her absence and the reason for her absence.

The commissioner also went further to state that what was completely absent from the chairman's findings was any mention or consideration of the emergency lockdown regulations in place across the country at the time. In other words, not only was he advised by the employee, but the news and media were full of communication concerning the closure of most businesses and services, including in the transport sector.

In light thereof, the commissioner found that for the chairman to state that the employee did not supply corroborating evidence of the lack of transport was simply mind-boggling. Every business would have known that there were severe restrictions on the movement of people at the time and that the transport sector was closed. There was further no need for the employee to phone the employer every single day to report her absence as the lockdown continued.

The commissioner accordingly found that the employer's decision to dismiss the employee was irrational and illogical and therefore unfair. The commissioner ordered the employee's reinstatement.

Imraan Mahomed and Jordyne Löser

COVID-19 CASES

TO WHAT EXTENT ARE EMPLOYERS REQUIRED TO CONSIDER FAMILY CIRCUMSTANCES AMIDST COVID-19?

Beck v Parmalat SA (Pty) Ltd [2021] 2 BALR 131 (CCMA)

SUMMARY OF THE FACTS

The applicant, a laboratory analyst, was dismissed for being absent from work without permission for 21 days during the national Alert Level 5 lockdown. The applicant admitted that she had not reported for duty during this period but claimed that she had decided to remain at home after her application for leave (even unpaid) had been turned down. The employee claimed that she had been forced to take the decision notwithstanding having her leave application denied, as she was afraid of infecting her family with COVID-19.

The applicant had informed her manager that her child suffered from asthma and that she lived with her vulnerable elderly mother. Although the employer had 16 other employees in the laboratory, it had not even considered the applicant's proposal that she take unpaid leave.

The employer claimed that it was required to continue full production during the lockdown because it provided what was deemed as an essential service, all prescribed safety precautions had been taken and only pregnant employees and those with underlying chronic conditions had been allowed to stay at home during the period in question.

SUMMARY OF THE FINDINGS OF THE CCMA

The commissioner noted that at the time the President had called on companies to take care of their employees in the exceptional situation created by the pandemic. During the period in question, the number of people infected had increased from 61 to 420, and by the time the arbitration was conducted it had risen to 725,000.

The commissioner found that although the employer had heeded the President's call to continue production and had taken the measures expected of it, the applicant was not merely seeking the comfort of her family because she was scared of an unknown virus. The applicant had informed her manager that her child suffered from asthma and that she lived with her vulnerable elderly mother. The commissioner found that in light thereof, the applicant had a reasonable explanation for not reporting for duty as contractually required and that the employer was more concerned about creating a possible precedent than dealing with the applicant's personal circumstances.

The applicant's dismissal was accordingly found to be unjustified and unfair.

Turning to relief, the commissioner noted that although there was no reason not to reinstate the applicant, it would be unfair to the employer to make reinstatement fully retrospective.

The applicant was reinstated, with back pay limited to a month's salary.

Imraan Mahomed and Jordyne Löser

The commissioner found that in light thereof, the applicant had a reasonable explanation for not reporting for duty as contractually required and the employer was more concerned about creating a possible precedent than dealing with the applicant's personal circumstances.

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COVID-19 Cases/Related Information

DISMISSAL DUE TO NON-COMPLIANCE WITH COVID-19 WORKPLACE POLICIES

DOES RECKLESS DISREGARD FOR COVID-19 PROTOCOLS AMOUNT TO GROSS NEGLIGENCE WARRANTING DISMISSAL?

Eskort Ltd v Mogotsi and Others [2021] 42 ILJ 1201 (LC)

SUMMARY OF THE FACTS

The employee was employed as an assistant butchery manager.

The employee was charged with misconduct that related to his failure to disclose to his employer that he had taken a COVID-19 test in August 2020, and continued to attend the office, notwithstanding. He was further charged with gross negligence, in that after receiving a positive test result he failed to self-isolate and continued working at the office for another three days. The employee was dismissed on 3 September 2020 on the basis of misconduct.

The employee referred an unfair dismissal dispute to the CCMA where the commissioner concluded that the employee's conduct was extremely irresponsible and that he was therefore grossly negligent. However, on the issue of sanction, the commissioner reasoned that the employer had deviated from its own disciplinary code and procedure, which called for a final written warning in such instances.

The employer, aggrieved by this award, launched a review application in the LC. The review was unopposed.

SUMMARY OF THE FINDINGS OF THE COURT

The LC found that the disconnect between the commissioner's findings and conclusion on the issue of sanction made the award reviewable.

Judge Tlhotlhalemaje found that the commissioner ought to have confirmed the dismissal after determining that the employee's conduct was extremely irresponsible and grossly negligent, irrespective of what the employer's disciplinary code and procedure stipulated.

In determining the appropriateness of a sanction of dismissal, a commissioner is obliged to assess whether the misconduct in question was gross in nature.

The LC relied on *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) for the proposition that commissioners are bound to consider the totality of circumstances in exercising discretion. The court held that given the impact of COVID-19, it was incomprehensible that the employee could have conducted himself in such a carefree manner that so fundamentally endangered the lives and well-being of his colleagues and their families, as well as the employer's customers.

As such, the LC found that the commissioner's award fell outside of the bounds of reasonableness. The court set aside the award and replaced it with a finding that the dismissal was substantively fair.

The judge also provided a stern warning that all employers must enforce their COVID-19 workplace policies and the national regulations in order to avoid employees being given the opportunity to flagrantly disregard the rules, placing others' lives at risk.

Thabang Rapuleng and Dylan Bouchier

The court held that given the impact of COVID-19, it was incomprehensible that the employee could have conducted himself in such a carefree manner that so fundamentally endangered the lives and well-being of his colleagues and their families, as well as the employer's customers.

02

Strikes and technology

STRIKES

CARRYING OF WEAPONS: IS DISMISSAL FAIR IN CIRCUMSTANCES WHERE THERE WAS A BREACH OF A VALID AND REASONABLE RULE OF WHICH EMPLOYEES WERE AWARE OR COULD REASONABLY BE EXPECTED TO BE AWARE?

Pailpac (Pty) Ltd v De Beer NO and Others (DA 12/2018) [2021] ZALAC 3

SUMMARY OF THE FACTS

This appeal was against the judgment and order of the LC that dismissed the review against the arbitration award in which the arbitrator found that the dismissal of the respondents (dismissed employees) was substantively unfair and reinstated them.

The National Union of Metalworkers of South Africa embarked on a national strike in the metal and engineering industry in July 2014. The employees were dismissed for misconduct relating to the carrying of weapons such as sticks, PVC rods, sjamboks and golf clubs during the strike and were charged in terms of Pailpac's revised Breaches of Discipline document (revised BOD rules), for "*brandishing and wielding weapons during a strike*". The dismissed employees were found guilty in disciplinary hearings and dismissal was recommended. Pailpac subsequently dismissed all of them.

The dismissed employees referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council for arbitration. The arbitrator found the dismissals to be substantively unfair, stating that it would be unfair to hold employees to a rule that they were unaware existed, or which was ineffectively communicated to them. The arbitrator reinstated the dismissed employees retrospectively to the date of their dismissal.

The employer challenged this finding on review. The LC dismissed the review application, finding that the arbitrator's conclusion was one to which another arbitrator would reasonably have arrived.

SUMMARY OF THE FINDINGS OF THE LAC

The primary issue for determination by the LAC was whether the employees knew or could reasonably have been expected to be aware of the rule pertaining to the carrying of weapons.

The employer's dominant argument was that the evidence showed that the dismissed employees had knowledge of the rule and that the employees presented contradictory versions as to their knowledge thereof during the arbitration. Accordingly, the arbitrator ignored material evidence.

The dismissed employees contended that that there was no acceptable evidence before the arbitrator that any of the dismissed employees had actual knowledge of the rule and that the employer had not taken sufficient steps to ensure that the employees were aware of the rule. Therefore, the employees could not have been aware of the rule and sanction.

The arbitrator found the dismissals to be substantively unfair, stating that it would be unfair to hold employees to a rule that they were unaware existed, or which was ineffectively communicated to them.

STRIKES

CARRYING OF WEAPONS: IS DISMISSAL FAIR IN CIRCUMSTANCES WHERE THERE WAS A BREACH OF A VALID AND REASONABLE RULE OF WHICH EMPLOYEES WERE AWARE OR COULD REASONABLY BE EXPECTED TO BE AWARE?

Pailpac (Pty) Ltd v De Beer NO and Others (DA 12/2018) [2021] ZALAC 3...*continued*

Having considered the evidence on this aspect, the LAC was of the view that the arbitrator correctly rejected the dismissed employees' version that the revised BOD rules were not placed on the notice board. It was, however, the arbitrator's related finding that the employees were not given sufficient notice of the rule that was open to question because it was inconsistent with the proved facts which indicated that:

- the employees (including the dismissed employees) were notified of the revised BOD rules as they were placed on the notice board at the entrance to the factory;
- the dismissed employees regularly read notices and other announcements posted on that particular notice board; and
- the employees (including the dismissed employees) were fully aware of their obligation to read the notices and other communications posted on the board.

Given the above, the LAC held that it was clear that the dismissed employees were, or ought reasonably to have been, aware of the rule and the arbitrator failed to have regard to the evidence presented. Accordingly, the arbitrator's finding on this aspect was not one that could reasonably have been reached on the evidence before them.

the LAC determined that it was clear that the dismissed employees were, or ought reasonably to have been, aware of the rule and the arbitrator failed to have regard to the evidence presented.

The LAC further held that a reasonable decision maker in the position of the arbitrator would have rejected the evidence of the dismissed employees as unreliable.

As for the arbitrator's submission that there was no positive duty on the dismissed employees to approach the notice board, that is not the test. The correct test is whether, on the evidence, the dismissed employees were aware of the rule or could reasonably have been expected to be aware of the rule.

As far as the appropriate sanction was concerned, the LAC found that it was not unreasonable for the sanction of dismissal to be warranted where such was in flagrant disregard of a workplace rule which prohibits such conduct during a picket or strike and expressly warns that the consequence of the breach is the sanction of dismissal.

Viewed objectively, the breach of the rule by the dismissed employees coupled with the ensuing harm to, and intimidation of, non-striking employees rendered their continued employment intolerable and made dismissal an appropriate sanction. Accordingly, the LAC found that the dismissals were substantively fair.

Hugo Pienaar, Jaden Cramer and Taigrine Jones

02
Strikes and technology

STRIKES

IS AN ULTIMATUM BY AN EMPLOYER A WAIVER OF THE RIGHT TO DISMISS FOR THE PERIOD OF ITS DURATION?

AMCU obo Rantho and Others v SAMANCOR Western Chrome Mines (JA62/19) [2020] ZALAC 46

SUMMARY OF THE FACTS

In May 2013, some Association of Mineworkers and Construction Union (AMCU) members participated in an unprotected strike. The first respondent (Samancor) issued a final written warning (valid for 12 months) to the striking employees, including the individual appellants.

Despite the final written warnings, on 25 November 2013 the employees embarked on another unprotected strike. Samancor issued three ultimata to return to work. The first ultimatum made repeated reference to a final ultimatum that would be issued should there be continued non-compliance.

The final ultimatum did not reserve the right to disciplinary action, even if the employees returned to work. The striking employees for the most part returned to work before the expiry of the final ultimatum.

Despite the striking employees' compliance with the final ultimatum, Samancor dismissed them. An internal appeal was launched by AMCU on behalf of the dismissed employees, but before the internal appeal could be decided Samancor and AMCU reached a settlement, in terms of which, Samancor would reinstate all employees who participated in the unprotected strike in November 2013, save for those employees who had received final written warnings for participation in the unprotected strike earlier that year.

The employees who were on final written warnings and who were not reinstated brought an unfair dismissal claim before the LC.

The LC found that the dismissals for participation in the unprotected strike were procedurally and substantively fair and did not allow the employees to challenge the validity of the final written warnings for their participation in the strike in May 2013.

SUMMARY OF THE FINDINGS OF THE LAC

On appeal, the LAC had to determine whether an employer is entitled to dismiss an employee that complies with an ultimatum or whether the employee's compliance with the ultimatum constitutes a waiver of the right to dismiss.

Central to this question is Item 6(2) of Schedule 8 of the LRA which states that before an employer can dismiss striking employees for their participation in an unprotected strike the employer should issue an ultimatum that sets out the terms of the ultimatum, what is required of the employees, and the sanction for non-compliance. It should also ensure that the employees are afforded sufficient time to consider and respond to the ultimatum.

The LAC held that it is a trite principle of our law that where illegally striking employees comply with the terms of an ultimatum and return to work within the given time frame the employer is barred from dismissing the employees for their participation in the unprotected strike. To find otherwise would be to render the ultimatum obsolete.

Despite the striking employees' compliance with the final ultimatum, Samancor dismissed them.

STRIKES

IS AN ULTIMATUM BY AN EMPLOYER A WAIVER OF THE RIGHT TO DISMISS FOR THE PERIOD OF ITS DURATION?

AMCU obo Rantho and Others v SAMANCOR Western Chrome Mines (JA62/19) [2020] ZALAC 46...*continued*

The LAC further stated that an ultimatum serves two purposes: to give striking employees an opportunity to reconsider their action and to place the negotiation process back on track, thus ending the hastened action taken by the striking employees.

Interestingly, the LAC found that the terms in which the first two ultimata were framed were preliminary in nature and indicated that dismissal would only materialise after non-compliance with the third and final ultimatum, and until then any employee who returned to work would be seen as complying with the ultimatum.

Therefore, the LAC was of the view that when an employer issues an ultimatum the employer effectively waives its right to dismiss the illegally striking employees for the entire period the ultimatum remains open for acceptance or until it is rejected by the employees.

The LAC noted that if the employer wanted to reserve the right to dismiss the employees, even if they returned to work, it should have worded the ultimatum differently.

Accordingly, the LAC found that the dismissals of the illegally striking employees were in fact substantively unfair.

It must be noted that this finding of the LAC was fact specific given the ambiguity in the ultimata issued.

Hugo Pienaar and Jaden Cramer

The LAC found that the dismissals of the illegally striking employees were in fact substantively unfair.

STRIKES

SYMPATHY STRIKES: WHAT TEST SHOULD BE APPLIED TO DETERMINE WHETHER THERE IS A SUFFICIENT LINK BETWEEN THE PRIMARY EMPLOYER AND THE SECONDARY EMPLOYER?

AngloGold Ashanti Ltd and Others v Association of Mineworkers and Construction Union and Others [2019] 40 ILJ 1552 *(LC)*

SUMMARY OF THE FACTS

The first appellant, the Association of Mineworkers and Construction Union (AMCU), issued Sibanya Gold Limited t/a Sibanye Still Water (Sibanye) with a 48-hour strike notice, following which its members commenced with a protected strike.

AMCU thereafter (after seven days) proceeded to issue notices of secondary strike action to the first, second, fourth, fifth, sixth, seventh, eighth and ninth respondents, indicating that the secondary strike would be in support of the protected strike at Sibanye, in relation to a dispute over wages and other conditions of employment.

Following these notices, all nine respondents launched separate urgent applications seeking to interdict the appellants from striking and to declare the proposed secondary strike unprotected.

Prinsloo J, sitting at the LC, ordered that the secondary strike be declared unprotected. The judge applied a proportionality test that weighs up the reasonableness of the nature and extent of the secondary strike against the effect of the nature and extent of the strike on the business of the primary employer.

On appeal to the LAC, the appellants proceeded on the grounds that exceptional circumstances existed to declare that the nature and extent of the secondary strike was reasonable.

SUMMARY OF THE FINDINGS OF THE COURT

The appellants' argument turned on whether the disruption of services and economic loss were factors that ranked highly when considering the legitimacy of a secondary strike.

The LAC determined that the position is clear: a proportionality assessment must be undertaken weighing the reasonableness, nature and extent of the secondary strike against the effect of the secondary strike on the business of the primary employer. This establishes that the economic consequences for the secondary employer must be taken into account.

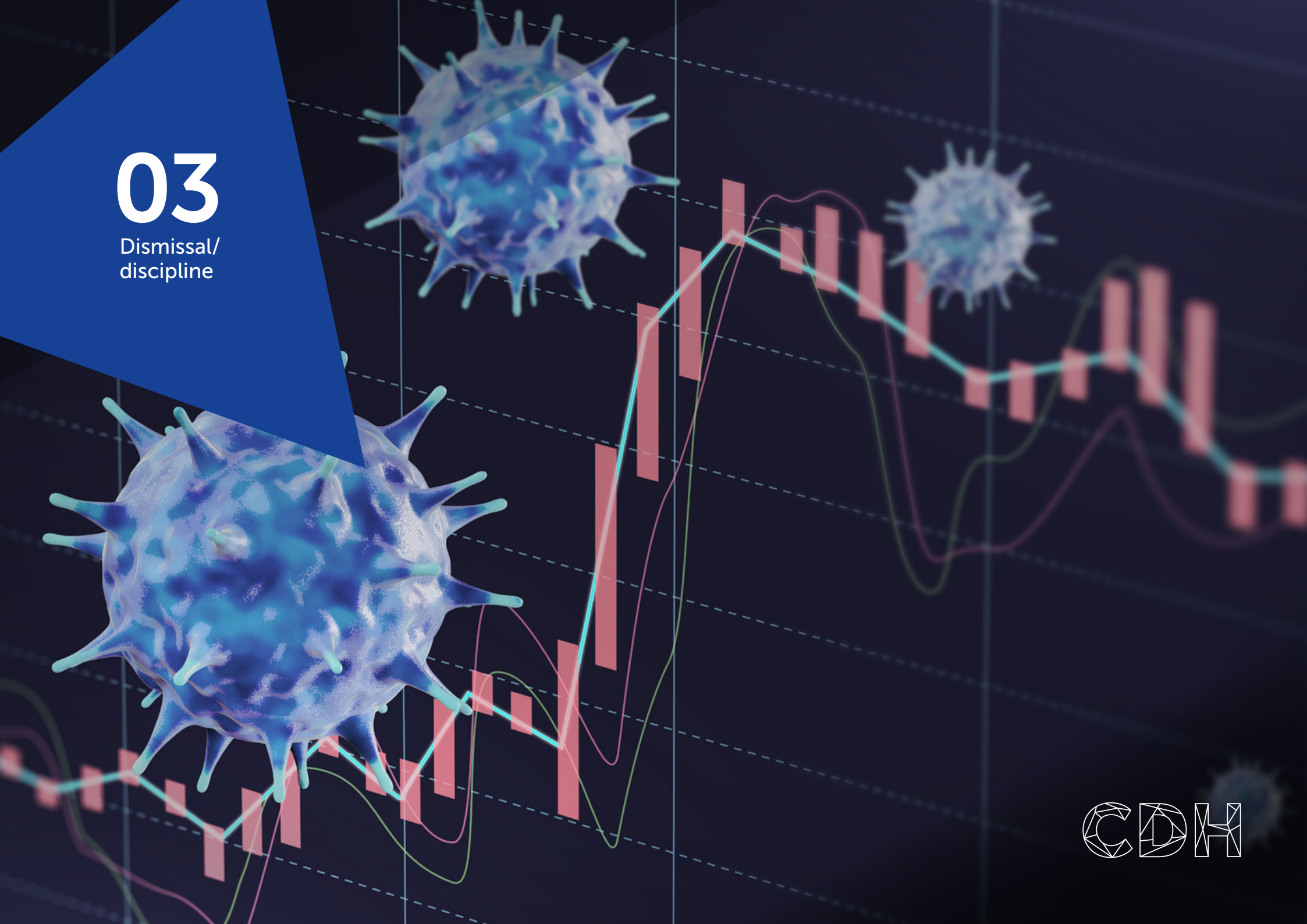
The LAC found that there was no significant point of law flowing from this appeal that required a determination to be made where there was no longer a live dispute between the parties. In other words, the answers being sought were established principles.

Hugo Pienaar and Jaden Cramer

The appellants' argument turned on whether the disruption of services and economic loss were factors that ranked highly when considering the legitimacy of a secondary strike.

03

Dismissal/
discipline



DISMISSAL/DISCIPLINE

FALSE ALLEGATIONS OF RACISM – WHAT NEEDS TO BE CONSIDERED?

Forever Living Projects (Pty) Ltd v Nompumelelo Cindy Bolelwang
Case No: JR 1928/18, 19 January 2021 (Unreported judgment)

SUMMARY OF THE FACTS

Mr Harrington manages Forever Living Project's (the employer) warehouse. The employees who work in the warehouse and report to Harrington are all black men. The employer's staff complement comprises of mostly black people and three white people.

During a meeting with the warehouse staff, Harrington addressed the conduct of certain employees who he believed were sabotaging him. He alleged that they were provoking him to use the "*K*" word.

A few months after the staff meeting Ms Bolelwang (the employee), when speaking to a colleague who suggested that she raise an IT problem she was having with Harrington, declined the suggestion, stating that Harrington was a racist as he once said, "*he mustn't be forced to use the 'K' word,*" when addressing employees. The employee's comment was reported to management. In a written statement, Harrington admitted that he made the remark relating to the use of the "*K*" word and acknowledged that racism is a major problem in South Africa, given the historical context. The employee was subjected to a disciplinary enquiry and dismissed for "*unacceptable and divisive behaviour*" when she referred to Harrington as a racist. The employee referred a substantively unfair dismissal dispute to the CCMA.

The arbitrator found that at the heart of the dispute was whether the employee's accusations were baseless and without reasonable cause. When considering the term "*racist*" she relied on the definition of "*a person behaving in, advocating, or practising racism*". She reasoned that she could not envisage any employee taking comfort from being assured by their manager that they would not be provoked into saying the "*K*" word. She found that the employee had not falsely accused Harrington of being a racist and that the dismissal was unfair and awarded her 10 months' compensation.

Aggrieved by the CCMA award, the employer launched a review application before the LC.

The arbitrator found that at the heart of the dispute was whether the employee's accusations were baseless and without reasonable cause.

DISMISSAL/DISCIPLINE

FALSE ALLEGATIONS OF RACISM – WHAT NEEDS TO BE CONSIDERED?

Forever Living Projects (Pty) Ltd v Nompumelelo Cindy Bolelwang
Case No: JR 1928/18, 19 January 2021 (Unreported judgment)...*continued*

SUMMARY OF THE FINDINGS OF THE COURT

The LC noted that the allegation which resulted in the employee's dismissal had two components: firstly, her remark that Harrington was a racist, and secondly, its impact (i.e. unacceptable and divisive behaviour).

The LC found that the arbitrator properly identified, understood and pronounced on the first component of the allegation. She determined that the employee did not falsely accuse Harrington of being a racist. She took into account the concessions made by Harrington, in particular, that he used the "*K*" word and often used phrases such as "*you black people*". In the circumstances, and as a reviewing court, the LC found that it could not interfere with this finding.

The court, however, found that the arbitrator had not dealt with the second component of the allegations, that is, whether the comment made by the employee was unacceptable and constituted divisive behaviour. The LC agreed with the employer that some statements should be avoided in the workplace as they are divisive, but found that the employee's comment was not divisive. Harrington made his "*k*" word remarks in a staff meeting consisting of black people, whereas the employee made her remark to a single colleague. The LC did not see anything wrong with this. The employee's remark was not divisive nor did it amount to unacceptable behaviour.

The employer's review application was accordingly dismissed.

Gillian Lumb and Mbulelo Mango

The LC agreed with the employer that some statements should be avoided in the workplace as they are divisive, but found that the employee's comment was not divisive.

DISMISSAL/DISCIPLINE

THE IMPORTANCE OF THE CIRCUMSTANCES IN WHICH SERIOUS MISCONDUCT TAKES PLACE

Solidarity obo Kruger v Transnet SOC Ltd t/a Transnet National Ports Authority and Others [2021] 5 BLLR 484 (LAC)

SUMMARY OF THE FACTS

Mr Kruger (the employee), a Marine Operations Manager at the Richards Bay harbour, was instructed by the Transnet National Ports Authority (the employer) to ensure that full services were provided at the port on Christmas Day, 2015. The employee raised a concern that past practice was that work on Christmas Day was treated as voluntary and that staffing on the day may be a problem. Despite this, the employee made arrangements for a full service to be provided.

The employee put a full team together and issued an instruction to other employees to work on Christmas Day. He made sure employees were aware that this was an instruction and that reporting for duty on the day was not voluntary. One of the employees, who was a tug master, failed to report for the second shift. As a result, the port had to be closed.

The employee was subsequently called to a meeting with human resources (HR) representatives and served with a letter of suspension. In response, the employee said to the HR representatives "*When this is over, I am coming to get you.*" One of the HR representatives cautioned the employee not to make the situation worse. Neither of the HR representatives called for the aid of the security manager who was within the vicinity. The HR representatives went for lunch together following the meeting.

An arbitrator appointed in terms of section 188A of the LRA found the employee guilty of gross dereliction of duty in that he failed to ensure the provision of full marine services on Christmas Day and intimidated and threatened the employer's HR representatives. Despite his 21 years of service and clean disciplinary record, the employee was dismissed. The employee reviewed the award before the LC.

The LC upheld the dismissal. The employee then referred the matter to the LAC.

An arbitrator appointed in terms of section 188A of the LRA found the employee guilty of gross dereliction of duty in that he failed to ensure the provision of full marine services on Christmas Day and intimidated and threatened the employer's HR representatives.

DISMISSAL/DISCIPLINE

THE IMPORTANCE OF THE CIRCUMSTANCES IN WHICH SERIOUS MISCONDUCT TAKES PLACE

Solidarity obo Kruger v Transnet SOC Ltd t/a Transnet National Ports Authority and Others [2021] 5 BLLR 484 (LAC)...*continued*

SUMMARY OF THE FINDINGS OF THE COURT

The LAC found that there was no evidence before the arbitrator that the employee knew or should have known that one of the crew members would not report for work. The arbitrator relied on the fact that the crew member had raised a concern about working on Christmas Day, as this was previously voluntary. The LAC noted that the employee responded to this by giving the crew member an unequivocal instruction to report for duty. Two other employees who had raised the same concern had still reported for duty.

In addition, the employer was well aware that there was no budget to secure standby tug masters and no standby tug masters were available to work. The employer did not indicate what further steps the employee could have taken in the circumstances. The arbitrator's finding that the employee's efforts were "*insufficient and half-hearted*" were found not to be borne out by the material placed before the arbitrator. The employee had done what he could. The LAC questioned what contingency plan could, given the undisputed circumstances, reasonably have been put in place by the employee.

Turning to the allegation of intimidation, the arbitrator had found that the employee's conduct was unwarranted and had meant to inflict fear and subjugation. The LAC found that while the employee's words constituted a threat and must reasonably have aimed to intimidate, it was not clear precisely what was meant by the words. There was no suggestion that either of the HR representatives were fearful of the employee or considered their lives to be in danger.

The LAC held that while the allegation was serious, the arbitrator had to carefully consider the circumstances in which the threat was made and its precise nature and effect. The LAC found that the evidence before the arbitrator was that the employee was angered by the fact that disciplinary action was being taken against him, an anger which was not without justification in the circumstances.

In determining the appropriate sanction, consideration was given by the LAC to the fact that no employee testified on behalf of the employer that a continued employment relationship would be intolerable. In addition, regard was had to the employee's 21 years of service and clean disciplinary record.

The appeal was upheld with costs. The order of the LC was set aside and substituted with an order that the dismissal was substantively unfair. The employee was retrospectively reinstated, subject to a final written warning for threatening and intimidating behaviour.

Gillian Lumb and Mbulelo Mango

The order of the LC was set aside and substituted with an order that the dismissal was substantively unfair.

DISMISSAL/DISCIPLINE

IS AN EMPLOYER'S FAILURE TO ADVANCE EVIDENCE RELATING TO A BREAKDOWN IN THE TRUST RELATIONSHIP IN THE CASE OF DISHONESTY A CRUCIAL ERROR?

Autozone v Dispute Resolution Centre of Motor Industry and Others [2019] 6 BLLR 551 (LAC)

SUMMARY OF THE FINDINGS OF THE COURT

Mr Sikhakhane, an employee of Autozone (the employer), was instructed to employ three casual workers for the day and to obtain R150 from the cashier to pay them R50 each. Sikhakhane obtained R180, paid each casual worker R50, and withheld R30.

On completion of their work and after receiving R50, the casual workers complained about the payment. The branch manager was informed by the cashier that Sikhakhane had requested R180 and not R150, as instructed. When confronted about the discrepancy Sikhakhane took the R30 out of his pocket but offered no explanation. Later he claimed that he had acted on his own initiative to pay the casuals more and had withheld the R30 until the work had been completed.

A disciplinary enquiry was held and Sikhakhane was dismissed on the grounds of dishonesty relating to the misappropriation of company funds. Sikhakhane referred an unfair dismissal dispute to the CCMA.

The arbitrator upheld the dismissal after finding that Sikhakhane's conduct amounted to dishonesty and that this had irretrievably broken down the trust relationship.

Sikhakhane brought review proceedings before the LC.

Relying on *Edcon Limited v Pillemer NO* [2010] 1 BLLR 1 (SCA), the LC held that the test is whether the trust relationship has been breached to the extent that the employment relationship has become intolerable. This is a question of fact to be established by appropriate evidence. The LC concluded that, given that the employer had not presented any evidence to show how the misconduct impacted on the trust relationship, the arbitrator ought to have held that the dismissal was substantively unfair.

The LC reviewed and set aside the award. It ordered that Sikhakhane be reinstated and issued with a written warning (accepting that he was guilty of the misconduct).

Unsatisfied with the decision, the employer launched appeal proceedings.

The LC concluded that, given that the employer had not presented any evidence to show how the misconduct impacted on the trust relationship, the arbitrator ought to have held that the dismissal was substantively unfair.

DISMISSAL/DISCIPLINE

IS AN EMPLOYER'S FAILURE TO ADVANCE EVIDENCE RELATING TO A BREAKDOWN IN THE TRUST RELATIONSHIP IN THE CASE OF DISHONESTY A CRUCIAL ERROR?

Autozone v Dispute Resolution Centre of Motor Industry and Others [2019] 6 BLLR 551 (LAC)*...continued*

SUMMARY OF THE FINDINGS OF THE COURT

The LAC accepted that the evidence on this issue was somewhat thin. It recorded that an employer, relying on irreparable damage to the employment relationship to justify a dismissal, would be prudent normally to lead evidence in that regard, unless the conclusion that the relationship has broken down is apparent from the nature of the misconduct or the circumstances of the dismissal.

The LAC accepted that where the misconduct in question reveals a stratagem of dishonesty or deceit, the employer will probably lose trust in the employee, who by reason of the misconduct alone will have demonstrated a degree of untrustworthiness rendering them unreliable and the continuation of the relationship intolerable or unfeasible.

The LAC found that in the circumstances it was not necessary for the employer to have produced evidence to show that the employment relationship had been irreparably destroyed. The nature of the misconduct and the circumstances in which it took place supported a conclusion that the continuation of the employment relationship became intolerable. The LAC noted that *"Dishonest conduct, deceitfully and consciously engaged in against the interests of the employer, inevitably poses an operational difficulty. The employer therefore will be hard pressed to place trust in such an employee ... The operational requirements of the employer alone, therefore may very well justify the dismissal."*

The LAC found that the decision of the arbitrator was one that a reasonable decision maker could reach. There was accordingly no basis for the LC to review and set aside the award. The employer's appeal was upheld.

Gillian Lumb and Mbulelo Mango

The LAC found that in the circumstances it was not necessary for the employer to have produced evidence to show that the employment relationship had been irreparably destroyed.

04

Discrimination

DISCRIMINATION

DISCRIMINATION ON THE BASIS OF SOCIAL ORIGIN.

Tshwane University of Technology v Maraba and Others (JA110/2019) [2021] ZALCJHB 56 (17 May 2021)

SUMMARY OF THE FACTS

The appellant, Tshwane University of Technology, was established following a merger between the former Pretoria Technikon, the Technikon Northern Gauteng, based in Soshanguve, and the Technikon North-West, based in Ga-Rankuwa.

During the merger process, all positions across the three institutions were evaluated and graded by an external consulting firm. By agreement with organised labour, employees whose positions were downgraded as a result of the merger had their salaries capped. This was to remain in place until salary disparities were worked out of the system. However, as a result of a subsequent wage dispute, the appellant agreed with organised labour that the salary cap would be removed.

The three respondents were all employed as professional nurses. They referred an unfair discrimination claim on the basis that nursing staff from the previously well-resourced and advantaged Pretoria Technikon remained on higher salaries than nurses from historically disadvantaged institutions. As a result, they alleged that they were discriminated against due to their social origin.

The appellant, in response, contended that the employees who benefitted from the removal of the salary cap came from all three of the appellant's campuses.

SUMMARY OF THE FINDINGS OF THE COURT

The LC held that the three respondents were unfairly discriminated against as a result of their social origin because they were originally based in the historically disadvantaged institutions, which were under-resourced. Further, the LC held that the appellant had failed to present a justifiable ground for its conduct (i.e. the differential treatment).

The LC therefore ordered the appellant to increase the respondents' salaries retrospectively to the same level as their identified comparator.

On appeal, the LAC set out the legal test for unfair discrimination claims, which is to:

- establish whether the appellant's conduct differentiates between people;
- establish whether that differentiation amounts to discrimination; and
- determine whether the discrimination is unfair.

The LAC held that "*social origin*" refers to a person's inherited social status or descent-based discrimination by birth, economic or social status. Further, it includes discrimination on the basis of class, caste or a socio-occupational category.

The LC held that the three respondents were unfairly discriminated against as a result of their social origin because they were originally based in the historically disadvantaged institutions, which were under-resourced.

DISCRIMINATION

DISCRIMINATION ON THE BASIS OF SOCIAL ORIGIN.

Tshwane University of Technology v Maraba and Others (JA110/2019) [2021] ZALCJHB 56 (17 May 2021)...*continued*

While the appellant accepted that there was a differentiation in salaries, the differentiation arose from the decision to uncap salaries, which was applied across all three institutions. There was, therefore, no evidence that the decision to uncap salaries was applied only to the previously advantaged campus of Pretoria, or that it was limited to a particular occupation or job grade.

The LAC held that, in terms of the evidence, the differential treatment that arose from the decision to uncap salaries was not attributable to the respondents' social origin. The appellant, by way of example, was able to demonstrate that other employees who were employed at the previously disadvantaged campus before the merger also enjoyed the benefit of a higher salary after the cap was removed, despite their geographical location. Further, the uncapping of salaries was applied in the same manner for all employees employed at different occupational categories and grades across all three of the appellant's campuses.

The appellant therefore proved that it had not discriminated against the respondents on the basis of social origin.

The LAC upheld the appeal and ordered that the unfair discrimination claim be dismissed.

Hedda Schensema

The LAC held that, in terms of the evidence, the differential treatment that arose from the decision to uncap salaries was not attributable to the respondents' social origin.

DISCRIMINATION

DOES AN AGE REQUIREMENT IN RESPECT OF A RECRUITMENT POLICY ALWAYS CONSTITUTE UNFAIR DISCRIMINATION?

South African Navy and Another v Tebeila Institute of Leadership, Education, Governance and Training [2021] JOL 49934 (SCA)

SUMMARY OF THE FACTS

The military skills development system (MSDS) was used by the South African National Defence Force (of which the first appellant, the South African Navy, formed part) to select persons who enlisted in the defence force, to undergo training.

Recruitees had to be 26 years of age or under to qualify. Tebeila, an organisation that works to ensure access to further education for persons from poor communities, challenged the age requirement for admission to the MSDS. It contended that the age requirement constituted unfair discrimination that was contrary to section 9 of the Constitution.

Tebeila argued that the requirement failed to accord post-matric students the right to further education, which the state, through reasonable measures, must make progressively available, as required by section 29(1)(b) of the Constitution, and the Navy had failed to respect, protect, promote and fulfil the Bill of Rights in terms of section 7(2) of the Constitution by stipulating the age requirement.

The HC found in favour of Tebeila and found that the age requirement constituted unfair discrimination and the Navy's policy concerning the admission of applicants under MSDS was declared invalid.

Accordingly, the HC held that the applicants were deprived of the opportunity to be trained, which amounts to unfair discrimination.

The Navy was granted leave to appeal.

SUMMARY OF THE FINDINGS OF THE COURT

The SCA referred to *Harksen v Lane No and Others* [1997] (11) BCLR 1489 (CC) (Harksen), the current authoritative case law interpretation of section 9(3) of the Constitution.

In line with *Harksen*, the age limit amounts to discrimination because it excludes persons from participation in the MSDS on the specific grounds of age.

The SCA held that *Harksen* makes it plain that the constitutional prohibition of unfair discrimination protects against infringing human dignity.

The respondent's challenge to the policy was that it was arbitrary because it excluded young capable people between the ages of 26 and 35. The SCA held that the respondent failed to adequately appreciate the rationale for the age requirement.

The respondent's challenge to the policy was that it was arbitrary because it excluded young capable people between the ages of 26 and 35.

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South African Navy and Another v Tebeila Institute of Leadership, Education, Governance and Training [2021] JOL 49934 (SCA)*...continued*

Firstly, the constitutional duty of the defence force is to defend and protect and, secondly, the older people are when first recruited, the shorter the time will be that they can serve as soldiers who are combat ready.

The SCA found that the discrimination was fair because:

i. the age requirement is predicated upon a reasonable delineation of the attributes that generally correlate with age; and

ii. the age requirement cannot constitute unfair discrimination simply because it is possible to imagine other thresholds or other means by which the functional requirements of recruitment for the defence force could be met. That the maximum age might have been set at 25 or 27 does not render the specified maximum age of 26 unfair.

The SCA held that the age requirement, forming part of the MSDS, has a rational basis that serves the functional requirements of the defence force so as to permit the force to carry out its constitutional mandate.

Hedda Schensema and Asma Cachalia

The SCA held that the age requirement, forming part of the MSDS, has a rational basis that serves the functional requirements of the defence force so as to permit the force to carry out its constitutional mandate.

DISCRIMINATION

DOES THE PAYMENT OF BONUSES TO NON-STRIKING EMPLOYEES AMOUNT TO UNFAIR DISCRIMINATION IN TERMS OF SECTION 5 OF THE LRA?

NUM v Cullinan Diamond Mine (A Division of Petra Diamonds (Pty) Ltd) [2021] 42 ILJ 785 (LAC)

SUMMARY OF THE FACTS

The employer and the National Union of Mineworkers (NUM) deadlocked on wage negotiations. As a result, NUM called upon its members to embark on a protest strike that lasted approximately 12 operational days.

Before the commencement of the strike, on 26 August 2013, the employer sent a letter to all its employees pleading with them to again consider its final wage offer. Striking employees ran the risk of losing out on a bonus payment scheduled for the end of September 2014.

After the strike ended, all employees (striking or not) would not receive an annual production bonus. However, an exceptional bonus would be paid to all employees who worked one or more days during the strike, contributing to the company's exceptional productivity and performance during that period. With only 34% capacity, the company attained 52% of its expected carats target.

NUM contended that this was unfair discrimination, and thus referred an unfair discrimination claim before the LC that alleged a breach of sections 5(2)(c)(vi) and 5(3) of the LRA and sections 6 and 10 of the EEA.

The discrimination claim was dismissed by the LC. The court found that there was no evidence of infringement of section 5 of the LRA or discrimination in terms of the EEA. In addition to discrimination on grounds of participating in a strike not being listed or an analogous ground, discrimination in this instance was in any event rational and justifiable.

NUM appealed to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC held that the EEA was not applicable to the kind of discrimination alleged by NUM, but that section 5 of the LRA, which prohibits anti-union discrimination, was applicable.

It found, however, that there was generally no express provision in the LRA (or elsewhere) prohibiting employers from providing non-strikers with rewards for the extra work or exceptional performance they may have put in during a strike. The issue was whether that practice was unfairly discriminatory.

Whether the employer's conduct during industrial action constitutes unfair discrimination is dependent on the context and reasons for which it occurred.

There is no denying that the impact of differential treatment between strikers and non-strikers is disadvantageous for the strikers, and, although the basis of the differentiation might, on the face of it, be innocent, the effect of the differentiation is nonetheless discriminatory in the narrow sense that there is a disparate impact.

The LAC rejected NUM's argument that the payment of rewards to non-strikers is generally unfair because it undermines the union as a bargaining agent by discouraging employees from exercising the right to strike and thereby weakens its impact. This, NUM argued, was against the object of the LRA, which is to promote orderly collective bargaining as the preferred means of setting terms and conditions of employment. NUM argued that by allowing the payment

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DISCRIMINATION

DOES THE PAYMENT OF BONUSES TO NON-STRIKING EMPLOYEES AMOUNT TO UNFAIR DISCRIMINATION IN TERMS OF SECTION 5 OF THE LRA?

NUM v Cullinan Diamond Mine (A Division of Petra Diamonds (Pty) Ltd) [2021] 42 ILJ 785 (LAC)*...continued*

of bonuses to non-strikers, the message was sent that in future employees would be better rewarded if they did not strike. Likewise, by rewarding non-strikers, the employer was advantaging them for not exercising their right to strike and was thus acting in contravention of section 5(3) of the LRA.

Findings of the LAC

The LAC found that a distinction should be drawn between bypassing or undermining a bargaining agent and the deployment of a retaliatory measure as part of the collective bargaining power play during a strike.

Insofar as the policy of the LRA aims to strengthen collective bargaining as the means of industrial self-regulation, its success depends on strong representative trade unions and employers acting within stable bargaining relationships, underwritten by the right to engage in industrial action. The possibility of an ultimate power play by either side is an influential inducement for agreement and industrial peace.

Just as employees have measures to compel the process to advance their interests, such as strikes, go-slows, overtime bans, boycotts and picketing, so too does the employer, which may seek to protect its interests by resorting to a lock-out, unilateral implementation of its last offer, employment of temporary replacement labour, and, ultimately, operational requirements dismissals when a strike becomes dysfunctional.

In offering bonuses to non-strikers on the eve of the strike, the employer hoped to gain a tactical advantage before its employees' campaign picked up momentum, at a time when its business was not overly vulnerable.

Just as it is legitimate for a trade union to resort to industrial action (temporarily suspending a contract) in response to an employer's unilateral management changes, so too may it be legitimate (depending on the circumstances) for an employer to respond to a strike with a unilateral exercise of the managerial prerogative to temporarily alter the terms of employment.

Economic sanctions underwrite the collective bargaining process. The unilateral offer of bonuses or additional overtime payments to non-strikers (who may not be members of the union) is no more or less objectionable than the employment of replacement labour, provided that the measures are suitable and necessary (proportional) for that purpose.

The company's conduct did not unfairly discriminate against or prejudice the striking employees, nor did it unfairly advantage the non-strikers without a legitimate reason. The non-strikers were not advantaged for not exercising their right to strike. They were advantaged for their attendance and exceptional performance during the strike. But for the exceptional performance, the bonus would not have been paid.

The finding of the LC was upheld.

Phetheni Nkuna

The LAC found that a distinction should be drawn between bypassing or undermining a bargaining agent and the deployment of a retaliatory measure as part of the collective bargaining power play during a strike.

DISCRIMINATION

DETERMINING WHETHER AN EMPLOYEE'S DISMISSAL WAS A RESULT OF UNFAIR DISCRIMINATION RELATING TO THEIR DEPRESSION OR DUE TO MISCONDUCT.

Legal Aid South Africa v Jansen [2021] (1) SA 245 (LAC)

SUMMARY OF THE FACTS

The employee, appointed as a paralegal, suffered from mental health problems.

In October 2010, he participated in Legal Aid's employee wellness programme. He was subsequently diagnosed with depression and high anxiety and was prescribed anti-depressants.

In 2012, the employee got divorced. In September 2012, domestic violence proceedings were instituted against him by his ex-wife. She was represented by Mr Terblanche, Legal Aid's justice centre executive for the George area (where the employee was based) who was also his colleague and superior. This claim was subsequently settled. The employee consulted a clinical psychologist who reported that the primary cause of the employee's condition was Terblanche representing his ex-wife. The psychologist did not conclude that he suffered from chronic, major or ongoing depression but indicated that he did carry a lot of frustration and showed symptoms of burnout.

Although Legal Aid was furnished with the report, nothing was done. The employee eventually lodged a grievance against Terblanche with the CEO. No action was taken.

The employee failed to report for duty for 13 days between August 2013 and November 2013. Efforts to reach him were unsuccessful.

On 1 October 2013, Terblanche attended the CCMA at Riversdale, where he coincidentally encountered the employee and enquired why he had been absent. The employee reacted to this enquiry by turning his back on Terblanche, walking away and making a dismissive gesture with his hands. The appellant regarded this conduct as an act of insolence and defiance.

When he was again contacted to enquire why he had not reported for duty, the employee said that that he was awaiting a dismissal letter as he no longer wished to work for the appellant. He presented one medical certificate accounting for his absence from work due to depression on some of the days of his absence during this period. The medical certificate reflected that the employee consulted a doctor on 16 October 2013, although the certificate booked him off work from 11 to 18 October 2013.

Disciplinary action was instituted against the employee and he was dismissed for misconduct.

The LC accepted that the misconduct was caused by his medical condition of depression and found that the dismissal amounted to unfair discrimination on grounds of disability.

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DISCRIMINATION

DETERMINING WHETHER AN EMPLOYEE'S DISMISSAL WAS A RESULT OF UNFAIR DISCRIMINATION RELATING TO THEIR DEPRESSION OR DUE TO MISCONDUCT.

Legal Aid South Africa v Jansen [2021] (1) SA 245 (LAC)*...continued*

The clinical psychologist who had examined the employee testified at the LC that the employee was in such a state that he no longer cared and was avoiding every possible demand. His lack of rational thought processing resulted in self-destructive behaviour and he was unable to see how to rectify certain behavioural patterns. She believed that if he had been given some time off work to resolve his issues – as she had recommended in her report – it was possible that the whole misconduct scenario could have been avoided.

His dismissal was found to be automatically unfair.

The LC ordered the employee's reinstatement with full retrospective effect and the payment of compensation equivalent to six months' salary. Legal Aid appealed.

SUMMARY OF THE FINDINGS OF THE COURT

The employee contended that the dominant reason for his dismissal was him suffering from depression.

It is incumbent on an employee alleging that the reason for their dismissal is discrimination on prohibited grounds, to produce sufficient evidence raising a credible possibility that the dismissal amounted to differential treatment on the alleged ground.

The stresses and pressures of modern-day life being what they are, depression is common in the workplace. Employers from time to time will need to manage the impact of depression on an individual employee's performance. The approach to be followed will depend on the circumstances.

Depression must be looked at as a form of ill health. As such, incapacitating depression may be a legitimate reason for terminating the employment relationship, provided it is done fairly in accordance with a process akin to that envisaged in Items 10 and 11 of the Code of Good Practice: Dismissal.

Depression may also play a role in an employee's misconduct. It is not beyond possibility that depression might, in certain circumstances, negate an employee's capacity for wrongdoing. An employee may not be liable for misconduct on account of severe depression impacting on their state of mind (cognitive ability) and will (conative ability) to the extent that they are unable to appreciate the wrongfulness of their conduct or are unable to conduct themselves in accordance with an appreciation of wrongfulness. Should the evidence support such a conclusion, dismissal for misconduct would be inappropriate and substantively unfair, and the employer would need to approach the difficulty from an incapacity or operational requirements perspective.

The LC ordered the employee's reinstatement with full retrospective effect and the payment of compensation equivalent to six months' salary. Legal Aid appealed.

DISCRIMINATION

DETERMINING WHETHER AN EMPLOYEE'S DISMISSAL WAS A RESULT OF UNFAIR DISCRIMINATION RELATING TO THEIR DEPRESSION OR DUE TO MISCONDUCT.

Legal Aid South Africa v Jansen [2021] (1) SA 245 (LAC)*...continued*

Alternatively, where the evidence shows that the cognitive and conative capacities of an employee have not been negated by depression, and they are able to appreciate the wrongfulness of their conduct and act accordingly, their culpability or blameworthiness may be diminished by reason of the depression.

Alternatively, where the evidence shows that the cognitive and conative capacities of an employee have not been negated by depression and they are able to appreciate the wrongfulness of their conduct and act accordingly, their culpability or blameworthiness may be diminished by reason of the depression. In which case, the employee's depression must be taken into account in determining an appropriate sanction. A failure to properly take account of depression before dismissal for misconduct could possibly result in substantive unfairness.

However, for an employee to succeed in an automatically unfair dismissal claim based on depression, the question is different. Here, the enquiry is not confined to whether the employee was depressed and if their depression impacted on their cognitive and conative capacities or diminished their blameworthiness. Rather, it is directed at a narrower determination of whether the reason for their dismissal was their depression and if they were subjected to differential treatment on that basis. Here, too, the employee bears the evidentiary burden to establish a credible possibility (approaching a probability) that the reason for dismissal was differential treatment on account of them being depressed and not because they misconducted themselves.

Although the employee had suffered from depression, he had remained functional and able to carry out his duties. He was even well enough to attend at the CCMA.

There was a legitimate basis to impose discipline. The proximate cause for this was his misconduct, and not the medical condition.

The employee failed to establish a credible possibility that his dismissal was automatically unfair. Nor did he show, on balance of probabilities, discrimination on a prohibited ground under the EEA. The more probable reason for his dismissal was the misconduct to which he admitted in the disciplinary enquiry and which was recorded as common cause in the pre-trial minutes.

The LAC accordingly held that they erred in finding for unfair discrimination and that the dismissal was automatically unfair.

Phetheni Nkuna

DISCRIMINATION

PEPUDA AMENDMENT BILL

In a case where an employee has committed a discriminatory act, their employer will have to show that it took reasonable steps to prevent such discrimination. If this cannot be proven, both the employee and employer could be held jointly and severally liable for any act of discrimination.

PROPOSED AMENDMENTS TO PEPUDA

The proposed amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, commonly known as PEPUDA or the Equality Act, have been controversial in many quarters. In this summary of the proposed amendments we look at the proposed amendments through the lens of their potential effects in the workplace and the difficulty they will create for employers.

The definition of "*discrimination*" is widened to include the words "*whether intentionally or not*" and in our view is overly broad. This, of course, means that one can now be liable for committing a discriminatory act even if done unknowingly. This makes it easier for a complainant to make out a case of discrimination. The bill also states that a person would be liable for a discriminatory act irrespective of whether or not the discrimination was on a particular ground and was the sole or dominant reason for the discriminatory act. In addition, it is not just the person who is accused or charged with discrimination that will be liable for discrimination, but also the person (or entity/institution) who encouraged, requested or caused another person to discriminate. There will now be a subjective test to determine discrimination as opposed to the current objective test which has been sanctioned by the CC. These are massive shifts from our current law.

In a case where an employee has committed a discriminatory act, their employer will have to show that it took reasonable steps to prevent such discrimination. If this cannot be proven, both the employee and employer could be held jointly and severally liable for any act of discrimination. This brings us to vicarious liability. In *Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited* (21830/2014) [2020] ZAGPJHC 111 (25 March 2020), the court confirmed the general rule that an employer is vicariously liable for the wrongful acts or omissions of an employee if they are committed within the course and scope of the employee's employment or whilst the employee was engaged in any activity incidental to it. Simply put, the court will look at aspects such as when and how the act was committed when deciding if an employer is liable. In certain cases, like the Fujitsu case, which dealt with theft, the court looked at the freedom, access and power that the employee was given to determine vicarious liability. It appears from the proposed amendments that even if an employer is able to avoid vicarious liability, it could still be liable for failing to take reasonable steps to prevent the act of discrimination committed by an employee in the first place. In addition, the bill enforces prohibition against discrimination under threat of criminal liability.

DISCRIMINATION

PEPUDA AMENDMENT BILL...*continued*

BROADER DEFINITION OF EQUALITY

A broader definition has also been given to *"equality"*, which now requires equal rights and access to resources, opportunities, benefits and advantages. The definition also accommodates substantive equality. This has significant practical consequences for employers.

A new section titled *"Prohibition of retaliation"* has also been introduced, which provides that if a person is aggrieved under PEPUDA or institutes proceedings in terms of PEPUDA, such person may not be victimised.

Under *"General responsibility to promote equality"*, the bill provides for the elimination of all discrimination rather than elimination of unfair discrimination. This is another major shift in the law as it currently stands, as the amendment will make it virtually impossible for an employer to prove the fairness of it actions as the defence of *"fair discrimination"* may not be valid and the definition of *"discrimination"* has been broadened.

The current PEPUDA lists about 18 prohibited grounds of discrimination. These are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, and HIV/AIDS status.

At present, a number of NGOs have made submissions challenging the constitutionality of the bill, so there is likely to be some contestation in the months ahead. Where PEPUDA will stand in the workplace, amongst other employment laws, should its current form become law will be controversial.

Imraan Mohamed and Yusuf Omar

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05

Individual labour law

INDIVIDUAL LABOUR LAW

RESIGNATIONS WITH IMMEDIATE EFFECT AND CONTRACTUAL DUTY OF NOTICE: EMPLOYERS' RIGHT TO DISCIPLINE EMPLOYEES DURING THEIR NOTICE PERIOD

Standard Bank of South Africa Limited v Nombulelo Cynthia Chiloane [2021] 42 ILJ 863 (LAC)

SUMMARY OF THE FACTS

Ms Chiloane (the employee) was given notice to attend a disciplinary hearing by her employer (the bank) to answer the charge of dishonesty, following a failure to follow proper procedures. On the day the employee received the notice, she handed in her letter of resignation with immediate effect. The employee took the view that her letter of resignation with immediate effect summarily terminated the employment relationship and, as such, the employer was not entitled to proceed with the disciplinary hearing that was scheduled. In response, the bank advised the employee that she would have to serve her notice period whilst on suspension and that the disciplinary hearing would continue within that period.

The disciplinary hearing continued in absentia, following the employee's refusal to participate, and the employee was found guilty of the charges and the sanction of summary dismissal was imposed.

The employee approached the LC on an urgent basis seeking to have her dismissal declared invalid and seeking an order interdicting the bank from enlisting her name on the Banking Association of South Africa's central database, the Register of Employees Dishonesty System. This application was opposed by the bank. The LC found in favour of the employee holding that once her resignation with immediate effect was submitted, the employment relationship was immediately terminated and, as such, the bank lost its right to insist that the employee serve out her notice period and its right to proceed with disciplinary action against her during that notice period.

SUMMARY OF THE FINDINGS OF THE COURT

On appeal, the LAC set aside the LC's decision and held that where termination of employment is in breach of a contractual term or section 37 of the BCEA, which requires the giving of notice, such a notice of resignation amounts to a breach of contract that can only be valid if the employer accepts the breach and foregoes its right to the serving of notice by the employee.

Therefore, where a contract prescribes a period of notice, the party withdrawing from the contract through resignation is obliged to give notice for the period prescribed in the contract. Where the contract of employment is silent on the giving of notice, then the provisions of section 37 of the BCEA are triggered and the appropriate notice in terms thereof must be given. The contract and the obligations created therein only terminate when the specified notice period runs out.

The disciplinary hearing continued in absentia, following the employee's refusal to participate, and the employee was found guilty of the charges and the sanction of summary dismissal was imposed.

INDIVIDUAL LABOUR LAW

RESIGNATIONS WITH IMMEDIATE EFFECT AND CONTRACTUAL DUTY OF NOTICE: EMPLOYERS' RIGHT TO DISCIPLINE EMPLOYEES DURING THEIR NOTICE PERIOD

Standard Bank of South Africa Limited v Nombulelo Cynthia Chiloane [2021] 42 ILJ 863 (LAC)*...continued*

The LAC concluded by finding that the employee's narration that her resignation was with immediate effect was of no consequence because it was in breach of the termination clause contained in her employment contract. Accordingly, the bank was entitled to read into the resignation letter a four-week notice period within which it was free to proceed with the disciplinary hearing.

This judgment re-establishes the principles that apply to all contracts of employment regarding termination. It also reconfirms the imposition of the provisions of the BCEA into any contract of employment, particularly those relating to the giving of notice of termination of employment. In short, where notice of resignation is given in breach of the termination clause of a contract of employment or in breach of the provisions of the BCEA, the employer has a choice to either accept the breach and terminate the contract of employment or to hold the employee to the terms of the agreement.

Bongani Masuku, Mayson Petla, Sivuyile Mpateni

In short, where notice of resignation is given in breach of the termination clause of a contract of employment or in breach of the provisions of the BCEA, the employer has a choice to either accept the breach and terminate the contract of employment or to hold the employee to the terms of the agreement.

INDIVIDUAL LABOUR LAW

IS A SETTLEMENT AGREEMENT THAT EXTINGUISHES ALL FUTURE CLAIMS ARISING FROM AN EMPLOYMENT RELATIONSHIP VALID?

Toerien v University of Witwatersrand Johannesburg (JS628-20) [2021] ZALCJHB 116 (27 May 2021)

At conciliation, the parties entered into a settlement agreement in terms of which they agreed to settle any and all claims, be they present or future claims, that the applicant may have against the respondent arising out of the employment relationship.

SUMMARY OF THE FACTS

The applicant was a former employee of Wits University (the respondent). The applicant was dismissed for misconduct. Aggrieved by the dismissal, the applicant referred a dispute to the CCMA. At conciliation, the parties entered into a settlement agreement in terms of which they agreed to settle any and all claims, be they present or future claims, that the applicant may have against the respondent arising out of the employment relationship. Both parties signed the agreement and performed their reciprocal obligations in terms of it.

A while after the conclusion of the settlement agreement, the applicant instituted a fresh claim for discrimination against the respondent in terms of section 51 of the EEA before the LC.

The respondent raised a special plea that the settlement agreement precluded the applicant from bringing any claim that arose during his employment against it at any future point in time. In defending the special plea, the applicant denied that the settlement agreement covered any other claims than those that were in existence at the date of the conclusion of the settlement agreement.

SUMMARY OF THE FINDINGS OF THE COURT

In upholding the respondent's special plea, the LC identified the issue for determination as being the interpretation of the terms of the settlement agreement. The LC, relying on the judgment in *Natal Joint Muncipal Pension Fund v Endumeni* [2012] 2 All SA 262 (SCA), held that, when interpreting a settlement agreement, the court must consider:

i. the language used therein according to the ordinary rules of grammar and syntax;

ii. the provisions of the agreement in the context provided by reading the provisions in light of the document as a whole; and

iii. the circumstances giving rise to the agreement coming into existence.

After interpreting the settlement agreement using these criteria, the LC concluded that the interpretation contended for by the applicant did not make sense as the discrimination dispute arose from his employment relationship with the respondent and was, therefore, clearly covered (expunged) by the settlement agreement.

INDIVIDUAL LABOUR LAW

IS A SETTLEMENT AGREEMENT THAT EXTINGUISHES ALL FUTURE CLAIMS ARISING FROM AN EMPLOYMENT RELATIONSHIP VALID?

Toerien v University of Witwatersrand Johannesburg (JS628-20) [2021] ZALCJHB 116 (27 May 2021)*...continued*

The LC reasoned that the effect of the settlement agreement was that any claim arising out of the applicant's employment relationship with the respondent had been settled fully and finally by agreement between the parties. The court also disagreed with the applicant's contention that the settlement agreement was against public policy or in violation of sections 51(1), (3) and (4) of the EEA. The LC reasoned that the EEA prohibits an employer from preventing an employee from exercising any right(s) contained in the EEA. The applicant was no longer an employee as defined in the EEA and, therefore, no longer enjoyed the protections of the EEA. Furthermore, the court held that the settlement agreement was not contrary to public policy as the applicant had willingly consented to relinquishing all present and future claims of whatsoever nature against the respondent, which included any claim in terms of the EEA.

This judgment reaffirms the applicability of the contractual principle of *Pacta Sunt Servanda* (agreements must be kept) in respect of settlement agreements concluded between employers and employees. It also highlights the importance of ensuring that the "*full and final settlement*" clauses in settlement agreements are well drafted to ensure that the parties' intentions are properly captured, thereby precluding avoidable future litigation.

Bongani Masuku, Mayson Petla and Muzammil Ahmed

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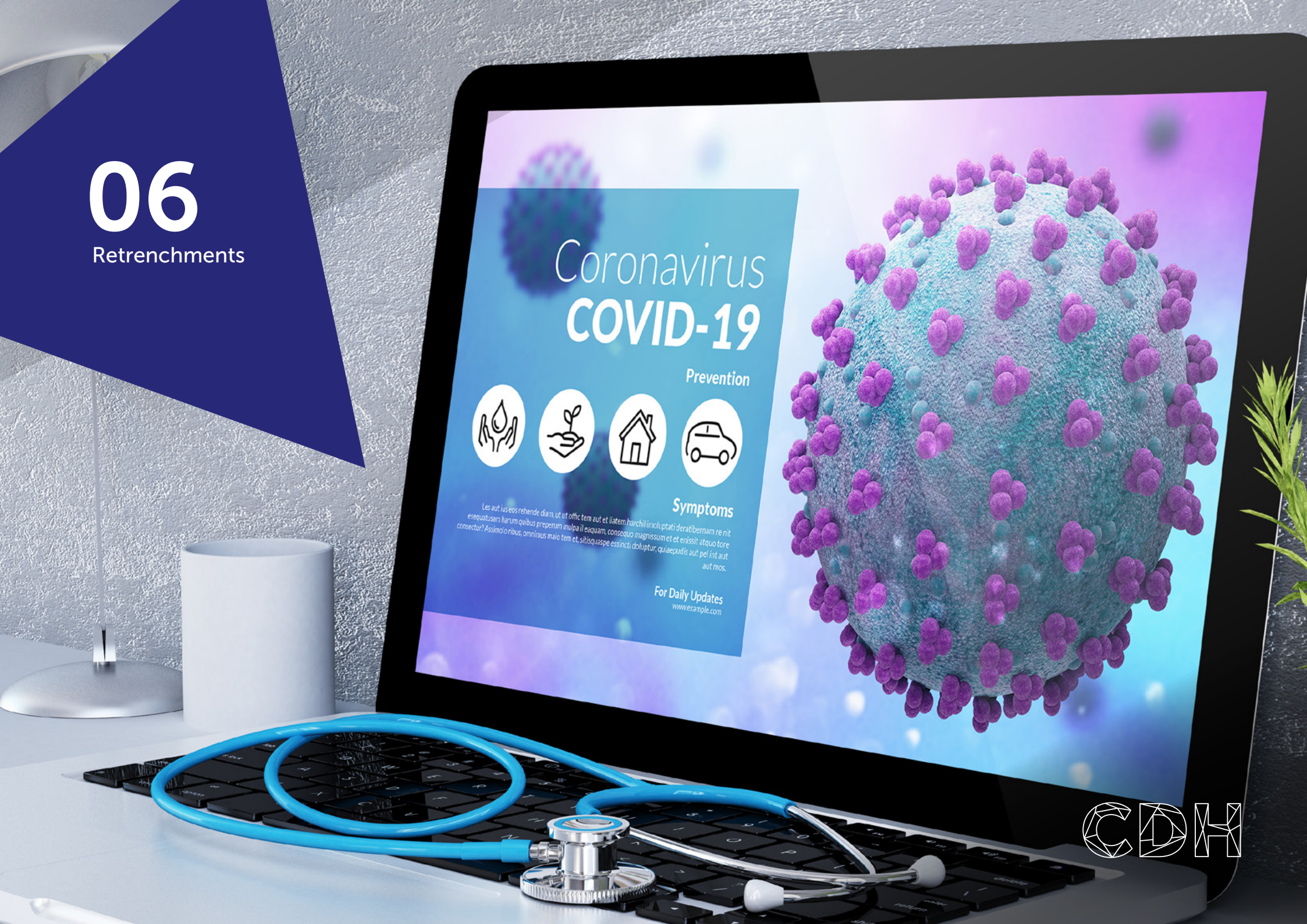
06

Retrenchments



RETRENCHMENTS

IS A DISMISSAL AUTOMATICALLY UNFAIR EVEN IF EMPLOYEES ARE DISMISSED FOR REJECTING A DEMAND TO REDUCE THE EMPLOYMENT TERMS AND CONDITIONS THAT ARISE AS A RESULT OF THE EMPLOYER'S OPERATIONAL REQUIREMENTS?

National Union of Metalworkers of SA and Others v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) and Another [2021] 42 ILJ 67 (CC)

SUMMARY OF THE FACTS

Aveng Trident Steel (Aveng) took part in a restructuring exercise as a result of a decline in sales and profitability. To remain commercially viable, Aveng needed to restructure its workforce by firstly, reducing its staff under a voluntary retrenchment process, and secondly, by redesigning job descriptions to enable the combining of certain functions. By doing so, Aveng had sought to reduce the existing terms and conditions of employment.

Pending a finalisation of the consultation process, an interim agreement was concluded with the National Union of Metalworkers of South Africa (NUMSA), which operated for approximately five months, in terms of which the employees agreed to participate in a pilot project and work in accordance with Aveng's redesigned job descriptions. However, while this pilot project was under scrutiny, NUMSA unexpectedly reneged on the interim agreement, stating that the employees would stop performing duties in accordance with the redesigned job descriptions, and further demanded a wage increase of R5 per hour.

After Aveng felt that it had exhausted all possible avenues during the consultation process, the affected employees were offered contracts of employment with redesigned job descriptions to avoid the possibility of the contemplated retrenchments eventuating. Some 733 employees rejected Aveng's offer and were subsequently dismissed. NUMSA then approached the LC claiming that the dismissals were automatically unfair in terms of section 187(1)(c) of the LRA as the employees were dismissed "*due to a refusal by [the] employees to accept a demand in respect of any matter of mutual interest between them and their employer*".

Aveng denied such a contention and argued that the dismissals were the result of its genuine and *bona fide* operational requirements and thus, substantively fair.

SUMMARY OF THE FINDINGS OF THE COURT

Both the LC and LAC had found in favour of Aveng, namely that the dismissals had been for a fair reason and satisfied the general requirement of substantive fairness. In reaching its decision, the LAC further found that section 187(1)(c) does not preclude an employer from dismissing employees, provided that such dismissals were due to genuine operational requirements. NUMSA appealed the decision of the LAC to the CC.

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RETRENCHMENTS

IS A DISMISSAL AUTOMATICALLY UNFAIR EVEN IF EMPLOYEES ARE DISMISSED FOR REJECTING A DEMAND TO REDUCE THE EMPLOYMENT TERMS AND CONDITIONS THAT ARISE AS A RESULT OF THE EMPLOYER'S OPERATIONAL REQUIREMENTS?

National Union of Metalworkers of SA and Others v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) and Another [2021] 42 ILJ 67 (CC)*...continued*

All 10 of the presiding justices of the CC agreed that the appeal should be dismissed and that the decision of the LAC should be upheld. Apart from differing in their views as to the appropriate approach when determining the true reason for a dismissal, where a refusal to accept a demand by an employer had been proven; the CC unanimously confirmed that where an employer has dismissed employees as a result of their refusal to accept a proposed change to their terms and conditions of employment, as an alternative to retrenchment, and as part of a business restructuring to meet its operational needs, then such a dismissal would be for a fair reason and would not constitute a contravention of section 187 (1)(c) of the LRA.

The CC found Aveng had a *bona fide* reason for its intention to protect its economic interests as a going concern. The intention of the LRA is not to prevent a business from remaining both competitive and economically sound when regard is had to market conditions. As such, the CC accordingly found that Aveng had approached the employees with the proposed redesigned job structures as an economic imperative and as a suitable alternative to retrenchment. The actions of NUMSA in turn made it impossible for Aveng to save jobs and avoid the consequent dismissals.

Fiona Leppan, Kgodisho Phashe and Reece Westcott

The CC found Aveng had a *bona fide* reason for its intention to protect its economic interests as a going concern.

RETRENCHMENTS

DOES THE TERMINATION OF A CONTRACT OF EMPLOYMENT UPON AN EMPLOYEE REACHING THE AGREED RETIREMENT AGE CONSTITUTE A "*BREAK*" IN SERVICE AS CONTEMPLATED IN SECTION 84(1) OF THE BCEA FOR THE PURPOSE OF DETERMINING SEVERANCE PAY?

Barrier v Paramount Advanced Technologies (Pty) Ltd [2021] 42 ILJ 1177 (LAC)

The unintended consequences of not expressly terminating an employment contract and causing a clear distinction between a pre- and post-retirement employment relationship is reflected by the costly nature of the decision in this judgment.

SUMMARY OF THE FACTS

Mr Barrier was employed by Paramount Advanced Technologies (Pty) Ltd since 1985. It was agreed that his employment would terminate upon him reaching the age of 65. However, in 2013 when Barrier turned 65, he continued to work for Paramount on an uninterrupted basis. It was only in 2017, approximately four years later, in light of a looming potential retrenchment, that Barrier was provided with the option of applying for a voluntary retrenchment package (VRP). Barrier was successful in his application for the VRP, however, when Paramount calculated the severance pay it only took into account his years' of service from age 65, arguing that he was a post-retirement employee. Paramount held the view that Barrier was entitled to four weeks' severance pay, but he disagreed with this calculation and approached the court for relief.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC, in considering the dispute, stated that the correct question was not one related to the length of the continuous service but actually whether there had been a "*break*" in Barrier's employment upon him reaching the agreed retirement age. The LAC held that it is evident from section 84(1) of the BCEA that the "*break*" contemplated by the section is a time lapse between periods of employment. The LAC concluded that Barrier, despite turning 65, had continued to work in the employment routine that he had been following since 1985. The LAC found that there had not been a "*break*" of even one working day and even though Barrier's written contract had (strictly) terminated in 2013, his employment routine remained unchanged. As such, Barrier's employment with Paramount was "*continuous*" from 1985 until he was retrenched in 2017, despite his contract of employment terminating in 2013 and him working beyond the retirement age.

Barrier's uninterrupted employment with Paramount from 1985 until 2017 therefore entitled him to one week's severance pay for each and every completed year of service and the LAC ordered that Paramount pay him the further 29 weeks' severance pay that he had not been paid upon him taking the VRP option.

It is in an employer's best interests to note the nominal retirement age of its employees. The unintended consequences of not expressly terminating an employment contract and causing a clear distinction between a pre- and post-retirement employment relationship is reflected by the costly nature of the decision in this judgment.

Fiona Leppan, Kgodisho Phashe and Reece Westcott

RETRENCHMENTS

NOTICE OF RETRENCHMENT IN TERMS OF SECTION 189(3) OF THE LRA AND THE SELECTION PROCESS: WHETHER THE DISMISSAL OF THE EMPLOYEES WAS SUBSTANTIVELY UNFAIR ON THE BASIS THAT THE SELECTION METHOD APPLIED (LIFO) WAS NOT FAIR AND OBJECTIVE?

MTN Group Management Services (Pty) Ltd v Mweli and Another [2021] 42 ILJ 775 (LAC)

SUMMARY OF THE FACTS

The respondents were employed by MTN as part of its Risk Management Division. In 2015, MTN, based on expert advice, decided to restructure the division. MTN gave its affected employees a notice in terms of section 189(3) of the LRA informing them of the intended restructure. The employees were further informed that five affected employees may be retrenched as a result of the restructure. Where retrenchment could not be avoided, the last in first out (LIFO) selection method would be used.

Pursuant to this restructure, the respondents were not integrated into the new structure and thus applied for new positions. Despite applying, MTN did not have any suitable positions for the respondents and they were subsequently retrenched.

Aggrieved by their retrenchment, the respondents approached the LC. The LC found that their dismissal was substantively unfair on the basis that the selection method used was not fair and objective.

MTN, not happy with this decision, appealed to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

In finding that the selection method was not fair and objective, the LC relied on the case of *Wolfaardt and Another v Industrial Development Corporation of SA* [2002] 23 ILJ 1610 (LC) in which the employees were not given an opportunity to apply for positions in the new structure.

The LAC distinguished these cases on the basis that there was a legitimate rationale for MTN to opt for the restructuring of the division and that it is not unfair to require affected employees, including the respondents, who enjoyed job security, to apply for appointment into the new restructured division.

The LAC found that the respondents were given adequate opportunities to compete with other employees and to support their applications. MTN had followed its global talent standard in considering the applications of the respondents and other affected employees. It was also found that the respondents scored poorly in the interviews.

The LAC held that there was no evidence that the panel had acted unfairly, subjectively, capriciously or in bad faith and no evidence advanced that the appointment criteria had been unfairly applied against the respondents.

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MTN Group Management Services (Pty) Ltd v Mweli and Another [2021] 42 ILJ 775 (LAC)*...continued*

However, since the selection criteria for retrenchment was not the subject of any agreement in terms of section 189(7) of the LRA, then such criteria had to be fair and objective. The selection method proposed by MTN had been disclosed in the section 189(3) notice and the employees were informed that LIFO would be applied if retrenchments were to be considered. Although not clearly stated, what was clear from the method proposed was that the stated selection criteria would be applied where necessary.

In terms of section 189(3), when an employer considers retrenchments, it is required to give notice to affected employees, inviting them to consult. MTN had given such notice and had accordingly informed the affected employees that where retrenchments could not be avoided and the LIFO method would be applied. The LAC held that MTN had no obligation to propose any further criteria after the respondents had been unsuccessful in seeking appointment in the new structure and, as such, the selection method adopted by MTN was found to be fair and objective.

This case makes it clear that where an employer considers retrenchments in terms of section 189 of the LRA, the employer, in its initial notice to the potentially affected employees, can inform them of the selection method that would be applied, without any agreement to the contrary reached in the consultation process if the need for retrenchment arises. The employer is not obliged to select or consider a new selection process where the affected employees do not find suitable positions in the new structure.

Fiona Leppan, Kgodisho Phashe and Muzammil Ahmed

The employer is not obliged to select or consider a new selection process where the affected employees do not find suitable positions in the new structure.

RETRENCHMENTS

DOES THE NON-PLACEMENT OF EMPLOYEES CONSTITUTE A FAIR AND OBJECTIVE SELECTION CRITERION AND PLACE AFFECTED EMPLOYEES AT RISK OF RETRENCHMENT?

Telkom SA SOC Limited v van Staden and Others (JA68/2018) [2020] ZALAC 52; (2021) 42 ILJ 869 (LAC) (1 December 2020)

SUMMARY OF THE FACTS

The respondent employees were employed at management and specialist levels by the appellant, Telkom. In October 2014, the respondents were retrenched following Telkom's "*Fit for the Future*" business restructuring process which commenced in 2014 in response to declining revenue, market share and profitability. The method used to select employees for retrenchment was that affected employees would be placed in vacant positions (according to a revised organogram following the restructure) using placement criteria such as "*(a) qualifications and experience (best fit for the job); (b) qualification and potential; (c) LIFO [last in, first out] where more than one employee qualifies for appointment to the same position; and (d) employment equity retention*".

Notice in terms of section 189(3) of the LRA was given to affected managerial and specialist employees, including the respondents. Affected employees were provided with the new organogram to allow them to identify vacant positions into which they could apply for placement. While many employees accepted voluntary severance packages or took voluntary early retirement, some 100 employees who had not been placed in any alternative posts were retrenched. Aggrieved by their dismissals, the 10 respondents referred an unfair dismissal dispute to the LC. The LC found that the dismissal of the respondents for operational reasons was substantively unfair. The LC ordered that the respondents be reinstated in the positions they held with the appellant prior to their dismissals "*or [in] any equivalent position without loss of any benefits*" and that they repay any amount paid as severance pay to Telkom.

Telkom was granted leave to appeal to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC held that there was nothing unfair in a process which, given its scale, did not allow for interviews at the second and subsequent rounds of placement but permitted employees to submit extensive written motivations in support of their placement and retention, with the opportunity to object and appeal against any unfavourable decision taken against them. The employees, however, simply did not exhaust the internal remedies available to them, as only four objections were raised, one of which was withdrawn and only one appeal was lodged. These

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Telkom SA SOC Limited v van Staden and Others (JA68/2018) [2020] ZALAC 52; (2021) 42 ILJ 869 (LAC) (1 December 2020)*...continued*

internal mechanisms provided dissatisfied employees with the opportunity to apply to rectify scores, request reasons to be given for decisions taken, or to correct any errors or irregularities where they may have arisen. Having failed to exhaust such available internal remedies, nine of the employees were unable to show that by the end of the first phase of the placement process, the selection criteria had been applied unfairly against them. Telkom was able to objectively justify the non-selection of the remaining employees who had lodged an appeal.

The LAC held that the LC had erred in failing to take cognisance of the fact that a number of the respondents failed to apply for placements during the second phase of the process even when positions were available and substantially relaxed criteria for placement existed. The LAC found that Telkom had not been called upon to show why the respondents had not been appointed to any other vacant positions as a consequence.

In light of this, the LAC concluded that the respondents had not shown that they had been unfairly selected for retrenchment and that their dismissals on grounds of the employer's operational requirements was not shown to have been unfair. The appeal therefore, succeeded in confirming that the non-placement of an employee pursuant to a placement process may constitute a valid selection criterion for retrenchment, provided that the placement process itself is fair and objective.

This decision illustrates the importance of implementing appropriate internal remedies when selecting employees for retrenchment. It is advisable for employers to ensure that speedy and cost-effective internal mechanisms are readily available to allow affected employees an opportunity to correct, rectify, request reasons for or appeal any adverse decisions made about them in relation to the selection of employees for retrenchment

Fiona Leppan, Kgodisho Phashe and Sivuyile Mpateni

The LAC held that the LC had erred in failing to take cognisance of the fact that a number of the respondents failed to apply for placements during the second phase of the process even when positions were available and substantially relaxed criteria for placement existed.

RETRENCHMENTS

CAN A BUSINESS RESCUE PRACTITIONER COMMENCE WITH RETRENCHMENT PROCEEDINGS IN TERMS OF SECTION 189 OF THE LRA PRIOR TO THE ADOPTION OF A BUSINESS RESCUE PLAN AS CONTEMPLATED IN SECTION 150 OF THE COMPANIES ACT?

South African Airways (SOC) Limited (In Business Rescue) and Others v National Union of Metalworkers of South Africa obo Members and Others (JA32/2020) [2020] ZALAC 34; [2020] 8 BLLR 756 (LAC); [2020] 41 ILJ 2113 (LAC); [2021] (2) SA 260 (LAC) (9 July 2020)

The trade unions argued that section 136(1)(b) of the Companies Act only empowers the BRPs to commence with and give effect to retrenchments if such retrenchments were "*contemplated in the company's business rescue plan*".

SUMMARY OF THE FACTS

South African Airways (SOC) Limited (SAA) was placed under voluntary business rescue. The business rescue practitioners (BRPs) appointed to facilitate the proceedings issued a notice in terms of section 189(3) of the LRA in order to commence with the mandatory consultation process required for the contemplated retrenchment of employees for operational requirements. The notice was issued without a business rescue plan having been adopted or communicated to the affected parties, which included the employees and their representative trade unions. Having regard to the scale of the proposed retrenchments as well as the size of the business, the effect of the notice was that for a 60-day period, SAA was precluded from issuing any notice of termination of employment unless consensus had been reached in that period.

The BRPs attempted to commence the consultation process with the affected employees but this failed due to the employees' refusal to participate. The trade unions representing the employees addressed the BRPs with the contention that in the absence of a business rescue plan, the section 189 process was premature as the employees had not been given adequate information to inform them of any election they would be required to make in that regard. The trade unions argued that section 136(1)(b) of the Companies Act only empowers the BRPs to commence with and give effect to retrenchments if such retrenchments were "*contemplated in the company's business rescue plan*".

Van Niekerk J in the LC held that it was necessary to interpret section 136(1) of the Companies Act in light of the constitutional right to security of employment and that if there is an interpretation of section 136(1) which better promotes the preservation of work security, then that interpretation ought to be preferred. With this in mind, the LC held that section 136(1)(b) of the Companies Act requires that a need to retrench must be necessarily rooted in a business rescue plan. Moreover, in the business rescue context, there is no other provision, apart from an agreement to accept a voluntary retrenchment package, that empowers a BRP to retrench employees in the absence of a business rescue plan.

RETRENCHMENTS

CAN A BUSINESS RESCUE PRACTITIONER COMMENCE WITH RETRENCHMENT PROCEEDINGS UNDER SECTION 189 OF THE LRA PRIOR TO THE ADOPTION OF A BUSINESS RESCUE PLAN AS CONTEMPLATED IN SECTION 150 OF THE COMPANIES ACT?

South African Airways (SOC) Limited (In Business Rescue) and Others v National Union of Metalworkers of South Africa obo Members and Others (JA32/2020) [2020] ZALAC 34; [2020] 8 BLLR 756 (LAC); [2020] 41 ILJ 2113 (LAC); [2021] (2) SA 260 (LAC) (9 July 2020)*...continued*

The main ground of appeal stemmed from the LC's interpretation of section 136(1) of the Companies Act. According to the LAC, the main purpose of section 136, and the process of business rescue generally, is to provide for the efficient rescue and recovery of a financially distressed company.

Notably, the court did emphasise that section 136(1) of the Companies Act does not provide for an absolute moratorium on retrenchments during business rescue proceedings, but that it establishes the right to retrench where specifically contemplated by a business rescue plan. The LC thus held that issuing any notice to commence a consultation process in terms of section 189 of the LRA in the absence of a business rescue plan would be premature and constitute an act of procedural unfairness.

As a business rescue plan had not been adopted on the date that the section 189(3) notice was issued, the LC granted the relief sought by the National Union of Metalworkers of South Africa.

SUMMARY OF THE FINDINGS OF THE COURT

The BRPs appealed to the LAC. The business rescue plan had been published by the time the appeal was heard by the LAC, but it noted the importance of establishing a precedent in the context of this matter.

The main ground of appeal stemmed from the LC's interpretation of section 136(1) of the Companies Act. According to the LAC, the main purpose of section 136 of the Companies Act, and the process of business rescue generally, is to provide for the efficient rescue and recovery of a financially distressed company. The LAC further noted that a crucial part of this process involves a balancing of the rights and interests of all relevant stakeholders in such a company, which includes its employees.

With this in mind, the LAC ultimately dismissed the appeal, upholding the decision of the LC, and found that the need to retrench must be rooted in the business rescue plan specifically. The LAC did note, however, that nothing would prevent a BRP from unilaterally offering voluntary severance or retrenchment packages to employees in this context.

As such, it would be in a company's best interests, in such circumstances, for the BRP to explore the option of offering voluntary retrenchment or severance packages before a business rescue plan is adopted to avoid any instance of procedural unfairness when considering retrenchment as part of the business rescue.

Fiona Leppan and Reece Westcott

07

Sexual harassment, GBV and the code of good practice on the elimination of violence in the workplace

SEXUAL HARASSMENT, GENDER-BASED VIOLENCE AND THE CODE OF GOOD PRACTICE ON ELIMINATION OF VIOLENCE IN THE WORKPLACE

WHAT CONSTITUTES APPROPRIATE COMPENSATION FOR PROCEDURAL UNFAIRNESS WHERE AN EMPLOYEE IS DISMISSED FOR SEXUAL MISCONDUCT?

McGregor v Public Health and Social Development Sectoral Bargaining Council and Others [2021] ZACC 14

SUMMARY OF THE FACTS

Dr Charles McGregor, a senior medical practitioner practicing in the Western Cape, was dismissed on the basis of sexual misconduct in the workplace. McGregor's internal appeal was dismissed.

McGregor referred an unfair dismissal dispute to the Public Health and Social Development Sectoral Bargaining Council challenging the procedural and substantive fairness of the dismissal. The arbitrator found McGregor guilty of the charges, but found procedural unfairness because McGregor was denied an opportunity to defend himself – in that relevant evidence was excluded during the disciplinary hearing. The arbitrator found the dismissal to be procedurally and substantively unfair. The arbitrator did not order reinstatement and instead awarded six months' compensation.

On review, the LC found the arbitrator's finding in respect of the three charges reasonable and not reviewable. The court agreed that the procedure adopted was unfair. However, it altered the award indicating that the dismissal was procedurally unfair but substantively fair. It did not review the compensation award.

The LAC agreed that the dismissal was procedurally unfair but substantively fair. It did not revisit the compensation award as the DOH had not cross appealed the issue.

McGregor approached the CC seeking an order confirming the arbitrator's findings that the dismissal was procedurally and substantively unfair; as well as seeking an order reinstating him.

The DOH cross appealed on the ground that the LAC erred in not revisiting the compensation award.

The court agreed that the procedure adopted was unfair. However, it altered the award indicating that the dismissal was procedurally unfair but substantively fair.

SEXUAL HARASSMENT, GENDER-BASED VIOLENCE AND THE CODE OF GOOD PRACTICE ON ELIMINATION OF VIOLENCE IN THE WORKPLACE

WHAT CONSTITUTES APPROPRIATE COMPENSATION FOR PROCEDURAL UNFAIRNESS WHERE AN EMPLOYEE IS DISMISSED FOR SEXUAL MISCONDUCT?

McGregor v Public Health and Social Development Sectoral Bargaining Council and Others [2021] ZACC 14
...continued

The court further considered that while compensation for unfair dismissal serves an important purpose, the appropriateness of the compensation must be understood in the context of the reason for the dismissal being sexual harassment.

SUMMARY OF THE FINDINGS OF THE COURT

The CC confirmed that sexual harassment is the most heinous misconduct that plagues a workplace. It confirmed the Code of Good Practice's finding that sexual harassment's persistence and prevalence poses a barrier to the achievement of substantive equality in the workplace and is inimical to the constitutional dream of a society founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

The CC dismissed McGregor's appeal but considered the DOH's cross appeal on the quantum and found that the LC erred by not appreciating that the arbitrator's decision on quantum was based on his finding that the dismissal was procedurally and substantively unfair. When the LC amended the arbitrator's finding to one of procedural unfairness only, it should have revisited the quantum.

In revisiting the quantum, the CC found that an important factor in determining compensation is the degree to which the employer deviated from the requirements of a fair procedure. The CC held that courts may overlook minor procedural irregularities. However, where a procedural irregularity is trifling, the courts may exercise their discretion not to grant compensation.

The CC found that it is important to consider the nature and gravity of the misconduct, and that the attitude of the perpetrator weighs heavily in the determination of compensation.

The court further considered that while compensation for unfair dismissal serves an important purpose, the appropriateness of the compensation must be understood in the context of the reason for the dismissal being sexual harassment. This is because the Constitution provides for the right to fair labour practices, but also maintains that democracy is founded on the explicit values of human dignity, integrity and the achievement of equality in a non-racial and non-sexist society under the rule of law.

It held that the harshness of the wrong of sexual harassment is compounded when it is suffered at the hands of one's supervisors.

In the circumstance the CC reduced the compensation award from six months' compensation to two months.

Aadil Patel and Dylan Bouchier

SEXUAL HARASSMENT, GENDER-BASED VIOLENCE AND THE CODE OF GOOD PRACTICE ON ELIMINATION OF VIOLENCE IN THE WORKPLACE

DOES POSTING A WHATSAPP IMAGE OF A MOTOR CAR MADE TO RESEMBLE A NUDE WOMAN CONSTITUTE SEXUAL HARASSMENT?

Mcpherson v PRASA SOC (Metrorail Western Cape) [2021] 2 BALR 169 (CCMA)

SUMMARY OF THE FACTS

Ms Mcpherson, a section security commander in Cape Town, received a WhatsApp image on her cell phone from a protection official, Mr K, who was her subordinate. The picture K had posted was of a car with the bonnet touched up to resemble a nude female.

The image was purportedly mistakenly sent to about 255 other employees. K was suspended on allegations of misconduct and an investigation was conducted.

Mcpherson lodged a grievance and K was transferred to a different area.

Mcpherson was hospitalised pursuant to a psychological breakdown in an incident which she claimed was related to the receipt of the image. Thereafter, she applied to the head office complaining of the inadequacy of the response to her complaint.

Mcpherson claimed damages from the employer.

SUMMARY OF THE FINDINGS OF THE COURT

The commissioner noted that employers are obliged to handle cases of sexual harassment sensitively.

Mcpherson had not claimed that she felt degraded by the image and some of the female recipients of the message had found it amusing. Mr K had not aimed the message specifically at Mcpherson. He had posted an apology which was seen by Mcpherson at the same time as the offending message.

Ultimately, the arbitrator did not find that the sending of the image amounted to sexual harassment for the following reasons:

i. the image was not sent to Mcpherson alone;

ii. it was not an explicitly sexual image;

iii. Mcpherson was the only one who interpreted it as sexual harassment;

Mcpherson was hospitalised, pursuant to a psychological breakdown in an incident which she claimed was related to the receipt of the image. Thereafter, she applied to the head office complaining of the inadequacy of the response to her complaint.

SEXUAL HARASSMENT, GENDER-BASED VIOLENCE AND THE CODE OF GOOD PRACTICE ON ELIMINATION OF VIOLENCE IN THE WORKPLACE

DOES POSTING A WHATSAPP IMAGE OF A MOTOR CAR TOUCHED UP TO RESEMBLE A NUDE WOMAN CONSTITUTE SEXUAL HARASSMENT?

Mcpherson v PRASA SOC (Metrorail Western Cape) [2021] 2 BALR 169 (CCMA)*...continued*

- there was no evidence of anyone else feeling that their dignity was impaired from having received the image;
- there was no reliable evidence proving a link between the image and Mcpherson's subsequent mental anguish and mental breakdown;
- Mcpherson saw the image and apology simultaneously;
- Mcpherson was not offended by a previous pornographic image sent to her by someone else;
- the image was not accompanied by any wording or suggestion;
- it was simply the image, open to interpretation; and
- Mr K had never caused Mcpherson to fear for her safety, despite her assertion that she thought he had a violent character.

Mcpherson had not explained why she was so shocked by the image or proved any causal connection between her reaction to it and her hospitalisation.

Since Mcpherson had failed to prove that K's act constituted sexual harassment, the employer could not be held liable for his action in terms of the EEA. In any event, Mcpherson had failed to quantify the damages she had allegedly suffered. The application was dismissed.

Aadil Patel and Dylan Bouchier

Since Mcpherson had failed to prove that K's act constituted sexual harassment, the employer could not be held liable for his action in terms of the EEA.

The Draft Code categorises four *"main forms"* of violence and harassment: (i) sexual violence and harassment, (i) racial, ethnic and social origin violence and harassment, (iii) violence and harassment on account of a protected disclosure (whistleblowing) and (iv) workplace bullying.

WORKPLACE BULLYING AND THE DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK

Increasingly, the modern workplace has become the site of bullying of employees by their peers and even superiors. This has not disappeared with the advent of the remote workplace.

South African law is widely protective of employee rights through various pieces of legislation and codes of good practice. Yet, while the concept of bullying is well known, the law does not specifically define bullying and by implication recognise the concept as actionable in the CCMA or the LC. However, the Minister has published a *"Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work"* (Draft Code) that defines workplace bullying. The Draft Code's objectives are: (i) to offer a framework and clarity on the interpretation and implementation of the EEA; (ii) provide guidelines to employers on the prevention of discrimination and harassment; and (iii) guide human resources policies and practices related to violence and harassment. The Draft Code also sets out seven guiding principles for employers and employees to prevent harassment.

The Draft Code's definition of workplace bullying casts a very wide net, defining it as *"unwanted conduct in the workplace, which is persistent or a single incident which is serious and insults, demeans, humiliates, lowers self-esteem or self-confidence or creates a hostile or intimidating environment or is calculated to induce by submission or by actual or threatened adverse consequences, which includes the abuse of coercive power by either an individual or a group of individuals in the workplace."*

The Draft Code also defines other terms for the first time in our law. Cyber bullying is, *"the inappropriate use of technology, as an expression of psychological violence and harassment through email, text, memes, and web posts on any form of technology which has the same effect as conventional bullying"*. Mobbing, a particularly vile form of bullying, is defined as *"harassment by a group of people targeted at an individual"*, and victimisation as *"the action of singling someone out for cruel or unjust treatment"*. All of these are real experiences for employees in the workplace.

The Draft Code categorises four *"main forms"* of violence and harassment: (i) sexual violence and harassment, (i) racial, ethnic and social origin violence and harassment, (iii) violence and harassment on account of a protected disclosure (whistleblowing) and (iv) workplace bullying. The Draft Code also sets out a test for sexual, racial and whistleblowing harassment.

In its current form the Draft Code does not include a test for determining workplace bullying, although one is (apparently) in the works. The Draft Code does, however, state that *"interpersonal conflict"* may not be considered bullying if the incident is an isolated event or if the conflict involves *"two parties of approximately equal strength"*. This recognises the power dynamics often at play in bullying cases. Under the Draft Code, a victim of bullying could potentially find protection in either the EEA or the LRA. Section 6(1) of the EEA prohibits unfair discrimination against an employee on certain listed grounds (race, gender, sexual orientation) as well as on *"any other arbitrary ground"*. Section 6(3) also states that *"harassment"* on any

WORKPLACE BULLYING AND THE DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK *...continued*

one or more of the listed grounds is considered a form of prohibited unfair discrimination. However, workplace bullying differs from other forms of harassment because it is not based on a protected status. Could it at this stage be considered harassment on an arbitrary ground? Section 60 of the EEA states that an employer may be held vicariously liable if a complaint of harassment by an employee is not properly dealt with by the employer. We are now familiar with the reach of the law on this front, especially relating to sexual harassment.

The Draft Code includes both section 6 and section 60 as part of the "*legal framework*" within which it operates. One of the major developments of the Draft Code is that it has brought clarity regarding bullying claims. According to the Draft Code, section 6(3) of the EEA should be interpreted to include workplace bullying in light of the prohibition of unfair discrimination under section 9(3) of the Constitution. Bullying is also considered a violation of the right to dignity which in our view it certainly is. The Draft Code also states that violence and harassment (of which bullying is a recognised form) can constitute unfair discrimination.

Claims for unfair dismissal

At this point in time, where an employee alleges bullying that is not coupled with any of the specific grounds of discrimination, the employee bears a specific onus under section 11(2) of the EEA to prove that the bullying or harassment amounts to unfair discrimination "*on an arbitrary ground*". It was the failure to prove this that was fatal to the appellant's appeal in the case of *Samka v Shoprite Checkers* [2020] 9 BLLR 916 (LAC), for instance. In Samka, an employee of Shoprite claimed under sections 6(1), 6(3) and 60 of the EEA, that her employer should be liable for subjecting her to harassment, bullying and victimisation. She stated that she had been targeted for particular bullying and victimisation because she had raised a grievance regarding alleged racism. The claim was dismissed. The employee had to show, on a balance of probabilities, that the employer's conduct was not rational, that it amounted to discrimination and that it was not fair. This is because a mere allegation of harassment (or bullying) is not sufficient to succeed with such a claim: more is required. The claimant was not able to produce any evidence that could discharge the burden of proof. On the other hand, according to the judge, the employer correctly did not take a "*passive stance*" that may have led to liability but instead, management made numerous efforts to ensure that complaints of bullying were dealt with.

A dismissed employee could also bring a claim in terms of the LRA for unfair dismissal. In the case of *Mkhize and Dube Transport* [2019] 40 ILJ 929 (CCMA), the commissioner found that, where the true reason for a dismissal was bullying and victimisation the dismissal would be referred to the LC as an automatically unfair dismissal.

A very common form of workplace bullying occurs when an employer, by demeaning, humiliating, and degrading an employee, creates such a hostile or toxic working environment that the victim "*finds continued employment intolerable*" and resigns. This gives rise to a constructive

In the case of *Mkhize and Dube Transport* [2019] 40 ILJ 929 (CCMA), the commissioner found that, where the true reason for a dismissal was bullying and victimisation the dismissal would be referred to the LC as an automatically unfair dismissal.

WORKPLACE BULLYING AND THE DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK *...continued*

dismissal claim. This can either be pursued in the CCMA or the LC, depending on how the claim is formulated by the employee.

In the recent case of *Centre for Autism Research and Education v CCMA* [2020] 41 ILJ 2623 (LC), the LC, on review, found that two employees who had resigned due to being severely bullied were in fact constructively dismissed. The court looked at the employer's abusive conduct as a whole and determined that the employees could not be expected to put up with such abuse. Interestingly, the court recognised bullying in the absence of any legislative definition of the concept. This is already an advancement for employee protection. The judgment was also delivered before the promulgation of the Draft Code and it remains to be seen how such a case would be adjudicated if the code becomes law. It would no doubt spell disaster for an employer that is found wanting.

The LC has repeatedly dealt with employers who have insidiously pushed their employees out of the company, not by formally dismissing them, but by abusing them to the point of resignation. Cases include physical assault, *"callous and cruel"* verbal abuse, vilification, extreme intolerance of psychological problems, marginalization, and humiliation. In one instance, an employer published an employee's final written warning in a company newsletter, and in another, the manager that initiated a complaint against an employee, was the presiding officer in the resultant disciplinary hearing.

Our courts may have to take the following into account in the future when the Draft Code becomes law: the code, in addition to the very broad definition above, lists a number of insulting, demeaning or intimidating behaviours that lower a victim's self-esteem, including: (i) harassing, offending or excluding someone; (ii) physical bullying; (iii) tangible or material bullying, where formal power in the workplace is used as a form of intimidation, threat or harassment; (iv) verbal bullying (threats, teasing, insults); (v) passive-aggressive or *"covert"* bullying, which includes negative gossip, sarcasm, condescending eye-contact and invisible treatment. The Draft Code also gives a long list of examples of bullying, ranging from slandering, sabotaging, ostracising, insulting, persecuting and humiliating an employee, to withholding work-related information, abuse of disciplinary proceedings and intolerance of psychological, medical, or personal circumstances.

Many court cases have dealt with bullying through unwarranted threats of demotion, suspension or dismissal. The Draft Code now states that section 186(2) of the LRA which covers unfair conduct relating to promotion, demotion, training or relating to the provision of benefits *"may be areas of manifestations of workplace bullying"*. So, there may be an extension of the definition of an unfair labour practice in time to come. The Draft Code includes in its list of examples of bullying such as *"demotion without justification"* as well as *"offensive administrative sanctions without an objective cause"*.

International comparison

The Draft Code includes in its list of examples of bullying such as *"demotion without justification"* as well as *"offensive administrative sanctions without an objective cause"*.

WORKPLACE BULLYING AND THE DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK *...continued*

A major reason for publishing the Draft Code is to bring South African law in line with the International Labour Organization's Convention on Violence and Harassment (ILO Convention C190). The South African Commission for Employment Equity (CEE) commended the adoption of the convention. The CEE advised the Minister of Employment and Labour to recommend to NEDLAC and Parliament that the convention be ratified. The Draft Code has been published as part of the preparations for ratification, in order to ensure full alignment with the ILO Convention.

In the US, harassment and discrimination laws require a protected status (such as gender or race) to found a claim, so employees that are victims of "*mere*" bullying must rely on "*intentional infliction of emotional distress*" claims. This is akin to a delictual claim for pain and suffering under South African law. The problem is that the courts attach too high a threshold for liability when dealing with such claims, requiring "*extreme and outrageous conduct*" by the bully. This leaves many victims of bullying without a remedy. No statute explicitly deals with workplace bullying in the US. To remedy this Prof. David Yamada, Professor of Law, Director of the New Workplace Institute and Co-Director of Employment Law at Suffolk University in Boston has proposed the "*Healthy Workplace Bill*". The bill would introduce a less onerous "*reasonableness*" standard for determining the existence of workplace bullying. It would also introduce vicarious liability for employers based on the creation of an "*abusive work environment*".

In Europe, multiple countries have found ways to protect against workplace bullying into their legal systems. In England, the courts themselves have interpreted the UK Protection from Harassment Act to prohibit workplace bullying. France amended its Labour Code to include liability for "*moral harassment*" and this is especially helpful in dealing with the distinction between harassment or discrimination on protected grounds versus "*garden-variety*" or "*status neutral*" bullying. The Republic of Ireland has developed a code of practice for the prevention of bullying at work, which makes a similar distinction: an Irish "harassment" claim must be based on a list of nine protected grounds (race, gender, etc) whereas a claim for bullying is not "*predicated on belonging to any group*".

The different provinces of Canada also offer a variety of legal mechanisms to deal with the problem. In the Saskatchewan province, the Employment Act prohibits two separate forms of harassment: "*harassment based on prohibited grounds*" and "*personal harassment*", that is, bullying. In the province of Ontario, "*workplace harassment*" includes bullying in terms of the Occupational Health and Safety (OHS) Act and accompanying Code of Practice. The fact that harassment is dealt with under OHS laws recognises (i) the psychological and physical toll that bullying can have and (ii) the duty of employers to create a safe working environment. The Prince Edward Island province explicitly includes "*bullying*" in its definition of harassment in the Workplace Harassment Regulations.

How are employers to manage workplace bullying in SA?

In Europe, multiple countries have found ways to protect against workplace bullying into their legal systems.

The Draft Code includes seven principles that guide the implementation of strategies to prevent violence and harassment at work.

WORKPLACE BULLYING AND THE DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK *...continued*

The issues caused by unchecked workplace bullying are manifold: increased absenteeism, lowered morale and productivity, poor work performance, depression, anxiety and, increased likelihood of resignation. Additionally, employers expose themselves to a claim of 24 months' compensation for an automatically unfair dismissal, as well as to vicarious liability for harassment in terms of section 60 of the EEA.

The Draft Code includes seven principles that guide the implementation of strategies to prevent violence and harassment at work.

1. Workplaces must be free of violence and harassment and employers have the duty to remove all forms of unfair discrimination in their companies.
2. Employers must provide information, training, and instructions in order to create a safe working environment in which the dignity of all employees is respected and protected
3. Employers should create a workplace culture where employees can bring a complaint without fear of reprisal and with the knowledge that complaints will not be ignored. (This is especially important in order to avoid liability.)
4. Employers and employees are to proactively refrain from committing acts of violence and harassment.
5. Employers and employees must create a working environment in which violence and harassment are regarded as unacceptable.
6. Employers and employees should attempt to ensure that people who have dealings with the employer (e.g. customers or suppliers) are not subject to violence and harassment.
7. Employers must take appropriate action where instances of violence and harassment occur at the workplace.

Employers have numerous duties under the Draft Code to help prevent violence and harassment in the workplace. Employers must create clear rules, policies and procedures prohibiting all forms of violence and harassment. A policy must clearly state that violence and harassment are forms of unfair discrimination that will not be tolerated or condoned and are regarded as very serious forms of misconduct, which may result in a dismissal. Employers must communicate to employees the reporting procedures to be followed by a victim of harassment and that employees can lodge complaints without fear of victimisation or reprisal.

An employer that receives a complaint must investigate the complaint and take the necessary steps to address the complaint and eliminate the conduct. The Draft Code recommends designating a person outside of line management who complainants can approach for confidential advice and counselling.

When an employee complains of harassment, the employer must give them the choice between following the formal or informal procedure.

WORKPLACE BULLYING AND THE DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK *...continued*

The duties of employers do not stop there: they must also establish *"prevention and awareness"* programmes that train and educate employees about violence and harassment. The Draft Code also mandates *"treatment care and support"* programmes that include health and safety measures with procedures to be followed and provide for appropriate referrals to counselling. Complaints must also be received and managed with due regard for confidentiality and the privacy of complainants. Finally, all employers must ensure that there are systems in place to monitor and evaluate their policies and procedures to check for effectiveness.

The upshot of this all is that if the Draft Code were to become law, it would force employers to recognise that their organisational culture can either contribute to the increase in workplace bullying or contribute to eradicating it. The first step is the creation of a zero-tolerance anti-bullying policy or code of conduct. This policy should clearly detail the grievance procedures to follow in case of being bullied. Suitable reporting mechanisms must be established, and all complaints should be documented, investigated and filed. Employers should also educate and train employees to increase awareness and decrease instances of bullying. Frequent evaluations of the policy and its effectiveness would allow for continual improvement of the policy and the identification of successes and failures.

Employers should be aware that appropriate disciplinary sanctions are outlined by the Draft Code. Fundamentally, sanctions must be proportionate to the harassment. For minor offences, a warning could be issued, but continued minor offences of bullying could lead to dismissal. A dismissal could be imposed for serious instances of harassment, and depending on the seriousness, a single instance of harassment could lead to dismissal. Alternatives to dismissal should only be considered in appropriate circumstances.

A more nuanced policy could also, while having due regard to the above sanctions, include principles based on the concept of restorative justice. A purely punishment-based framework may do very little to eradicate the problem whereas one that is based on healing, repairing the harm done and preventing subsequent bullying could be more effective. This approach recognises the importance of managing conflict and building better teams bring the workplace more in line with the constitutional imperative of ubuntu.

The benefits of having an anti-bullying policy (dealing with fewer workplace issues and the avoidance of costly legal claims) outweigh the increased costs of creating, implementing and maintaining the anti-bullying policy and procedure.

WORKPLACE BULLYING AND THE DRAFT CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK *...continued*

What can a victim of bullying do?

The Draft Code sets out a formal and an informal procedure that a victim could follow.

When an employee complains of harassment, the employer must give them the choice between following the formal or informal procedure, except that in certain limited circumstances the employer can itself choose to follow the formal procedure, regardless of the wishes of the complainant. This can only be done if the employer, after a proper investigation, finds that there is a significant risk of harm to other persons in the workplace.

The recommended informal procedure is for a complainant or another appropriate person to talk to the bully and explain that their conduct is unwelcome, is offensive, makes the victim feel uncomfortable or interferes with their work. An alternative is for another person to approach the bully without revealing the identity of the victim. The process could then escalate or de-escalate as necessary.

The formal procedure should outline how complaints are to be lodged, including provision for the complainant's desired outcome and expected time frames. The formal procedure must also state that it will be a disciplinary offence to victimise or retaliate against a victim who has lodged a complaint. Should the matter not be satisfactorily resolved internally, a complainant may refer the matter to the CCMA.

Until the Draft Code become law, an employee can turn to the CCMA Information Sheet on Harassment. The information sheet is similar to the proposed procedures in the Draft Code. The information sheet recommends that the bullied employee record instances of bullying by taking notes. They should then directly confront the harasser and, with a witness present, demand that they stop their behaviour. The employee can also use a workplace grievance or disciplinary procedure or, if they are a member of a union, request assistance from their union or employee's association. Finally, they can contact the CCMA for assistance.

Conclusion

The lack of a clear definition of bullying in our law has led to inconsistencies in the case law.

The Minister of Employment and Labour has published the Draft Code of Good Practice on bullying (like the Code on Sexual Harassment) to settle the issue and provide guidance to employers and employees. The Draft Code was published for public comments and the comment period on the Draft Code has now closed. The question that remains is what changes the Draft Code will undergo as public comments and the input of NEDLAC and Parliament are incorporated. The ILO Convention C190 on Violence and Harassment provided the impetus for publishing the draft. South Africa has not yet ratified the ILO convention. The date on which the convention and its provisions took effect become binding on ratifying states was 25 June 2021. The Commission for Employment Equity has advised the Minister of Employment and Labour to recommend ratification of the convention to Parliament and NEDLAC *"as a matter of urgency"*. When we consider the strong push towards incorporating the convention into our law, as well as the current legal uncertainty and prevalence of workplace bullying, it can be expected that the Draft Code will be on well on its way to becoming law in the near future.

Imraan Mahomed and Menachem Gudelsky

The Draft Code was published for public comments and the comment period on the Draft Code has now closed.

08

Temporary employment services and non-permanent employment

TEMPORARY EMPLOYMENT SERVICES

DISTINGUISHING BETWEEN A SERVICE PROVIDER AND A TES

Victor and Others v Chep South Africa (Pty) Ltd and Others [2021] 1 BLLR 53 (LAC)

SUMMARY OF THE FACTS

The appellants were employed by the fourth respondent, Contracta Force Corporate Solutions (Pty) Ltd (C-Force), to repair wooden pallets for the first respondent (the client). A service-level agreement (SLA) was in place which indicated that C-Force was a service provider. At the CCMA, the commissioner scrutinised the SLA, the nature of the relationship between the parties, the degree of control, who directed the work to be performed by the employees, and who had the right to discipline the employees. The Commissioner found that the true nature of the relationship was a temporary employment services (TES) relationship. A review of the commissioner's findings was referred to the LC. The LC found that the commissioner erred in his findings and that no TES relationship existed. The matter went on appeal to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC stated that the first question to consider when deciding whether a company is a TES in terms of section 198(1) of the LRA is whether it has provided other persons to a client. Where employees are brought to the client by a third party to perform work at its premises, this would normally be at least an indication that the employees were procured to work for the client, especially if the client retains overarching control over the work process and can determine whether the employee continues to perform their work at all.

The second question is whether the provider procured the employees for reward. The LAC found that there is no reason why the reward payment to a TES cannot be calculated by reference to tasks or products. All that section 198(1) of the LRA requires is that employees be provided to a client for reward and that the employees be remunerated by the provider. The method for computing the reward payable, by the client to the provider, is not a sufficient basis to exclude the provider from the TES category. The substance of the arrangement is more definitive than the form – the enquiry is therefore one of substance over form.

The LAC further held that certain factors must be considered in deciding the question of whether they are procured to "*perform work for client*". Such factors include: questions of control and integration, including the manner in which the employees work, the authority to which they are subjected, the degree they are integrated into the functioning of the organisation and the provision of the tools of the trade and work equipment. The LAC accordingly found that the LC approach and interpretation was too restrictive and confirmed that a TES relationship existed between the parties.

Hedda Schensema

The LAC stated that the first question to consider when deciding whether a company is a TES in terms of section 198(1) of the LRA is whether it has provided other persons to a client.

08

Temporary employment services and non-permanent employment

TEMPORARY EMPLOYMENT SERVICE

WHEN DOES A FIXED-TERM CONTRACT BECOME OF INDEFINITE DURATION IN TERMS OF SECTION 198B(5)?

Unilever SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2021] 42 ILJ 411 (LC)

SUMMARY OF THE FACTS

The dispute related to section 198B of the LRA. In March 2017, Unilever retrenched a number of packers and almost immediately thereafter, on 1 April 2017, offered them fixed-term contracts. As fixed-term contract employees, they would not be entitled to benefits such as medical aid, pension, education and home loan schemes. In addition, they were to work variable hours.

Although the Amalungelo Workers' Union members did not sign the contracts, they nonetheless continued to work in line with the terms of the fixed-term contracts. The employees were assigned to a specific project and in terms of the fixed-term contract, their services would not be required after June 2019.

On 16 April 2018, the union referred a dispute to the CCMA in terms of section 198B of the LRA, alleging that the dispute arose on 12 April 2018. The union sought a declarator to the effect that the employees who were in fixed-term agreements be considered permanent employees. At arbitration, the CCMA acknowledged that there were no signed contracts, and went on to state that a fixed-term contract had to be in writing and had to stipulate the reason for the limited duration. The CCMA found that the employees were employed for an indefinite duration, and not on fixed-term contracts. Accordingly, they were permanent employees and ought to be paid rates of remuneration which were not less favourable than those earned by permanent employees performing the same or similar work.

The union subsequently sought a variation of the award to quantify back-pay due for its members. The award was varied, and Unilever and the union directed to meet to quantify the back-pay.

Unilever reviewed both the arbitration award and variation ruling in two separate applications that were subsequently consolidated (together with a further application to stay the main arbitration award).

The matter went on review to the LC.

Unilever raised a point in limine related to the CCMA's jurisdiction, which was essentially two-fold: firstly, the section 198B dispute was referred outside of the six-month period with no accompanying condonation application; and secondly, the CCMA lacked jurisdiction to award benefits – the union specifically sought a declarator only in the CCMA referral (to be declared permanent employees).

On the issue of condonation, Unilever argued that the union had until September 2017 to refer the dispute. The union's counter argument was that the dispute was a continuing wrong (akin to an unfair labour practice) and the referral was therefore not late at all.

The union subsequently sought a variation of the award to quantify back-pay due for its members. The award was varied, and Unilever and the union directed to meet to quantify the back-pay.

TEMPORARY EMPLOYMENT SERVICE

WHEN DOES A FIXED-TERM CONTRACT BECOME OF INDEFINITE DURATION IN TERMS OF SECTION 198B(5)?

Unilever SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2021] 42 ILJ 411 (LC)
...continued

SUMMARY OF THE FINDINGS OF THE COURT

The LC was called upon to determine the following:

i. the date on which the dispute arose;

ii. whether the alleged wrong was of a continuing nature; and

iii. whether a condonation application was necessary.

It was common cause that the dispute arose in April 2017 when the employees were offered fixed-term employment contracts on terms that were not in compliance with sections 198B(3)(a) and (b) of the LRA and were, as such, to be deemed to be employed on the basis of an indefinite contract as envisaged by section 198B(5). They suffered the effects of the less favourable treatment on a continuous basis. This, however, did not automatically constitute an ongoing wrong.

This was not an unfair labour practice dispute (section 186(2)) or unfair discrimination claim. The dispute arose from a single event in April 2017 which did not amount to a continuing wrong. The time limit in section 198D(3) was generous enough and applied to the section 198B disputes. In the absence of an application and condonation being granted, the dispute was not properly before the CCMA. The review application succeeded on this basis alone.

Although not necessary, the court went on to consider the second jurisdictional issue. Relying on the judgment in *Nama Koi Local Municipality v SA Local Government Bargaining Council and Others* [2019] 8 BLLR 830 (LC), it held that the relief that flows from section 198D can only be declaratory relief to be sought prior to the expiry of the fixed-term contract. There was no automatic entitlement under section 198D to compensatory relief where a declarator has been granted. The granting of benefits and a comparison to employees who were permanently employed was an error of law. Once the declarator was granted, the next step was for the union to refer an unfair labour practice dispute or unfair discrimination (unequal treatment) dispute.

Phetheni Nkuna

This was not an unfair labour practice dispute (section 186(2)) or unfair discrimination claim. The dispute arose from a single event in April 2017 which did not amount to a continuing wrong.

09

POPI, privacy and protected disclosures

POPIA, PRIVACY, PROTECTED DISCLOSURES

LESSONS FROM TURKEY: DOES THE AUDIT OF A BUSINESS EMAIL ADDRESS WITHOUT THE CONSENT OF THE CONCERNED EMPLOYEE AMOUNT TO A VIOLATION OF PRIVACY AND FREEDOM OF COMMUNICATION?

Celal Oraj Altunörgü Application, Turkish Constitutional Court, Application Number 2018/31036 dated and issued /2/2021-31386

The applicant referred a dispute to the relevant labour court seeking a declarator for his reinstatement on the basis that his right to privacy and freedom of communication, as entrenched in the Turkish Constitution, had been violated by his employer when his email communication was audited without notice.

SUMMARY OF THE FACTS

The applicant worked as a customer relations manager at a bank based in Turkey. The applicant's contract of employment stated that the applicant would carry out their duties in accordance with the instructions and orders of the bank management and the relevant regulatory framework and that a failure by the applicant to comply with their work obligations would constitute a valid reason for dismissal in terms of Article 17 of the Turkish Labour Code 4857, dated 22 May 2003.

The employment agreement further provided that the applicant was only permitted to use their business email address for business purposes and that their business email address may be audited by the bank without prior notice. In terms of this provision, by accepting the contract of employment, the applicant agreed that they had no objections to the audit and accepted that they would follow the bank's instructions.

The applicant's business email address was subsequently audited following allegations that he worked in a registered business owned by his wife. The bank had these allegations investigated and found that the applicant had indeed conducted work for his wife's business through his business email address, during working hours, in breach of the terms of his contract of employment.

The applicant was consequently dismissed for misconduct. The applicant referred a dispute to the relevant Turkish labour court seeking a declarator for his reinstatement on the basis that his right to privacy and freedom of communication, as entrenched in the Turkish Constitution, had been violated by his employer when his email communication was audited without notice.

The matter was dismissed in both the labour court and the regional court with jurisdiction. The Constitutional Court of Turkey was then called upon to decide the matter on appeal. The findings of the court outlined in this article focus on the issue of the right to privacy and freedom of communication.

POPIA, PRIVACY, PROTECTED DISCLOSURES

LESSONS FROM TURKEY: DOES THE AUDIT OF A BUSINESS EMAIL ADDRESS WITHOUT THE CONSENT OF THE CONCERNED EMPLOYEE AMOUNT TO A VIOLATION OF PRIVACY AND FREEDOM OF COMMUNICATION?

Celal Oraj Altunörgü Application, Turkish Constitutional Court, Application Number 2018/31036 dated and issued /2/2021-31386...*continued*

Where disputes relate to instances where an employer takes advantage of the opportunities presented by technological developments and the like, a balance must be struck between the needs of the employer and the basic rights and freedoms of employees.

SUMMARY OF THE FINDINGS OF THE COURT

The Turkish Constitutional Court considered Articles 20 and 22 of the Turkish Constitution, being the right to privacy and the right to freedom of communication respectively. Article 20 of the Turkish Constitution reads as follows:

"Everyone has the right to ask for respect for their privacy and family life. The privacy of private or and family life shall not be violated. Everyone has the right to request the protection of personal data about themselves. This right; it includes being informed about the personal data about the person himself, accessing this data, requesting that it be corrected or deleted, and finding out if it has been used for its purposes. Personal data may only be processed where stipulated in the law or with the express consent of the person. The principles and procedures for the protection of personal data are regulated by law."

Article 22 of the Turkish Constitution states that:

"Everyone has the freedom to communicate. The confidentiality of communication is essential. Unless there is a judge's decision duly issued based on one or more of the reasons for national security, public order, prevention of crime, protection of general health and general morality, or protection of the rights and freedoms of others; in cases where it is inconvenient to delay due to these reasons, unless there is a written order of the authority authorised by law; communication cannot be blocked and privacy cannot be touched. The decision of the competent authority shall be submitted to the approval of the competent judge within twenty-four hours. The judge announces his decision within 48 hours; otherwise, the decision will be lifted on its own. Public institutions and organisations to which exceptions will be applied are specified in the law."

The court held that the monitoring of business email accounts constituted processing of personal data. In addition, where disputes relate to instances where an employer takes advantage of the opportunities presented by technological developments and the like, a balance must be struck between the needs of the employer and the basic rights and freedoms of employees.

POPIA, PRIVACY, PROTECTED DISCLOSURES

LESSONS FROM TURKEY: DOES THE AUDIT OF A BUSINESS EMAIL ADDRESS WITHOUT THE CONSENT OF THE CONCERNED EMPLOYEE AMOUNT TO A VIOLATION OF PRIVACY AND FREEDOM OF COMMUNICATION?

Celal Oraj Altunörgü Application, Turkish Constitutional Court, Application Number 2018/31036 dated and issued /2/2021-31386...*continued*

The court held that the applicant's contract of employment made express provision for the auditing of his business email account without prior notice and that any breach of his obligations to the bank would result in the termination of his contract of employment.

The court held further, as a general position, that the processing of personal data through the monitoring of business email accounts was permissible as it served legitimate business objectives such as measuring productivity and issues related to security and flow of information.

The court noted, however, that where employers monitor and track communication devices used by their employees, they must ensure the following:

- the monitoring is conducted for a legitimate reason;
- the right of the employer to monitor employee communications is communicated to employees prior to doing so;
- the interference with the rights of employees must be consistent with the objectives and purpose for which the monitoring is performed;
- less invasive means have been explored;
- the data obtained by the employer must be related and limited to the object for which it was sought; and
- the rights and freedoms of both parties must be balanced.

The court held that the applicant's contract of employment made express provision for the auditing of his business email account without prior notice and that any breach of his obligations to the bank would result in the termination of his contract of employment. The applicant agreed to these terms when he signed his contract of employment and thus no prior notice was required in this instance.

The court held that the bank audited the applicants' email address following allegations that he was engaged in activities related to a business owned by his wife and that the interception of his communication was used to substantiate these claims, which action was in line with the intended purpose of investigating allegations of misconduct.

In light of the aforesaid considerations and the legitimate interests of the employer, which was a bank, and by virtue of this the employee was privy to sensitive information, the court found that the right to privacy and freedom of communication of the applicant was not infringed on a balance of factors.

POPIA, PRIVACY, PROTECTED DISCLOSURES

LESSONS FROM TURKEY: DOES THE AUDIT OF A BUSINESS EMAIL ADDRESS WITHOUT THE CONSENT OF THE CONCERNED EMPLOYEE AMOUNT TO A VIOLATION OF PRIVACY AND FREEDOM OF COMMUNICATION?

Celal Oraj Altunörgü Application, Turkish Constitutional Court, Application Number 2018/31036 dated and issued /2/2021-31386...*continued*

When considering the South African context, in light of the introduction of POPI, employers must review their contracts of employment to ensure that provision is made for employees' consent for the interception of communication and business email accounts for a legitimate purpose so as to ensure that employers may still monitor business communication in a lawful manner. The effect of the POPI read together with the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 must be considered when updating contracts of employment and all company policies related to the monitoring of information and other surveillance of employees in order to ensure that employers remain compliant. To this effect, the eight principles for the lawful processing of information must be complied with and the requisite consent must be obtained.

Faan Coetzee and Riola Kok

The eight principles for the lawful processing of information must be complied with and the requisite consent must be obtained.

THE PROTECTED DISCLOSURES ACT 26 OF 2000 AND SECTION 188A(11) OF THE LRA

WHAT EFFECT DOES A DEFECTIVE REFERRAL HAVE ON THE JURISDICTION OF THE CCMA? WHEN IS A SECTION 188A(11) PROCEDURE AVAILABLE TO AN EMPLOYEE?

PEDLAR v Performing Arts Council of the Free State [2021] 6 BALR 649 (CCMA)

SUMMARY OF THE FACTS

The applicant was employed by the Performing Arts Council of the Free State (PACOFS) as its chief operating officer in 2019. In August 2020 an investigation was launched after an anonymous whistle-blower accused the applicant of contravening PACOFS' human resources policies by engaging in nepotism and misusing his position. A second whistle-blower's report surfaced on 1 September 2020. On 3 November 2020 the applicant was suspended from duty. On 17 December 2020 disciplinary charges were issued against the applicant. The applicant subsequently approached the CCMA to request that an enquiry be held in terms of section 188A(11) of the LRA. This section allows the CCMA to hold an enquiry by an arbitrator (rather than by the employer) where the employee alleges in good faith that the holding of an internal enquiry contravenes the Protected Disclosures Act 26 of 2000 (PDA). The applicant's request was based on his contention that he was being targeted because he had "*blown the whistle*" on four council members to the Minister of Arts and Culture.

PACOFS argued that the referral was defective, the application was not *bona fide* and the CCMA had no jurisdiction to hear the matter.

In respect of the defective referral it contended that the pro-forma LRA 7.19 form, which is used to apply for a section 188A(11) process, did not allow an employee to bring such an application. In this case the applicant had simply crossed out where the employer would ordinarily complete the form and had written "*employee*" on that part of the referral form and filled out his details. PACOFS argued that the applicant had to obtain its consent to the proceedings before he could bring such an application. It had not consented to the process and would proceed with the internal enquiry as it was its prerogative to apply discipline at the workplace. Furthermore, it argued that CCMA Rule 34 prescribed that the employer had to pay the necessary fees associated with the section 188A(11) process. In this case the applicant had paid the fee to the CCMA.

In respect of the requirement that the allegation that the internal enquiry contravened the PDA be made *bona fide*, it argued that it was unaware of the alleged protected disclosure to the Minister of Arts and Culture and that the applicant had misused the PDA to try avoid disciplinary action being taken against him. The disclosure itself did not meet the prerequisites for a protected disclosure as, among other things, it was made based on information already in the Department of Arts and Culture's hands.

PACOFS argued that the applicant had to obtain its consent to the proceedings before he could bring such an application. It had not consented to the process and would proceed with the internal enquiry as it was its prerogative to apply discipline at the workplace.

THE PROTECTED DISCLOSURES ACT 26 OF 2000 AND SECTION 188A(11) OF THE LRA

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PEDLAR v Performing Arts Council of the Free State [2021] 6 BALR 649 (CCMA)...*continued*

PACOFS further argued that the employee had already approached the LC seeking an interdict against the internal disciplinary proceedings (his application was dismissed) and had raised a preliminary point at the enquiry that the section 188A(11) referral stayed the finalisation of the internal process (his point was also dismissed by the chairperson).

The applicant argued that the LRA 7.19 form was merely a document to facilitate the commencement of the process and parties were not bound by it. He argued that it was not mandatory to complete the LRA 7.19 form and a letter requesting the enquiry by an arbitrator would have sufficed.

Furthermore, the applicant contended that he did not need PACOFS' consent to the enquiry as he had a statutory right to refer the matter to the CCMA. Section 188A(11) in any event did not require the consent of the employer.

All that was required from the applicant was to make a *bona fide* protected disclosure, which he contended he had done. Section 188A(11) was a mechanism to replace an internal disciplinary hearing and PACOFS was obliged to follow the process.

Furthermore, the applicant contended that he did not need PACOFS' consent to the enquiry as he had a statutory right to refer the matter to the CCMA. Section 188A(11) in any event did not require the consent of the employer.

SUMMARY OF THE FINDINGS OF THE CCMA

The first issue that the arbitrator decided was whether the referral was defective. He accepted that the form did not allow for an employee to complete it or to make the prescribed payment to the CCMA.

The arbitrator considered that section 188A(11) was introduced in the 2015 amendments to the LRA. It provides that an employee or an employer may require that an enquiry be conducted in terms of section 188A into allegations by the employer into the conduct or capacity of the employee. Historically, parties in cases involving claims of protected disclosure would get drawn into extensive collateral litigation that led to the delay of the disciplinary enquiry. Section 188A(11) was aimed at reducing the risk of collateral litigation.

The arbitrator noted that the CCMA rules had not yet been amended to accommodate the introduction of section 188A(11). However, it was trite that a CCMA referral form was not a pleading and that commissioners were not bound by them. The arbitrator found that the applicant had a statutory right to refer the matter to the CCMA and the consent of the employer was not necessary in terms of section 188A(11). He dismissed this point and found that PACOFS had raised the point opportunistically.

THE PROTECTED DISCLOSURES ACT 26 OF 2000 AND SECTION 188A(11) OF THE LRA

WHAT EFFECT DOES A DEFECTIVE REFERRAL HAVE ON THE JURISDICTION OF THE CCMA? WHEN IS A SECTION 188A(11) PROCEDURE AVAILABLE TO AN EMPLOYEE?

PEDLAR v Performing Arts Council of the Free State [2021] 6 BALR 649 (CCMA)...*continued*

In considering whether the disclosure had been made *bona fide*, the arbitrator considered the preamble of the PDA. The preamble recognises that the presence of criminal or other irregular conduct in organs of state and private institutions is detrimental to good, effective, accountable and transparent governance in these entities. This type of conduct increases the likelihood of social damage, as well as destabilising the economy. Every employee and employer has an obligation to disclose any criminal or irregular conduct in the workplace. The PDA also provides that employers have an equal duty to ensure that all necessary steps are taken to protect employees from any "*occupational detriment*", as a result of a protected disclosure. An "*occupational detriment*" includes any disciplinary action, being dismissed, suspended, demoted, harassed, intimidated, transferred against one's will, or refused a transfer or promotion, or being otherwise adversely affected in respect of the employee's employment, profession or office, including employment opportunities and work security.

A disclosure made in terms of the PDA need not be factually accurate, rather, the disclosure must be in good faith. The employee making the disclosure must reasonably believe that the information disclosed is substantially true. The disclosure cannot be made by an employee for the purposes of personal gain.

"*Reasonable belief*" does not relate to the reasonableness of the information, but rather the reasonableness of the belief. A belief could still be reasonable, even if the information is inaccurate. It was not necessary to prove the accuracy of the information, as this would elevate the requirement to a higher standard than required by the PDA.

The arbitrator was not convinced that the disclosure in question was not made *bona fide*, nor could he find that the disclosure was made for gain. He accordingly found that the CCMA did have the necessary jurisdiction to arbitrate the matter in terms of section 188A(11) of the LRA. He directed the parties to file a pre-arbitration conference minute and the CCMA to schedule the matter accordingly.

The arbitrator correctly found he did not have any powers to order the stay of the internal disciplinary proceedings. He held that the parties were at liberty to exercise their rights in that regard.

Jose Jorge and Mbulelo Mango

A disclosure made in terms of the PDA need not be factually accurate, rather, the disclosure must be in good faith. The employee making the disclosure must reasonably believe that the information disclosed is substantially true.

THE PROTECTED DISCLOSURES ACT 26 OF 2000 AND SECTION 188A(11) OF THE LRA

CAN AN EMPLOYER CONTINUE WITH A DISCIPLINARY ENQUIRY WHEN AN EMPLOYEE BRINGS A SECTION 188A(11) REFERRAL?

Peter Jacobs v Minister of Safety and Security and Others (unreported case number J194/21)

After receiving notice of the disciplinary enquiry, the applicants approached the Safety and Security Sectoral Bargaining Council (SSSBC) to request an enquiry by an arbitrator in terms of section 188A(11) of the LRA.

SUMMARY OF THE FACTS

The applicants in this matter all hold senior ranks in the Crime Intelligence Division (CID) of the South African Police Services (SAPS). They are Divisional Commissioner Jacobs, Major General Lekalakala (Acting Chief Financial Officer), Brigadier Lombard (Section Head of Intelligence Planning and Monitoring), Colonel Gopal (Section Commander of Vehicle, Fleet and Asset Management) and Colonel Walljee (Acting Station Head of Supply Chain Management).

On 27 November 2020, SAPS National Commissioner Sithole was alerted by the Inspector General of Intelligence about alleged procurement irregularities in the CID relating to the purchase of personal protective equipment using the Secret Service Account in violation of various prescripts, including the Public Finance Management Act 29 of 1999. On 30 November 2020, Sithole appointed Lieutenant General Vuma to conduct an internal investigation into the allegations. The applicants were subsequently served with notices of intended suspension pending the investigation and asked to make representations in this regard.

On 10 December 2020, Sithole suspended the applicants. The applicants demanded that they be reinstated. When Sithole dug his heels in they approached the High Court on an urgent basis to set aside their suspensions. Their application was refused.

On 12 and 13 February 2021 the applicants were issued with notices of an expedited enquiry set down for 22 to 26 February 2021. Limpopo Provincial Commissioner Ledwaba was appointed as the chairperson of the disciplinary enquiry. After receiving notice of the disciplinary enquiry, the applicants approached the Safety and Security Sectoral Bargaining Council (SSSBC) to request an enquiry by an arbitrator in terms of section 188A(11) of the LRA.

Section 188A allows the SSSBC to hold an enquiry by an arbitrator (rather than by the employer) where the employee alleges, in good faith, that the holding of the internal enquiry is in contravention of the Protected Disclosures Act 26 of 2000 (PDA). The basis of the request was that the decision by Sithole to institute disciplinary action against them constituted an occupational detriment in terms of the PDA.

On 17 February 2021, the applicants informed Sithole of the section 188A(11) referral and requested that the disciplinary enquiry be stayed, pending the outcome of the section 188A(11) process. Sithole advised them to raise this issue with the chairperson, at the hearing. On 22 and 23 February 2021 the applicants raised a number of jurisdictional points. One such point was Ledwaba's lack of jurisdiction to hear the matter on the basis of their section 188A(11) referral to the SSSBC. They insisted on a

THE PROTECTED DISCLOSURES ACT 26 OF 2000 AND SECTION 188A(11) OF THE LRA

CAN AN EMPLOYER CONTINUE WITH A DISCIPLINARY ENQUIRY WHEN AN EMPLOYEE BRINGS A SECTION 188A(11) REFERRAL?

Peter Jacobs v Minister of Safety and Security and Others (unreported case number J194/21)*...continued*

determination from the chairperson on the points that they had raised. Ledwaba, however, saw this as a delaying tactic and adjourned the matter to 25 February 2021 to attend to the verdict.

On 24 February 2021, the applicants launched an application in the LC on an *"extremely urgent"* basis to interdict the internal disciplinary proceedings. The hearing of the matter was postponed by agreement to 10 May 2021.

Sithole argued that there was no urgency and it was self-created by the applicants as they had known since November 2020 that disciplinary action would be instituted after the investigation. He argued further that the section 188A(11) referral was an afterthought as the applicants did not invoke this provision at the time of their suspensions.

The applicants argued that it was not necessary to invoke section 188A(11) when they were suspended as they could not be aware of the outcome of the investigation at that stage. However, they contended that they correctly invoked the process as soon as disciplinary action was instituted against them. In addition, they argued that they could not approach the LC until they knew what the chairperson's attitude to their request for a section 188A(11) enquiry by an arbitrator would be. They approached the LC as soon as they realised that he would not agree with the request for an enquiry by an arbitrator.

SUMMARY OF THE FINDINGS OF THE LABOUR COURT

The court accepted that the matter was urgent. The court noted that in order to understand section 188A(11) of the LRA, section 188A(12) also had to be considered. Section 188A(12) specifically records that the holding of a section 188A(11) enquiry does not constitute an occupational detriment.

It is not the purpose of section 188A(11) of the LRA to determine whether there was an occupational detriment. The aim of section 188A(11) is to avoid collateral litigation in circumstances where the employee claims that the holding of the internal disciplinary enquiry is in contravention of the PDA. Section 188A(11) of the LRA strikes a balance between an employer taking no action against the whistle-blower at all, or allowing a disciplinary process, but with the safeguard that the process is done entirely independently of the employer.

Section 188A(11) strikes a balance between an employer taking no action against the whistle-blower at all, or allowing a disciplinary process, but with the safeguard that the process is done entirely independently of the employer.

THE PROTECTED DISCLOSURES ACT 26 OF 2000 AND SECTION 188A(11) OF THE LRA

CAN AN EMPLOYER CONTINUE WITH A DISCIPLINARY ENQUIRY WHEN AN EMPLOYEE BRINGS A SECTION 188A(11) REFERRAL?

Peter Jacobs v Minister of Safety and Security and Others (unreported case number J194/21)*...continued*

The court considered the judgment of *Nxele v National Commissioner: Department of Correctional Services and Others* [2018] 39 ILJ 1799 (LC) where it was held that the purpose of section 188A(11) was to provide employees with a degree of protection and to avoid parallel litigation. Nxele held that following a section 188A(11) request, the internal disciplinary enquiry that would have commenced and was pending must terminate.

The court considered that Jacobs had made a number of disclosures over a period of two years. The latest disclosure was made a month before the applicants' suspensions. The court found that in invoking the section 188A(11) process the applicants were not trying to avoid the disciplinary process because they were whistle-blowers, but were merely seeking to exercise the right to a fair process that would be conducted independently from their employer, who had been implicated in the protected disclosures. The court noted that Sithole had issued the applicants with transfer letters on 3 March 2021 in breach of the PDA.

The court held that to the extent that the applicants held the view, in good faith, that the institution of the disciplinary enquiry against them was in contravention of the PDA, section 188A(11) had been correctly invoked. The disciplinary enquiry had to be terminated and an enquiry before a SSSBC arbitrator had to be held in terms of section 188A(11) of the LRA.

The court was satisfied that a final interdict should be granted in favour of the applicants on the basis that they had demonstrated a clear right in terms of section 188A(11), and that the chairperson had unlawfully infringed on, or threatened to infringe on, that right by insisting on proceeding with the enquiry and delivering his verdict. In addition, the applicants had no alternative remedy as their challenge to the chairperson's conduct was based on legality.

The disciplinary enquiry against the applicants, the conduct of the chairperson and the pending verdict were all reviewed and set aside. The respondents were interdicted from proceeding with the disciplinary enquiry or instituting any disciplinary enquiry against them pending the finalisation of the section 188A(11) process before the SSSBC.

Jose Jorge and Taryn York

The respondents were interdicted from proceeding with the disciplinary enquiry or instituting any disciplinary enquiry against them pending the finalisation of the section 188A(11) process before the SSSBC.

10

Vaccinations in the workplace

VACCINATIONS IN THE WORKPLACE

A FOREIGN TAKE: DISMISSAL OF EMPLOYEES WHO REFUSE TO BE VACCINATED

Jennifer Bridges et al v Houston Methodist Hospital, Dist. Court, SD Texas [2021] (Civil Action No. H-21-1774)

SUMMARY OF THE FACTS

In April 2021, Houston Methodist Hospital in Texas, America introduced a mandatory vaccination policy (MVP) which provided that all employees were to be vaccinated by 7 June 2021 at the hospital's expense. The plaintiff and 166 other employees approached the court to stop the implementation of this policy, as well as any possible terminations by the hospital, on the basis that it was unlawful to force employees to be vaccinated or face dismissal following refusal to do so.

SUMMARY OF THE FACTS

The court considered the first argument that the vaccines were experimental and dangerous and that any termination based on refusal would therefore be wrongful.

In this regard, the court stated that in Texas law an employee is only protected from being dismissed for refusing to commit an act that will carry criminal penalties for that employee. Wrongful termination in this instance would need to show that the plaintiffs were required to commit an illegal act which carried criminal penalties, they refused to engage in the illegality, and they were then discharged because they refused to commit the illegal act.

The court held that receiving a vaccination is not an illegal act that carries criminal penalties, instead the plaintiffs were refusing a vaccination that would make it safer for all persons in the hospital.

The Equal Employment Opportunity Commission stated in May 2021 that employers can require employees to be vaccinated against COVID-19 subject to reasonable accommodation of those with disabilities or religious beliefs that prevent vaccination. The wrongful termination claim accordingly failed.

The second argument before the court was that the MVP violated public policy. In this regard, the court stated that in federal law, the Secretary of Health and Human Services (Secretary) is authorised to introduce the usage of emergency medical products and in doing so, that all recipients should be informed of the benefits, risks and their options with regards to the products' administration.

The court held that the plaintiffs had misunderstood the provision as the powers and responsibility conferred on the Secretary in emergencies has no effect on private employers such as the hospital. Therefore, the claim that the policy violates public policy also failed.

The court considered the first argument that the vaccines were experimental and dangerous and that any termination based on refusal would therefore be wrongful.

VACCINATIONS IN THE WORKPLACE

A FOREIGN TAKE: DISMISSAL OF EMPLOYEES WHO REFUSE TO BE VACCINATED

Jennifer Bridges et al v Houston Methodist Hospital, Dist. Court, SD Texas [2021] (Civil Action No. H-21-1774)

A further argument brought by the plaintiffs was that the MVP violated federal law which governs human subjects because the hospital was forcing the employees to participate in a human trial. In this regard, the court stated that federal law requires that all participants in a human trial must provide legal, effective and informed consent which cannot be obtained through coercion or undue influence.

The court held that the plaintiffs misinterpreted the provision and misrepresented the facts as the employees were not participants in a human trial because the hospital had never applied to test the vaccines on its employees. The plaintiffs' claim on this basis accordingly failed.

The plaintiffs then went on to state that the MVP violated the Nuremberg Code. The court held that in light of the fact that the hospital was a private employer the code did not apply.

Therefore, the plaintiffs' claim failed, and the court stated that they were not coerced in any way by being forced to face dismissal should there be a refusal to be vaccinated. The court provided that all the hospital was trying to do was save the lives of many people, and employees could choose to either be vaccinated or work elsewhere.

According to the court *"every employment includes limits on the worker's behaviour in exchange for his remuneration. That is all part of the bargain."*

Jordyne Löser and Storm Arends

The plaintiffs' claim failed, and the court stated that they were not coerced in any way by being forced to face dismissal should there be a refusal to be vaccinated. The court provided that all the hospital was trying to do was save the lives of many people, and employees could choose to either be vaccinated or work elsewhere.

10
Vaccinations in the workplace

MANDATORY VACCINATION POLICIES: ARE EMPLOYEES CAUGHT BETWEEN A ROCK AND A HARD PLACE?

Since the commencement of the vaccine rollout, there has been some hesitation regarding whether or not to be vaccinated against COVID-19. A question raised in the employment sector is whether an employer may make vaccination compulsory in the workplace.

The answer is simply that it is dependent on the individual workplace.

On 11 June 2021 the Department of Employment and Labour released Consolidated Directions on Occupational Health and Safety in Certain Workplaces (Consolidated Directions). The Consolidated Directions provide that an employer must include whether it will make vaccinations mandatory for its employees in its risk assessment. A decision regarding the adoption of a mandatory vaccination policy (MVP) requires a consultation between employers, trade union representatives, members of the health and safety committee and/or employee representatives. The guidelines provided by the Consolidated Directions are for determining the fairness of the implementation of an MVP. It is noteworthy that these guidelines do not substitute any collective agreements or procedures that were previously agreed upon.

The Consolidated Directions provide for a three-pronged enquiry by the employer:

i. it must make an assessment by 2 July 2021 with considerations of the workplace's operational requirements and the general duties of an employer under the Occupational Health and Safety Act 85 of 1993;

ii. should it decide to implement an MVP, the employer is required to identify which employees will be required to be vaccinated either by virtue of the risk of transmission due to the nature of their work, age, or existing comorbidities; and

iii. once these employees have been identified, the workplace plan must be amended to include the vaccination measures to be taken.

The identified employees should be notified that they are obligated to be vaccinated and of their right to refuse the vaccination on constitutional or medical grounds, including that they will be afforded an opportunity to consult a health and safety representative, worker representative or trade union official should they request to do so.

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MANDATORY VACCINATION POLICIES: ARE EMPLOYEES CAUGHT BETWEEN A ROCK AND A HARD PLACE? *...continued*

Direction 4 of the Consolidated Directions states that every employer must establish certain administrative measures, which include granting an employee paid time off on the day they are to receive their vaccination, provided that they can prove they were vaccinated or that the date and time given is during their ordinary working hours. If reasonably practicable, this may include transport to and from the vaccination site.

May an employee be dismissed for refusing to take the vaccine?

An employee may refuse to take the COVID-19 vaccine on constitutional grounds or medical grounds. An example of the former may be in terms of the right to life, the right to bodily and psychological integrity and the right to freedom of conscience, religion, thought, belief, and opinion. Medical grounds may include allergies to the available vaccines, pregnancy, breastfeeding or any underlying medical conditions that cause their immune system to be compromised, like cancer. Individuals that refuse on the aforementioned grounds should be treated differently from those who merely object to taking the vaccine.

In respect of an employee who objects to being vaccinated on a constitutional or medical ground, an employer should counsel the employee and allow them to seek guidance from a health and safety representative, a worker representative or a trade union official if they request to do so. The employer may also refer the employee for a further medical evaluation should there be a medical contraindication for vaccination.

Additionally, the employer should try to reasonably accommodate the employee who fails or refuses to be vaccinated in the workplace by any modification or adjustment to the nature of their job or their working environments so that they may remain in employment. This may also include allowing an employee to work from home or in an isolated space, outside ordinary working hours, or simply by wearing a N95 mask.

If an employee cannot be reasonably accommodated, then, as a last resort, dismissal may be considered. Whilst this is still a new area of our law with limited precedent, we are able to see in foreign jurisdictions that employees who refuse to be vaccinated may be dismissed, as in the *Jennifer Bridges et al v Houston Methodist Hospital, Dist. Court, SD Texas* [2021] (Civil Action No. H-21-1774) case.

Sides effects of the vaccination when an MVP is in place

In terms of section 22 of the BCEA, during a sick leave cycle (36 months of being employed with that employer) an employee is entitled to an amount of paid sick leave that is equal to the number of days they would normally work in a six-week period. However, during the first cycle the amount is equivalent to one day for every 26 days. These sick leave entitlements may vary depending on an employee's employment contract and the employer's policies.

An employee may refuse to take the COVID-19 vaccine on constitutional grounds or medical grounds.

MANDATORY VACCINATION POLICIES: ARE EMPLOYEES CAUGHT BETWEEN A ROCK AND A HARD PLACE? *...continued*

If an employee experiences any side effects such as, but not limited to, flu symptoms, headaches, or a sore throat as a result of the vaccine, such an employee should take sick leave. Should they no longer be entitled to sick leave, the employee should be allowed to take paid leave in terms of the BCEA, e.g. annual leave. This may also be in terms of any applicable collective agreement or an employee may lodge a claim for compensation in terms of the COIDA.

An employee also has the option of the scheme which was introduced by the Department of Co-operative Government. This scheme aims to provide prompt and easy access to compensation for those persons who suffer any harm, loss, or damage as a result of a vaccine injury. A person is eligible in the following circumstances:

i. if they suffered harm, loss or damage caused by a vaccine injury at a facility within South Africa; or

ii. if they are a dependant of a person who died of a vaccine injury and suffered harm, loss, or damage as a result of the deceased's death.

Severe injuries which result or resulted in permanent or significant injury, serious harm to a person's health, other serious damage, or death are covered by the scheme. However, it must be noted that if a person elects to submit a claim to the scheme they waive and abandon their right to institute legal proceedings in court against any party for a claim arising from harm, loss or damage allegedly caused by a vaccine injury.

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Foreign views on mandatory vaccinations in the workplace

In the UK, instead of making vaccinations a requirement, workplaces are advised to encourage and support their employees with incentives like offering paid time off on the day of a vaccination appointment, sharing resources and information on vaccinations and even having other employees share their experiences with the vaccine. Employers were warned that a blanket MVP may be unlawful if applied inflexibly as it may not be suitable for every individual. It may also result in discrimination based on race, religious belief and sex should a woman refuse to take the vaccine due to fertility concerns.

In light of the fact that being vaccinated from COVID-19 is not a legal requirement, an employer may not force an employee to be vaccinated without their consent as this may result in a criminal offence such as assault. Employers do, however, have the choice to restrict unvaccinated employees' duties and access to the workplace, which could affect their salary.

When deciding whether or not to impose MVPs employers should consider the following:

i. The vaccination may not be suitable for everyone due to underlying medical conditions.

ii. Forcing an employee to be vaccinated in order to continue working may result in a claim of constructive dismissal.

MANDATORY VACCINATION POLICIES: ARE EMPLOYEES CAUGHT BETWEEN A ROCK AND A HARD PLACE? *...continued*

iii. It may indirectly discriminate against employees' rights.

iv. Private vaccinations are currently unavailable, therefore, employees will have to wait until they are eligible to be vaccinated.

v. It may result in negative publicity for the employers which may have a detrimental impact on their business.

vi. There are data protection implications for requiring employees to disclose their vaccination status.

In the UK, like in South Africa, collective consultations with employees or trade union representatives to discuss vaccination policies in the workplace are encouraged. It is also suggested that employers explore alternative measures that could be put in place such as regular testing for frontline staff as well as regular health and safety checks to ensure proper COVID-19 preventative measures are being implemented. Working from home or changing employees' roles or responsibilities may also be another way to minimise risk in the workplace.

The answer to whether employees may implement mandatory vaccinations is not as clear cut as we think. There are processes, ethical concerns, and other relevant factors at play when workplaces are considering implementing an MVP. Employers have the option to implement these policies, but they need to be cognisant that the LRA gives primacy to collective agreements, not all individuals are the same and the phase-in process of the current National Vaccination Programme may affect their policies.

Imraan Mahomed and Jordyne Löser

The answer to whether employees may implement mandatory vaccinations is not as clear cut as we think.

11

Occupational health and safety in a COVID-19 era

11

Occupational health and safety in a COVID-19 era

OCCUPATIONAL HEALTH AND SAFETY

SHOT BY THE COPS! CAN A POLICE STATION CLEANER WHO WAS ACCIDENTALLY SHOT BY A POLICE OFFICER WHILE ON DUTY LODGE A CLAIM IN TERMS OF COIDA?

Minnies v Ayshlie and Another [2021] JDR 0270 (WCC) unreported (12 February 2021)

SUMMARY OF THE FACTS

The plaintiff was employed as a cleaner at a police station and was accidentally shot by a police officer during the course and scope of his employment. The bullet struck the plaintiff's head and he lost his left eye as a result. The Minister of Police, who was the second defendant, raised a special plea that the plaintiff was precluded by section 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) from instituting proceedings against the Department of Justice and Correctional Services and denied liability in terms of common law for the plaintiff's damages. The parties agreed that the Minister of Police's special plea should be determined separately, before the merits of the plaintiff's action.

SUMMARY OF THE FINDINGS OF THE COURT

The court began by summarising section 35 of COIDA, which relates to the substitution of compensation for other legal remedies. The court reaffirmed its support for case law upholding the trite principle that in order for a common law claim against an employer to be precluded, the *"accident"* must have occurred during the course of an employee's employment and must have arisen out of that employment. The court referred to this as the *"exclusivity doctrine"*. The court ultimately dismissed the Minister of Police's special plea but also found that the exclusivity doctrine was not satisfied in the present case.

The court considered the risks incidental to employment and found that this analysis relates to whether or not the accident occurred at the workplace. That is, if the accident occurred during the course and scope of an employee's employment while they were doing the work that they were ordinarily engaged to do. The court concluded that the accident did not arise out of the nature of the plaintiff's work and was, therefore, out of the course and scope of his employment.

Michael Yeates and Thato Maruapula

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11
Occupational health and safety in a COVID-19 era

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Michael Yeates and Thato Maruapula

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12
Restraint
of trade
X-RAY
ZONE:A
X-RAY
CDH

RESTRAINT OF TRADE

ENFORCING RESTRAINTS OF TRADE DURING A PANDEMIC.

Oomph Out of Home Media (Pty) Limited v Brien and Another [2021] JOL 49492 (GJ)

SUMMARY OF THE FACTS

The employee in question had signed a restraint of trade agreement which, amongst other things, prohibited him from joining a competitor.

The employee had also provided a further written undertaking not to engage in any conduct that may be harmful to the business of his employer.

The employee nevertheless resigned and sought to join Provantage (Pty) Ltd, a direct competitor of the employer.

The employer applied to the High Court to interdict and restrain the employee from joining its competitor.

The employee, in defence, did not deny the fact that he was joining a competitor. Instead, he sought to challenge the validity and enforceability of the restraint of trade agreement. In this regard, the employee alleged that the restraint of trade was unreasonable and that it prevented him from earning a living.

SUMMARY OF THE FINDINGS OF THE COURT

The HC placed importance on the circumstances prevailing in South Africa at the time when the employer sought to enforce the restraint of trade. In particular, the court placed emphasis on the context of the COVID-19 pandemic and its impact on employment.

The HC found that in view of the effect of COVID-19 on South Africa's economy, which led to businesses closing down, retrenchments, layoffs and the like, it would be unreasonable and contrary to public policy to enforce the restraint of trade agreement in these circumstances.

The High Court therefore refused to enforce the restraint of trade agreement and awarded costs against the employer for "*its lack of sight and reasonableness*".

This case must be read together with the case of *Bulldog Abrasives Southern Africa (Pty) Ltd v Davie and Another* (J123/21) [2021] ZALCJHB 58 (20 May 2021) whereby the LC enforced a restraint of trade agreement in similar circumstances where the employee sought to rely on the pandemic as a defence.

CDH Employment Law

The HC found that in view of the effect of COVID-19 on South Africa's economy, which led to businesses closing down, retrenchments, layoffs and the like, it would be unreasonable and contrary to public policy to enforce the restraint of trade agreement in these circumstances.

12
Restraint of trade

RESTRAINT OF TRADE

THE NEXT FRONTIER IN THE GAMING CONSOLE WARS: THE LABOUR COURT AND RESTRAINT OF TRADE.

Prima Interactive (PTY) LTD v Haidee Lemon and Others J 246-21 ZALCJHB (30 April 2021)

SUMMARY OF THE FACTS

Prima Interactive (the applicant) launched an urgent application in the LC to enforce a restraint undertaking against a former employee (the first respondent) who had commenced employment with alleged competitors – Apex International (the second respondent) or the Triggercraft (the third respondent). There was a dispute as to whether the first respondent was employed by the second or third respondents.

The applicant, a licensed distributor of electronics, supplies major retailers with Xbox gaming consoles on a national basis. This is a highly competitive industry. The first respondent was employed by the applicant in the position of General Manager: Xbox and Operations at the time of her resignation in October 2020. The applicant alleged that the first respondent had breached the restraint undertaking by commencing employment with a direct competitor, thereby placing confidential information and customer connections at risk of being lost.

The applicant alleged that the first respondent had breached the restraint undertaking by commencing employment with a direct competitor, thereby placing confidential information and customer connections at risk of being lost.

The applicant alleged that the first respondent was party to confidential strategic planning meetings and, among other things, had information relating to costings, sales, contractual relationships and marketing plans. The first respondent opposed the application, alleging that neither the second nor third respondent were competitors of the applicant. The basis for this was the following:

i. the third respondent was an online retailer selling *"to the man on the street"*, as opposed to the wholesale market in which the applicant operates; and

ii. the first respondent had no customer contacts or proprietary information arising from her employment with the applicant that could be exploited.

SUMMARY OF THE FINDINGS OF THE COURT

The court outlined the general principles applicable to restraints of trade, that:

i. restraint undertakings are enforceable unless they are proved to be unreasonable; and

ii. once a breach of a restraint agreement has been proved the onus lies on the party attempting to avoid the restraint to show that it is unreasonable. A restraint must not seek merely to eliminate the competition.

RESTRAINT OF TRADE

THE NEXT FRONTIER IN THE GAMING CONSOLE WARS: THE LABOUR COURT AND RESTRAINT OF TRADE.

Prima Interactive (PTY) LTD v Haidee Lemon and Others J 246-21 ZALCJHB (30 April 2021)...*continued*

The court further confirmed the applicability of the classic four-pronged test:

i. Does the party seeking to uphold the restraint have an "*interest*" deserving of protection? (Proprietary interests)

ii. Is that interest being prejudiced by the other party?

iii. How does the interest weigh up against the interest of the other party that the other party should not be economically inactive and unproductive?

iv. Is there a general public policy consideration that points to maintaining or rejecting the restraint?

The court considered the two types of "*proprietary interests*" that can be protected: "*trade secrets*" (i.e. confidential matters that a competitor could use to gain a competitive advantage) and "*trade connections*" (i.e. company goodwill or relationships with customers). Determining the existence of these protectable interests is a factual question. The onus was accordingly on the first respondent to prove the unreasonableness of the restraint and to establish that she had no access to confidential information and never acquired personal knowledge of the applicant's customers.

The onus was accordingly on the first respondent to prove the unreasonableness of the restraint and to establish that she had no access to confidential information and never acquired personal knowledge of the applicant's customers.

The decision of the court would accordingly hinge on the determination of two core issues:

i. the identity of the first respondent's employer; and

ii. whether that employer was a competitor of the applicant.

Identity of the first respondent's employer

The first respondent alleged she was only employed by the third respondent. The court found, however, that no material distinction could be drawn between the businesses of the second and third respondents. Accordingly, for purposes of the application, they were both considered the first respondent's employer.

Is the employer a competitor of the applicant?

The court then considered whether the second and third respondents were competitors of the applicant. In this regard, the first respondent conceded that the second respondent was a direct competitor of the applicant. The first respondent's main defence was that the third respondent was not in competition with the applicant as it was merely an online retailer. This defence, however, fell flat in the face of a finding that there was no meaningful distinction between the second and third respondents. The court accordingly found that the first respondent had taken up employment with a competitor of the applicant.

RESTRAINT OF TRADE

THE NEXT FRONTIER IN THE GAMING CONSOLE WARS: THE LABOUR COURT AND RESTRAINT OF TRADE.

Prima Interactive (PTY) LTD v Haidee Lemon and Others J 246-21 ZALCJHB (30 April 2021)...*continued*

First respondent's roles, responsibilities, customer connections and access to confidential information

A further consideration was the first respondent's roles and responsibilities, customer connections and access to confidential information. In this regard, when working for the applicant, the first respondent was employed as head of operations. The effect thereof was that the first respondent was involved in every order and was copied on all communications to the warehouse, internal processing teams and debtors. Furthermore, the first respondent was the primary contact with customers regarding operational issues and was involved in meetings at which sales figures, store visits, new releases and the status of trading terms for customers were discussed. In short, the court held that the first respondent had full access to the applicant's proprietary information – both trade secrets and trade connections.

In relation to the reasonableness of the restraint from a geographical and temporal perspective, no evidence was placed before the court as to why the extent of these restrictions was unreasonable.

The court then considered the recent High Court decision of *Oomph Out of Home Media (Pty) Ltd v Brien and Another* [2021] JOL 49492 and stated that the approach adopted in that judgment ought not to be followed. In that judgment, when considering the reasonableness of the restraint, the HC considered the circumstances which prevailed at the time the employee left the employer's employ. The HC referred to the COVID-19 pandemic, and the extent to which the pandemic would preclude the employee from earning a living. The HC found it unreasonable for an employee to be forced out of a career of choice at a time of such economic devastation.

The court stated that the HC's approach ignored that COVID-19 is no respecter of persons: essentially, employers and employees are equally vulnerable in the face of the pandemic. Although employees have borne the brunt of the devastation caused, businesses have not been unaffected. Restraint undertakings are sought to protect the proprietary interests of a business. There is no reason that legitimate restraint undertakings should yield to the bare assertion that alternative employment would be difficult to secure, whatever the cause.

The court's enquiry into public policy considerations to uphold or reject the restraint does not allow a court to make assumptions about the state of the labour market and introduce some factor, drawn out of context and in isolation, as a basis to reject a restraint undertaking.

The court accordingly ordered that the restraint undertakings were enforceable and the first respondent was bound by the terms of the restraint of trade.

Imraan Mahomed, Jordyne Löser and Menachem Gudelsky

There is no reason that legitimate restraint undertakings should yield to the bare assertion that alternative employment would be difficult to secure, whatever the cause.

COVID-19 CASES/RELATED INFORMATION

THE ENFORCEABILITY OF A RESTRAINT OF TRADE AGREEMENT DURING COVID-19.

Bulldog Abrasives Southern Africa (Pty) Ltd v Davie and Another (J123/21) [2021] ZALCJHB 58 (20 May 2021)

SUMMARY OF THE FACTS

Davie was dismissed as an employee by Bulldog Abrasives Southern Africa (Pty) Ltd (Bulldog) pursuant to a disciplinary hearing. Davie referred an unfair dismissal dispute to the CCMA and the parties reached a monetary settlement. Davie then took up employment with Wadeville Paint (Pty) Ltd (Wadeville) as the New Business Development Manager of its Abrasive Division. This constituted a breach of the restraint of trade agreement between him and Bulldog. Bulldog sought an undertaking from Davie that he would comply with the restraint of trade agreement and when no undertaking was given, despite numerous requests, Bulldog launched an urgent application to interdict Davie from joining Wadeville. One of the defences raised by Davie was a reliance on the decision of *Oomph Out of Home Media (Pty) Ltd v Brien and Another* [2021] JOL 49492 (GJ) where the HC, in considering whether the restraint agreement was contrary to the public interest, concluded that such circumstance should take into account the COVID-19 pandemic and its impact on job opportunities.

SUMMARY OF THE FINDINGS OF THE COURT

The LC held that to suggest that enforcing a restraint of trade amidst COVID-19 is contrary to public policy is to stretch the meaning of public policy beyond what it is supposed to be. Public policy requires that parties to a contract, freely entered into, be bound by the terms of that contract. It cannot be said that during the pandemic employment opportunities are completely non-existent. The pandemic is not a vis major which renders the contractual performance impossible. In a vis major proper, a party must prove that its contractual performance is objectively impossible. Notwithstanding the effect of the pandemic, it is still possible for employees to breach their restraint of trade undertakings. To hold otherwise would be contrary to the rule of law. Lastly, the court held that the agreement was found to be enforceable as Davie failed to discharge his onus of proving that the terms of the agreement were unreasonable and contrary to the public interest.

Hugo Pienaar and Asma Cachalia

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13
Kenya
(redundancy)
%Chg
-1.74%
0.00%
+1.00%
-0.54%
-1.28%
0.00%
0.00%
0.00%
CDH

KENYA – REDUNDANCY

CAN AN EMPLOYER ALTER THE TERMS AND CONDITIONS OF A CONTRACT OF EMPLOYMENT AND A COLLECTIVE BARGAINING AGREEMENT ON ACCOUNT OF COVID-19 WITHOUT CONSULTING THE AFFECTED EMPLOYEES OR THEIR TRADE UNION?

Kenya Aviation Workers Union v Kenya Airways PLC: Central Organization of Trade Disputes (K) and Another (Interested Party) [2020] eKLR

SUMMARY OF THE FACTS

On 2 April 2020, Kenya Aviation Workers Union and Kenya Airways PLC (Kenya Airways) entered into a memorandum of agreement (MOA) in which the parties agreed to alter certain terms and conditions of employment, including pay cuts and unpaid leave, on account of COVID-19. The MOA was to remain in force until 30 April 2020 and parties were free to extend the terms of the MOA by mutual agreement.

On 5 May 2020, without consulting the employees or the union, the Chief Human Resource Officer of Kenya Airways issued a notice which required employees to consent to a salary reduction for the month of May and June 2020. The notice indicated that the MOA that had been executed on 2 April 2020 remained in force and employees who would not have given consent by 7 May 2020 would have their reduced salaries withheld until further notice. On 8 May 2020, Kenya Airways issued a further notice extending the deadline for consent in terms of the notice issued on 5 May 2020 to 11 May 2020.

The union rushed to court seeking injunctive relief on the grounds that the employer breached the terms of the registered collective bargaining agreement for unilaterally amending the terms and conditions of the employment of its members without prior consultation, discussions or concurrence with employees. The union was of the view that Kenya Airways' actions were unconstitutional and in breach of the MOA.

SUMMARY OF THE FINDINGS OF THE COURT

The Kenyan Employment and Labour Relations Court (ELRC) held that consultations are part of the constitutional norm of fair labour practices. The ELRC also stressed that the need for consultation during the COVID-19 pandemic has been emphasised by the International Labour Organization. As such, the ELRC held that the employer had a duty to consult with the other stakeholders, that is, the trade union and other employees who were affected by its decision, before implementing any directives and decisions. Failure to do so by Kenya Airways amounted to a breach of the law, the Kenyan Constitution and fair labour practices.

The ELRC further held that the fact that COVID-19 had a grave impact on Kenya Airways' activities did not in any way mean that the airline was free to breach the Kenyan Constitution and the law or any other agreement binding the employer and the employee. The ELRC therefore granted an injunction in favour of the union and ordered that parties revert to the conciliation process and reach the best decision in the circumstances.

Njeri Wagacha and Desmond Odhiambo

The ELRC further held that the fact that COVID-19 had a grave impact on Kenya Airways' activities did not in any way mean that the airline was free to breach the Kenyan Constitution and the law or any other agreement binding the employer and the employee.

13
Kenya
(redundancy)

KENYA – REDUNDANCY

IS A REDUNDANCY NOTICE ISSUED WITHOUT CONSULTATIONS WITH AN EMPLOYEE'S TRADE UNION ENFORCEABLE?

Amalgamated Union of Kenya Metal Workers v Kenya Coach Industries [2021] eKLR

SUMMARY OF THE FACTS

On 5 August 2020, the employees' union and employer had a consultative meeting where it was mutually agreed that the union-affiliated employees' salaries would be reduced by 20% for a period of two months due to the COVID-19 pandemic. It was also agreed that in the event of termination, the terminal dues would be computed in accordance with the provisions of the registered collective bargaining agreement (CBA).

Despite this agreement, the employees' union was served with a notice on 27 August 2020 indicating the respondent's intention to declare 35 employees redundant whose names were set out in a list. The employer's reasons for the redundancies were that it was unable to maintain the current staffing levels due to the effects of the COVID-19 pandemic.

The union sought to challenge the redundancy process, claiming that the employer failed to inform it of the intended redundancy as required by the law and the CBA and the employer had failed to provide proof of the reasons given for the redundancy.

SUMMARY OF THE FINDINGS OF THE COURT

The Kenyan Employment and Labour Relations Court (ELRC) held that although redundancy is a right of an employer, it is done at no fault of the employee. As such, employees must be protected from unjustified layoffs on account of redundancy.

The ELRC emphasised that an employer has to strictly follow the procedure provided for under section 40 of the Kenyan Employment Act 2007 and any CBA agreement between the employer, the employee and their trade union.

The ELRC held that an employer must first issue a general notice to employees who are likely to be affected, or to their trade unions, and the labour officer in the area of employment of the concerned employee. This general notice elicits consultations between the parties on the reasons and criteria to be followed by the employer in declaring the affected employees redundant.

At this stage, the notice should not have names of employees to be affected. Further, the notice should be issued at least one month prior to the intended implementation of the redundancy. The 30 days start running immediately upon the notice being served on the employees that are likely to be affected or their trade union. It is only after the conclusion of consultations on all issues in the notice that another notice would be served upon the affected employees declaring them redundant. If an employer deviates from the standard procedure, any notice of redundancy issued would be irregular and of no legal effect. Therefore, the ELRC found that the notice issued to the claimants did not follow the standard procedure and was thus unenforceable.

Njeri Wagacha and Desmond Odhiambo

The union sought to challenge the redundancy process, claiming that the employer failed to inform it of the intended redundancy as required by the law and the CBA and the employer had failed to provide proof of the reasons given for the redundancy.

DEFINITIONS

ABBREVIATION	FULL REFERENCE
America	United States of America
BBBEE	Broad Based Black Economic Empowerment
BCEA	Basic Conditions of Employment Act 75 of 1997
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
Companies Act	The Companies Act 71 of 2008
the Constitution	The Constitution of the Republic of South Africa Act 108 of 1996
Department	Department of Employment and Labour
DMA	Disaster Management Act 57 of 2002
DOH	Department of Health
EEA	Employment Equity Act 55 of 1998
HC	High Court
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LLAA	Labour Laws Amendment Act 10 of 2018
LRA	Labour Relations Act 66 of 1995
LRAA	Labour Relations Amendment Act 8 of 2018
Minister	Minister of Employment and Labour
NEDLAC	National Economic Development and Labour Council
NMWA	National Minimum Wage Act 9 of 2018
OHSA	Occupational Health and Safety Act 85 of 1993
POPI	Protection of Personal Information Act 4 of 2013
Prescription Act	Prescription Act 68 of 1969
President	President of the Republic of South Africa
SCA	Supreme Court of Appeal
SA	Republic of South Africa
Superior Courts Act	Superior Courts Act 10 of 2013
TERS	Temporary Employee Relief Scheme
UIF	Unemployment Insurance Fund

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from *2012–2020.*

The Legal 500 EMEA 2021–2024 recommended Anli Bezuidenhout for employment.

Chambers Global 2018–2024 ranked Fiona Leppan in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from *2012–2018.*

Chambers Global 2021–2024 ranked Imraan Mahomed in Band 2 for employment and in Band 3 from *2014–2020. The Legal 500 EMEA 2020–2024* recommended him for employment.

The Legal 500 EMEA 2023–2024 recommended Phetheni Nkuna for employment.

The Legal 500 EMEA 2022–2024 recommended Desmond Odhiambo for dispute resolution.

The Legal 500 EMEA 2023 recommended Thabang Rapuleng for employment.

Chambers Global 2024 ranked Njeri Wagacha in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment. *The Legal 500 EMEA 2023–2024* recommends her for corporate, commercial/M&A.

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

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

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