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INTRODUCTION

That Employment Law has become increasingly complex and demanding for employees, employers and trade unions is well known to those involved – but perhaps others are less aware of the challenges. Readers of the feature this year will discover just how encompassing this area of law is and how unwise it is to assume anything.

In the current political climate in South Africa there are several people who make headlines on a frequent basis. One person who has featured prominently is the Public Protector – Busisiwe Mkhwebane. The calls for her removal are numerous and are based on her fitness to hold office. While we may question why the employer keeps the Public Prosecutor in her office despite a raft of examples of her lack of competence, there is, as Bouwer van Niekerk writes, a legal process. However, as shareholders in South Africa Ltd we expect our board of directors to behave honourably, and move swiftly to prevent the country going into business rescue.

Employment in whatever field one is qualified and adequately skilled to work was one of the great opportunities we saw in the advent of democracy in 1994. Of course, before people can be employed they have to be educated. One of the damming results of apartheid was, and remains, the consequence of poor education. Equally damming is that after 25 years of democracy the standard of education is, if anything, worse than it was pre-1994. Education is the single greatest force for change. The result of South Africa’s education policy is a country that still lacks skilled people and greater racial equality in the workplace.

Statistics SA’s figures on unemployment for Q2 this year make for gloomy reading – 29.1% (6.65 million) of the population who are actively looking for work; if those who have stopped (given up hope) looking for work are included, the figure is 38.54%. This is the worst it has been since 2003. Our labour laws are criticised for being inflexible and, given these figures, perhaps those in power would do well to change legislation to enable greater employment.

The authorities could benefit from looking to Singapore for inspiration on both the education and employment front. Singapore, as a sovereign state introduced various policies to fast track development – in particular, the areas of a high standard of education and skills development. The country was acutely aware of the link between education and employment. Unlike South Africa where the standard of education has been lowered along with the pass rate, Singapore aims for excellence. English was a primary tool for the country to become part of the international marketplace but their mother-tongue was not forgotten. Singaporeans are realistic about the fact that the language of business is English and demanding about academic excellence. The pay-off is that unemployment in Singapore in Q1 stood at 3.2%.

This year we carry an article on the impact of mental health; along with issues around gender and race, the mental health of employees challenges employers. These matters go beyond the contract, and introduce a need for tolerance and understanding, qualities strangely lacking in this modern world of ours. Mental health is now one of the biggest reasons for sick leave and a survey of 1 000 British workers shows that solicitors practise in the second most stressed profession. Blame is laid on workloads, tight deadlines, and emotionally challenging cases.

Perhaps the increasing demand for more flexible working conditions will help alleviate these challenges to which, unfortunately, many law firms seem to pay only lip-service. A telling comment in an article “Constantly On Call, Lawyers Risk Exhaustion” came from an attorney who had changed profession to that of a psychotherapist, “If they had just given me a couple days to sleep for 15 hours, I would have been a different person”.

The need for a new world of flexibility and tolerance is discussed in articles in this feature, but too is a world in which people are chipped and consequently less free than ever before.

Enjoy this informative and very interesting feature.

Myrie Vanderstraeten

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HOW TO HIRE AND FIRE A PUBLIC PROTECTOR

BOUWER VAN NIEKERK

I have always held the office of the Public Protector in high esteem. This is because of the pivotal role that the Public Protector plays in South African society – the title itself is indicative of this. The Public Protector is there to protect the public by investigating any conduct into state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper, to report thereon and to take appropriate remedial action (s182(1) of the Constitution).

The individuals who have held the office of Public Protector have left varying legacies. Selby Baqwa was a novice, a little bit like our democracy was at the time. Lawrence Mushwana was often persona non grata, much like our president at the time. And then there was Thuli Madonsela, a beacon of light; the oxygen that many South Africans needed to see them through the smothering reign of Jacob Zuma, the Guptas and the rest of those who oiled the state capture machinery.

The current Public Protector, Busisiwe Mkhwebane, can also be compared to one or two different kinds of gasses. Oxygen, however, is unfortunately not one of them. In the less than three years she has held office, her term has been marred by review applications, allegations of incompetence and political meddling, and even a personal, punitive costs order against her.

It is this costs order that has moved many of my friends and acquaintances to ask me why the president does not simply fire Advocate Mkhwebane and be done with it, and appoint a new one. But is it that simple? This article will examine the process of doing just that, and will opine on the fate that may await the current Public Protector.

Appointing a Public Protector

The office of the Public Protector is a state institution specifically established to strengthen constitutional democracy in the Republic (s181 of the Constitution). It is colloquially referred to as a Chapter 9 institution; that is, it is established in terms of Chapter 9 of the Constitution.

The appointment of the Public Protector is governed by s193 and the process is pretty straightforward:

“193 Appointments

(1) The Public Protector ... must be women or men who-

(a) are South African citizens;

(b) are fit and proper persons to hold the particular office; and

(c) comply with any other requirements prescribed by national legislation.

...”

Why would the Public Protector threaten one of the arms of government with such far-reaching legal action? If you believe Advocate Mkhwebane, the threat stems from her perceptions that she is being victimised and that there is some kind of clandestine witch-hunt by nefarious politicians who are out to get her.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector...

...

(5) The National Assembly must recommend persons-

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a support- ing vote-

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector...

...

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59 (1) (a).”

The process has been designed to be open and transparent and, in the case of the current Public Protector, highly publicised.

So much for the appointment process.

Removing a Public Protector

The process of removing the Public Protector is set out in s194 of the Constitution:

“194 Removal from office

(1) The Public Protector ... may be removed from office only on-

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person’s removal from office.

(2) A resolution of the National Assembly concerning the removal from office of:

(a) the Public Protector ... must be adopted with a supporting vote of at least two thirds of the members of the Assembly ...

(3) The President:

(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person’s removal."

It is this process that has not yet (to date) been followed, as it has not previously been necessary. Exactly how a committee contemplated in s194(1)(b) should be formed, what the make-up of that committee must be and how it will perform its duties are therefore unclear. Alarmingly, however, the current Public Protector has threatened the National Assembly with legal action should they initiate such proceedings – the very proceedings contemplated in the Constitution.

Why would the Public Protector threaten one of the arms of government with such far-reaching legal action? If you believe Advocate Mkhwebane, the threat stems from her perceptions that she is being victimised and that there is some kind of clandestine witch-hunt by nefarious politicians who are out to get her.

With apologies to the Bard, the lady doth protest too much, methinks. I say so with reference to the recent Constitutional Court judgment of Public Protector v South African Reserve Bank [2019] ZACC 29.

In this case, the Court was called upon to adjudicate two core issues.

“First, whether this Court should interfere with the discretion exercised by the Full Court of the High Court of South Africa, Gauteng Division, Pretoria ... to award punitive costs in favour of the South African Reserve Bank ... against the incumbent Public Protector, Ms Busisiwe Mkhwebane, in her personal capacity. Second, whether the Reserve Bank is entitled to the declaratory order it seeks to the effect that the Public Protector abused her office in conducting the investigation that gave rise to her impugned report.” (Paragraph 131)

It is noteworthy that the Court found the release of this specific report by the Public Protector caused severe harm to the South African economy – it “included a significant depreciation in the Rand as a sell off by non-resident investors of R1.3 billion worth of South African government bonds.” (Paragraph 142)
The Court, by way of the majority of the bench, had the following to say about the duties of the Public Protector:

“In terms of section 181(2) of the Constitution, Chapter 9 institutions are independent and subject only to the law and the Constitution. This section further provides that the Public Protector must be impartial and exercise her powers and perform her functions without fear, favour or prejudice. Section 41(1)(c) of the Constitution further requires that the Public Protector, as an organ of the State, provide effective and accountable government for the Republic as a whole. The Public Protector is also required to perform all her constitutional obligations diligently and without delay. In terms of section 195(1) of the Constitution, the Public Protector is bound by the basic values and principles governing public administration, including, amongst others:

a) a high standard of professional ethics;

b) the constitutional imperative to use resources efficiently, economically and effectively;

c) accountability; and

d) the constitutional imperative to foster transparency by providing the public with timely, accessible and accurate information.” (Paragraph 151)

The Public Protector argued that, in her position as such, she should be exempted from a personal costs order, much as judges are. The majority disagreed:

“The Public Protector falls into the category of a public litigant. A higher duty is imposed on public litigants, as the Constitution’s principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.

The Public Protector is therefore enjoined by the Constitution to observe the highest standards of conduct in litigation.

There is no merit in the Public Protector’s contention that the independence of her office and proper performance of her functions demand that she should be exempted from the threat of being mulcted with adverse personal costs orders.

“The imposition of a personal costs order on a public official, like the Public Protector, whose bad faith or grossly negligent conduct falls short of what is required, vindicates the Constitution.”

Personal cost orders are not granted against public officials who conduct themselves appropriately. They are granted when public officials fall egregiously short of what is required of them.” (Paragraphs 155 – 159)

They went further:

“The immunity which the Public Protector enjoys against personal liability under section 5(3) is only triggered when she acts in good faith. To the extent that the Public Protector conducted herself in bad faith, the potential immunity she may otherwise enjoy under section 5(3) is of no assistance to her.

The High Court found that the Public Protector acted in bad faith. This Court has no reason to interfere with this finding.” (Paragraph 162)

With regard to her failure to produce a complete record to the high court (a non-negotiable in review applications), the Court had this to say:

“The Public Protector is wrong when she claims that she ‘filed the entire record’. She did not. She omitted pertinent documents from the record, some of which were only put up for the first time as annexes to her answering affidavit in the High Court, and others, which were disclosed for the first time in this Court.

The Public Protector’s failure to include these documents in the record, or to account for this failure, stands in stark contrast to her heightened obligation as a public official to assist the reviewing court.” (Paragraphs 186 – 187)

The Court then examined her conduct:

“The Public Protector’s persistent contradictions, however, cannot simply be explained away on the basis of innocent mistakes. This is not a credible explanation. The Public Protector has not been candid about the meetings she had with the Presidency and the State Security Agency before she finalised the report. The Public Protector’s conduct in the High Court warranted a de bonis propriis (personal) costs order against her because she acted in bad faith and in a grossly unreasonable manner.” (Paragraph 205)

“The Public Protector’s entire model of investigation was flawed. She was not honest about her engagement during the investigation. In addition, she failed to engage with the parties directly affected by her new remedial action before she published her final report. This type of conduct falls far short of the high standards required of her office.” (Paragraph 207)

“The Public Protector either failed entirely to deal with the allegations that she was irresponsible and lacking in openness and transparency, or, when she did address them, offered contradictory or unclear explanations. She gave no explanation as to why there were no transcripts of the meetings with the Presidency and the State Security Agency and why the vulnerability of the Reserve Bank was discussed with the State Security Agency. No explanation was provided for the meeting with the Presidency on 7 June 2017. Instead, another meeting with the Presidency, held on 25 April 2017, was disclosed for the first time by the Public Protector in her answering affidavit in the High Court.” (Paragraph 217)

“Regard must be had to the higher standard of conduct expected from public officials, and the number of falsehoods that have been put forward by the Public Protector in the course of the litigation. This conduct included the numerous “misstatements”, like misrepresenting, under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, ordered and indexed, so that the contents thereof could be determined, failing to disclose material meetings and then obfuscating the reasons for them and the reasons why they had not been previously disclosed, and generally failing to provide the court with a frank and candid account of her conduct in preparing the report. The punitive aspect of the costs order therefore stands.” (Paragraph 237)

**Observations**

The quoted passages by the highest Court in the land are not only damning, but simply shocking. It speaks of a public official who exemplifies not only someone guilty of misconduct but one who is also incapable and incompe- tent to fulfil her duties to those whom she should represent – the public at large. I, for one, hope that the wheels that are necessary to remove her start rolling sooner rather than later – for the public’s sake. Only time will tell whether those who represent us in the National Assembly feel the same. ●

*Van Niekerk is a Director at Smit Sewgoolam.*
THE LINE BETWEEN POLITICAL PARTIES AND TRADE UNIONS IN THE WORKPLACE

LUDWIG FRAHM-ARP

Traditionally it has been the role of trade unions to represent members in the workplace, in terms of the Labour Relations Act, 1995. Recently political parties have become involved in employment matters in an effort to seize the recognised role of the trade union; frequently this has included a demand that the employer not interact with the trade union.

This judgment draws a clear line between the activities of a political party and the workplace and all parties involved would do well to consider the clear direction the Labour Court has given about who the role players in collective bargaining are, and the scope and extent of their rights.

The EFF was not satisfied with Calgan’s accommodation of demands it had made. This resulted in a series of unprotected strikes. The company sought and was granted an interim interdict declaring the strikes unprotected and unlawful. The interdict was subsequently confirmed by the Labour Court.

The Labour Court began its analysis by asking what the EFF was doing getting involved in workplace issues, particularly since NUFAWUSA was the recognised trade union. The court held that the answer to that was simply that the EFF had no business in doing so as it was not a registered trade union. It held that the Labour Relations Act was specifically designed to designate the task of dealing with workplace disputes and grievances to employers’ organisations, trade unions and workplace forums and that within that structure there is no place for political party involvement.

The EFF argued that it had a constitutional right to become involved in workplace issues. The court dismissed this:

“The approach adopted by the EFF is that the Constitution entitles the EFF to conduct itself as it did in this case. It is sadly mistaken in this respect. It is by now trite law that direct reliance on the Constitution is not permissible...
where there is a specific statute regulating the constitutional right. In this case, the rights under section 23 of the Constitution are regulated by the LRA and other related employment law statutes, and it is incumbent and prescribed that all the provisions of these statutes must be complied with in pursuit of these rights. The Constitution lends no support for the EFF to have become involved in this matter."

The court found that the EFF had undermined the cornerstones of the Labour Relations Act – orderly collective bargaining and dispute resolution. Calgan was entitled to expect its employees to comply with the Labour Relations Act if it sought to resolve disputes with the company. In the court’s view, it was unacceptable. Snyman J stated “Where it comes to the EFF and its functionaries, it simply should not stick in its nose where it does not belong.” The court found that the EFF could not negate this based on a misguided view that it was permitted by the Constitution, “In this regards, it can be hardly better said than the following dictum in Gcaba v Minister for Safety and Security and Others[20]: ‘... The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, B4 just administrative action (PAJA) and labour relations (LRA). Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system...’”

The respondents were ordered to pay all costs jointly and severally. This judgment draws a clear line between the activities of a political party and the workplace and all parties involved would do well to consider the clear direction the Labour Court has given about who the role players in collective bargaining are, and the scope and extent of their rights.

Frahm-Arp is a Partner with Fasken (South Africa).

ORGANISATIONAL RIGHTS AND A TRADE UNION’S CONSTITUTION

VERUSHKA REDDY

The Labour Appeal Court (LAC) has held that a registered trade union may exercise organisational rights in respect of individuals who are not eligible for membership in terms of the union’s constitution.

In the case of Lufl Packaging (Isithebe) (a division of Bidvest Paperplus) (Pty) Ltd v CCMA and others LAC (DAB/2018) (2019) ZALC 39 13 June 2019, NUMSA (National Union of Metalworkers of South Africa) wrote to the employer, Lufl, requiring that it deduct trade union subscriptions in respect of its members. Lufl’s core business was the manufacture of printed and plain paper bags and similar paper products. It accordingly fell within the scope of the Statutory Council for the Printing, Newspaper and Packaging Industries. NUMSA’s registered scope is defined in its constitution, and does not include the packaging industry. Lufl refused to deduct trade union subscriptions on the basis that NUMSA’s constitution did not allow for it to admit members employed in the packaging industry. NUMSA then sought to obtain organisational rights by referring a dispute to the CCMA.

At the CCMA, Lufl argued that NUMSA did not have locus standi to refer the unfair dismissal dispute because its constitution did not permit it to organise and recruit in the packaging industry. The CCMA issued a ruling that NUMSA had standing to seek organisational rights in workplaces that fell outside of its registered scope. Lufl brought an application to review the CCMA ruling, and an application to postpone the arbitration, pending the outcome of the review application. The application for a postponement was dismissed and the arbitration continued. The CCMA ultimately found that NUMSA was representative of 70% of Lufl’s employees, and issued an award in terms of which it granted NUMSA all the organisational rights provided for in sections 12 to 16 of the Labour Relations Act, 1995 (LRA). The company applied to the Labour Court to review and set aside the award. The review applications, which were opposed, were dismissed by the Labour Court. Lufl then appealed to the LAC.

Lufl argued that a union could only be “sufficiently representative” if it had an adequate number of employees in the workplace as members. An
employee could not be a member of a registered trade union if he or she did not qualify for membership. NUMSA’s constitution provided that all workers who are or were working within its registered scope were eligible for membership. If an employee was not employed in a workplace within the registered scope, it followed that the employee was not eligible for membership. Thus, NUMSA could not have been sufficiently representative of Lufti’s employees. There was, therefore, no basis in law upon which NUMSA could exercise organisational rights at Lufti’s workplace.

NUMSA argued that the Constitution, 1996 affords employees the right to form and join trade unions and freedom of association. Section 4(1)(b) of the LRA provides that “[e]very employee has the right to join a trade union, subject to its constitution”. The interpretation that an employee must meet the requirements of eligibility set out in the union’s constitution was an undue limitation on an employee’s constitutional rights. The LAC rejected the argument. It found that the limitation was reasonable and justifiable and gave effect to “the legitimate government policy of orderly collective bargaining at sectoral level.”

The LAC found that a trade union is governed by a constitution. It therefore cannot create a category of membership outside the conscripts of its constitution, and to do so would be to act ultra vires its constitution. An act that is ultra vires the union’s constitution is invalid, and it is open to an employer to challenge the validity of an employee’s membership when the issue is whether a union is sufficiently representative to organise organisational rights.

The LAC also held that the issue before it was not whether NUMSA had standing to refer the dispute, but whether it was entitled to organisational rights. This puts paid to the argument often raised by employers at the COMA that a registered trade union does not have standing to refer an organisational rights dispute if the employer’s business does not fall within the ambit of the union’s registered scope. The correct approach in the circumstances is for an employer to contest whether a union is sufficiently representative to enjoy the organisational rights that it seeks. Such a challenge may be founded in the union’s registered scope. A union’s constitution may frequently be found on its website, failing which a copy may be obtained from the Registrar of Labour Relations.

On the face of it, the judgment affords employers a valid basis to refuse organisational rights in these circumstances. However, it must be borne in mind that a union’s constitution may be amended in accordance with the procedures provided in that constitution. This includes changes to its registered scope. Such changes must also be registered with the Registrar of Labour Relations, as provided for in s100 of the LRA. An employer should, therefore, carefully consider raising such issues against the long term benefits to industrial relations that may emanate from building a strong and structured relationship with a registered trade union.

Reddy is a Director of Norton Rose Fulbright (South Africa).

HOW NOT TO DEAL WITH SUFFICIENT REPRESENTATION MATTERS

JONATHAN GOLDBERG AND GRANT WILKINSON

The organisational rights that trade unions enjoy in companies have always been a bone of contention. Trade unions want to ensure that they are sufficiently represented in as many working environments as possible, while companies prefer to have a non-proliferation of trade unions in the workplace as envisaged by the original LRA text.

The case of Lufti Packaging (Isithebe), A division of Bidvest Paperplus (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (D459/16, D722/15) [2018] ZALCD 3; (2018) 39 ILJ 1786 (LC) (20 April 2018) – which was an appeal against the Labour Court judgment (Gush J) dismissing two consolidated review applications – shows how the courts will deal with such trade union matters.

The employer in this case manufactures printed and plain paper bags and associated paper or paper-based packaging.

On 27 January 2015, NUMSA wrote to the employer asking it to provide stop orders for the deduction of union fees for its (alleged) members who were employees. The company wrote back as follows:

“That it does not fall within the scope of the Union we wish to point out that in recruiting members from our operations, you acted ultra vires your constitution. In view of the above, the Company thus acts within its rights not to recognise NUMSA and we therefore will not be able to action your request to implement union stop order deductions in our workplace.”

Chapter 2(2) of NUMSA’s constitution provided:

“All workers who are or were working in the metal and related industries are eligible for membership of the Union subject to the discretion of the relevant ‘Shop Stewards Council’...”

Annexure B of NUMSA’s constitution deals with “the scope of the Union” and provides that “the Union shall not be open to all workers employed in any of the following industries”. The Annexure lists 21 different industries.

The court concluded that it was common cause that:

- in order to be eligible to be a member of NUMSA, an employee is required by its constitution to work in an industry which falls within its scope, as defined in its constitution; and
- the employees in question worked at a workplace which did not fall within that scope.
Employers who face organisational rights disputes in the company must ensure that they comply with the Labour Relations Act requirements both with regard to the workplace definition and the rights to which the trade union is entitled (and what they are not) in terms of their representational numbers.

It was submitted that both the ruling and the award by the Commissioner were based on a material error of law, were decisions to which a reasonable decision-maker would not have come to in the circumstances, and that the Labour Court erred in not setting aside both the ruling and the award.

The court found that the correct legal position, therefore, is that NUMSA had to show that it was sufficiently representative. The employees which it relied on – who alleged that it was sufficiently representative – could not be, and thus were not, in law, members of NUMSA’s constitution. As such, NUMSA was not sufficiently representative of the employees at the workplace and therefore lacked any organisational rights. The Commissioner committed a material error of law, which resulted in an unreasonable decision. The Labour Court erred equally in not setting aside the award on that basis.

Employers who face organisational rights disputes in the company must ensure that they comply with the Labour Relations Act requirements both with regard to the workplace definition and the rights to which the trade union is entitled (and what they are not) in terms of their representational numbers.

Goldberg is CEO and Wilkinson an Executive of Global Business Solutions.

THE FRICTIONLESS WORKFORCE: NIRVANA OR NIGHTMARE?

JOHAN BOTES

Modern employees have higher workplace expectations than their predecessors. “Jobs for life” is not only unfeasible from an employer perspective, it is no longer a realistic need for the modern employee. It has been replaced with a need for job satisfaction and fulfilment, availability of opportunities for development, flexible working arrangements, and committed mentoring. The evolution of the flexible age means that the business world is desperate to eliminate friction, seeking to remove any obstacles that stand in the way of maximising customer satisfaction, attracting the best talent and improving operational efficiency. This desire for a frictionless environment, however, has given rise to new challenges.

One of the challenges (or “friction”) that arises is when employers are unable to deliver on modern employee expectations for various reasons, including philosophical differences in approach to employment, budgetary constraints and lack of management expertise to deal with these modern workplace dilemmas. Businesses that struggle to recognise the challenge of the changing workforce and implement measures to change workplace practices run the risk of failing to attract and retain top talent, with all the difficulties that such problems occasion. Simply put, the modern workforce must evolve to keep pace with rapid technological change and the increasing need for agility. Removing various sources of friction in the system can unlock true employee potential.

The rise in demand for contingent workers, changing skill requirements, and the rapid increase in remote working and job sharing is further driving the need for change. It serves to motivate companies to adapt their strategies to engage diverse talent and unlock future productivity. Businesses are aided by continuous technological advancements, which have made it easier for them to increase workplace flexibility, streamline communications, reduce costs and administrative burdens and speed up access to high-level talent.

A global survey by WIRED Consulting, in collaboration with Baker McKenzie, explored how employers are balancing the risks and benefits of the flexible age. It was reported that the advantages of a flexible workforce extend
beyond the obvious cost-saving benefits (https://www.wired.co.uk/article/wired-consulting-baker-mckenzie-frictionless-workforce). Flexible workforces are bigger and more diverse, and the talent pool is wider, all of which encourage innovation and creativity. But this flexibility also comes with notable downsides.

**Misclassification risk**

Inherent in the employment of flexible workers is the risk of legal misclassification. Businesses need clearly delineated employment categories to avoid misclassifying freelance workers and falling foul of labour obligations such as minimum wages, pension contributions, and holiday and sick pay. In South Africa, contract workers are presumed to be employees when triggering statutory presumptions in s200A of the Labour Relations Act, 1995 (and s83A of the Basic Conditions of Employment Act, 1997). However, these sections only apply to employees who earn less than the annual earnings threshold. The existing earnings threshold is R205 433.30 per year.

In a 2017 case, *South African Broadcasting Corporation SOC Ltd v Padayachi and others,* (South African Broadcasting Corporation SOC Ltd v Commission for Conciliation, Mediation and Arbitration and Others (D150/15) [2017] ZALCD 22 (31 October 2017)), the Labour Court confirmed that the statutory presumptions on employment do not apply where the individual earns more than the earnings threshold. Absent the statutory presumption, a tribunal or court must consider the following factors when establishing the true nature of the relationship between parties:

- an employer’s right to supervision and control;
- whether the employee forms an integral part of the organisation with the employer; and
- the extent to which the employee was economically dependent upon the employer.

Recent amendments to the LRA show more active regulations of non-standard employment (staff employed through labour brokers and fixed-term contract employees). The local employment tribunal has seen a number of disputes arising from these statutory amendments, where workers demand employment with the client of their employer, or equal treatment when compared with others doing similar work. And as the flexible workforce gathers momentum, we can expect these types of disputes to increase.

**Confidential information and privacy**

In addition to employment law considerations, the survey found that external consultants could be privy to sensitive intellectual property or strategic insights, and boundaries needed to be set to protect corporate information. Employers may exercise inherent rights to take action where employees owe a duty of good faith to the employer. Disclosing confidential information is readily actionable in the employment relationship context but decidedly more difficult with arms-length contract work relationships, where contractual rights are the best way of managing this risk.

Further, survey respondents noted that it could be difficult to track compliance with stringent global privacy regulations where it was unclear as to where the labour force started and ended. A blurred edge created all sorts of data privacy conundrums. The report also noted a subtler downside to the rise of the remote workforce – a lack of cohesion which can dilute a company’s culture and identity. Flexibility and remote working may do wonders for...
employees seeking greater say in their daily lives, but can play havoc with efforts to form or maintain a cohesive corporate culture.

**Attention capital**

Another interesting negative factor identified was the impact on attention capital, which is simply defined as employees’ ability to focus on value-creating work. Thanks to frictionless communications delivered in an always online, open-plan, hot-desking environment, employees are continuously bombarded with information from which there is no escape. This never-ending distraction can have a detrimental effect on an employee’s ability to get the job done. Here the salient advice to employers is to ask why further methods of communication are introduced, rather than why not. Adopting an approach whereby the benefits need to be explored, rather than allowing new methods of communication to slip in by default, allows the business to protect staff from constant bombardment of communication which drastically impacts on fatigue and burnout.

**Pros and cons**

It is evident that the WIRED-Baker McKenzie survey respondents had an ambivalence about the frictionless era. Notably, 64% of participants agreed that a flat organisational structure lead to more innovation and 53% said that a frictionless workplace increased creativity and innovation by bringing together diverse views, skills and cultures. However, 51% acknowledged that a frictionless workplace, such as hot-desking or renting flexible workspaces, weakened cohesion and corporate culture. Further, 43% of respondents agreed that the increased use of freelancers was creating a fragmented workplace culture, which was burdening the organisation. When it came to technology, 75% of survey participants said that frictionless internal communications (email, chat, video calls, document sharing and professional social media) helped their organisation be responsive and agile, but four out of ten participants thought these same tools could cause distraction and burnout. And 74% said that companies needed rules to avoid an always-on work culture.

To manage these challenges, the report noted that it was important for companies to hire outside help when they needed the talent or wanted to address specific bottlenecks, and that it should never be because they wanted to avoid responsibility. Further, companies should know where the organisational border was in terms of intellectual property, so that trade secrets were not put at risk. An atomised workforce should also be avoided – cohesion and stable teams are also markers of successful companies. The survey noted that companies should also adopt a purposeful, conscious strategy to address new frictionless communications tools; and they should nurture attention capital amongst their workforce.

**What to do**

World-class organisations focus their attention on employee outputs – rather than attendance at the workplace during traditional working hours – in the quest to satisfy their employees’ need to work remotely or to have flexible working hours (if monitored working hours are still required). If workplace attendance is the major measurement of employee productivity, attendance may become the best output achieved from staff. Managers who do well in managing the ever-morphing need of their workforce find workable solutions to satisfy their need for face-to-face engagement with their teams, without imposing archaic attendance requirements. Such solutions include scheduling all meetings during a particular portion of the calendar (last week of the month for all management meetings, for example, or no client meetings on the first Monday of the month), updating technology infrastructure to remove unnecessary friction inherent in working remotely (examples include centralised document filing, safe and fast remote access to business systems, hassle free video-conferencing and messaging services).

Employers are assessing options on how to adapt and manage the risks brought about by their changing workforce, while also ensuring they are tapping into the many advantages of operating in a frictionless environment. World-class organisations can steal a march on their competitors by tapping into the zeitgeist of the frictionless workplace and how this can motivate a new generation of employees.

*Botes is a Partner and Head of the Employment & Compensation Practice at Baker McKenzie (South Africa).*

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**RE-IMAGINING LEAVE**

**GAIL SCHIMMEL**

One of the joys of being part of the start of a new business is the ability to revisit old, accepted ways of doing things and ask oneself if they still serve the modern world. This question became central when I looked at the employment contracts of our newly appointed staff at the start of the Advertising Regulatory Board in terms of parental leave.

We all know the old standard – 4 months of maternity leave, paid or unpaid depending on the company’s coffers. (Our coffers were minimal – unpaid was the only option). And then, progressive types realise, a decent stint of paternity leave is also fair – two or three weeks, perhaps, and this is usually paid. So my starting point was this:

- 4 months unpaid paternity leave
- 3 weeks paid paternity leave

Then I asked myself where we stood on adoptive parents. And gay parents. And parents where, for whatever personal reasons, the mother would prefer to go back to work sooner, and the father would prefer to stay home.
And I had an epiphany. It is NOT the role of the employer to dictate these choices through the structure of its leave. And I came up with something a bit different.

Fundamental to my ability to do this was the fact that the maternity leave we offer is unpaid; and that we would never base an employment decision on gender and likelihood of pregnancy - in other words, our risk profile in terms of loss to the company is always the same on the creation of any role.

In my small organisation, I know that none of my employees would take advantage of a “no leave counting” policy. I am not prepared to have them at work, miserable and resentful, when allowing them one or two days leeway would address that.

Given this, I decided that the nature of their parental leave should be in the hands of each individual. Every employee should be entitled to choose between four months unpaid leave or 3 weeks paid leave on the birth or adoption of their child; regardless of their sex or parental role. When we create any role, we face the risk of four months unpaid maternity leave - so the fact that we hire a man should not necessarily mean that this risk be regarded as untenable.

I then thought: What if both parents decide to take “maternity” leave from their respective jobs? And I realised that, given that it is unpaid, it is none of my business. The fact that my employee’s partner is also at home does not double the loss to my company. The only possibility of this becoming a problem is if both parents work for the organisation; which in this particular case is a highly unlikely scenario – but one that could be built into the employment contract.

Employers need to start looking at ways that we can encompass the changing face of families and make the workplace a more supportive and allowing space. This is a start.

An even more controversial trend – and one that I admit I have not been brave enough to formally follow – is to do away with the concept of “leave days”. We all know the stress of having to cut family holidays short because one member does not have enough leave; the constant balancing of what is “worth” using your leave for and what is not; and the challenges of parents during school holidays, when child care becomes an issue. Surely allowing employees to be measured on output and task-achievement is a more sensible approach than holding them strictly to a 15 or 20 or 25 day leave policy. Surely the relaxed and happy employee is worth the cost of a few more days of leave taken; or some “work from home” days.

In my small organisation, I know that none of my employees would take advantage of a “no leave counting” policy. I am not prepared to have them at work, miserable and resentful, when allowing them one or two days leeway would address that. But our contracts still specify leave days. And that is because I am also a realist. While I may have hard-working and committed employees, the organisation is not guaranteed an endless future of fine individuals. There will always be those who see the gap and take it. And as an employer, one must be able to prevent this. The answer lies in clever drafting. Watch this space.

Schimmel is the CEO of the Advertising Regulatory Board.
THE EVOLUTION OF LEAVE BENEFITS

NADIRA DEONARAIN

In an age of unparalleled workforce agility, employers are offering enhanced employee benefits and flexibility in their bid to be an “employer of choice” in order to attract, engage and retain talent. In empowering employees to achieve greater work-life balance and personal well-being, the latest international trend is the extension of leave benefits beyond the traditional leave types.

Traditional leave types in South Africa

In South Africa, the Basic Conditions of Employment Act, 1997 (the BCEA) prescribes minimum leave benefits, being an entitlement to:

- 21 consecutive days annual leave on full pay per annual leave cycle (which translates to 15 working days for an employee working a five-day week and 18 working days for an employee working a six-day week);
- 30 days sick leave on full pay in every three-year cycle;
- 4 months unpaid maternity leave; and
- 3 days family responsibility leave on full pay per annual leave cycle to be used when (a) the employee’s child is born; (b) the employee’s child is sick; (c) on the death of the employee’s spouse or life partner, parent or adoptive parent, grandparent, child or adopted child, grandchild or sibling.

In response to changing socio-economic conditions, President Cyril Ramaphosa signed the Labour Laws Amendment Act, 2018 (the LLAA) on 23 November 2018. While no effective date for commencement of the LLAA has officially been proclaimed, it provides for:

- 10 consecutive days parental leave to an employee who is a parent of a child on birth or when the adoption order is granted;
- 10 consecutive weeks adoption leave or parental leave to an employee who is an adoptive parent of a child below the age of two years; and
- 10 consecutive weeks commissioning parental leave or parental leave to an employee who is a commissioning parent in a surrogate motherhood agreement.

While the above leave types are unpaid, qualifying employees may claim unemployment benefits from the Unemployment Insurance Fund.

All other leave types simply don’t feature in employment legislation and are offered at the employer’s discretion and are governed by employer policies.

Innovative leave types

Pawternity leave – With the changing definition of family, employers are expanding their parental leave policies beyond human children to offer “pawternity” leave, recognising that pets are family.

Pawternity leave is paid time off granted to employees for the care of ill or injured pets or for the adoption of a new furry friend. It allows pet owners time off to enjoy the latest addition to their family while ensuring their pets settle into their new environment. Added to this is a pet bereavement benefit that allows employees paid time off to mourn a departed fur-baby, in recognition of the fact that losing a pet is often very traumatic.

Floating holidays – PepsiCo Australia offers staff one floating public holiday per year, which allows employees to “swap” an Australian public holiday for another day during the year to celebrate a religious or cultural holiday such as Diwali.

Caretaker leave – leave granted to care for a family member or relative or an individual whose close relationship with the employee is the equivalent of a family relationship, who needs medical diagnosis, care or preventive care.

Ultimately, whether South African employers choose to introduce more novel leave benefits, and join the international trend of offering unique leave types, depends on whether they want to become an employer of choice and retain an edge over their competitors for the best talent.
means that an employee’s annual, sick and other leave types are all rolled into one leave policy that can be used for any absence from work – holidays, dentist appointments, religious holidays etc. Unlimited PTO encourages employees to take as much time off as they choose, as long as they get the job done. Employees are trusted to manage their own time in a way that serves their personal needs while still getting the work done, which can lead to a more engaged workforce. Unlimited PTO also supports improved employee wellness, which can indirectly reduce the cost of other benefits, for example, medical aid, as employees can take time off needed for personal needs such as a doctor’s appointment and are therefore less likely to take sick leave; which helps increase productivity.

Unlike traditional leave policies which cap leave days, with employees forfeiting leave on reaching the cap, with an unlimited PTO policy, employees are less likely to feel pressurised into using their annual leave days before they lose them within their annual leave cycle. There may also be financial benefits for the employer who may see a lower accrued but unused cost of leave being carried over on the company’s balance sheet – after all, how many of your infinite PTO days have you not used? Employers will likely only be required to pay out the value of unused statutory minimum leave days on termination of employment in terms of s40(b) of the BCEA.

South African employers considering a transition to unlimited PTO should consider whether the industry, culture and roles within the organisation are a good fit for such a policy and, more importantly, understand the needs of employees, balanced against an assessment of whether management believes that the employees are ready to be given such freedom. An employer-specific programme that works for the company may include reasonable limits being imposed, for example requiring that employees obtain management approval for time off or a maximum limit on the number of paid consecutive working days an employee may take off.

Since unlimited PTO is still relatively new and developing, it will be interesting to see how employment legal issues around whether paid time off can be truly unlimited are dealt with. This raises a number of questions, such as, can employers place caps on the number of possible leave days an employee can take? What consideration, if any, should be given to whether employees can really use the leave days as opposed to having to do a lot of work while theoretically on vacation? To what extent can the employer force a hard-working employee to take leave?

Ultimately, whether South African employers choose to introduce more novel leave benefits, and join the international trend of offering unique leave types, depends on whether they want to become an employer of choice and retain an edge over their competitors for the best talent. The experience from international employers indicates that employees value workplace flexibility and the opportunity to enjoy a life outside of work.

Deonarain is Senior Legal Counsel: Employment Legal, Africa with Absa.

YOU HAVE BEEN CHIPPED

Deirdre Venter

“We are now perched on a strange cusp of history, a time when the world feels like it’s been turned upside down, and nothing is quite as we imagined. But uncertainty is always a precursor to sweeping change; transformation is always preceded by upheaval and fear. I urge you to place your faith in the human capacity for creativity and love, because these two forces, when combined, possess the power to illuminate any darkness.” Dan Brown, Origin

In the Book of Revelation, John tells of the Mark of the Beast: “The Beast forced all people, small and great, rich and poor, slave and free, to have a mark placed on their right hands or on their foreheads. No-one could buy or sell unless he had this mark, that it had the beast’s name or the number that stands for the name”.

In 1949, George Orwell wrote of a world some 35 years later in “1984” where secret surveillance was the order of the day; “Thought Police” could monitor your innermost personal thoughts and inflict punishment for treacherous thinking. It was a World where “Big Brother is Watching You”.

In 2017, Dan Brown in his novel “Origin” explored the theme of the co-existence of religion and science in a world where technology plays a major role in our everyday lives. The reader is left questioning whether humanity will one day be taken over by a Supercomputer over which we will have no control.

A tiny piece of technology the size of a grain of rice has realised George Orwell’s imaginary world and will make humanity confront the controversial question of whether the World’s hunger for convenience and benefits, which
technology offers on a grand scale, can be reconciled not only with the religious beliefs of a great portion of the World’s population but also with the individual’s right to keep personal information about every aspect of his/her life and body private and protected.

A microchip is not new technology, it has been around for a while and has been used by humans as a tool to locate missing animals. It has almost become mandatory to chip your pet dog or cat. Farmers use microchips to track and identify livestock and as a deterrent to livestock theft. The chip is capable of storing medical and vaccination records and can log fluctuations in the animal’s body temperature.

The tiny chip is powered by a lithium battery which self-emergises through changes in the host’s body temperature. Once implanted, using Radio Frequency Identification (RFID) the chip is capable of being tracked by satellite, and the host can be geographically located within inches anywhere on the planet.

Globally, the implantation of microchips into humans is relatively recent. Some countries, including Sweden, Germany and the United States of America, are experimenting in this space and employees of organisations have been “chipped”.

The benefits of implanting microchips into employees are many for both the employee and the employer.

The employee gets the benefit of the convenience of not having to carry a wallet or access card with him. He can clock in and out, open doors, operate printers, purchase food from the vending machines and canteen and access his laptop and workspace with a simple movement of his hand over a scanner. Being chipped has benefits for the employee outside the workplace. It can be used to access his home and gym, purchase meals at restaurants and groceries at stores, store e-tickets and train journeys. More sophisticated chips can hold all the employee’s personal records such as bank account details and passwords, credit cards, drivers’ licence, emergency contact details and social media profiles. It could even monitor the employee’s health and bodily functions and keep detailed records of the employee’s visits to doctors and other health practitioners. It makes the employee’s daily routine faster and easier in a cashless environment.

For the employer, the benefits are even greater. The implantation of the chip between the index finger and the thumb is painless. It takes a few seconds and is administered by a hypodermic needle just like a flu shot. The cost of the chip and implantation is minimal. The chip offers increased security as access to the employer’s IT systems is closely monitored, passwords do not have to be reset and dealing with errant employees who have forgotten or allowed passwords to expire will no longer haunt IT. The chip cannot be lost, unlike an access card or keys, and so security is enhanced. The device enables the employer to control access to prohibited areas within the workplace and to monitor the employee’s performance and movements in and around not only the workplace but in his personal life too. If fitted with a GPS, the employer can scrutinise the employee’s movements after hours and outside the workplace and will be able to keep check on the company the employee keeps and places he frequents. The employer will have insight into the employee’s visits to medical practitioners for health or mental issues, a “real time” view of the employee’s body and health conditions being forewarned of impending illness or possible disease.

Chipping an employee does have a few drawbacks. The chip cannot be turned off and is vulnerable to cyber-attacks with the risk of identity theft and data sniffing. The chip stores a mountain of personal information on the employee’s behaviour, health and personal identification which has risks of infringement of privacy. The chip could migrate within the body and could be incompatible with other medical devices such as MRIs. The removal of the chip involves surgical intervention and may pose other health risks. The chip

Globally, the implantation of microchips into humans is relatively recent. Some countries, including Sweden, Germany and the United States of America, are experimenting in this space and employees of organisations have been “chipped”.
can be reprogrammed while inside the body modifying its use as initially agreed between the employer and employee. Playing host for a chip and being under 24/7 surveillance with no place to hide may cause anxiety and depression.

These drawbacks pale into insignificance when compared with the legal questions and complications the chipping of employees presents. Questions such as who owns the microchip once it is inserted, who owns the data that is recorded on the microchip, the employee, the employer or the third-party provider. If the employee refuses on termination of employment to remove the chip, what recourse does the employer have? Can the employer demand that the employee removes the chip? Can an employee withdraw consent to the device? Must an employer accommodate those employees who have religious beliefs opposing the chip? Can an employer, as a condition of employment, oblige an employee to be microchipped. Will microchipping ever become an inherent requirement of the job? If the insertion and extraction of the chip leads to health complications, who is liable and could the employee claim from Workers Compensation? If an employee resigns and the new employer requires chipping, what happens to the old chip? Will employers have to start restraining chipped employees from using the information on the chip to compete with the employer after termination?

Considering the high risk these chips pose for the rights of privacy and dignity of persons and how intrusive and pervasive these devices can be in the workplace, one would expect the law to have kept pace. It has not. There is no legislation globally regulating the chip in the workplace. But as some brave employers start to push the envelope, lawmakers are starting to wake up to the reality of a George Orwell “1984” World were Big Brother is watching and the “Thought Police” monitor every move. Certain states in the USA have passed bills and anti-chipping legislation to protect employees from forced human microchip implantation.

As the trend of chipping grows globally, South Africa will have to step up and enact legislation to regulate the microchipping of employees. We may one day see an amendment to the Employment Equity Act prohibiting an employer from asking a prospective employee in an interview whether he/she will consent to the implantation of a chip, and that requires an employer to provide reasonable accommodation to employees who do not consent to being chipped. The Labour Relations Act may have to be amended to require consent to chip employees and to include termination on the ground of refusal to consent to be chipped as a form of an automatically unfair dismissal. Policies on the implantation and removal of chips in the workplace may one day be as common as disciplinary codes and procedures.

Technology is part of our daily lives and is to some degree already incorporated into our bodies. We carry our smart phones with us all day, we sleep with our smart phones next to us on our side tables, we wear our smart phones around our wrists and use smart devices attached to our bodies while training to monitor our heartbeat and endurance. We disclose our personal secrets and lives on Social Media platforms for all to see with our searches and desires monitored every time we “ask Google”, pass time on YouTube or update our status on Facebook. Are we not already in “1984”, where our every move is monitored? Are we not living in a World told by John in the Book of Revelations? As Dan Brown poses: Can technology and religion co-exist in this World?

The United States Court of Appeal for the Fourth Circuit in U.S. Equal Employment Opportunity Commission v Consol Energy Inc.; Consolidation Coal Company No. 16-1230 (4th Cir. June 12, 2017) does not believe so. It upheld an award of $150 000 compensatory damages and $436 860.74 for front and back pay and lost benefits granted by a jury where an employer refused to accommodate an employee who believed that the use of a hand scanner implemented by the employer would be “showing allegiance” to the “Antichrist”.

The Appeal Court stated that: “It is not Consol’s place as an employer, nor ours as a court, to question the correctness or even the plausibility of Butcher’s religious understandings... So long as there is sufficient evidence that Butcher’s beliefs are sincerely held – which the jury specifically found, and Consol does not dispute – and conflict with Consol’s employment requirement, that is the end of the matter.”

This statement surely sets the scene for future challenges from employees who refuse to be chipped on the grounds of religious beliefs, citing the “Mark of the Beast” as justification. But one is still left questioning whether Humanity has not already offered itself as a sacrifice to a Supercomputer in exchange for more convenience and efficiency? Lawmakers can regulate and legislate but will humans still be in control?

Venter is a Partner with Stepstone & Wylie.

GREEN VALLEY BY LOUIS GREENBERG

GAIL SCHIMMEL

For a more recent book that touches on the issues of how far the technological tracking of our lives could go, read Louis Greenberg’s new novel, Green Valley. Greenberg is a South African writer living in the UK, and part of the best-selling duo, SL Grey.

In Green Valley, we visit a world of the future. On one side lives a community that has rejected the big brother world of technology and reverted to a screen free time. And next door, in a giant building almost sealed from the world, is a community who only live in virtual reality, completely wired in to society.

And then dead children start to appear.

One finishes the book eyeing one’s cell phone with distrust, wondering if we are already on the slippery slope to our own Green Valley. A great, contemporary insight into the fears raised in 1984 and other classics.

Schimmel is the CEO of the Advertising Regulatory Board.
DEPRESSION IN THE WORLD OF WORK

DAMIAN VIVIERS

Mental health conditions constitute one of the most critical social and occupational concerns worldwide and affect more human lives than any other disabling condition. Society appears to have a general misconception that mental illness is rare. On the contrary, the possibility that people may develop mental health conditions during the course of their personal and professional lives is considerable, given the high rates of violence, not only in South Africa but worldwide, as well as the stressors of daily life.

Mental health conditions are unique from other health concerns in that they are both prevalent and stigmatised in modern society. The social understanding and the actual medical definition of mental health conditions are often at odds with each other, resulting in certain negative societal perceptions of those who suffer from these conditions.

Mental health conditions themselves do not discriminate and constitute a universal phenomenon affecting all countries, cultures and people of all ages and socio-economic status. However, despite the increased prevalence of mental health conditions across the globe affecting a considerable percentage of the world’s population, the stigma is more significant today than in the past.

Affected individuals experience various forms of prejudice and discrimination in the workplace, including dismissal, the denial of employment, enduring exposure to demeaning and condescending attitudes from supervisors and co-workers, and falling victim to harassment and workplace bullying. As a result of stigma, many employers are unwilling to hire people with mental health conditions, and many employees are unwilling to have them as colleagues. These negative attitudes play no minor role in reinforcing the exclusion of persons with mental health conditions from the workplace, whether or not they are willing and able to work.

The heightened levels of commitment and stress in today’s employment environments may contribute to an increase in mental health conditions. Workplace stress is considered a prominent trigger for the onset of various mental disorders, especially depression. Although particularly prevalent in recent years, the mental health condition commonly known as “depression” is no new phenomenon in society or in employment and can in fact be traced throughout history.

Depression is a mood disorder that causes persistent feelings of sadness and loss of interest. It is also termed “major depressive disorder” or “clinical depression”. Depression affects how an individual feels, thinks and behaves, and can lead to a variety of emotional and physical problems. People with depression may have trouble performing normal day-to-day activities and may sometimes feel that life is not worth living. This condition may require long-term treatment. Depression may also be present and diagnosable over an extended period of time, which is then known as persistent depressive disorder. This condition is notorious for the fact that it presents differently in different people, its changeable nature and its rate of reoccurrence is high as symptoms never fully disappear but merely vary in intensity over time.

Depression may occur along with other illnesses or hide behind their symptomology (so-called “masked depression”). People may develop depression outside the workplace, with the disorder affecting their employment, or may develop depression due to occupational factors. Irrespective of the form it takes, it remains a serious mental health issue and an occupational concern.

Depression is in fact a deceptively mild term for an extremely debilitating illness. Although it can be managed and treated with primary care and is generally regulated with the use of medication (such as anti-depressants) and psychotherapy, most people who suffer from depression do not receive treatment, and many afflicted individuals worldwide do not have access to treatment. According to studies conducted by the World Health Organisation, the average rate of untreated depression is significant.

Depression is episodic in nature and normally persists throughout a person’s life. Its onset is however usually between the age of 20 and 30, which makes it a particularly relevant concern in the employment sphere, as people typically seeking employment or being employed and attempting to advance their careers fall into this age bracket.

As a major occupational concern, depression has several negative effects in the workplace, including absenteeism, presenteeism (being at work for more hours than is required, due to insecurity about employment), occupational and social dysfunction, lower employee productivity, an increased possibility of suicide, and increased stigma and discrimination. Depression
reportedly has a more significant impact on work performance than several other major health problems. Mental health conditions in South Africa, including depression, are governed by the Constitution, various legislative provisions and the common law, and consequently constitute a complex area of the legal system. This may be attributed to the fact that addressing mental health conditions in the legal sphere involves interplay between fundamental human rights and extends across various areas of employment law, including the law of disability, dismissal, unfair discrimination and reasonable accommodation. Mental health conditions also influence other areas of employment law, such as occupational health and safety, statutory compensation and employer liability.

Employment in South Africa is a heavily regulated field and mental health conditions such as depression attract several significant legal considerations and should be carefully evaluated in line with the relevant facts and circumstances. Research indicates that depression is a concern in the world of work and one that will continue to increase in prevalence over time, which in turn will continue to increase the relevance of this subject in the labour law arena.

Dr Viviers is a Senior Associate Labour and Employment practice, Phatshoane Henney.

“EQUAL WORK FOR EQUAL PAY” DOES NOT MEAN I MUST ELIMINATE ALL FORMS OF SALARY DISPARITY

LUDWIG FRAHM-ARP

In a recent judgment the Labour Court confirmed that the “Equal Work for Equal Pay” provisions within the Employment Equity Act, 1998 do not empower an arbitrator (or the Labour Court for that matter) to order an employer to eliminate all forms of salary disparity between its employees.

The arbitrator in the case of Sun International Ltd v SACCAWU ordered Sun International to “eliminate all forms of salary disparity on its employees starting with the applicant/complainant dispute”. The Labour Court found that there was simply no legal basis for such an order. The court went on to hold that commissioners tasked with the determination of unfair discrimination disputes ought to appreciate and respect the limits of their powers of intervention and that in this case the arbitrator’s sweeping order which potentially-affected all of Sun International’s employees was simply incomprehensible.

The case is also a good reminder that differences in pay are not always unfair and that there are factors that need to be taken into account when considering whether a difference in pay is unfair.

The relevant facts of the case were that the employee was employed by Sun International on 1 January 2008 as a guest services attendant. In 2014, the employee was engaged in the position of surveillance auditor.

Mr Botha was employed in the same position in June 2016.

The employee and Mr Botha had the same job descriptions, did the same work on a daily basis, were graded at the same level, and reported to the same surveillance shift manager. However, the employee earned less than Mr Botha.

The employee contended that the differential in earnings amounted to unfair discrimination on the grounds of race and gender; specifically, that Mr Botha (her comparator) was paid a higher salary on account of the fact that he was white and male.

In defence of this difference, Sun International led evidence that the employee was appointed to the surveillance position during the course of a restructuring exercise, and that she received a 20% increase to bring her remuneration into the applicable salary band. Mr Botha was recruited from a security company and his package was calculated to match his existing remuneration. Mr Botha was recruited on the basis of his experience, skills and qualifications. He had been previously employed at various casinos (including a period of 10 years employment at Gold Reef City Casino), and thus had more experience than the employee, and had better qualifications (a PSIRA Grade A).

Since it was common cause that the dispute concerned employees performing the same work but receiving a difference in remuneration, the question before the arbitrator was whether the difference constituted unfair discrimination, applying s11 of the Act.

Frahm-Arp
The arbitrator found that Sun International had unfairly discriminated against the employee in paying Mr Botha more than her.

Sun International, strangely, took the matter on review rather than appealing against the award in terms of s11 of the Employment Equity Act. In considering the award on review, the Labour Court found that the award lacked coherence, and comprised a series of often random observations. More particularly, to the extent that the arbitrator considered that it was for the employee to establish and prove on a balance of probability that Sun International’s conduct was not rational and amounted to unfair discrimination, it overlooked the provisions of s11 of the Employment Equity Act. That section makes clear that if unfair discrimination is alleged on a specified ground listed in s6(1) (which it was in this case), the employer against whom the allegation is made must prove, on a balance of probabilities, that the discrimination did not take place or that any discrimination was rational and not unfair, or is otherwise justifiable. Sun International was thus obliged to discharge the onus to prove the absence of any discrimination and to justify any discrimination found to exist.

Since it was common cause that the dispute concerned employees performing the same work but receiving a difference in remuneration, the question before the arbitrator was whether the difference constituted unfair discrimination, applying s11 of the Act.

Sun International denied any act of unfair discrimination and it therefore bore the onus to establish, on a balance of probabilities, that the difference in remuneration between the employee and Mr Botha was not because of the difference in their race or gender, or that it was rational and not unfair, or otherwise justifiable. Sun International, in effect, sought to assert a “market related forces” defence to the claim of discrimination, namely that it had recruited Mr Botha on the remuneration package it did because that was what he demanded and what the market justified, and to raise the “justifiability factors” of qualifications and experience in the event that the primary defence failed.

The court found that there was no proper analysis to support the arbitrator’s rejection of the defenses raised. There are authorities that address what amounts to a “market forces” defence to the employee’s claim but the arbitrator considered none of them, nor did he make any reference to the principles that they establish, for example, the rejection of the “I paid him more because he asked for more” and “I paid her less because she was willing to come for less” defenses.

The court confirmed that regulation 7 sets out the factors that might serve to justify a differentiation in income – seniority, length of service and qualifications are among them. It then found that the arbitrator effectively ignored the factors of seniority and qualification, and regarded experience as a criterion to be limited to the job in which the employee and Mr Botha were currently engaged. In other words, he disregarded entirely Mr Botha’s work history and experience and was prepared only to regard as relevant his experience in the position of surveillance auditor. This is too narrow a consideration.

The evidence disclosed that Mr Botha’s work experience in security extended over more than 30 years, as opposed to the employee’s much more limited work experience in the same sector. Furthermore, Mr Botha’s qualifications were considerably better than those of the employee. There ought to have been a proper scrutiny and analysis of this aspect of Sun International’s defence. What was required of the arbitrator was to undertake an analysis of all of the evidence, and to determine properly whether Sun International had made out a case of rationality, fairness or other justifiability in respect of the admitted differential in income.

The arbitrator’s failure to consider these issues properly rendered the award reviewable, and it was sent back to the CCMA for the issue to be determined afresh by another arbitrator.

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DISCRIMINATION: DO DIFFERENT GROUNDS CONSTITUTE DIFFERENT CAUSES OF ACTION?

PIETER MOLL

This is the question that confronted the Labour Court in Maqavana v Massbuild (Pty) Ltd and others (JR393/18) handed down on 3 April. Mr Maqavana was employed by Massmart as a Merchandise Controller, earning R12 500 per month. He discovered, at some point, that Ms Melles, also a Merchandise Controller, earned R16 500 a month. Apprised by this discovery, Maqavana lodged an internal grievance; he was given several reasons to explain this difference in remuneration.

However, dissatisfied with the reasons offered, Maqavana referred an unfair discrimination claim, based on equal pay for work of equal value, to the CCMA in accordance with s6 of the Employment Equity Act (55 of 1998) (EEA). Conciliation failed, and the dispute proceeded to arbitration, with a senior commissioner appointed as arbitrator. Although Maqavana initially relied on an “arbitrary ground” in support of his claim, he subsequently identified and pinned his colours to the mast of “race” as the ground for discrimination. On 31 August 2017, the arbitrator found that although there had been pay disparity, the employer had proved a balance of probabilities that no discrimination had taken place. On this basis, the referral to the CCMA was dismissed. Notably, Maqavana did not challenge this arbitration award at the Labour Court.

Instead, on 20 November 2017, Maqavana referred another unfair discrimination dispute to the CCMA and applied for condonation. In response, the employer contended that the second referral was res judicata and thus the CCMA lacked the jurisdiction to entertain the referral. On 18 January
2018, the res judicata point was upheld. The CCMA thus dismissed the second referral. This ruling was the subject of the review application before the Labour Court.

Maqavana pursued several grounds of review before the Labour Court. In essence, he argued that the commissioner erred because the second referral was not res judicata. The Labour Court considered the res judicata principle and referred to the judgment of the SCA in Royal Sechaba Holdings (Pty) Ltd v Coote and Another 2014 [3] Ali SA 431 (SCA) where it dealt with the requisites to rely on the principle as:

“[11] The requisites of a valid defence of res judicata in Roman-Dutch law were that the matter adjudicated upon must have been for the same cause, between the same parties and that the same thing must have been demanded.”

The Labour Court also considered the purpose of the principle as stated by the SCA in Prinsloo NO and others v Goldex 15 (Pty) Ltd and another 2015 (5) SA 297 (SCA):

“[23]...That purpose, so it has been stated, is to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue.”

The Labour Court identified Maqavana’s argument as follows: “The applicant’s case is that one of the requirements is lacking thus the [res judicata] principle does not find application. The applicant contends that it is not the same cause of action involved.” Maqavana argued that each of the grounds contained in s6 of the EEA constitute separate and distinct causes of action. This prompted the Labour Court to consider the concept “cause of action” in closer detail, particularly in the context of the EEA. The Labour Court referred to the Court of Appeal judgment in Read v Brown (1888) 22 QBD 131 per Lord Ester, M.R where it defined cause of action as:

“Every fact which would be necessary for the plaintiff to prove if traversed, in order to support his right to judgment of the court, it does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is material to be proved to entitle a plaintiff to succeed in his claim.”

Against this backdrop, the Labour Court considered the crux of Maqavana’s argument and held:

“[24]...The grounds are the fulcrum upon which a claim of discrimination must rotate. In other words, they (grounds) complete, as it were, a cause of action. It ought to be remembered that discrimination on its own is not an actionable cause. It becomes an actionable cause once the element of unfairness is present. The grounds are enablers of this element of unfairness. Therefore, the listed grounds refer to the basis on which the differentiation is made, not to the reason or purpose of the differentiation.

[25] Ordinarily, discrimination based on any of the listed grounds is presumably unfair unless it can be shown to be fair. However, if it is based on unlisted grounds – arbitrary grounds – unfairness needs to be proven. To demonstrate that grounds are not causes of action, section 6 of the EEA reads in part: ‘on one or more grounds’. This suggests that a party can rely on two or all the grounds to prove unfairness. If the argument of M[a]qavana is accepted, it would mean that such a party would be relying on multiple and different causes of action if reliance is placed on two or more of the grounds. That is untenable.

[27] Reverting to the definition of a cause of action, ‘grounds’ constitute pieces of evidence necessary to prove the cause of action – unfair discrimination. Put differently, in the absence of any of the grounds listed or unlisted differentiation lacks a legal basis to constitute an actionable claim. There can never be a legal claim of unfair discrimination if the grounds are not alleged to any form of differentiation. Therefore, a ground is not a separate and distinct cause of action. To suggest that the first claim was based on race thus a different cause of action is to stretch the concept of cause of action beyond what the concept actually means.

[33] To conclude, in my judgment, listed or unlisted grounds do not constitute separate but distinct actionable causes of action but are pieces of evidence to aid the alleged unfairness of the differentiation in order for same to transform into an actionable cause of action – unfair discrimination.”

On this basis, the Labour Court concluded that different grounds of discrimination do not give rise to separate and distinct causes of action and thus the res judicata principle is applicable to the second CCMA referral, as correctly held by the commissioner.
conflicting judgments from different fora on the exact same issue.

Accordingly, it is advisable for employees who allege unfair discrimination in terms of the EEA to rather err on the side of caution and identify all of the suspected grounds of discrimination and to pursue them all in a single unfair discrimination claim. Employees who fail to do so may fall victim to the res judicata doctrine.

*Mqavana was denied leave to appeal by the Labour Court and, subsequently, his petition for leave to appeal to the LAC was also dismissed. He approached the Constitutional Court for leave to appeal, thus the Labour Court may not have the final say in this matter.

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SUBLIMINAL RACISM – SWEPT UNDER THE CARPET?

ANLI BEZUIDENHOUT & ROWAN BROMHAM

Covert racism can be described as racial discrimination in a disguised and subtle form. It is a form of racism that is not publicly obvious but is hidden within the fabric of society through evasive and often passive means. The perpetrators of subliminal racism often discriminate against individuals subconsciously, rationalising these discriminatory decisions with explanations that they deem to be socially acceptable.

Racism in the workplace can be defined as an insidious superiority-based ideology that manifests itself either through speech or action, the effect of which is to demean the dignity of employees or employers based on their immutable characteristic of race (Racism in the Workplace (2008) 29 ILJ 43).

Racial harassment directly impairs the dignity of those affected and has the potential to fundamentally impair the working relations between different race groups. The question, however, is whether every racial slur, word or conduct is of such a nature so as to destroy the working relationship between individuals and to render the continuation of such a relationship intolerable, thereby calling for the ultimate sanction of dismissal.

In terms of s9 of the Constitution, unfair discrimination on grounds of race is prohibited. As a result of this express prohibition, the legislature has enacted the Employment Equity Act (55 of 1998) (EEA). Racial discrimination may also manifest itself in the form of harassment, which is a listed ground of unfair discrimination in terms of the EEA.

The issues and social effects of covert racism have been addressed by a number of courts and tribunals in South Africa, most recently in the high court decision of Chowan v Associated Motor Holdings (Pty) Ltd and Others (2018 (4) SA 145 (GJ)).

This case concerned an employee, Ms Chowan, who was head-hunted for the position of group financial manager. She accepted the position subject to assurances that she would be provided with opportunities for growth and progression within the company. Her ultimate goal was the position of Chief Financial Officer (CFO). When the CFO resigned, Chowan was recommended and applied for the position. She was the only black candidate.

Chowan was not appointed and after tendering and subsequently withdrawing her resignation, a number of racially fuelled incidents took place. After being provided with a brown colour company car, she was told that the colour of the car suited her skin. A meeting to discuss her failed application was held, during which the CEO referred to her as “a female, employment eq-
Aggrieved by these instances of racial discrimination, Ms Chowan instituted action against the company and the CEO in delict under the actio legis Aquilae, with an alternative claim for damages.

In a critical judgment handed down by Meyer J, the judge stated that there is public interest in ensuring that the existence of systemic discrimination and inequalities in respect of race and gender are eradicated, and that in present times, latent and subtle forms of discrimination often manifest themselves. As far as the iniuria claim for defamation was concerned, Judge Meyer said “However, the evidence, as I have mentioned, revealed that what had been said by Mr Lamberti on 15 April 2015 was rather that Ms Chowan is a female, employment equity, technically competent, they would like to keep her, but if she wants to go, she must go – others have left his management and done better outside the company – and that she would require three to four years to develop her leadership skills. The correct words comprising the utterance have been fully canvassed in the evidence, and are undisputed. Mr Lamberti, although available as a witness, elected not to testify. I, therefore, consider Ms Chowan’s iniuria claim on the basis of the utterance that is proved and not the one as formulated in her particulars of claim. “I am unable to find that the ordinary meaning given to Mr Lamberti’s words in its context by a reasonable person, is one that is defamatory of or concerning Ms Chowan.”

But when it came to the iniuria claim for dignity he said, “Ms Chowan has established the common law requirements for her dignity claim to succeed. Imperial and Mr Lamberti are liable, jointly and severally, for Ms Chowan’s damages, as quantified in due course, as a result of the impairment of her dignity.”

In Modikwa Mining Personnel Services v Commission for Conciliation, Mediation & Arbitration & others ((2013) 34 ILJ 373 (LC)), the Labour Court held that implicit, indirect and covert acts of racism, depending on the context in which they occur, may be as offensive, if not more so, than overt racist acts, precisely because they are aimed at achieving the effects of racism through indirect, underhand or divisible means. (A Mr Ramaepadi addressed a meeting at Modikwa and said that there was a problem with the use of a specific office by MTTMs (Multi Task Team Members) because other employees such as technicians would be sitting there, and that the problem ‘had to do with concentration, we need to get rid of the whites.’) In setting aside an arbitration award, Acting Judge Gaibie said, “It is my view that the terms used by Ramaepadi, on their own and out of context – ‘we need to get rid of the whites’ – constitute words that are clear, unequivocal and overtly racist in nature. In other words, the words speak for themselves and they conjunctively demon-
strate the intention to be racist. They are, in other words a racist remark or a racist slur.

It is clear, therefore, that the mere fact that typically racist terms are not used does not imply that utterances or words cannot constitute racism, as this often rears its ugly head in subliminal forms, especially where individuals derive a sense of superiority over others on the basis of their race (Fester and AVR Labour Outsourcing (2007) 28 ILJ 1349 (CCMA), Rorich Fester was dismissed on the grounds that when he referred to a colleague as “you people” it was in a derisive manner that indicated a low opinion in which he held the racial group to which his colleague belonged).

In the past, the CCMA and the courts were of the view that when determining whether words or utterances constitute racism, the words used have to be viewed in context. However, the Labour Court took a different stance and held that words have their own meaning and do not necessarily require a context within which to acquire meaning. To put it simply, the context merely serves to aggravate the purpose for which the words were used.

This issue of context was put to bed by the Constitutional Court in Bester v Rustenburg Platinum Mine (2018) 39 ILJ 1503 (CC), where it was held that the correct test to be applied is whether a reasonable, objective and informed person would, on the correct facts, perceive the words or language used to be racist and derogatory. Theron J held that the Labour Appeal Court had erred in finding the starting point to be that phrases are presumptively neutral and found that this assessment failed to take heed of the history of segregation and the legacy of apartheid that has left the country with a racially-charged present.

The Bester decision, where Meyer Bester was dismissed for referring to a fellow employee at Sibanye Rustenburg Platinum Mines as a “Swart man”, shows that when determining the derogatory or racist nature of apparently neutral statements, the words used must be viewed against the totality of the circumstances and take into account the country’s history of institutionalised racism.

It is clear that the courts will be critical of degrading and discriminatory remarks, in whatever form these might arise and, therefore, there is a potential for companies to be held jointly and severally liable. South African workplaces face real challenges in attempting to eradicate racism, discrimination and inequality and we can only hope that the chastisement and punishment of such acts serve to prevent future occurrences.

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**ENTERPRISE AND SUPPLIER DEVELOPMENT**

**LYNN MUNSAMY**

Enterprise Development (ED) and Supplier Development (SD) is one of the three Priority Elements of the Broad-Based Black Economic Empowerment (B-BBEE) Scorecard. An entity is required to achieve a 40% sub-minimum in each of the categories on the ED and SD Scorecard (excluding bonus points). SD 4 points out of 10 points and ED 2 points out of 5 points. Failure to comply with the 40% sub-minimum leads to a drop of one level on the B-BBEE scorecard. An entity may make monetary or non-monetary contributions to a Beneficiary Entity. The requirements may differ if a company is subject to verification based on a specific Sector Code.

The ED and SD Beneficiaries must meet the following criteria:

- The beneficiary is required to be at least 51% black-owned.
- The beneficiary must be an Exempt Micro Enterprise (EME) (Turnover under R10 million) or a Qualifying Small Enterprise (QSE) (Turnover less than R50 million), subject to the specific Sector Code.

What is the difference between Enterprise and Supplier Development?

SD contributions are made to entities that already form part of the Measured Entity’s (ME) current supplier chain. ED contributions are made to entities that are not part of the ME supplier chain.

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**Compliance Targets for the Amended Codes of Good Practice**

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**Identification of Suitable Beneficiaries:**

When considering who to support, a ME should critically analyse the type of beneficiary. Some factors to consider:

- An ED beneficiary should be an EME or QSE who they can assist and develop to become part of their supply chain. This has a twofold benefit for the ME, namely (i) to develop a reliable future supplier, and (ii) to gain additional bonus points when that beneficiary graduates to a supplier.
- When identifying a SD beneficiary, the ME should first look to their existing supply chain to assess if there are existing black owned EMES and QSES that they can assist and develop. If no suitable beneficiaries are identified, they should look for EMES and QSES that can be taken into their supply chain immediately, and developed.
- Often, if the ME cannot identify suitable beneficiaries, the ME appoints an ESD Facilitator to provide mentorship and training programmes to black-owned EMES and QSES in order to develop their businesses.
Documentation required by the Verification Agency to evidence contributions for ED and SD

The following documentation is required to evidence ED and SD contributions:

- An ED or SD agreement between the ME and the ED or SD Beneficiary.
- A letter from the ED or SD Beneficiary confirming the value and nature of the assistance received from the ME.
- Sworn EME Affidavit of the ED or SD Beneficiary or Sworn QSE Affidavit of the ED or SD Beneficiary.
- A copy of the identity document of the owner of the ED or SD Beneficiary.
- Proof of the contribution to the ED or SD Beneficiary, evidencing the support given (for example, invoice and proof of payment of contribution).
- Supplier invoice from the SD Beneficiary and proof of payment of items purchased (Required for SD only).

Steps in executing a successful Enterprise and Supplier Development initiative:

- **Step 1** - Determine the compliance targets for ED and SD, to achieve the maximum points for the Enterprise and Supplier Development Scorecard.
- **Step 2** - Identify suitable ED Beneficiaries that could form part of the ME supply chain. By procuring goods and services from the ED Beneficiary in the second year, the ME will be entitled to one bonus point on the Enterprise and Supplier Development Scorecard as the ED Beneficiary has now graduated to Supplier.
- **Step 3** - Identify suitable SD Beneficiaries that can add value to the ME supply chain.
- **Step 4** - Monitor and track the progress of the Enterprise and Supplier Development initiative within the ME’s financial period. This will ensure that the ME is able to report more efficiently on the implementation of the ED and SD initiative. If the ED or SD beneficiary is growing and creating jobs as a result of the ME’s contribution, the ME will be entitled to one bonus point on the Enterprise and Supplier Development Scorecard.
- **Step 5** - Be involved in the development of the ED and SD beneficiaries.

Types of contributions that the ME can make to ED or SD Beneficiaries

The following are the most common types of contributions that ME’s make to ED or SD Beneficiaries:

- Grant Contribution;
- Direct costs incurred by the ME on behalf of the Beneficiary Entity, for example the purchase of a computer for the Beneficiary Entity;
- Discounts in addition to normal business practice;
- Professional services rendered by the ME to the Beneficiary Entity at no cost;
- Overhead costs incurred by the ME on behalf of the Beneficiary Entity, for example providing free rental space to the Beneficiary Entity;
- Loans on favourable terms.

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**SOCIAL MEDIA MISCONDUCT – “POST” THE EMPLOYMENT RELATIONSHIP**

**Naa’ilah Abader**

The world is becoming smaller with the ever evolving prevalence of social media. Facebook, Twitter, Instagram,Whatsapp and LinkedIn all traverse both our social and work lives. However, what some see as a tool to exercise the right to freedom of expression has the potential to lead to a dismissal.

Essentially, posting anything that may have an impact on the employment relationship may lead employees to find themselves in a situation “post” the employment relationship. A further consideration is the heightened seriousness of social media misconduct where allegations of racism are involved, particularly within the context of historical and political sensitivities in South Africa.

The aim of this article is to consider Commissioners’ approaches to these issues in a series of recent arbitration awards involving the fairness of dis-
missals arising from social media misconduct, specifically where allegations of racism are involved:

- In Shumayiru / Commodity Inspection Group (Pty) Ltd [2019] 6 BALR 676 (CCMA) the applicant made certain comments in a WhatsApp group consisting of a number of the respondent’s employees. The applicant claimed in the chat that he was more intelligent than white and Indian managers and directors working for the respondent and aligned himself with other employees in the chat who shared a similar view. The applicant claimed that the chat was a forum for airing employees’ concerns and that he was merely “fighting for his rights”. The Commissioner noted from the outset that racism is defined as prejudice, discrimination, or antagonism directed against someone of a different race based on the belief that one’s own race is superior. The Commissioner also made reference to s10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) which clearly outlaws the communication of words that could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or propagate hatred. The Commissioner found that the applicant uttered those words with the intention to hurt Indians and whites because he thought that he deserved to be paid more than them. The Commissioner found that the applicant’s dismissal was substantively fair.

- In Clarence/Express Employment Professionals SA (Pty) Ltd [2018] 11 BALR 1149 (MIBC) the applicant was dismissed for making a racist comment to a fellow employee pursuant to a WhatsApp chat between the respondent’s employees. Briefly, in a WhatsApp group of employees, an instruction was issued to an employee in terms of which her name was unintentionally auto-corrected to “Monkey”. The applicant was alleged to have made the following verbal comment to the complainant in person “Oh, Nonku so you the monkey”. The applicant denied that he made the comment and indicated that he merely asked the complainant why she was called a monkey. The Commissioner found that on a balance of probabilities, the respondent’s version was to be believed and the applicant’s dismissal was found to be substantively fair.

Interestingly, in another award relating to the same WhatsApp chat, the dismissal of an employee was found to be unfair (National Union of Metalworkers of South Africa obo Ndozazi/Express Employment Professionals [2018] 11 BALR 1157 (MIBC). The applicant in this matter was found guilty of “insulting, abusive, obscene or racist language” in terms of which he was alleged to have participated in making a mockery out of the situation and was subsequently dismissed. The applicant’s comments in the chat were made due to the highly controversial and publicised H&M advertisement of two young boys wearing sweaters. On the black boy’s sweater was written “the coolest monkey in the jungle” while written on the white boy’s sweater was “the survival expert”. After receiving the message unintentionally referring to “Monkey” instead of a fellow employee, the applicant commented in the chat “H&M Store” after which another employee commented “Ayi Bheki dnt go there nw” and the applicant responded: “I will there is a sale today”. Another employee then posted: “H&M Store with a laughing emoji and one of a monkey covering its eyes and another employee similarly posted a laughing emoji and one of a monkey, followed by a post from the applicant: “sale of pets”. Other employees then posted: “The coolest one in the jungle” and “The coolest monkey in MSSL”, but these posts were followed by a thumbs down emoji from the applicant. The applicant contended that his reference to H&M stores was not racist and was not meant to insult anyone. The Commissioner criticised the nature of the allegations against the applicant. He reasoned that the posting of “monkey” was not done in a racist manner, the applicant himself did not call the complainant a monkey and that it was unfair to suggest that the applicant influenced the other employees to respond in the manner they had responded. Further, the thumbs down emoji indicated the applicant’s disapproval of the subsequent comments. The Commissioner ordered that the applicant be reinstated retrospectively.

- In Meyer/Onelogix (Pty) Ltd [2018] 11 BALR 1232 (CCMA), the applicant (who had previously received a final written warning for using the “K-word”) sent a WhatsApp message to his fleet controller with a meme depicting a young white boy holding a cigar and a can of beer, with the caption “Growing up in the 80’s before all you pussies took over may as well die young.” The Commissioner found that the meme did not expressly contain any racially derogatory remarks and that the applicant apologised and advised the recipient that he sent the meme in error. The Commissioner further took into account that the meme was shared (not forwarded) with others from Facebook to WhatsApp contacts and that it is probable and prevalent for posts to be shared with unintended recipients. The Commissioner found that the recipient of the meme was overly sensitive in his reading and understanding of the meme and that, “A reasonable reader informed of all the correct facts would have understood
the meme to be generational in nature and not having any racial under-
tones.” The Commissioner further found that it does not follow that be-
cause the applicant was guilty of the “K-word” incident he should also be
found guilty for the second incident and that the applicant’s dismissal
was accordingly unfair.

- In *African Meat Industry & Allied Trade Union on behalf of Makhoba and
  Clover SA (Pty) Ltd* (2013) 39 ILR 477 (CCMA), the applicant was charged
  with making racist comments on social media after he put a post on the
  Facebook page of *Eyewitness News* calling for all whites to be killed. The
  applicant was subsequently dismissed. The Commissioner found that, “In
  a country like South Africa, which has suffered for hundreds of years from
  racism, it is a grossly offensive form of racist misconduct to call for mem-
  bers of one race group to be killed”. The Commissioner referred to *Crown
  Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* (2002) 23 ILJ
  863 (LC) in which Zondo JP said, “Within the context of labour and em-
  ployment disputes this court and the Labour Court will deal with acts of
  racism very firmly. This will show not only this court and the Labour
  Court’s absolute rejection of racism but it will also show our revulsion at
  acts of racism in general and acts of racism in the workplace in particu-
  lar. This approach will also contribute to the fight for the elimination of
  racism in general and racism in the workplace in particular and will help
to promote the constitutional values which form the foundation of our
  society”. The Commissioner confirmed that it is trite that the fact that the
  post was made outside of working hours was irrelevant as the employer

had a legitimate interest in the employee’s conduct. The applicant’s dis-
missal was found to be fair in the circumstances.

The approach adopted in the cases highlighted is in accordance with the
judgment of the Constitutional Court in *South African Revenue Service v Com-
mission for Conciliation, Mediation and Arbitration 2017 (1) SA 549 (CC)*
where the Constitutional Court observed that “racist conduct requires a very
firm and unapologetic response from the courts, particularly the highest
courts. Courts cannot therefore afford to shirk their constitutional obligation
or spurn the opportunities they have to contribute meaningfully towards the
eradication of racism and its tendencies”.

The cases mentioned demonstrate that social media as a forum to ex-
press individual and collective views has resulted in increased levels of mis-
conduct, particularly insofar as employees tend to perceive social media as a
forum which is exempt from employer scrutiny. The prevalence of such mis-
conduct is further fuelled by perceived defences of privacy, freedom of ex-
pression and conduct outside of the workplace. Accordingly, employees
should be circumspect and approach posting on social media forums with
some caution. Our courts and dispute resolution forums have taken the view
that they will hold employees accountable, particularly in cases where the
conduct constitutes racism and/or racially offensive conduct.

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THE PURSUIT OF THE HOPELESS CASE –
THE LABOUR COURT GETS TOUGH

**NEIL COETZER AND TANYA MULLIGAN**

In recent months, the Labour Court has signalled on more than one occasion
that its processes are not to be abused by litigants. The court’s articulation
of this principle comes in response to an increasing number of meritless dis-
putes which are being pursued or defended in the Labour Court. Such “hope-
less” cases create unnecessary delays in the adjudication of disputes,
negatively impact on the court, its judges and other litigants and prevent gen-
uine disputes from being resolved timeously in accordance with the principle
of expeditious dispute resolution espoused by the Labour Relations Act (66
of 1995), as amended (the LRA). We set out some of the pertinent issues in
this recent development as they are particularly relevant to attorneys.

The LRA and the CCMA

The problem articulated by the Labour Court does not, however, start there.
Hopeless cases often have their origin in the noisy halls of the CCMA, where
the informal nature of the procedures and processes allows laypersons, often
with little or no understanding of the law or the merits of their claim, to refer
disputes with relative ease and without obtaining an informed, preliminary
view of their prospects of success.

The LRA’s dispute resolution mechanisms were a conscious and laud-
able attempt to ensure easy, cheap and quick resolution of employment-
related disputes. Those provisions were, presumably, drafted on the
assumption that only persons who had genuine disputes would seek to in-
voke the provisions of the LRA. That was some 25 years ago and the gen-
eral consensus amongst practitioners is that the CCMA is struggling to
cope with the workload.

Employees have made good use of the LRA’s simple dispute resolution
mechanisms. The CCMA’s Annual Report for 2017 records that 188 449 dis-
putes were referred to the CCMA during the 2016/2017 year. This represents
an increase of 5%, or an additional 745 new referrals every working day, com-
pared with the previous financial year. Given the recent amendments to our
employment legislation, the CCMA’s caseload is also likely to increase sub-
stantially this year.
Legal practitioners, and others who have been granted right of appearance in the Labour Court, should neither encourage nor assist their clients or members in pursuing a claim or a defence which is frivolous, vexatious or hopeless. The warning sounded by the Labour Court in Mashishi is clear: “... those who appear in this court should be aware that in future, the pursuit of the hopeless case will attract consequences”.

The LRA’s dispute resolution machinery is set out in s135 of the LRA. It requires conciliating commissioners only to “attempt” to resolve a dispute using a variety of techniques. In reality, many Commissioners approach conciliation in a mechanical fashion without much engagement with the merits, perhaps wary of the Labour Court’s warnings about overstepping the line in the well-known case of Kaspersad v CCMA and Others (2003) 24 ILJ 178 (LC).

Nevertheless, in terms of the LRA, commissioners are not empowered to dispose of meritless cases at conciliation stage. They must instead rely on their ability to resolve disputes to prevent meritless cases from progressing any further than conciliation. While there are a number of techniques to adopt during conciliation proceedings, resolution of a dispute is not always possible, even where cases have no merit. Of the figures cited by the CCMA, it is not clear how many of the disputes had any merit. The fact that 68% of those disputes were settled at conciliation may perhaps be an indicator, but this is certainly not definitive.

If the dispute cannot be resolved at conciliation, commissioners will complete the LRA 7.12 form. The election to pursue the dispute further again falls to the employee. Notwithstanding the high number of settlements at conciliation stage, there are still a substantial number of disputes which progress to the Labour Court, either for adjudication or, eventually, as a review of an arbitration award.

The court has recently commented that “a significant number” of the disputes on the court’s motion roll are “unarguable or hopeless cases”. The Labour Court has found that when those disputes reach the court and the litigants are represented by attorneys, advocates, union officials or representatives from employers’ organisations, an obligation not to pursue meritless litigation falls on them.

The Labour Court intervenes
While notoriously soft when it comes to making costs orders against unsuccessful litigants, the Labour Court appears to have drawn a line in the sand. A host of cases have emerged in recent months where the Labour Court has come down harshly on litigants (and their legal representatives) who have sought to advance hopeless cases. The focus in these cases has primarily been on the conduct of the legal representatives who assisted the parties in pursuing meritless litigation.

In Mashishi v Mdladla & Others (2018) 39 ILJ 1607 (LC) the Labour Court was faced with a review application which was filed some five years late. The employee failed to explain the delay and his prospects of success were non-existent, having been dismissed by his employer after admitting to seven counts of unauthorised payments to suppliers. The court made it clear that it is improper for persons with right of appearance in the Labour Court, including attorneys, advocates and officials from Unions and Employers’ organisations, to act for a client or member in respect of a claim or a defence that is hopeless on the facts or in law. In this matter, it found that as a matter of professional ethics and conduct, the attorney should have declined to file the application, regardless of the employee’s instructions.

While not referring to the dispute as a hopeless case, the Labour Court in Kabe v Nedbank Ltd (2018) 39 ILJ 1760 (LC) reiterated the importance of costs orders as a tool to deter frivolous and vexatious disputes. The employee had been dismissed for poor work performance but sought to suggest that her dismissal was automatically unfair because she had made a protected disclosure or had exercised her right to refer an unfair labour practice dispute. The court found that there was no evidence to reach such a conclusion and granted absolution from the instance. In deciding to award costs against the employee, it indicated that pursuing frivolous disputes negatively affects the administration of justice and the business of the Labour Court and its judges.

In Sepheka v Du Pont Pioneer (Pty) Ltd (unreported, J267/18, 9 October 2018) the Labour Court reiterated that legal practitioners are part of a profession that demands “complete professionalism, honesty, reliability and integrity from its members” and that an Order of Costs de bonis propriis conveys the court’s displeasure when these objectives are not adhered to. It found that these objectives inherently demand that legal practitioners comply
with their ethical duties toward the court by refraining from prosecuting or defending hopeless cases in the pursuit of, presumably, pure financial gain.

In Ntombela & 49 Others v UNTU & Others (unreported, D1724/18, 6 November 2018) the Labour Court again advocated the expeditious resolution of employment disputes and reiterated that cases without merit would be “visited with adverse consequences”. In this case, the court attributed an ulterior motive to the conduct of the applicants in approaching it on an urgent basis whilst knowing that they had no prospects of success. It found that such conduct constituted an abuse of the court’s process and violated the purpose and spirit of the LRA.

Similarly, in the recent case of Petersen v Eskom Pension and Provident Fund (unreported, JS130/17, 14 February 2019), the employer unsuccessfully raised a special plea of waiver only some two days prior to the commencement of a five day trial. This was in circumstances where the Pre-Trial Minute had recorded that there were no preliminary points to be taken. The Labour Court remarked that due to the limited resources available to it, special pleas should be timeously dealt with before the commencement of the trial. The conduct of the employer in this case had negatively impacted the expeditious resolution of disputes. The court remarked that the employer’s special plea was “dressed up to look like something with substance, however being stripped of its dress, it [was] nothing but an opportunistic attempt by the Respondent to delay the trial proceedings”. Costs were awarded against the employer on a punitive scale. Subsequently, the employer filed an unsuccessful application for leave to appeal and unsuccessfully sought to petition the Labour Appeal Court.

It appears that the ceaseless tide of disputes being referred to the CCMA by disgruntled employees is unlikely to abate, absent a legislative amendment. Apart from using their powers of persuasion to reach a settlement, there is unfortunately no effective tool for CCMA Commissioners to dispose of meritless disputes at an early stage.

Legal practitioners, and others who have been granted right of appearance in the Labour Court, should neither encourage nor assist their clients or members in pursuing a claim or a defence which is frivolous, vexatious or hopeless. The warning sounded by the Labour Court in Mashishi is clear: “... those who appear in this court should be aware that in future, the pursuit of the hopeless case will attract consequences”. ●

Mulligan and Coetzer are Partners with Cowan-Harper-Madikizela.

GRANTING OF PERSONAL COST ORDERS AGAINST UNSUCCESSFUL LITIGANTS

THABANG RAPULENG, TAMSANQA MILA AND THABO MKHIZE

Section 162(1) of the Labour Relations Act (66 of 1995) (the LRA) states that the Labour Court may make an order for the payment of costs according to the requirements of the law and fairness. Section 162(2) further sets out the factors the Labour Court may take into account when deciding whether or not to order the payment of costs by an unsuccessful litigant. These are whether the matter referred to the court ought to have been referred to arbitration in terms of the LRA, and the conduct of the parties in proceeding with or defending the matter before the court. On an analysis of recent Constitutional Court judgments such as the Public Protector v South African Reserve Bank 2019 ZACC29 decision, one wonders what the implications of these decisions are in the employment law context, more particularly, do these punitive personal cost orders extend to business managers and chief executives of companies?

In Zungu v Premier of the Province of Kwa-Zulu Natal and others (CCT136/17) 2018 (CC), the Constitutional Court set out the following considerations, which may be relevant in relation to costs:

- The provision that “the requirements of the law and fairness” are to be taken into account is consistent with the role of the Labour Court, as one in which both law and fairness are to be applied; and
- Parties, including employers and employees, should not be discouraged from approaching the Labour Court in instances where they feel their rights are being infringed upon. Orders for costs may have such a result and consideration should be given to avoiding it, especially where there is a genuine dispute and the approach to the court was not unreasonable.

Furthermore, in the matter between the Passenger Rail Authority of South Africa v Molepo (2014) 5 BLLR 468 (LC), the Passenger Rail Authority of South Africa (PRASA) instituted review proceedings to set aside an arbitration award made in favour of Molepo (the Respondent), following his dismissal on 1 February 2012. The court dismissed PRASA’s review application on the grounds that it had no merit, thereby upholding the CCMA’s arbitration award. With respect to the issue of costs, the court held that: “The applicant is a public entity financed at least in part from the fiscus. Officials of public entities should not litigate ‘willy-nilly’ at the public expense simply because they do not have to bear the costs personally. The applicant had been ordered to pay wasted costs of the arbitration proceedings on a punitive scale and the costs of a postponement of the review application because its counsel was unprepared. The applicant had changed its case on review and had attempted to add a further ground in a misguided application. The court found that it “begged belief” that the applicant was seeking review on the grounds now relied upon.”
The court further held that:

“The applicant had given notice of its intention to appeal against an earlier order enforcing the award, but had done nothing further in that regard.

Given these considerations, the Court held that it was appropriate to order the applicant’s CEO to pay the costs of the review application personally.

That the applicant was a juristic person and that the CEO was not personally involved in the review proceedings was immaterial to such an order.

The fact was that the entire dispute arose from the CEO’s actions, and he had demonstrated a degree of high-handedness that should be discouraged.” (own emphasis)

The Court held that there was no merit in the Public Protector’s contention that the independence of her office and proper performance of her functions demand that she should be exempted from the threat of adverse personal costs orders. On the contrary, personal costs orders constitute an essential, constitutionally infused mechanism to ensure that the Public Protector acts in good faith and in accordance with the law and the Constitution.

This was also the case in Black Sash Trust v Minister of Social Development and others (CCT48/17) 2018 ZACC where the Constitutional Court ruled that former Social Development Minister, Bathabile Dlamini, is personally liable for 20% of the costs of the 2018 South African Social Security Agency debacle.

In SABC SOC Ltd v SABC Pension Fund and others (17/29153) ZAGPJHC 2019 (GJ), the court granted a personal costs order in the interim against Hlaudi Motsoeneng. The court reasoned that the award of costs, unless expressly otherwise enacted, is at the discretion of the presiding judicial officer, and that the successful party should, as a general rule, have his or her costs paid. In applying these principles, the court saw fit that a cost order be granted against Hlaudi Motsoeneng, having regard to his regrettable approach in the litigation proceedings.

In light of this, it may be argued that there might be room in employment law to order punitive costs orders against managers – those who have the authority to hire, discipline and dismiss employees in the workplace - who unfairly dismiss employees (usually out of personal gripes as opposed to a legitimate operational objective to maintain workplace discipline and order), and who waste precious Court time challenging arbitration awards whose reasonableness is a foregone conclusion. In such cases, the “floodgates” argument which was submitted by the Public Protector will not suffice.

Practically, the Molepo and the Public Protector cases serve to caution managers of the possibility of a personal cost order as a result of frivolous litigation.

Section 162(1) of the Labour Relations Act (66 of 1995) (the LRA) states that the Labour Court may make an order for the payment of costs according to the requirements of the law and fairness.

Most recently, in the matter between Public Protector v South African Reserve Bank 2019 ZACC29, the Court held that it is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation. The Court dismissed the Public Protectors contention that if personal cost orders are granted against her, then she will always operate in fear of personal adverse cost orders and that these orders may open the floodgates for similar applications in other matters where her conduct is reviewed.

Rapuleng is a Director, Mila an Associate and Mkhize a Candidate Attorney with Cliffe Dekker Hofmeyr.
AMENDMENTS TO THE CODES OF GOOD PRACTICE

EDSON MUNETSI

On 31 May, the Department of Trade and Industry (DTI) published amendments to the Codes of Good Practice. The changes include:

- Revised Code Series 000 General Principles;
- Revised Skills Development Code Series 300;
- Revised Code Series 300: General Principles for Measuring Skills Development

The amended Skills Development Generic scorecard is detailed below with the changes noted:

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Weighting points</th>
<th>Compliance Target</th>
<th>Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Skills Development Expenditure on Learning Programmes specified in the Learning Programme Matrix for Black People as a percentage of the Leviable amount.</td>
<td>6</td>
<td>3.5%</td>
<td>Points reduced from 8 to 6 and compliance target reduced from 6% to 3.5%.</td>
</tr>
<tr>
<td>Skills Development Expenditure on Bursaries for Black Students at Higher Education Institutions.</td>
<td>4</td>
<td>2.5%</td>
<td>New indicator relating to bursaries for tertiary education.</td>
</tr>
<tr>
<td>Skills Development Expenditure on Learning Programmes specified in the Learning Programme Matrix for Black employees with disabilities as a percentage of Leviable amount.</td>
<td>4</td>
<td>0.3%</td>
<td>No changes.</td>
</tr>
<tr>
<td>Number of Black people participating in Learnerships, Apprenticeships and Internships as a percentage of total employees.</td>
<td>6</td>
<td>5%</td>
<td>Previously there were 8 points available, 4 for employed learners and 4 for unemployed learners. There are now 6 points available with no distinction between employed and unemployed black people.</td>
</tr>
<tr>
<td>Bonus Points: number of Black People Absorbed by the Measured Entity and Industry at the end of the Learnership, Apprenticeship and Internship.</td>
<td>5</td>
<td>100%</td>
<td>No change but clearly limited to Internships, Learnerships and Apprenticeships only.</td>
</tr>
</tbody>
</table>

- Revised Enterprise and Supplier Development Code Series 400;
- Revised Interpretation and Definitions Schedule 1.

The Amended Codes will be effective from 1 December. This means that if your verification is performed before 1 December, the Current Codes will be applicable but after that the changes will be applicable.

Revised Code Series 000, Statement 000: General Principles

- There is clarification about Priority Element compliance, particularly on Skills development and Enterprise and Supplier Development (ESD), which now specifies the sub-minimum points for the three categories under ESD.
- Exempted Micro Enterprises (EMEs) or Qualifying Small Enterprises (QSEs) that are at least 51% or 100% Black Owned will only receive the enhanced recognition if measured using the flow through principle. The modified flow through principle can no longer be used to receive the benefit of the enhanced recognition provisions.
- The Department of Trade and Industry (DTI) has also included a new section for the Eligibility of Joint Ventures (JV). This section gives guidance on how to calculate a consolidated BEE scorecard for Unincorporated JVs.
- The application of demographic targets will apply to Skills Development Expenditure on Bursaries for Black Students at Higher Education Institutions. Double counting of initiatives under Skills Development expenditure and bursaries is not permitted.
- The cap on informal training and informal workplace skills development expenditure has increased from 15% to 25%.
- The provisions regarding recognisable expenses for bursaries are extended to include ancillary costs for subsistence, catering, travel and accommodation, without a limit.
- The cap on ancillary costs such as accommodation, catering, travelling and employing a skills development facilitator remains at 15% but the cap does not apply to bursaries.
- The inclusion of stipends under formal skills development expenditure is extended to include bursary students. Stipends can now be claimed for employees linked to learnerships, internships, apprenticeships and bursary programmes, whereas previously they could only be claimed for learnerships, internships and apprenticeships.
Revised Code Series 400: General Principles for Measuring Enterprise and Supplier Development

The amended Enterprise and Supplier Development Generic scorecard is detailed below with the changes noted:

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Weighting points</th>
<th>Compliance Target</th>
<th>Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Preferential Procurement</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B-BBEE Procurement Spend from all Empowering Suppliers based on the B-BBEE Procurement recognition levels as a percentage of Total Measured Procurement Spend (TMPS).</td>
<td>5</td>
<td>80%</td>
<td>No changes.</td>
</tr>
<tr>
<td>B-BBEE Procurement Spend from all Empowering Suppliers that are QSE’s based on the applicable B-BBEE Procurement recognition levels as a percentage of TMPS.</td>
<td>3</td>
<td>15%</td>
<td>No changes, however certain qualifying Generic entities may be recognised here. See narrative below.</td>
</tr>
<tr>
<td>B-BBEE Procurement Spend from all Empowering Suppliers that are EME’s based on the applicable B-BBEE Procurement recognition levels as a percentage of TMPS.</td>
<td>4</td>
<td>15%</td>
<td>No changes, however certain qualifying Generic entities may be recognised here. See narrative below.</td>
</tr>
<tr>
<td>B-BBEE Procurement Spend from all Empowering Suppliers that are at least 51% Black Owned based on the applicable B-BBEE Procurement recognition levels as a percentage of TMPS.</td>
<td>11</td>
<td>50%</td>
<td>The points were increased from 9 to 11 and the compliance target has increased from 40% to 50%</td>
</tr>
<tr>
<td>B-BBEE Procurement Spend from all Empowering Suppliers that are at least 30% Black Women Owned based on the applicable B-BBEE Procurement recognition levels as a percentage of TMPS.</td>
<td>4</td>
<td>12%</td>
<td>No changes.</td>
</tr>
<tr>
<td>Bonus Points: B-BBEE Procurement spend from Empowering Designated Group suppliers that are at least 51% Black Owned.</td>
<td>2</td>
<td>2%</td>
<td>No changes.</td>
</tr>
<tr>
<td><strong>Supplier Development</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Annual value of Supplier Development (SD) contributions made by the Measured Entity as a percentage of the Target.</td>
<td>10</td>
<td>2% of NPAT</td>
<td>No changes except for the extension of beneficiaries to include qualifying Generic Entities.</td>
</tr>
<tr>
<td><strong>Enterprise Development</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Annual value of Enterprise Development (ED) contributions made by the Measured Entity as a percentage of the Target.</td>
<td>5</td>
<td>1% of NPAT</td>
<td>No changes except for the extension of beneficiaries to include qualifying Generic Entities.</td>
</tr>
<tr>
<td>Bonus point for the graduation of one (or more) ED beneficiary to the SD level.</td>
<td>1</td>
<td></td>
<td>No changes.</td>
</tr>
<tr>
<td>Bonus point for creating one or more jobs directly as a result of ED and SD initiatives by the Measured Entity.</td>
<td>1</td>
<td></td>
<td>No changes.</td>
</tr>
</tbody>
</table>

The multiplier of 1.2 for first-time suppliers has been removed and replaced by enhanced recognition of 1.2 times for purchasing from suppliers who are at least 51% Black Owned or 51% Black Woman Owned using the flow through principle. The modified flow through principle cannot be used.

Beneficiaries of ED and SD contributions are EME’s, QSE’s or Generic Entities that are at least 51% black owned or black woman owned whose qualification is achieved using the flow through principle. In the case of a Generic Entity they will only qualify as an ED or SD beneficiary if they were an EME or QSE at the time that they first received contributions from the Measured Entity. The Measured Entity will be allowed to recognise ED and SD contributions to these Generic Entities for five years from the first time that the Measured Entity assisted them.

A similar qualification applies to procurement from Generic entities who were EMEs or QSEs when the Measured Entity first procured from them. For a period of five years from the date that the Measured Entity first procured from these Entities, they can claim the spend as if they were a QSE or an EME, even if they have now become a Generic entity.

The amendments also clarify that a SD beneficiary is part of the measured entity’s supply chain, whereas an ED beneficiary is not.

The Benefit Factor Matrix has been amended to allow 50% of Guarantees provided on behalf of an ED or SD beneficiary to be claimed instead of 3% as before.

**Revised Schedule 1, Interpretation and Definitions**

The following amendments have been made to the definitions set out in schedule 1:

- **Absorption**
  
  The definition of absorption has changed. Absorption is now restricted to securing a long-term contract of employment for the Learner, Intern or Apprentice and no longer includes further education and training.
• Long-term contract of employment
A new definition has been added. A long-term contract of employment means a legal agreement between an individual and an entity for which the individual would work, until his or her mandatory date of retirement.

• Designated Group Supplier
This is a new definition and refers to a supplier that is at least 51% owned by black people defined under Black Designated Groups; that is, unemployed black people not attending or waiting admission to attend an educational institution, black youth, black people with disabilities, black people living in rural areas, black military veterans.

Munetsi is a B-BBEE Consultant with RSM (South Africa).

COLLABORATIVE PARTNERSHIPS:
THE TIME IS RIGHT FOR A PARADIGM SHIFT

LUVUYO BONO AND CINDY Foca

Globally there has been a push back against outdated models of dispute resolution, and a strong pull towards collaborative partnerships which promote economic growth and democracy.

In South Africa, there was a time when labour disputes had no other platform but the court in which to be resolved – which was not only costly, but ineffective, with only 20% of disputes being settled.

The Commission for Conciliation, Mediation and Arbitration (CCMA) eventually replaced the Industrial Court, shifting from the adversarial model of relations to a dispute resolution model based on promoting greater co-operation and industrial peace. The CCMA was established in terms of the Labour Relations Act (66 of 1995) (LRA).

The LRA regulates the employment relationship and aims to promote economic development, social justice, labour peace and democracy in the workplace. The Act levelled the playing field significantly in terms of the powers accorded to both the employer and employee parties.

Bodies such as the CCMA have enjoyed great success since the dawn of democracy in South Africa, boasting a national settlement rate of 70%.

The paradigm shift resulted in a more co-operative model based on collective bargaining, greater participation, organisational rights, effective resolution of conflict and higher levels of co-operation resulting in greater flexibility and improved productivity outcomes.

Another entity established in terms of the LRA is the Education Labour Relations Council (ELRC). The formation of the bargaining council in 1994 was a significant milestone for labour relations and education in South Africa. Over the years, the operations of the ELRC have created a high degree of stability in employer-employee relations in public education, and it has played a major role in maintaining labour peace in public education.

Much like the transformation in the CCMA, the role of the labour parties in the ELRC has shifted over the years and teacher unions in South Africa are starting to play an active role in changing learning and teaching conditions in classrooms.

But where to from here?

While the LRA provided a significant framework in a post-apartheid climate to ensure democracy and fairness in the workplace, recent developments in the labour environment in South Africa and abroad have necessitated a shift to improve on the advances made over the years. What will the next paradigm shift for labour relations in South Africa look like?

We strongly believe the method of Labour-Management Collaborative Partnerships is the “next big thing” as an innovative, universal platform designed to resolve labour disputes. It is not really a question of if this model will come to South Africa, but rather when.

Cultivating a greater understanding of this model and its successes should be on the radar of all professionals with an interest in growing the economy. In layman’s terms this method of co-management is when labour (unions) and the employer work towards making an organisation or business productive, while looking after the interests of one another.

Labour Management Collaborative Partnerships not only influence the quality of decisions made leading from labour disputes; they also have a positive impact on the quantity and diversity of solutions and their implementation in the workplace.

The Amended Codes will be effective from 1 December. This means that if your verification is performed before 1 December, the Current Codes will be applicable but after that the changes will be applicable.

Munetsi
Having both management and labour on the same page serves as a catalyst for successful collaboration, since it creates a positive climate and promotes better communication and information sharing. The historical perception of labour parties in South Africa has always been that of establishments that bargain exclusively for salary increases or instigate strike action when demands are not met. This narrow view has changed over the years and the scope of responsibility and expectations placed on, for example teacher unions, far exceed this constrained view.

Previously, collaboration and partnership to achieve associated goals did not form part of the dialogue involving employer and employee parties. This shift requires synergy between parties, and is the central distinction of the Labour Management Collaborative Partnerships model.

A collaborative system recognises the importance of every employee’s voice. It advocates for team-based structures that recognise the group, as opposed to the individual.

This may sound great in theory, but how will it work in practise? The logical starting point would be to consider the United States where this model has reaped proven success in the public education system. Countering 16 years of apparent ineffective market reforms, this alternate path to role in school reform by partnering with administrators to improve teaching and learning in a dramatic way.

If empowering educator collaboration in public schools in the United States has had such a positive impact on poverty alleviation and building democracy, it would be advantageous for our country to consider this model in labour practices to maximise the growth potential of South Africa’s currently stagnating economy.

Advocate Bono is an Advocate and Foca, General Secretary at Education Labour Relations Council.

RUNNING SCARED: WHAT TO DO WITH A RELUCTANT WITNESS OF MISCONDUCT

JOHAN OLIVIER AND SIYA NGCAMU

Witnesses of misconduct in the workplace are cognisant of being branded as “sell-outs” and traitors in the workplace. Quite often, they are not prepared to testify because they are scared or have been exposed to intimidation and threats of violence at the hands of the accused employee or their supporters. More particularly, employees are more reluctant to testify where the misconduct is committed during strikes, or where the misconduct relates to a trade union shop steward or theft.
Offending employees should not be given an opportunity to get away with serious misconduct by intimidating fellow employees who witnessed their misconduct. Witnesses of misconduct should also be aware that in the event that they fail to disclose misconduct of a fellow employee, they risk being subjected to disciplinary action.

Employers must be aware that there are remedies available to either present the evidence of the reluctant witness or to discipline a witness who fails to disclose knowledge of misconduct of fellow employees.

The recent Constitutional Court case, NUMSA obo Nganezi & Others v Dunlop Mixing & Technical Services (Pty) Ltd & Others (CCT202:18) [2019] ZACC 25, confirms that where an employee is aware that a colleague could potentially be guilty of misconduct, they should bring this to the employer’s attention and failing to do so can constitute derivative misconduct. However, while an employee has a duty to disclose knowledge of misconduct of fellow colleagues, this duty will only apply where the employer is able to offer protection and guarantee the safety of the employee in making such a disclosure.

An employer may offer protection and guarantee the safety of the employee in making a disclosure by calling on them to give their evidence in-camera or in a sworn written statement.

**In-camera evidence**

In-camera proceedings allow the identity of the witness to remain anonymous, while still giving admissible evidence which can be cross-examined. This process is allowed in situations where the witness has a genuine fear that if they provide evidence in an open forum they may not be safe, or where it would be prejudicial to one or all of the parties. Where in-camera proceedings are to be permitted in disciplinary hearings or arbitrations, they must be conducted in light of the three tier approach formulated in NUM & Others v Deelkraal Gold Mining Co Ltd [1994] 7 BLR 97 (IC):

- First, the employer presents evidence of an objective nature to establish that the witness has a genuine and real fear and the reasons for his/her fear;
- If the first stage is satisfied, the witness is called to give evidence (in-camera) regarding his/her fear and the reasons for it. The decision maker usually attends at the secret location in order to assess the demeanour of the witness;
- If the second stage is satisfied and the decision maker believes the witness truly is fearful and expects to be intimidated or harmed, the witness is allowed to give evidence in-camera on the merits. The witness is not required to give their name or any other information that would identify them.

To disguise the voice of the witness, the in-camera proceedings should ideally take place with the use of telephones and voice changing equipment. The presiding official attends with the witness in a separate location, while the witness is questioned on their version of events by the accused employee’s representative, who is in a separate location.

**Sworn statement**

Sometimes witnesses refuse to give evidence in either an open forum or in-camera. While caution must be exercised, witnesses may be permitted to give evidence in written statements on oath. Such evidence will be regarded as hearsay evidence and cannot be tested through cross-examination nor can the demeanour of the witness be observed. This version is given by the person who interviewed the witness and took the statement. They must also convince the decision maker about the witness’s fears and the reasons for not giving evidence in person.

Section 3 of the Law of Evidence Amendment Act affords a presiding officer a discretion to admit hearsay evidence if they are satisfied that this is suitable having regard to, among other factors, the reason why the evidence is not given by the person who has direct knowledge thereof. On several occasions our courts have approved decisions taken by employers and commissioners to rely on written statements in circumstances where witnesses were too afraid to testify.

In Southern Sun Hotels (Pty) Ltd v South African Commercial Catering & Allied Workers Union and another [2019] JOL 45117 (LAC), the Labour Appeal Court, recognised that if the hearsay evidence is excluded, then the employer and the victim may suffer serious prejudice because the employer would have no way of proving the accused is guilty on what is clearly a case of serious misconduct. Further, to exclude the hearsay evidence may have the effect that people can indulge in misconduct with impunity if they ensure that com-
plaintants and witnesses are harmed or intimidated into not coming to an open forum such as a disciplinary hearing or arbitration to testify against them.

However, the court in Southern Sun Hotels (Pty) Ltd emphasised that hearsay evidence must not be admitted without due regard to the rights and interests of those accused of misconduct.

Recently the LAC in Exxaro Coal (Pty) Ltd v Chipana and Others (JA161/17) [2019] ZALAC S2 (27 June 2019) clarified the CCMA commissioners duties as far as the admission of hearsay evidence is concerned. The court noted that while commissioners have a discretion to determine the dispute in a quick and fair manner, they must not arbitrarily receive or exclude hearsay evidence.

When dealing with the admission of hearsay evidence, commissioners and arbitrators are to observe certain safeguards and precautions. The court in Exxaro further reaffirmed that while a commissioner has a responsibility to be alert to the introduction of hearsay evidence and not remain passive, a party must make it known as early as possible in the proceedings that they intend to rely on hearsay evidence. This will enable the other party to appreciate the challenge they are facing. Accordingly, commissioners are tasked at the outset to ensure parties indicate their intention to rely on hearsay evidence.

Most importantly, the timing of a ruling on admissibility of hearsay evidence is crucial to ensure fairness in the proceedings. The court in Exxaro made it clear that the ruling must be given when the evidence is adduced or sought to be adduced.

The principles relating to the admission of in-camera evidence or hearsay evidence in the form of written statements applies not only to arbitration proceedings but should be applied by presiding officers in disciplinary hearings.

Offending employees should not be given an opportunity to get away with serious misconduct by intimidating fellow employees who witnessed their misconduct. Witnesses of misconduct should also be aware that in the event that they fail to disclose misconduct of a fellow employee, they risk being subjected to disciplinary action. However, employers should and can offer protection to witnesses to make it possible to present evidence of such serious misconduct even if they face intimidation or fear for their lives.

Olivier is a Partner and Ngcumu a Candidate Attorney with Webber Wentzel.

ENSURING PROTECTION OF EMPLOYEES DISCLOSING INFORMATION

NONKULULEKO MKHWANAZI AND LUSANDA RAPHULU

An employee cannot be expected to spill the beans about colleagues implicated in incidents of misconduct unless the employer has played its part by protecting that employee’s rights.

This is the crux of an important recent Constitutional Court judgment that should have employers moving swiftly to revise company policies if these unilaterally require employees to disclose information about their peers.

The judgment, delivered on 28 June 2019, ends a long-running legal standoff between the National Union of Metalworkers of South Africa (NUMSA) and Dunlop Mixing and Technical Services (National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others (CCT202/18) [2019] ZACC 25 (28 June 2019)). The ruling, in favour of NUMSA, makes it clear that when it comes to disclosing information about incidents of misconduct, employers can no longer place the “duty of good faith” solely on the shoulders of employees.

Duty of good faith is not unilateral

Previously, our courts have endorsed the position that if an employee fails to disclose knowledge of misconduct by other employees towards the employer they could be disciplined (including dismissal) for “derivative misconduct”. The rationale was that by refusing or failing to disclose such knowledge, an employee would be in breach of the duty of good faith.

However, the duty of good faith should be reciprocal, not unilateral, according to the latest Constitutional Court judgment.

The judgment concerned the action taken against a group of Dunlop employees who were dismissed in 2012 on the basis of derivative misconduct.

In August of that year, over 150 employees embarked on a protected strike that turned violent. Eventually, all of the employees were dismissed: some for being positively identified as committing violence, some for being identified as present when the violence took place, and some who were not identified as being present but failed to disclose information about the perpetrators. In relation to the last group of employees dismissed on grounds of derivative misconduct, Dunlop argued that they had participated in the strike
and therefore had knowledge of the perpetrators of the violence; omitting to disclose such information constituted a breach of their duty of good faith.

This was challenged by the employees’ representative, NUMSA, which argued that no derivative misconduct had been established and that the legal duty of good faith ought to have been reciprocal. At the very least, Dunlop ought to have guaranteed the employees’ safety before expecting them to come forward to disclose information.

As the Court put it: “Circumstances would truly have to be exceptional for this reciprocal duty of good faith to be jettisoned in favour of only a unilateral duty on the employee to disclose information”.

Effectively, what this judgment means is that employers who do not abide by their own duty of good faith towards the employees can no longer dismiss employees who refuse or fail to disclose information.

Both the Labour Court and Labour Appeal Court agreed with Dunlop and confirmed that the dismissal of the employees on grounds of derivative misconduct was fair. In contrast, the Constitutional Court held that the dismissal of these employees was unfair.

The employer has a reciprocal, concomitant duty
In essence, the Constitutional Court has confirmed that the duty of good faith in the context of an employment relationship is reciprocal. It said that an employee’s duty to disclose knowledge “must be accompanied by a reciprocal, concomitant duty on the part of the employer to protect the employee’s individual rights, including the fair labour practice right to effective collective bargaining”. The Constitutional Court also noted the importance of worker solidarity in the context of a strike. It highlighted that this would be undermined if employers were required to disclose information without any reciprocal obligation on an employer’s part to, for example, provide guarantees for safety and protection, before, at the time of and after the disclosures.

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WHY THE NEED FOR THE EMPLOYER TO HAVE EMPLOYERS PRACTICE LIABILITY?

BOITUMELO KGOEBANE

Employment Practice Liability known as EPL insurance or EPLI, provides coverage to employers against claims made by their employees who believe their legal rights as employees of the company have been violated.

In South Africa, there are approximately 800 employee versus employer cases a day at the CCMA. Of these, at least half are won by the aggrieved employee. The CCMA can award up to 12 months’ salary for example, for
an unfair dismissal case. EPL is designed to protect employers against third party liability claims for wrongful acts arising from the employment processes. This policy will provide cover for loss and/or damage to an employer due to employment related issues which can be attributed to the insured. Claims instituted by any current, prospective or past employees emanating from multiple employment related allegations and claims such as:

<table>
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<tr>
<th>Employment Practice Liability</th>
<th>Employers Liability</th>
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<tr>
<td>Covers claims of unfair labour practice</td>
<td>Covers injury to employees at work</td>
</tr>
<tr>
<td>Damages usually awarded by the CCMA and Labour Court</td>
<td>Damages typically awarded by the Magistrates Court or the High Court</td>
</tr>
<tr>
<td>The insured will be liable to pay the full amount.</td>
<td>The Government provides assistance in terms of the Compensation for Occupational Injuries and Diseases Act. For that reason, this extension excludes cover provided by COID.</td>
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- unfair dismissal, discharge or termination of employment contract;
- failure to promote, demotion, suspension, warnings, probation;
- inaccurate whistle blowing;
- discrimination;
- sexual harassment/victimisation;
- wrongful dismissal for misconduct, poor performance, illness, injury or incompatibility;
- retrenchment;
- defamation;
- negligence appraisal.

What is the difference between EPLI & employers liability?

CCMA (Council for Conciliation, Mediation and Arbitration) dispute statistics show a marked increase in employment-related legal disputes in South Africa. Statistics indicate that there are over 200 000 cases reported to the CCMA and Bargaining Councils each year, with the vast majority of these cases with regard to unfair dismissal. In terms of the quantum, definitive figures are difficult to obtain. However, it is estimated that awards of compensation exceed R150 million per annum. This translates to about one in eight employers being likely to have a dispute declared against them each year.

The possibilities for employment actions against businesses are multiplying; most staff are aware of their rights and are prepared to take action against employers if they think their rights are breached. Meanwhile, compensation continues to increase, setting precedents and giving employers everywhere context for their grievance. Employment Practices Liability (EPLI) insures employers against allegations of unfair dismissal, sexual harassment, discrimination and failure to employ and covers public and private companies, directors and officers, management personnel, and individual employees.

The question is no longer whether a firm will face an employment practices liability (EPL) claim, but rather, when and how much it will cost, and what damage it might cause to reputation and brand image. Sexual harassment is one of the most significant employment issues in the corporate world today, but issues such as discrimination, hostile work environment, and retaliation are also challenging employers in an increasingly complex legal and regulatory environment.

An EPL policy can be an excellent way to protect a firm and its employees from allegations of workplace violations and provides comprehensive protection from every possible kind of discrimination-related liability. EPL coverage is usually written on a claims-made basis. This means that the incident resulting in the claim had to occur during the coverage period. Because employment claims often come months or even years after the alleged incident, an employer might be vulnerable if the insurance coverage was dropped or if tail coverage (liability insurance that extends beyond the end of the policy period) wasn’t purchased.

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EPL policies are “claims made”, which means the policy that responds was in place when the claim was made against the policy holder, not when the wrongful act was alleged to have taken place. A claim under EPL is defined as being monetary or non-monetary relief and can come directly from an employee or can be instituted by an attorney.

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