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KIETI LAW LLP, KENYA

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Employment Law
ALERT

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How employers in Kenya can successfully manage the redundancy process

Declaration of redundancy is a managerial prerogative driven by business operations and market dynamics. This being a strategic business decision, the courts are reluctant to interfere unless it is sufficiently demonstrated that there was no valid and or justifiable reason for the redundancy.

On 20 January 2023, the Employment and Labour Relations Court (ELRC) in Eldoret delivered its judgment in a long-running employment dispute in *Lebo and 331 Others v Kenya Power & Lighting Co Ltd* (Cause 17 of 2019) [2023]. In his opening words, Hon. Justice Aboudha stated, "*This matter has a long and chequered history having been filed for the first time as HCCC No. 74 of 2003 long before the present court came into existence.*"

After 20 years, the ELRC found in favour of the Kenya Power & Lighting Company Ltd (KPLC), the employer and respondent in the suit. The court dismissed the claimants' suit stating that it was entirely without merit. The court held that the respondent's reasons for declaring the claimants redundant were valid and justified. It further found that the respondent had adhered to the law applicable at the time concerning the redundancy process. This judgment adds to the growing jurisprudence that confirms that the courts are unlikely to interfere with a redundancy exercise where it is demonstrated that the reasons for it are valid and justifiable and that the procedure as set out in the law has been followed.

This alert will identify the fundamental elements of redundancy highlighted in the case and what an employer must keep in mind when carrying out a redundancy exercise.

Overview of the case

Between 1998 and 2003, KPLC faced several challenges. Most notable was a prolonged drought that had devastated the country and significantly affected KPLC's power generation capabilities. This ultimately adversely affected its business operations. To sustain its operations, the respondent required restructuring and implementation of cost-cutting measures to reduce its running costs.

How employers in Kenya can successfully manage the redundancy process

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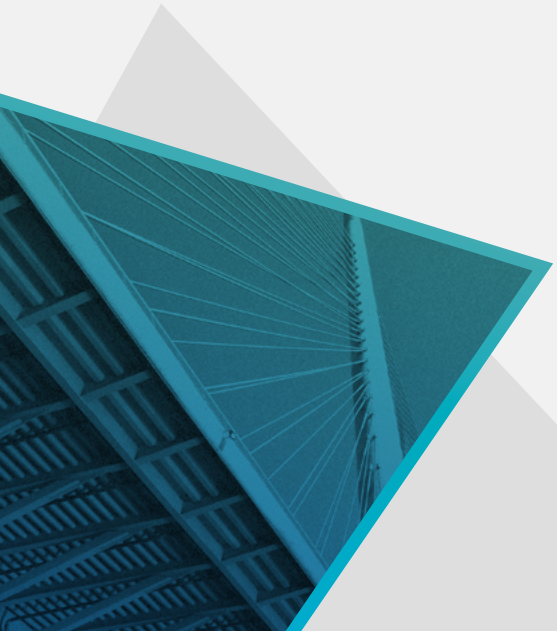

Redundancy was one of the recommendations made to the respondent to help it rescue its operations. Consequently, the claimants' employment contracts were terminated between 30 June 2001 and 19 March 2002 under the respondent's staff reduction programme. The claimants thereafter filed their suit against the respondent in 2003.

The court identified two main issues that required determination: whether the respondent had justifiable reasons for the redundancy and whether it had followed the applicable law at the time.

Fundamental elements of redundancy

For a redundancy exercise to be considered lawful, an employer must demonstrate that there are valid and justifiable reasons for the redundancy and that the procedure provided in the Employment Act of 2007 (Employment Act) has been followed.

Valid and justifiable reason

In this particular case, the respondent's reason for declaring a redundancy was that its business had been adversely affected by a prolonged drought which had significantly affected its power generation capabilities and necessitated the cutting of costs. In confirming that this was a valid and justifiable reason for the redundancy, the court held that:

> *"Declaration of redundancy is a managerial prerogative driven by business operations and market dynamics. This being a strategic business decision, the court is reluctant to interfere unless it is sufficiently demonstrated that there was no valid and or justifiable reason for the redundancy,* ***which is not the case here****."* (Emphasis ours)

Consequently, the court was persuaded that the effects of the prolonged drought constituted valid reasons for the respondent's declaration of redundancy.

In addition to economic hardships, other valid and justifiable reasons for redundancy may include, but are not limited to: organisational restructuring which could be the result of a merger or acquisition, and which may result in the abolition of some positions in the new business structure; automation and incorporation of technology which may make some functions traditionally performed by people obsolete; ceasing of operations and company closure; and a company's inability to sustain its wages and salaries.

How employers in Kenya can successfully manage the redundancy process

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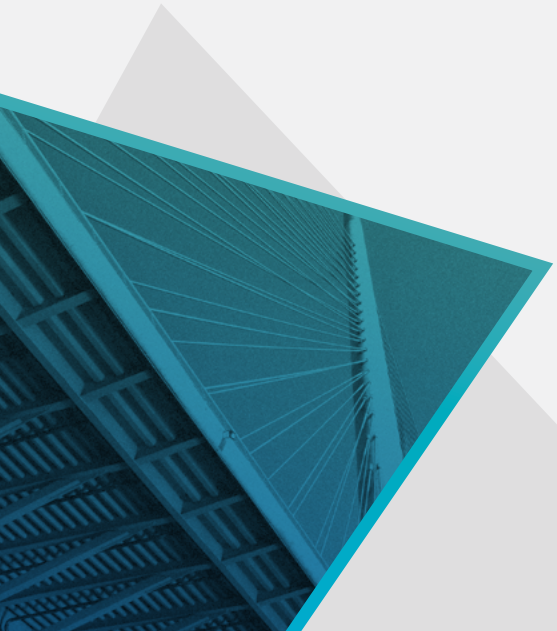

Procedure

As this particular case was filed in 2003, the ELRC held that the law applicable at the time the dispute arose was the now repealed Trade Disputes Act (Repealed Act) and the 1999/2000 collective bargaining agreement (1999/2000 CBA). Upon reviewing the requirements under the Repealed Act and 1999/2000 CBA the court held that the employer had complied with the requirements as it had informed the relevant trade union of the intended redundancies. Further, although not a requirement under the Repealed Act, the employer had also informed the Minister of Labour.

Redundancy procedure under the Employment Act

Today, section 40 of the Employment Act provides for and governs the termination of employment on account of redundancy. Section 40(1) sets out the requirements that must be fulfilled for a redundancy process to be valid under the law. These requirements are:

- Issuance of notice of the intended redundancy to the employee/trade union. An employer is required to issue a notice of intended redundancy to the employee personally in writing. If the employee is a member of a trade union, the employer should issue the notice to the trade union. This notice should be issued not less than one month prior to the intended date of termination on account of redundancy.
- The notice of intended redundancy must also be issued to the labour officer.
- Selection of the employees to be affected. An employer must give due regard to seniority in time and to the skill, ability and reliability of each employee to be affected by the redundancy.
- Issuance of notice of redundancy – this notice must be issued at least 30 days from the first notice (the notice of intended redundancy).
- Payment of terminal entitlements. An employee is entitled to their salary up to the date of termination, one month's notice pay or one month's wages in lieu of notice, any accrued but untaken leave days and severance pay at the rate of not less than 15 days' pay for each completed year of service.
- An employer also has an obligation not to place any employee at any disadvantage for being or not being a member of the trade union where a collective bargaining agreement (CBA) exists.

How employers in Kenya can successfully manage the redundancy process

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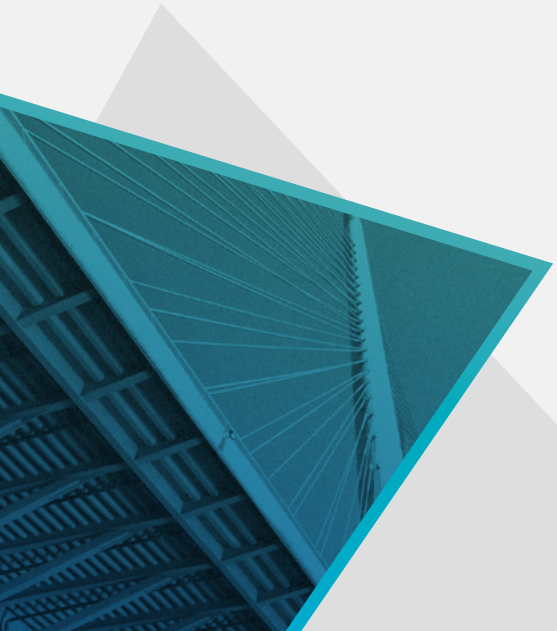
Although not expressly set out in section 40(1) of the Employment Act, consultation is another key requirement that must occur before and during a redundancy process. The right to be heard is a key element of fair labour practices. The Kenyan courts have stressed the importance of this and placed an obligation on employers to engage in meaningful negotiations with any employee who will be affected by a redundancy and, where there is a CBA, the relevant trade union. The purpose of these consultations is to give the parties an opportunity to consider the redundancy proposal and negotiate alternatives to the intended redundancy. An employer must consider the responses received before making any final decision on the redundancy. Consequently, an employer intending to carry out a redundancy must follow the above process to ensure that the exercise is in compliance with the law.

Conclusion

Based on the outline above, for a redundancy to be considered to have been done in compliance with the law, the following elements must be present:

- valid reason(s) justifying the redundancy;
- notification of intended redundancy and meaningful consultation with all parties affected by and involved in the redundancy process;
- adherence to the legal procedure on redundancy – if a CBA is in place, the procedure on redundancy should be adhered to by the employer; and
- payment of all terminal entitlements.

Christine Mugenyu and
Winfred Nakkazi Kiberu



The limitation by the court to the application of retirement fund rules: Withholding of pension benefits in terms of the PFA

The High Court in Johannesburg in the case of *Hansen & Genwest (Pty) Ltd v Corporate Selection Umbrella Retirement Fund NO2* [2023] ZAGPJHC 102 (6 February 2023) dealt with the question of whether the trustees of a pension fund can be ordered to withhold pension fund benefits where there is an allegation of a member's liability to an employer for damages caused by reason of theft, dishonesty, etc.

The court in this case found in favour of the applicant on the basis that it successfully proved the requirements for an interim interdict as well as the application of the provisions of section 37D of the Pension Funds Act 24 of 1956 (PFA), read with the applicable rule of the fund.

Section 37D of the PFA provides for a retirement fund to deduct any amount due by the member to an employer in respect of the damages suffered by the employer arising from the employee's wrongdoing. It is, however, worth noting that this provision is solely applicable to an employer who is able to prove that the damages arose from the employee's conduct.

Background

A summary of the facts is set out below.

Mrs Claudia Wilkinson and her husband, Mr Shaun Wilkinson, the third and fourth respondents in the matter, were both employed by the applicant, Hansen & Genwest (Pty) Ltd. Mr Wilkinson was employed as a service technician who resigned from his employment in December 2021. Mrs Wilkinson was employed as the applicant's assistant financial manager until she was dismissed on 26 May 2022 following a disciplinary enquiry in which she was charged with and found guilty of misconduct. At the time that the application was heard, Mrs Wilkinson had not challenged the fairness of her dismissal.

In April 2022, the applicant instituted action against Mr and Mrs Wilkinson as joint wrongdoers together with Seloane Industries (Pty) Ltd, the fifth respondent, a company of which Mr Wilkinson was a director. The applicant sought to *inter alia* obtain an order requiring Mr and Mrs Wilkinson to pay damages in the sum of R1,360,030.63, arising out of alleged breaches by Mr and Mrs Wilkinson of their contractual and fiduciary duties in assisting the fifth respondent to compete with the applicant.

The limitation by the court to the application of retirement fund rules: Withholding of pension benefits in terms of the PFA

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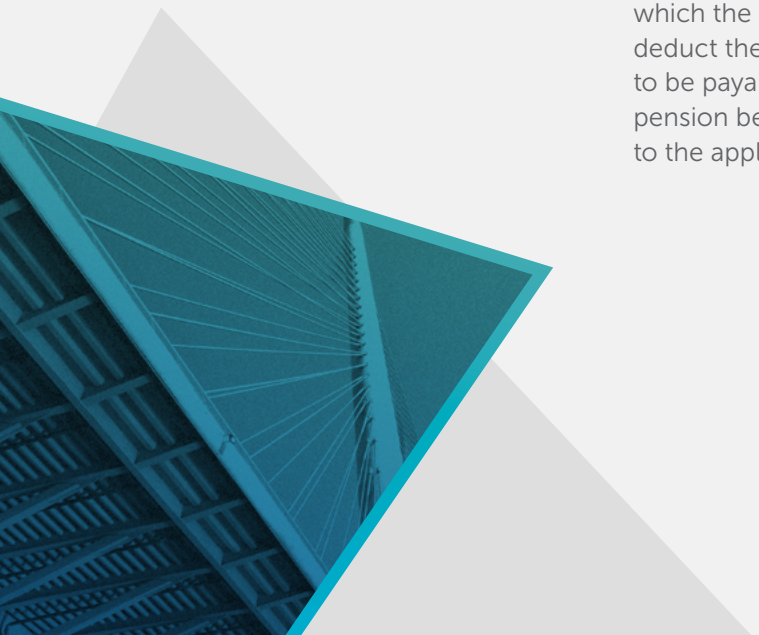

The damages amount was calculated on the basis that it represented the gross profit that the applicant would have earned had it exploited 10 specific transactions that it contends were unlawfully diverted to the fifth respondent.

The applicant contended that the damages that it claimed from Mrs Wilkinson were caused to it "*by reason of any theft, dishonesty, fraud or misconduct*" on her part as contemplated in section 37D(i)(b)(ii)(bb) of the PFA read with rule 12.4.5 of the fund's rules. It further contended that the PFA and the rules of the fund would be the governing principles upon which the fund would be entitled to deduct the amount of damages found to be payable from Mrs Wilkinson's pension benefit and to pay them over to the applicant.

On 30 November 2022, the fund indicated that, while it had decided to withhold Mr Wilkinson's pension benefits in terms of its rule, to the value of R449,219.30, it had elected not to withhold the pension benefits of Mrs Wilkinson to the value of R387,926.98 on the basis that the condition stipulated in rule 12.4.5 had not been met.

Rules of the fund

Rule 12.4.5 of the fund rules provides that:

> "*Where the employer or the fund seek to recover an amount referred to in section 37D(1)(b)(ii)(bb) of the Act by obtaining a judgment in value against the member from any competent court, notwithstanding anything to the contrary stated in these rules, the fund shall be entitled to withhold the amount to be recovered until the earlier of the date on which proceedings are determined, settled or withdrawn, provided that:*
>
> *(a) the board of trustees is satisfied that the employer or fund has established a prima facie case against the member;*
>
> *(b) the board of trustees are of the opinion that the employer or fund has a reasonable chance of succeeding in the proceedings instituted against the member; and*
>
> *(c) the employer or fund has taken all reasonable steps to enter the case on the rolls of the court at the earliest possible date and is not responsible for any undue delays in the prosecution of the proceedings.*"

The limitation by the court to the application of retirement fund rules: Withholding of pension benefits in terms of the PFA

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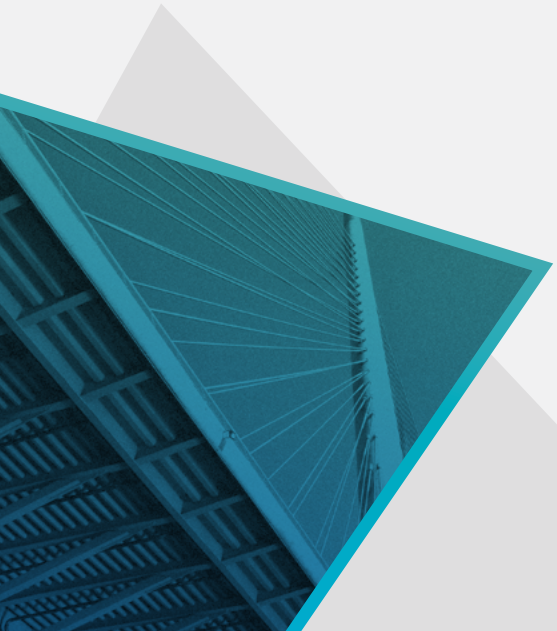

In this regard Mrs Wilkinson opposed the application on the basis that the applicant had not shown that its damages claim against her was based on the kind of conduct contemplated in section 37D(1)(b)(ii) of the PFA, namely *"any theft, dishonesty, fraud or misconduct"*. Essentially, this echoes the reason given by the pension fund for declining to accede to the applicant's request.

Secondly, she argued that the amount of damages claimed from her was *"excessive and inflated"* because (i) a number of the allegedly diverted corporate opportunities never in fact resulted in work or services being rendered by the fifth respondent; (ii) *"the total sum of work and/or services rendered by the fifth respondent for the period of complaint and having regard to the profits made reflects a more realistic amount of not more that R200,502.79"*; and (iii) the pension benefits of Mr Wilkinson in the amount of R449,219.30 were already being withheld.

Thirdly, she argued that the applicant had already admittedly withheld the sum of approximately R62,963.45 (net after tax) from her in respect of accrued leave pay as well as an amount of R10,908.65 in respect of tax deductions which were not due.

In response to Mrs Wilkinson's contention that these amounts had both been unlawfully withheld, the applicant contended that it was entitled to withhold these sums pursuant to clause 4.4 of her employment contract, which authorised the applicant to deduct from her remuneration *"all amounts which may be due by the employee to the employer for any reason"*.

Finally, Mrs Wilkinson contended that the effect of the order would be to allow the applicant to *"jump the queue"* of creditors and become a preferential creditor to the detriment of other creditors in the event that damages were awarded against her in the application and she was unable to satisfy the judgment.

The issues before the court

It had to be determined whether the court was permitted to grant the applicant the relief it sought, which was an interim order *"interdicting and restraining"* the pension fund from paying out the whole or part of Mrs Wilkinson's pension benefit pending the outcome of the final interdict.

The court also had to consider if the conduct the applicant sought to rely upon was recorded in paragraph 18 (read with paragraphs 16, 17 and 19) of the particulars of the claim.

In paragraph 18, it was alleged that Mrs Wilkinson *"assisted"* the fifth respondent, a competitor of the applicant, *"by processing [its] invoices and submitting them to its customers; and following up with [its] customers regarding payments and other matters relating to [its] business"*. In particular, the applicant's case was that by engaging in this conduct, Mrs Wilkinson *"assisted"* her husband

The limitation by the court to the application of retirement fund rules: Withholding of pension benefits in terms of the PFA

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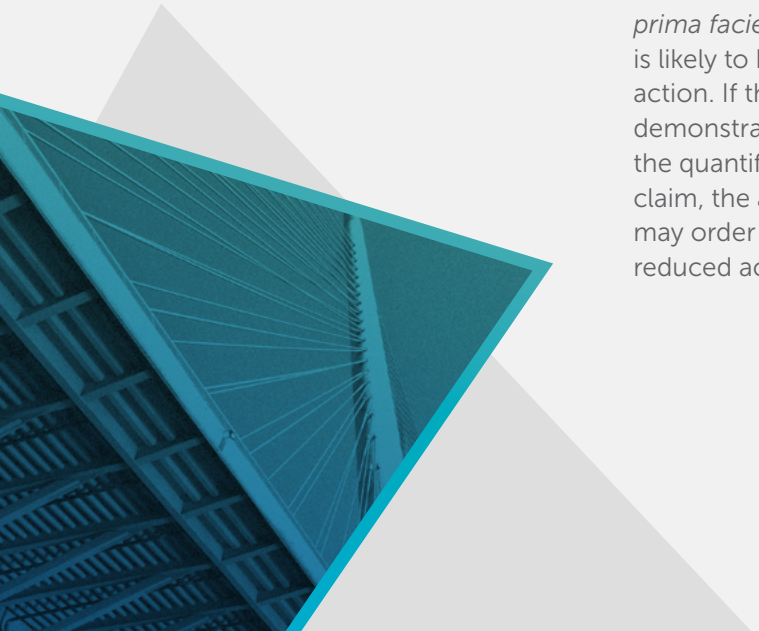

to divert corporate opportunities to the fifth respondent which ought to have been available to and secured by the applicant, unlawfully making use of customer connections established during her employment with the applicant, providing the fifth respondent with the applicant's confidential intellectual property, and giving the fifth respondent an unlawful advantage in competing with the applicant.

Finding

The court found that an applicant seeking relief of this nature can logically not be entitled to an order restraining a greater sum than it is able to show (albeit merely on a *prima facie* basis) that the employee is likely to be ordered to pay in the action. If the employee is able to demonstrate serious doubt regarding the quantification of damages in the claim, the amount that the court may order to be withheld should be reduced accordingly.

In this regard, employers such as the applicant participate voluntarily in pension funds and may at the least be assumed to be well aware of their rules, if not bound by them. As such, the court did not consider that it would ever be appropriate to grant an order compelling the fund to undertake conduct that would involve a breach of its own rules.

Apart from requiring the employer to satisfy the board of trustees that it has established a *prima facie* right to recover damages from the member, the rule in question provides that the fund may only accede to a request to withhold the amount to be recovered under section 37D(1)(b)(ii)(bb) of the PFA, where the board of trustees is *"of the opinion that the employer has a reasonable chance of succeeding in the proceedings instituted against the member" and the employer has "taken all reasonable steps"* to advance its claim and is not responsible for any undue delays in the prosecution thereof.

In considering paragraph 18 of the applicant's pleadings, the court found that the fund did not act reasonably when it refused the applicant's request to withhold any portion of the third respondent's pension benefits. Its contention that the misconduct relied upon by the applicant was limited to allegations that the third respondent *"used company time to issue invoices or follow up on outstanding payments in respect of her husband's business"*, was unreasonable in light of the content of the particulars of the claim, and was an indication that it failed to properly consider the request.

The court, however, found it extremely unlikely that Mrs Wilkinson would be liable for 100% of the applicant's damages arising from the diversion of the corporate opportunities and consequently held that any apportionment of damages based on Mrs Wilkinson's degree of fault would be very unlikely to exceed 20% of the damages suffered by the applicant flowing from the diverted transactions in which she had been implicated.

The limitation by the court to the application of retirement fund rules: Withholding of pension benefits in terms of the PFA

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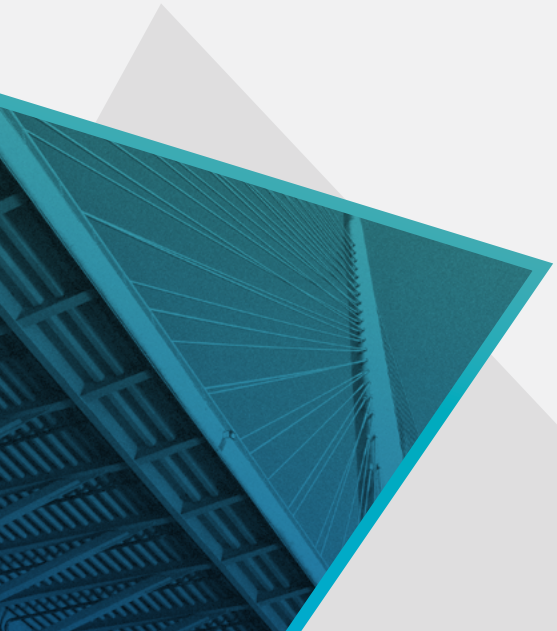
Conclusion

This judgment accords with the prevailing law as set out in section 37D of the PFA, which provides for the board of trustees to withhold the employee's benefits after assessing whether the employer holds a claim that may possibly stand in court. It goes without saying that when an employer makes an application to the pension fund for the deduction of the employee's benefit, based on allegations of theft, fraud or misconduct, the burden of proof rests on the employer to show that the claim is valid and that it is the legitimate victim of the dishonourable acts by the employee, which was done in this case.

The fund should be wary of not simply dismissing an employer's request without applying itself, the PFA and the rules of the fund to the facts before it. Failure to do so may expose the fund to being dragged to court to force it to do so.

Hedda Schensema and
Tshepiso Rasetlola



Monday, 20 March 2023 is coming – are you prepared? Tips to survive the national shutdown

The Economic Freedom Fighters (EFF) has announced a national shutdown on 20 March 2023. According to the EFF, the purpose of the shutdown is to highlight South Africa's socio-economic issues, including load shedding. The intention is to bring economic activity and movement to a halt by blocking road networks and disrupting the flow of services and goods.

The EFF will not be alone in this protest. Organised labour, including the South African Federation of Trade Unions (SAFTU) confirmed that it will join the national shutdown. This is significant because SAFTU has 24 trade union affiliates which span several sectors including facilities management, transport, the public sector, manufacturing, mining, and construction.

The right to initiate protest action is a constitutional right that is enshrined in section 17 of the Constitution and is regulated by the Regulation of Gatherings Act 205 of 1993. Furthermore, section 77 of the Labour Relations Act 66 of 1995 permits trade unions to embark on protest action to promote or defend the socio-economic interest of workers. SAFTU has complied with some of the procedural requirements of protest action, such as issuing a notice to the National Economic Development and Labour Council.

It has been reported that the EFF is in talks with some sectors, including the taxi industry, to join the national shutdown. A large portion of the workforce relies on public transport to commute to and from work. If the taxi industry, in addition to SAFTU affiliates and other political formations that have expressed their support, join the national shutdown, employers nationally will be impacted to some extent on Monday, 20 March 2023.

It is not a coincidence that Monday, 20 March is the day before Human Rights Day, which is a public holiday that also commemorates the Sharpeville massacre that took place in 1960 when apartheid police fired on a peaceful protest. Employers will accordingly have only three working days that week if the national shutdown occurs.

Considering the operational requirements of many businesses, employers may consider any of the following in preparing for the impact of the national shutdown:

- conducting a risk assessment to assess their exposure to potential risks;
- considering approving leave for 20 March 2023 as there may be many employees who will not be able to come to work;
- implementing flexible working arrangements for 20 March 2023, where possible; and
- concluding agreements to work overtime for the week of 20 to 24 March 2023, where relevant.

Ultimately, what is important is for employers to seriously consider the safety of their employees and their assets.

Thabang Rapuleng and Tamsanqa Mila

Protecting an individual's right to strike amidst widespread violence

On 13 March 2023, the Labour Appeal Court (LAC) handed down a judgment in an urgent appeal against the judgment and order of the Labour Court handed down a week earlier that interdicted the national public service strike called upon by the National Education, Health and Allied Workers' Union (NEHAWU).

The respondents in this matter consisted of various public bodies such as the Minister of Finance, the Department of Public Service and Administration, the Minister of Public Service and Administration, National Treasury, and the Public Service Coordinating Bargaining Council. It was contended that the legitimacy of a strike will be determined by the question of whether it serves a collective bargaining purpose. The respondents contended that the strike does not as it serves no collective bargaining purpose and that the applicant had abused the right to strike and it did so illegitimately and unlawfully.

It was further contended that due to budgetary constraints, National Treasury would not approve the additional wage increases which were being sought. Any collective agreement entered into would have been in breach of Regulations 78 and 79 of the Public Service Regulations, 2016 (Regulations) and thus related in the unlawfulness of the strike itself.

The court noted that demands or the strike itself cannot be rendered unlawful merely because the employer claims that it will not accede to such demands; has not required the approval to accede to such demands; or has not budgeted for such demands. Rather, the court held that this contention by the respondents failed to acknowledge both the power dynamics which collective bargaining seeks to address and the rights of unions and employees to exercise collective power.

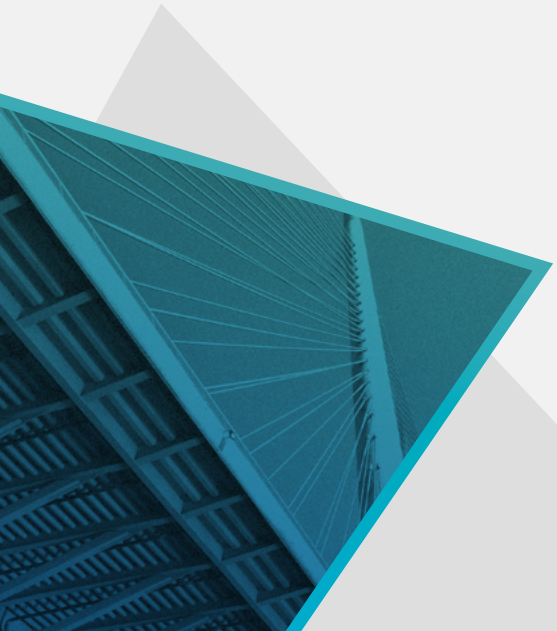
Protecting an individual's right to strike amidst widespread violence

CONTINUED

The LAC importantly made a point of noting the widespread violence and unlawful conduct inherent in this particular strike as well as the *"inaction of [the South African Police Service] in the face of criminal behaviour"*. In this regard, the court cited the Constitutional Court in *South African Transport and Allied Workers Union and Another v Garvas and Others* (with the City of Cape Town as an intervening party and the Freedom of Expression Institute as an *amicus curiae*) 2012 (8) BCLR 840 (CC) to allude to the fact that unlawful conduct and violence committed by others do not eliminate an individual's right to *"peaceful assembly"*.

The LAC substituted the order of 6 March 2023 by indicating that *"pending the final determination of the application for leave to appeal and any ensuing appeal"*, all strike action, picket or any other form of industrial action by NEHAWU has now been interdicted, NEHAWU was ordered to inform its members, officials and all those to whom it had given notice to strike of the order by no later than 13h00 on Monday 13 March 2023.

CDH's Employment Law practice



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2nd by BEE Deal Value.
3rd by General Corporate Finance Deal Flow.
3rd by BEE Deal Flow.
4th by M&A Deal Value.

2020
1st by M&A Deal Flow.
1st by BEE Deal Flow.
1st by BEE Deal Value.
2nd by General Corporate Finance Deal Flow.
2nd by General Corporate Finance Deal Value.
3rd by M&A Deal Value.
Catalyst Private Equity Deal of the Year.

2019
M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.
1st by BEE M&A Deal Flow.
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OUR TEAM

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

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

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

Jose Jorge
Sector Head:
Consumer Goods, Services & Retail
Director: Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Fiona Leppan
Joint Sector Head: Mining & Minerals
Director: Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Gillian Lumb
Director:
Employment Law
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

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

Bongani Masuku
Director:
Employment Law
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com

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

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

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

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

Hedda Schensema
Director:
Employment Law
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com

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

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

Faan Coetzee
Executive Consultant:
Employment Law
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com

Jean Ewang
Consultant:
Employment Law
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com

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

Nadeem Mahomed
Professional Support Lawyer:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com

OUR TEAM

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

Asma Cachalia
Senior Associate:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

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

Tamsanqa Mila
Senior Associate:
Employment Law
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

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

JJ van der Walt
Senior Associate:
Employment Law
T +27 (0)11 562 1289
E jj.vanderwalt@cdhlegal.com

Abigail Butcher
Associate:
Employment Law
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com

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

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

Fezeka Mbatha
Associate
Employment Law
T +27 (0)11 562 1312
E fezeka.mbatha@cdhlegal.com

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

Tshepiso Rasetlola
Associate:
Employment Law
T +27 (0)11 562 1260
E tshepiso.rasetlola@cdhlegal.com

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

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

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 100 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA