Deneys

Labour Law by the Book Volume 4

A collection of articles related to South African Employment and Labour law and regulations

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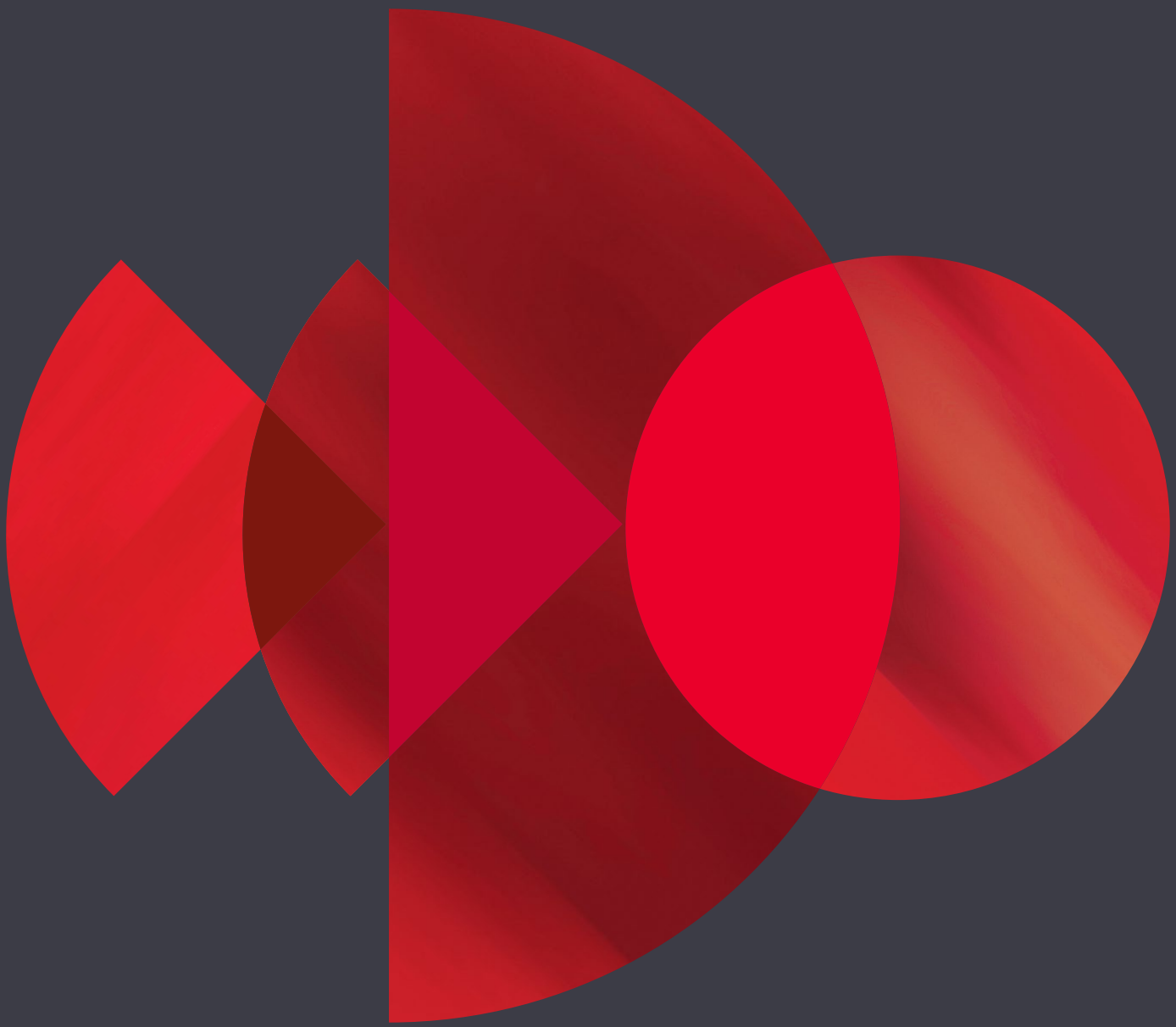


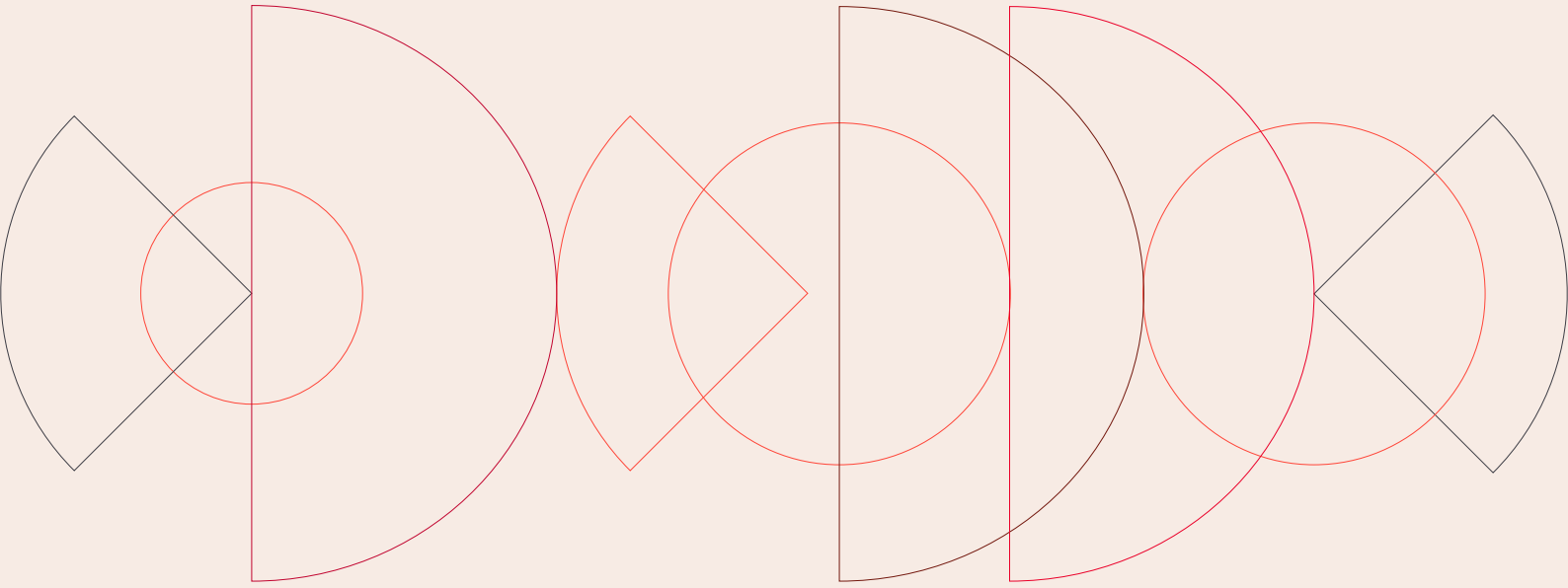
As the world moves

Introduction

Dearest Reader

Welcome to Volume 4 of Deneys' Labour Law by the Book, a collection of articles related to South African Employment and Labour law and regulations.

There is no shortage to labour and employment rulings, judgments and legislative and regulatory updates. It is admittedly difficult to keep track of all the changes and to stay up to date with recent developments. This volume includes articles on recent developments relating to disciplinary charge sheets, substance abuse policies, and a compilation of recent labour judgments; and on what employers should be aware of in respect of prescription, restraints of trade, employing foreign nationals, off-duty social media conduct, investigations and employer liability insurance. There is something for everyone and we trust it will guide you to do things "by the book"!



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Part 1: Developments arising from case law

Getting It Right: The Correct Formulation of Disciplinary Charges

By Frances Barker (Associate) and Gillian Lumb (Director)

An often-overlooked aspect of a disciplinary process is the formulation of the charges. While an overly technical approach to charges is not required, a poorly worded or vague charge can affect the substantive fairness of disciplinary action.

Legal framework

The Code of Good Practice: Dismissal to the Labour Relations Act, 1995 (Code) requires an employer to formulate the charges in sufficient detail to allow the employee to understand the case that they must answer. The Labour Court confirmed this requirement in *Police & Prisons Civil Rights Union v Minister of Correctional Services & others* in which the court stated that the charge sheet *"should be sufficient for an employee to know the case he is expected to meet. Anything short of that would be unfair".*

Substance over form

The Labour Appeal Court in E*OH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (EOH Abantu)* set out a guiding principle consistently applied by the court, namely employers, commissioners and courts *"must not adopt too formalistic or technical an approach".* It is sufficient for the employee to be provided with information which enables the employee to understand the substance of the allegation.The categorisation of the misconduct is less important.

This principle was applied by the Labour Appeal Court in *Dladla and Others v Motor Industries Bargaining Council and Others (Dladla)* in which the employees were charged with *"failure to obey a lawful instruction and insubordination, in that on 12 March 2018, despite being issued by ultimatums you did not return to duty".* The employees contended that the charge was narrowly framed as a failure to *"return to work"* and that the commissioner and Labour Court had widened the charge impermissibly to include failure to vacate the canteen or leave the premises. The Labour Appeal Court found this argument to be *"unduly technical and without merit".* It held that the instruction to return to work was the functional equivalent of an instruction to leave the canteen and report to the employees' designated workstations. The evidence showed that the employees understood exactly what was expected of them and that they had deliberately refused to comply with the instruction. The employees were found to have suffered no prejudice in relation to the formulation of the charges as the essence of the charge had been addressed fully in the proceedings.

The court referred to the *EOH Abantu* principle and held that *"there is no requirement that competent verdicts on disciplinary charges should be mentioned in the charge sheet".* The test is whether there was prejudice to the employee. Prejudice may arise if the record shows that, had the employee been alerted to the possibility of a competent verdict on a different formulation of the charge, they would have conducted their defence differently or would have had another defence available to them.

Practical implications for employers

The *Dladla* decision confirms that employers are not required to draft charges with the precision of a criminal charge. However, this does not mean that any charge will do. The following are useful guidelines for employers when formulating disciplinary charges:

- **The charge should identify the incident or conduct in question:** This includes the date, time and place of the alleged misconduct where possible, and providing enough detail to enable the employee to identify the incident which forms the basis of the complaint. As the Labour Court held in *Zeelie v Price Forbes*, the charges need only be *"sufficiently precise to allow the charged employee to identify the incident which forms the subject matter of the complaint in order for him or her to prepare a suitable defence".*

- **The charge should be formulated in plain, understandable language:** The Code requires charges to be *"formulated in plain understandable language".* Overly technical or legalistic language may confuse an employee, which may undermine the fairness of the process. An employee who does not understand the charge cannot meaningfully participate in the disciplinary process.

- **Employers should avoid using criminal law terminology when drafting charge:** Terms such as “fraud”, “theft” or “assault” carry specific legal meanings in criminal law and may invite technical arguments as to whether all the elements of the criminal offence have been proved. Generally, it is preferable to use workplace terminology such as “dishonesty”, “unauthorised removal of company property” or “physical altercation”, avoiding a focus on criminal liability.

When more detail may be required

Whilst the courts consistently reject an overly technical approach to the formulation of charges, there are circumstances in which more particularity may be necessary. Where the alleged misconduct is complex or involves multiple incidents, additional detail may be required to ensure that the employee understands the full extent of the allegations. Similarly, where the categorisation of the misconduct is challenged or where specific elements must be proved, a more detailed charge may be necessary.

For example, in *Kidrogen (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,* three senior executives were charged with gross dishonesty for receiving various payments to which they were not entitled and for which there was no board approval. The commissioner found that because the executives had not prepared the calculations or processed the payments themselves, they could not be found to have been *“dishonest”*. The commissioner reasoned that *“dishonesty involves deceitful intent and this the employer has failed to prove”.*

On review, the Labour Court rejected this approach. The Judge held that the commissioner had erroneously applied a criminal law standard of *“deceitful intent”* to a workplace charge of dishonesty. In employment law, the question is not whether the employee acted with criminal intent, but whether their conduct was consistent with the duty of good faith owed to the employer. The proper enquiry was whether the executives could genuinely have believed, acting *bona fide,* that they were entitled to payments which raised their total remuneration by at least 30% above what the board had approved. On the evidence, the court found that no reasonable arbitrator could have concluded that they did.

Notably, the charges in *Kidrogen* were formulated as “gross dishonesty” rather than as “fraud”, which is a criminal law concept requiring proof of specific elements such as misrepresentation and prejudice. Despite this, the commissioner still fell into the trap of applying a criminal law standard when interpreting the charge.

The case demonstrates that even when charges are correctly formulated in workplace terminology, employers and their representatives must ensure that criminal law concepts do not creep into the analysis at the hearing stage.

Adequacy of charges assessed in context

The adequacy of the charges cannot be assessed in isolation. In *Dladla*, the court had regard to the broader circumstances when determining whether the employees understood the case against them and whether they suffered any prejudice from the wording of the charge. The employees been issued with two written ultimatums, had discussions with management and shop stewards, and were fully aware of what was expected of them. In these circumstances, the court found that the argument that the charge was too narrowly framed was without merit, precisely because the surrounding context made the substance of the charge clear.

The same principle applies more broadly. Where an employee has been taken through an investigation report, has had the allegations explained to them, or has admitted to the conduct in question, it will be difficult for them to later argue that the charges were inadequate. Courts will consider the totality of the information available to the employee, not merely the words in the charges, when determining whether they had adequate notice of the case against them.

Conclusion

Employers should draft charges that identify the misconduct in plain language, which is understandable to an employee, avoiding criminal law terminology.

Police & Prisons Civil Rights Union v Minister of Correctional Services & others (1999) 20 ILJ 2416 (LC)

EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA4/18) [2019] ZALAC 57

Dladla and Others v Motor Industries Bargaining Council and Others (JA99/2024) [2026] ZALAC 4
Zeelie v Price Forbes (Northern Province) (1) (2001) 22 ILJ 2053 (LC)

Kidrogen (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2018] ZALCCT 27

Zero-tolerance, zero nuance? The continued unravelling of strict substance abuse policies

By Raees Halim (Associate) and Verushka Reddy (Director)

In 2024, the judgment of the Labour Appeal Court (LAC) in *Enever v Barloworld Equipment (Enever)* sent a message to employers: zero-tolerance substance abuse policies cannot be applied without regard to context and proportionality. Since then, the question has been whether the LAC's judgment would remain confined to cannabis-specific disputes or whether it would extend to workplace substance abuse policies more broadly.

Two Labour Court judgments have since confirmed that the principles articulated in the LAC's judgment extend beyond cannabis. *Chill Beverages International v CCMA and others (July 2025) (Chill Beverages)* and *Cipla Distribution Gateway (Pty) Ltd v CCMA and others (February 2026) (CIPLA)* confirm that employers who continue to treat positive test results as an automatic basis for dismissal risk having those dismissals overturned.

Recap: the *Enever* judgment

The LAC's judgment concerned a category analyst who worked in an office and was not involved with dangerous machinery. The employee was dismissed after testing positive for cannabis during a routine medical check, in breach of the company's zero-tolerance substance abuse policy. It was common cause that the employee consumed cannabis daily in the privacy of her home. Because cannabis remains detectable in the bloodstream long after its effects have subsided, the employee could never produce a negative test result unless she stopped using cannabis almost entirely. As a result, the LAC found that the company's policy effectively forced her to choose between cannabis and her job.

The LAC held that the zero-tolerance policy was unjustifiably broad insofar as it applied to office-based employees; there was no rational link between a blanket prohibition on private cannabis use and maintaining workplace safety. It emphasised that employers are not permitted *"to adopt a zero-tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence."* The dismissal was accordingly found to be automatically unfair.

The *Chill Beverages* judgment

This case involved a warehouse controller and forklift driver, Mr Tsamse, who was dismissed after failing a breathalyser test. Mr Tsamse had taken cough mixture the evening before and morning of his shift, unaware that it contained alcohol. It was common cause that he displayed no signs of intoxication and was not impaired; he was a first offender with six years of service.

The employer relied on its zero-tolerance policy, which prohibited employees from having any intoxicating substances in their bloodstream during working hours and forbade the use of alcohol within six hours before the start of a shift. It argued that Mr Tsamse's positive breathalyser result, without more, justified dismissal. The CCMA found that the dismissal was substantively unfair and awarded reinstatement.

The Labour Court dismissed the employer's application on the basis that the CCMA award fell within the band of reasonableness for the following reasons:

- The employee's explanation that the positive reading resulted from cough mixture he did not know contained alcohol was accepted as credible.
- There was no evidence that the employee was intoxicated or that his ability to perform his duties was compromised and his clean disciplinary record weighed in his favour.
- The court confirmed that having alcohol in one's blood and being intoxicated are different things. Substances such as medication can produce a positive breathalyser result without any impairment.
- Significantly, the court held that any zero-tolerance policy will only be accepted where the circumstances necessitate its implementation, and all employers are obliged to show that dismissal is appropriate and proportional to the offence.

The *CIPLA* judgment

This case similarly involved an employee who was dismissed after a breathalyser test returned a positive reading for alcohol of 0.019%; this is well below the legal driving limit of 0.05%. It was common cause that the employee was not impaired, that he did not display signs of intoxication, and that his ability to perform his duties was not compromised. The employee consumed an energy drink on his way to work, which he believed may have caused the positive reading.

The employer relied on its zero-tolerance policy which expressly stated that it would *"not consider whether or not a person is 'intoxicated' or 'under the influence' in deciding whether an employee is guilty of misconduct."* The employer's case was simply that because the employee tested positive and had an active final written warning for a similar offence, dismissal was warranted. The CCMA found the dismissal substantively unfair and awarded reinstatement with limited backpay.

The Labour Court dismissed the employer's review application for the following reasons:

- There were unresolved questions about the reliability of the breathalyser result itself. No evidence was led to establish that the device had been properly calibrated, and no confirmatory blood test was conducted.
- Despite the employer's own policy requiring a confirmatory blood test when an employee disputes a breathalyser result, the employee was not informed of his right to request this.
- Most significantly, the court rejected the employer's version that once a positive result was recorded, the arbitrator was bound to apply the zero-tolerance policy and uphold the dismissal.
- The court held that *"[s]uch a mechanistic approach, as suggested by the company, is incompatible with a proper enquiry into the fairness of the dismissal, and must be rejected."*
- The arbitrator was required to consider the totality of the evidence and the relevant circumstances, including the low alcohol reading, the absence of impairment, the known fallibility of breathalyser testing, and the failure to offer a confirmatory blood test.

The thread from cannabis to alcohol

The *Chill Beverages* and *CIPLA* judgments align with the principles expressed by the LAC in the *Enever* judgment. While the *Enever* judgment was based on the right to privacy and unfair discrimination following the decriminalisation of cannabis, the *Chill Beverages* and *CIPLA* judgments show that the same underlying principles, ie proportionality, the evidentiary burden on employers, and the impermissibility of a mechanical approach, apply equally to alcohol cases.

The thread connecting these decisions is that the crux of all dismissals is fairness, and employers cannot contract out by adopting rigid zero-tolerance policies that operate without regard to the circumstances of each case.

The upshot of these judgments is that employers should consider the following in relation to substance abuse policies:

- **Positive test results are not the end of the enquiry:** A positive result is a starting point, not a conclusion. Employers must still assess whether there is evidence of impairment, whether the result is reliable, and whether dismissal is proportionate in the circumstances.
- **Confirmatory testing matters:** Employers should ensure that employees are expressly informed of their right to request confirmatory testing, particularly where a positive result is disputed. A failure to do so may undermine the reliability of the evidence.
- **Calibration and documentation are essential:** Employers must be able to demonstrate that the testing equipment was properly calibrated and that the specific device used to test an employee can be identified.
- **Context is king:** The nature of an employee's duties, the degree of risk associated with those duties, whether they were impaired, and the actual reading are all relevant considerations. An employer that fails to lead evidence on these factors will struggle to defend a dismissal.

Employers must engage with the facts of each case before dismissal. Ultimately, where the dismissal is challenged, it is critical that an employer leads reliable evidence of intoxication, of the risk that the employee may have posed in an intoxicated state, and demonstrates that dismissal is a fair and proportionate response in the context of the workplace. As indicated by the LAC in the Enever judgment, a zero-tolerance policy may be justified where employees perform high-risk jobs.

Cipla Distribution Gateway (Pty) Ltd v Mwale & Others (C424/24) [2026] ZALCCT 22 (10 February 2026)
Chill Beverages International (Pty) Ltd v CCMA & Others (C160/2024) [2025] ZALCJHB 298; [2025] 11 BLLR 1203 (LC) (14 July 2025)

Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd (JA86/22) [2024] ZALAC 12; [2024] 6 BLLR 562 (LAC); (2024) 45 ILJ 1554 (LAC) (23 April 2024)

From Bench to Boardroom: Labour Law Trends of 2025 Shaping 2026

By Michael Balie (Associate) and Laura Macfarlane (Director)

The past year has produced a remarkable body of labour jurisprudence that will reshape how employers in South Africa manage their workforces. From the Constitutional Court's pronouncement on retirement age discrimination, to the Labour Appeal Court's stance against anti-union tactics disguised as retrenchments, the judiciary has continued to grapple with the enduring tension between employer prerogatives and employee protections within our constitutional framework.

Retirement and age discrimination: a Constitutional Court divided

Motor Industry Staff Association v Great South Autobody CC t/a Great South Panelbeaters; Solidarity obo Strydom v State Information Technology Agency SOC Limited (2025) 46 ILJ 481 (CC)

The Constitutional Court's decision on the interpretation of section 187(2)(b) of the Labour Relations Act, 1995 (LRA) which provides that *"a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity"* is arguably the most consequential labour law judgment of the year.

The facts: Two consolidated cases concerned employees who continued working beyond their normal retirement age of 60 with their employers' knowledge and consent, only to be dismissed on the basis of age at a later date.

The Court's finding: The Court was unable to reach a majority on the interpretation of section 187(2)(b), resulting in three separate judgments. In a judgment, authored by the Chief Justice and supported by three other justices it was held that a dismissal on the basis of age is fair only if the employee's employment is terminated on the date upon which the employee attains the normal or agreed retirement age. A termination on the basis of age at a later date is automatically unfair. A fifth member of the court, held that upon reaching retirement age, the employer has an election whether to terminate the employee's employment, governed by ordinary contractual principles. The termination, and notice thereof, may take place at a date after the employee's agreed retirement age. However, an employer may be found to have elected not to terminate the employment if it fails to exercise the election within a reasonable period of time. Whether an employer had knowledge of the legal position will be considered in evaluating this election. The remaining four members of the court held, that once an employee has reached the normal or agreed retirement age, section 187(2)(b) permits the employer, then or at any time thereafter, to terminate the employee's appointment on the basis of age, upon the giving of reasonable notice.

Despite the absence of a majority on the interpretation of section 187(2)(b), there were majorities for the orders in each case. In Landman's case the court dismissed the appeal resulting in his dismissal having been found to be fair. He was given notice of his dismissal 10 months following him reaching the agreed retirement age. In Solidarity's case the six dismissals were found to be automatically unfair because the parties "agreed" to a new retirement age after the applicants reached the initially agreed retirement age, and compensation equal to 24 months' remuneration was awarded. While these employees were dismissed well past their retirement ages, the five-judge judgment found that a new later date for retirement came into force based on the unique facts of that case.

Practical takeaways for employers:

- Employers face paying up to 24 months' remuneration in compensation for an automatically unfair dismissal, which underscores the severe financial exposure of mismanaging retirement-related terminations.
- The safest course is to action any retirement-related dismissal on the date the employee reaches the normal or agreed retirement age, or as close to that date as reasonably possible.
- Where an employer wishes to retain an employee

beyond the agreed retirement age, it should conclude a new fixed-term employment contract or negotiate a revised retirement age in writing.
- Employers should keep meticulous records of employees' retirement dates and begin planning for their retirement well in advance.

Parental leave

Van Wyk and Others v Minister of Employment and Labour [2025] ZACC 20

The facts: The appellant challenged the differentiated parental leave entitlements in sections 25, 25A, 25B and 25C of the *Basic Conditions of Employment Act, 1997* (BCEA) and corresponding provisions of the UIF Act as irrational, unjustifiably discriminatory, and offensive to human dignity. Under the impugned scheme, the BCEA afforded birth mothers four months' maternity leave (section 25), but granted their partner-parents only 10 days' parental leave (section 25A), while partner-parents in adoptive and commissioning arrangements received either 10 weeks or 10 days, limited to children under two years of age (section 25B and 25C). Corresponding UIF Act provisions prescribed the benefits available to each category.

The Court's finding: The Constitutional Court found that affording birth mothers four months leave while limiting fathers to 10 days was unconstitutional as it perpetuated the unfounded assumption that women are and should be the primary caregivers of children, thereby marginalising fathers. Similarly, the shorter entitlements for adoptive and commissioning parents were unconstitutional as it implied that their caregiving obligations were less onerous, which the court found unfounded and contrary to their dignity. The court declared the two-year age cap for adopted children in section 25B(1) unconstitutional as unfair discrimination based on age, reasoning that older adopted children were denied time with their new families and that the limitation decreased their likelihood of being adopted. The court implemented an interim parental leave regime and suspended its declaration of invalidity for 36 months to allow Parliament to enact remedial legislation.

Practical takeaways for employers:

- Rewrite leave policies in gender-neutral terms. Replace "maternity" and "paternity" leave with a single "parental leave" category applying equally to biological, adoptive, and commissioning parents.
- Administer the interim parental leave regime. Single parents and parents who are the sole employment party receive four months leave. Dual-employed parents share four months and ten days in total.
- Update documentary requirements in policies to allow for verification of partner leave and employment status.
- Employers who voluntarily fund parental leave should ensure that equal benefits are provided across all parent categories.
- Any reduction of paid contractual benefits should be done by agreement and any reduction in policy benefits should be proceeded by consultation and should be handled with fairness.

Automatically unfair dismissals: anti-union discrimination and religious accommodation

Anti-union discrimination disguised as operational requirements

Nutrichem (Pty) Ltd v SACTWU obo Mahlaba and Others (2025) ZALAC 13 (26 February 2025)

The facts: After reaching a short-time agreement with employees as an alternative to retrenchments, the employer dismissed 18 union members purportedly for operational requirements shortly after shop stewards wrote a letter expressing the union's dissatisfaction with the short-time agreement. A meeting was scheduled to discuss inter alia the short-time agreement. However, the employer prepared termination letters before the meeting, it increased the number of targeted employees, and replacement workers were immediately engaged.

The Court's finding: The Labour Appeal Court dismissed the employer's appeal and upheld the finding that the dismissals were automatically unfair under section 187(1)(d) of the LRA. The Court emphasised that the employees had a right under section 4(2)(a) of the LRA to participate in the lawful activities of the union. The employees participated in lawful union activity and the letter did not cancel the short-time agreement; it simply expressed dissatisfaction it. The Court characterised the dismissals as a ruse, sending a clear message about judicial intolerance for anti-union tactics disguised as operational requirements. Costs were awarded against the employer, with the Court

holding that where there has been a grave violation of employees' constitutional rights, the Courts must show their deprecation through appropriate costs orders.

SA Steelworks v MEIBC (2025) 46 ILJ 572 (LAC)

This case illustrates how courts scrutinise the true nature of workplace disputes. The employees were dismissed after refusing to work a newly introduced shift pattern. The central issue was whether the refusal constituted an unprotected strike (ousting the bargaining council's jurisdiction) or misconduct in the form of insubordination. All parties, including the union representing the employees, had characterised the dismissal as one related to misconduct throughout the disciplinary and arbitration proceedings. The Labour Appeal Court was not convinced by the union's contention in review proceedings that the dispute was in fact one related to an unprotected strike. The court held that parties cannot recast disputes after unfavourable outcomes to engage in forum shopping.

Glencore Operations South Africa (Pty) Ltd v Taala 2025 ZALAC 23

A rigger was dismissed for negligence after a crane accident resulting in R5.6 million in losses to the employer. The employer argued at arbitration that although the rigger had correctly done his calculation study, he had relied on incorrect information from the crane operator, which the rigger ought to have verified. The Labour Appeal Court upheld the arbitrator's finding of substantive unfairness, agreeing that there was no evidence of a rule which required the rigger to verify the crane operator's information. Importantly, the court indicated that there may well have been some merit in the argument that the rigger had failed to perform his duties at the level that his skill set required. However, that was not a case made out at arbitration. In addition, the employer had failed to discipline the supervisor who was also involved and could equally have verified the information from the crane operator. The case is significant: accountability must be proportionately distributed rather than concentrated on the most convenient target.

Religious accommodation in the workplace

Sun International Management Limited v Sayiti (2025) 1 BLLR 9 (LAC)

The facts: A Marketing Manager disclosed, two months into employment, that his Seventh-day Adventist beliefs precluded him from working during his Sabbath. The employer accommodated him for 16 months before initiating an incapacity inquiry and ultimately dismissing him for inability to perform the inherent requirements of the role.

The Court's finding: The Labour Appeal Court found that weekend work was indeed an inherent requirement of the job despite not being explicitly stated in the contract, and that the employer had reasonably accommodated the employee for 16 months until it became unsustainable. The court highlighted that the employee sought employment in a position manifestly requiring weekend work without disclosing his religious limitations beforehand and remained "uncooperative and uncompromising" in seeking alternatives. The dismissal was not automatically unfair but fair on the basis of the inherent requirements of the job.

Practical takeaways for employers (religious accommodation):

- Employers have a duty to reasonably accommodate an employee's religious beliefs. Discussions regarding reasonable accommodation and options explored must be well documented. Employers should explore all options, including stand-in arrangements with other colleagues, before concluding that accommodation imposes undue hardship.
- Inherent requirements of a job need not be explicitly labelled in a contract or job description. Courts will adopt a contextual and purposive interpretation to determine what is factually an inescapable requirement.
- Employees who fail to disclose religious constraints prior to accepting a role that manifestly requires weekend or other specific work, and who remain uncooperative in finding alternatives, risk weakening their claims.

Employment conditions: employment status

Sun International Management Limited (t/a Wild Coast Sun) v Powell (DA12/2023) 2025 ZALAC 20 (20 March 2025)

The facts: A permanent employee resigned and was subsequently reengaged, first through a labour

broker and then directly as an independent contractor, receiving payment on invoice without deductions or payslips.

The Court's finding: The Labour Appeal Court held that the individual was not an employee, applying the principle that where parties in a relatively equal bargaining position consciously elect one arrangement over another, legal effect should be given to their choice. The absence of a formal employment contract, payslips, and statutory deductions despite the individual's familiarity with the employer's practices as a former long-term employee was decisive.

Practical takeaways for employers:

- Where an individual performs services through a labour broker or as a contractor, the nature of the working relationship should be clearly documented, with payment structures (invoices, no deductions, no payslips) reflecting the true nature of the arrangement.
- Employers should not be complacent; substance prevails over form, and courts will look beyond labels to the true nature of the relationship.

Equal pay and employment equity

AMCU obo Members v Aberdare Cables (Pty) Ltd (PA09/2024) 2025 ZALAC 26 and Passenger Rail Agency of South Africa v Hoyo (2025) 46 ILJ 1123 (LAC)

The facts: A wage differential existed between employees performing the same work, based solely on their date of employment, a "grandfathering" arrangement agreed with the majority union. As an alternative to retrenchment the parties had agreed that new employees hired would be paid the bargaining council rates (which represented market rates) so that over time all employees would be engaged on the same rate of pay (as long-standing employees moved out of the business).

The Court's finding: The Labour Appeal Court's finding is instructive: Section 6(1) of the *Employment Equity Act, 1998* (EEA) does not prohibit mere differentiation; for a claim of unfair discrimination on "any other arbitrary ground," the complainant must identify a ground analogous to listed grounds that has the potential to impair upon human dignity in a comparable manner. The court highlighted that length of service is recognised in the EEA Regulations as a factor that may justify differentiation in terms and conditions of employment.

In *PRASA v Hoyo,* the Labour Appeal Court overturned a finding of race-based pay discrimination, holding that the comparators were not performing work of equal value and that the evidence did not establish the necessary link between the pay differential and a listed ground. The court did however stress that section 27(2) of the EEA requires the employer to take measures to progressively reduce disproportionate income differentials, subject to any guidance given by the Minister of Employment and Labour.

Practical takeaways for employers:

- Employers should regularly review "grandfathering" arrangements to ensure they remain rational over time. While a mere wage differential does not automatically constitute unfair discrimination, arrangements that persist without justification may become vulnerable to challenge.
- Employers should invest in proper job evaluation and benchmarking processes to defend against equal pay claims with objective evidence.
- Equal pay claims require proof that the work is the same or substantially the same, that there is a pay differential, and that the differential is based on a listed or analogous ground that impacts human dignity.
- Employers have an obligation to take measures to progressively reduce disproportionate income differentials.

Whistleblower protection and dispute resolution

National Commissioner: Department of Correctional Services v Nxele (2025) 5 BLLR 472 (LAC)

The facts: A senior employee made a protected disclosure regarding alleged improprieties against the then National Commissioner of the Department of Correctional Services. Thereafter, he was subjected to repeated suspension and disciplinary proceedings on account of the disclosure and was prevented from reporting to work. The employee requested the court to invoke section 188A(11) of the LRA which empowers the employee (or employer) to require that the disciplinary hearing be conducted by an arbitrator

under the auspicious of the bargaining council, as opposed to the employer, where an employee alleges, in good faith, that a disciplinary process contravenes the Protected Disclosures Act, 2000.

The Court's finding: The Labour Appeal Court found a direct correlation between the protected disclosure made by the employee and the disciplinary charges. This finding was influenced by the fact that the employer's conduct of proposing to hold the disciplinary enquiry in a different province to where the employee was employed, and from barring him entry to work when there was no legal impediment to his return, appeared to constitute victimisation. Accordingly, the disciplinary enquiry was converted to an inquiry by an arbitration as envisaged in section 188A(11) of the LRA.

City of Ekurhuleni Metropolitan Municipality v SAMWU obo Gwejane (JA 06/24) 2025 ZALAC 18

The facts: A municipality's persistent non-compliance with a certified arbitration award resulted in a contempt order against it and its accounting officer (which included suspended imprisonment). On appeal, the accounting officer argued that she could not be found in contempt personally as she had not been personally served the initial order or the contempt application, and she was not cited in her personal capacity.

The Court's finding: The court canvassed the Constitutional Court jurisprudence on contempt proceedings and rejected the account officer's defences, stressing that the accounting officer knew few well that the Municipality for which she was an accounting officer was required to comply with the arbitration award and she failed to ensure compliance therewith. The accounting officer was ordered to pay 10% of the legal costs.

SAMWU obo Koopman v City of Cape Town (2025) 46 ILJ 1132 (LAC)

The facts: An employee sought to obtain an order of contempt against his employer for failing to give effect to an arbitration award ordering his reinstatement and backpay.

The Court's finding: On appeal the court held that a reinstatement order is not self-executing and that the employee is required to tender their services. A failure to do so is fatal to an application for contempt against the employer. The court sympathised with the employee and recorded that the judgment would be forwarded to the Department of Labour to consider whether it may be necessary to consider a legislative amendment that requires employers to initiate communication regarding a return-to-work date for employees who have been reinstated or reemployed following an arbitration award or judgment.

Practical takeaways for employers:

- Employers should bear in mind that section 188A(11) of the LRA empowers an employee or employer to require that the disciplinary hearing be conducted by an arbitrator under the auspicious of the CCMA or bargaining council, as opposed to the employer, where an employee alleges, in good faith, that a disciplinary process contravenes the Protected Disclosures Act, 2000. An allegation is likely to be found to be in good faith where the disciplinary action is on account of or is closely connected to the disclosure and where the employer has demonstrated a pattern of victimisation.
- Accounting officers and senior officials can be held personally liable for contempt including suspended imprisonment if they know about the non-compliance and fail to ensure compliance with arbitration awards and court orders. They may also be required to pay a portion of the legal costs personally. The Constitutional Court's jurisprudence regarding personal service and being cited in a personal capacity are intended to ensure that the official is aware of the non-compliance.
- Following a reinstatement order, the employee bears the burden of tendering services. However, best practice suggests that employers should communicate with reinstated employees about when and how they are expected to tender their services, to avoid uncertainty.

Conclusion

The cases discussed in this contribution reveal several overarching trends.

Employers would do well to heed these trends from the Bench to the Boardroom in ensuring that their policies, contracts, and workplace practices are aligned with the evolving jurisprudence.

Part 2: “How to” guides

Should I be concerned about prescription?

By Heidi Davis (Associate) and Jason Whyte (Director)

Extinctive prescription rendering debts unenforceable is a widely known and long-standing legal concept within South Africa law. Despite its vast jurisprudence, it’s basic tenets are often misunderstood and have formed the basis of many an academic and judicial debate. In this piece we delve into the ins and outs of prescription and clarify the application of prescription to labour law.

What is prescription?

Prescription is the legal mechanism whereby a debt becomes legally unenforceable after the expiry of a specified period of time. Upon expiry of that period creditors lose their right to institute legal proceedings to recover that debt from the debtor.

The aim of prescription is to compel a creditor/claimant to prosecute their claim expeditiously within a specific period because this aids the predictability and stability of the legal system as a whole.

Prescription can therefore be raised as an absolute defence against any claim which was referred to a court or tribunal outside the statutory prescription periods. In this way, prescription operates in the favour of debtors/defendants by protecting them from expired claims.

What governs prescription?

Within South Africa, prescription is governed by the Prescription Act, 1969.

The Constitutional Court in *Road Accident Fund* and *Another v Mdeyide* confirmed that a central purpose of the Prescription Act is to bring finality, certainty and stability to legal and social affairs and to prevent drawn-out litigation.

What are the applicable time periods?

The period within which to enforce a debt differs depending on the nature of the debt on question. The periods of prescription within the Prescription Act are:

- 30 years for debts secured by mortgage bond, judgment debts, debts in respect of any taxation imposed or levied by law and certain debts owed to the State;
- 15 years for certain debts owed to the State;
- 6 years for debts arising from a bill of exchange, other negotiable instrument or notarial contract; and
- 3 years for any other debt.

The most common prescription period encountered, and the most likely one for an employer to come across, is 3 years. Typical 3-year prescription debts within the employment sector include debts resulting from breach of employment contracts, unpaid renumeration, unlawful terminations, unfair labour practices, unfair dismissals, and unfair discrimination.

It is not possible for a court to condone non-compliance with a period of prescription, and once a claim has prescribed it is permanently extinguished. Should a creditor sue for the debt after the prescription period has expired, they will be unsuccessful in any attempts to legally enforce their debt through the court system.

Do the prescription periods within the Act apply to labour legislation?

Labour legalisation, including the Labour Relations Act, 1995 (the LRA) and Employment Equity Act, 1998, contain time periods applicable for the referral of certain employment disputes to employment courts and tribunals. However, a failure to observe such time periods can be condoned on good cause shown.

These periods are quite short ranging from 30 days to six months depending on the nature of the dispute. For example, an employee has 30 calendar days from the date of their dismissal to refer an unfair dismissal dispute to the CCMA or bargaining council for conciliation; 90 calendar days from the date of the act or omission which allegedly constitute an unfair labour practice to refer an unfair labour practice dispute to the CCMA or bargaining council for conciliation; and up to six months from the act or omission that allegedly constitutes unfair discrimination to refer an unfair discrimination dispute to the CCMA for conciliation.

These above periods are all shorter than the three years provided for in the Prescription Act; however, unlike the Prescription Act, are all capable of being condoned in the event of non-compliance. For example, if a dismissed employee has referred their unfair dismissal dispute outside the requisite 30 days, their claim is not extinguished and such non-compliance may be condoned on good cause shown, taking into

account the extent of the delay, the reason for the delay, the prospects of success of the main action or application, the interests of justice and the prejudice to the parties.

However, this begs the question as to whether these specified disputes may be condoned irrespective of their lateness, or whether the three years within the Prescription Act applies.

The Constitutional Court put this question to rest in *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* when it ruled that the Prescription Act applies to claims arising under the LRA, meaning that these claims prescribe after three years. If an employee was dismissed more than three years prior, they would be unsuccessful in attempting to argue that they should be granted condonation for their late referral as their claim would have prescribed.

Employees may therefore only seek condonation for their late referrals within the three-year period laid down in the Prescription Act. If they refer a dispute outside that period, the employer may raise a special plea of prescription as a defence to the dispute.

When does prescription commence running?

Prescription begins to run as soon as the debt becomes due. This is when the debtor has knowledge of the facts giving rise to the alleged debt, including the identity of the debtor, but not the legal conclusions which flow from those alleged facts.

An example of this is found in the case of *MTN v Njokweni* where the Labour Appeal Court found that employees cannot wait for a court to legally confirm the facts which give rise to the debt, such as a declaration confirming who the true employer is. The debt becomes due as soon as the applicants have subjective knowledge of the facts which give rise to it.

In simple terms, a debt begins running as soon as everything has happened, to the knowledge of the employee, which would entitle the creditor to institute action and to pursue their claim. For example, a claim for unpaid renumeration begins from the date the renumeration was due but was not paid and a claim for breach of contract would begin from the date of breach.

Can the running of the prescription period be interrupted and can such interruption lapse?

The running of the prescription period will be interrupted by the express or tacit acknowledgement of liability by the debtor or by the service on the debtor of any process where legal proceedings are capable of being successfully prosecuted to final judgement.

A process that is commonly incapable of being pursued to final judgment is when the court or tribunal in question lacks the jurisdiction to determine the dispute. Should a dispute be referred to a court or tribunal which lacks jurisdiction, the interruption of prescription will lapse, and it will be as if the running of prescription was not interrupted in the first place. For example, if a claim is instituted in the Labour Court but should have instead been instituted in the High Court, it would be as if the prescription period had not been interrupted at all when the dispute was referred to the Labour Court.

It is the claimant who chooses the forum in which to institute their claim and should it transpire during the proceedings that the forum lacks jurisdiction, the onus is on the plaintiff to withdraw their claim and institute it in the correct forum within the prescription period. A failure to do this will result in the plaintiff's claim prescribing.

Does a referral to the CCMA interrupt prescription?

In *Pieman's Pantry,* the Constitutional Court confirmed that a referral to the CCMA is a process capable of interrupting prescription. However, a referral to the CCMA is only capable of interrupting prescription should the CCMA have jurisdiction to hear the dispute. Should the CCMA not have jurisdiction to hear the dispute, any interruption of prescription lapses and it is deemed that there was no interruption of prescription in the first place.

For example, neither the CCMA or the Labour Court has the requisite jurisdiction to adjudicate the breach of a mutual separation agreement and any such breach must be adjudicated by the High Court. An employer faced with such a referral in the CCMA or Labour Court, may raise a defence of absence of jurisdiction and, upon a ruling confirming the lack of jurisdiction, the running of prescription is deemed not to have been

interrupted when the dispute was referred to the CCMA or the Labour Court. The employee would then be compelled to refer the dispute to the High Court. Should the three-year period since the breach of the mutual separation agreement have lapsed, the employee's claim would have expired, and the employer can raise a special plea of prescription. Immediate assessment of a lack of jurisdiction defence is essential.

Conclusion

Prescription is a useful tool to dispose of legally unenforceable claims in an expeditious and simple manner. The defence can be separated out from the main action and determined separately and prior to the main action without the full court process having to play out.

Whenever an employer is faced with a claim, we strongly encourage a determination as to whether that claim has been expeditiously brought within the requisite period. If not, a special plea of prescription can be raised, and this will save time, money and many a headache for the employer.

POPCRU obo Sifuba v Commissioner of the South African Police Services and Others [2008] ZALC 162, (2009) 30 ILJ 1309

Road Accident Fund and Another v Mdeyide 2011 (2) SA 26 (CC)

Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited 2018 (5) BCLR 527 (CC)

What employers need to know about enforcing restraint of trade agreements in South Africa

By Alycia Pramlall (Associate) and Mohammed Chavoos (Director)

When a key employee with a restraint of trade resigns to join a competitor, the natural tendency for an employer to seek enforcement of the restraint is understandable particularly under circumstances where the employee has been privy to its trade secrets, confidential information and cultivated relationships with its customers. The prospect of all that confidential information been leaked to a competitor and into a rival's office is enough to keep any business owner awake at night.

The real question though is whether the restraint can actually hold up in court and what the legal requirements for enforceability are.
This article explains the legal framework governing restraint of trade agreements in South Africa, the factors courts consider when deciding whether to enforce them, and the practical steps employers should take to protect their businesses.

The starting point: restraints are presumptively valid

In terms of South African law, restraints of trade are valid and enforceable and the party seeking to escape the restraint bears the burden of proving that the restraint is unreasonable and contrary to public policy. This principle was established in the landmark case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis.*

Our courts will usually adopt a balancing approach by considering the employee's freedom to trade and work in a profession of choice against an employer`s entitlement to protect its proprietary interests.

The five factors most likely to be considered by our courts.

When faced with a restraint of trade dispute, courts work through the following enquiries:

1. Does the employer have a protectable proprietary interest?

This is the threshold question. An employer cannot simply restrain an employee from competing. The competition must be unfair and there must be a legitimate business interest that justifies the restriction. Without a protectable interest, the restraint fails at the first hurdle.

The law recognises two main categories of protectable interests. The first is trade secrets and confidential information. This includes technical know-how, manufacturing processes, pricing strategies, supplier terms, business plans, and other information that gives your business a competitive edge. For this information to qualify as confidential, it must be capable of application in the trade, known only to a restricted circle of people, and of genuine economic value. General knowledge about how a business operates is not sufficient. The information must be specific, confidential and commercially sensitive.

The second category of proprietary interests is trade connections, sometimes called customer relationships. The question here is whether the employee has used the employment relationship to cultivate business relationships and obtain influence over the employer`s customers creating a reasonable apprehension that such customers are likely to move with the restrained employee to the new employer. Courts look at factors such as the employee's seniority, the frequency and duration of customer contact, the personal relationships formed through employment, and the knowledge gained of customers' particular needs and preferences.

2. Is that interest being prejudiced or threatened?

It is not sufficient to simply prove a protectable interest. Employers are also required to demonstrate that the employee's proposed conduct poses a real risk of harm to that interest. If the employee is joining a business in an entirely unrelated industry or taking up a role where confidential information would be irrelevant, the restraint may not be enforceable even if the interest exists.

3. Do the employer's interests outweigh the employee's right to work?

This is where the balancing exercise comes in. Courts recognise that employees have a constitutional right to choose their trade, occupation, or profession freely. Enforcing a restraint necessarily interferes with that right. The court will weigh an employer`s legitimate business interests against the employee's interest in earning a livelihood.

Relevant factors include the employee's seniority and earning capacity, the availability of alternative employment, the duration of the restraint, and the hardship the employee would suffer if restrained. A restraint that would effectively render a specialist unemployable for two years will be scrutinised more closely than one affecting an employee with transferable skills. In this context, transferable skills are competencies and expertise that are not unique to a particular employer or industry but can readily be applied across a range of occupations. An employee with such skills is generally less vulnerable to the effects of a restraint, as their ability to find alternative employment is not confined to the field covered by the covenant. Conversely, an employee with highly specialised skills may face greater hardship, warranting closer judicial scrutiny of the restraint's reasonableness.

4. Are there any overriding public policy considerations?

Beyond the interests of the parties themselves, courts consider whether enforcing the restraint would be contrary to the public interest. This might arise, for example, where the restraint would deprive the public of a scarce professional skill or where enforcement would perpetuate anti-competitive behaviour or limit fair competition.

5. Does the restraint go further than necessary?

This proportionality enquiry emphasised in *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem & Another asks* whether the scope of the restraint is excessive. Courts examine three dimensions: the duration of the restraint, the geographical area it covers, and the nature of the activities it prohibits. A restraint that is broader than necessary to protect the employer's legitimate interests is vulnerable to challenge.

The duration trap: why two years may be too long

One of the most common mistakes employers make is imposing restraint periods that are longer than courts are willing to enforce. Recent case law reveals a judicial trend against lengthy restraints.

In *Beedle v Slo-Jo Innovations Hub (Pty) Ltd,* the Labour Appeal Court stated bluntly that *"a restraint for two years without any plausible justification being offered by the party seeking to enforce the restraint cannot, on its own, pass legal muster."*

The court in *Sadan and Another v Workforce Staffing (Pty) Ltd* similarly found that a two-year restraint was *"inordinately long"* and the employer's justification *"manifestly unconvincing".*

These cases signal that employers seeking to enforce restraints exceeding 12 months bear a heavy evidentiary burden. Employers must be prepared to explain, with specific evidence, why a longer period is necessary. Generic assertions that the industry is highly competitive or that information takes a long time to become stale will not suffice.

The nature of restraint of trade applications

When enforcement becomes necessary, the typical route is an urgent application seeking an interdict.

These applications are treated by courts as inherently urgent because they seek to prevent ongoing harm to the employer's business.

In the Labour Court, which has jurisdiction over restraints arising from employment contracts, Rule 39 of the Labour Court Rules provides a dedicated procedure. The process involves the exchange of affidavits, followed by heads of argument, with the matter then being enrolled for hearing. If the application is opposed, employers should anticipate a timeframe of approximately six to eight weeks from filing to judgment. If unopposed, the matter can be heard as early as seven days after filing.

The requirements for an interdict are well established. The employer must demonstrate a clear right (the restraint undertaking being valid and enforceable), an injury actually committed or reasonably apprehended (the employee taking up competing employment), and the absence of any other satisfactory remedy (damages typically being inadequate because they are difficult to quantify).

Speed is critical. Courts take a dim view of employers who delay in bringing restraint applications. If you wait before approaching the court, an employer may face questions about whether its need for protection is genuine. When a key employee resigns to join a competitor, the time to act is immediately.

What employers should do: practical guidance

Draft restraints with precision: Avoid vague or overly broad language. Define the activities you wish to prohibit with specificity, identify the geographical area with precision, and choose a duration you can justify. A tightly drafted restraint focused on genuine protectable interests is more likely to be enforced than a sweeping prohibition on all competitive activity.

Keep duration reasonable: Given the judicial trend against lengthy restraints, periods exceeding 12 months should only be imposed where one can articulate a clear and specific justification. Consider whether 12 months would actually be sufficient to protect your interests. If so, that should be your starting point.

Identify and document your confidential information: Do not assume a court will accept your characterisation of information as confidential simply because you say so. Maintain records of what information employees have access to, implement proper confidentiality protocols, and be prepared to demonstrate that the information is genuinely sensitive and commercially valuable.

Tailor restraints to the role: A one-size-fits-all restraint clause applied uniformly to all employees is unlikely to be effective. Senior executives with access to strategic information and key customer relationships warrant different treatment from junior staff. Ensure your restraints are proportionate to the actual risk each role presents.

Act immediately when a breach occurs: The moment you become aware that an employee intends to breach their restraint, take action.

Be realistic about outcomes: Even with a strong case, courts retain discretion to limit the duration of the restraint. Enter negotiations and litigation with a clear understanding of what outcome is realistically achievable. Being willing to accept that a reduced period may lead to a faster resolution and better commercial outcome than insisting on the full contractual term.

Conclusion

Restraint of trade clauses remain a valuable tool for protecting your business, but they are not self-executing. Their enforceability depends on careful drafting, genuine protectable interests, proportionate scope, and swift action when the time comes to enforce them.

The courts will uphold restraints that are reasonable and necessary to protect legitimate business interests. They will not, however, serve as instruments to prevent competition for its own sake or to punish departing employees. Understanding this distinction, and structuring restraints accordingly is the key to holding the line when it matters most.

Magna Alloys and Research (SA) (Pty) Ltd v Ellis [1984] 2 All SA 583 (A)

Kwik Kopy (SA) (Pty) Ltd v Van Haarlem & Another 1999 (1) SA 472 (W)
Beedle v Slo-Jo Innovations Hub (Pty) Ltd [2023] ZALAC 17 (17 August 2023)

Sadan and Another v Workforce Staffing (Pty) Ltd [2023] ZALAC 14 (17 August 2023)

Employing Foreign Nationals Without Valid Permits: A Legal Minefield for South African Employers

By Bonginkosi Ncobela (Candidate Attorney), Romy Homveld (Associate) and Cameron Wilson (Director)

Employing foreign nationals without valid work permits is no longer a marginal compliance issue. It is a legal minefield that South African employers can no longer afford to ignore. Recent enforcement efforts and CCMA decisions have highlighted that non-compliance with the Immigration Act exposes employers to criminal prosecution, financial penalties, reputational harm, and sudden workforce disruption. This article unpacks the legal framework, key case law, and practical steps employers should take to protect their operations.

Why Hiring Without Permits Is Legally Risky: When Employment law meets immigration law

The employment of foreign nationals in South Africa is governed by both the Labour Relations Act, 1995 (LRA) and the Immigration Act, 2002. The LRA establishes the rights of employees and employers, but it presupposes that the employment relationship is lawful. Where a foreign national does not hold a valid work permit, the employment contract is void from inception. In such circumstances, the protections ordinarily afforded under the LRA cannot be invoked, because the contract itself is unlawful.

The Immigration Act is more explicit. Section 38(1) provides that no person may employ a foreign national who is not authorised to work in South Africa. Section 38(3) goes further, stipulating that an employer who knowingly employs an undocumented foreigner commits a criminal offence, punishable by a fine or imprisonment. The Immigration Act therefore places a proactive duty on employers to verify the status of foreign employees and to retain documentary proof of compliance. Failure to do so exposes employers not only to criminal liability but also to reputational harm and operational disruption.

Case Law Spotlight: Sibanda v Roots Butchery

The recent decision in Sibanda and Others v Roots Butchery (2025) 46 ILJ 2969 (CCMA) illustrates how the law is applied in practice. In this matter, several employees were dismissed after failing to produce valid work permits. The Commissioner held that the dismissals were substantively fair. The reasoning was straightforward: the Immigration Act renders the employment of undocumented foreigners unlawful, and employers cannot be compelled to perpetuate an illegal relationship.

The Commissioner made it clear that an employment contract does not automatically terminate merely because a foreign national employee's work permit is invalid or has expired; rather, the employment relationship continues to exist, but the absence of a valid permit creates a situation of legal incapacity, because continued performance of the contract would be unlawful in terms of the Immigration Act. This however does not preclude the employer from affording the employee a fair incapacity process.

The Commissioner expressly rejected the argument that invalid permits rendered the employees' positions redundant, emphasising that no jobs had become unnecessary and the business remained operational, with the result that the dismissals could not constitute retrenchments triggering section 189 of the LRA or severance pay. The dismissals were therefore correctly characterised as dismissals for incapacity, and not misconduct or retrenchment, which the commissioner confirmed was the appropriate legal category in the circumstances.

Employers are therefore exposed to more than one risk. Non-compliance with the Immigration Act may attract criminal sanction, but the risk does not end there: an employer cannot simply "offload" or terminate an employee once it emerges that the employee was engaged on an invalid or expired permit. A second, and often cumbersome, hurdle is the requirement of fairness under the LRA, which generally requires the employer to follow a fair incapacity process before bringing the employment relationship to an end.

Enforcement on the Ground: Raids, Audits, and the Rise of Compliance Crackdowns

Recent enforcement trends demonstrate that the law is not merely theoretical. In KwaZulu-Natal, for example, the provincial government has conducted surprise raids on factories, including one in the KwaDukuza Local Municipality, where undocumented workers were discovered. These raids form part of a broader national strategy of integrated blitz inspections led by the Department of Employment and Labour.

The results have been significant. Employers found to be in breach face criminal prosecution, including where managers have been arrested and left with criminal records, fines, and public exposure. The reputational damage is often as severe as the financial penalties, with companies being named and shamed in the media. The sharp increase in inspections, particularly in sectors such as agriculture, manufacturing and retail, signals a new era of strict enforcement.

Practical Implications for Employers: Compliance is the Safest Investment

The consequences of non-compliance are severe. Employers may face substantial fines under the Immigration Act, criminal liability for directors and managers, reputational damage through public exposure, and operational disruption when undocumented employees are dismissed in their masses.

To mitigate these risks, employers must adopt proactive compliance strategies. The following checklist outlines the core steps every employer should implement to minimise their exposure:

- Verify all permits before employment.
- Check for fraud or altered documents.
- Keep clear, centralised records of permits.
- Track expiry dates and begin renewals early.
- Conduct periodic internal audits.
- Train HR and managers on immigration requirements.
- Be prepared for inspections or raids.
- Seek legal advice when documentation is unclear.
- Enforce zero-tolerance for expired or invalid permits.

Conclusion: A Wake Up Call for Employers

The employment of foreign nationals without valid permits is not a minor administrative oversight. It is an offence with far-reaching consequences. The decision in Sibanda together with the recent surge in raids and audits, highlights the urgent need for employers to prioritise compliance.

Sibanda and Others v Roots Butchery (2025) 46 ILJ 2969 (CCMA)

Off duty conduct, social media and brand risk: when can a corporate dismiss?

By Tracey Powell (Associate) and Murray Alexander (Director)

The increasing entanglement between employees' private lives and their public digital presence has significantly altered the risk landscape for employers. Social media platforms allow employees to express views instantly and widely, often outside working hours and away from the workplace. However, off-duty conduct, particularly where it manifests on social media, can have serious implications for an employer's reputation, operational integrity and trust relationship with its workforce. This article considers when an employer may fairly dismiss an employee for off-duty conduct, with particular emphasis on social media activity and brand risk.

Employees, often unintentionally, can appear as the "public face" of their organisations, even where they engage on social media in a personal capacity and outside working hours. Reputational damage need not be intentional, nor does it depend on the employee holding a senior position. Rather, the risk arises from the public association, actual or perceived, between the employee and employer. The general rule remains that employers do not have unlimited authority to discipline employees for conduct occurring outside working hours and away from the workplace. South African courts have however consistently recognised that disciplinary action may be taken where there is a sufficient nexus between the off-duty conduct and the employment relationship.

In Edcon Ltd v Cantamessa & Others (Edcon), a fashion buyer employed by Edcon, posted a racially offensive comment on her personal Facebook page while on annual leave, referring to government leaders as "monkeys" in the context of political events in December 2015. Her Facebook profile identified her as an Edcon employee, and the post attracted complaints and social media attention, creating a risk to Edcon's reputation. Edcon charged and dismissed her for making a racist comment that placed the company's reputation at risk. The Labour Court confirmed that misconduct committed outside working hours may justify disciplinary action where the employer is able to establish a sufficient nexus between the conduct and the employment relationship. While the general rule remains that an employer has no jurisdiction to

discipline an employee for purely private conduct occurring after hours and away from the workplace, the court recognised that this is not an absolute bar. Even where the conduct is unrelated to the employee's duties and does not fall squarely within the express terms of a disciplinary code, an employer may still be entitled to intervene if the conduct is of such a nature that it brings the employee within the employer's disciplinary reach. In the context of social media, the court's reasoning underscores that off-duty online conduct which identifies the employee as being associated with the employer may expose the employer to reputational or brand risk, thereby justifying disciplinary scrutiny notwithstanding that the conduct occurred outside the workplace.

The decision in Edcon is instructive in setting out the general principle that an employer's authority to discipline for off-duty conduct depends on the existence of sufficient nexus between the conduct and the employment relationship. The principle provides the framework within which cases involving social media misconduct must be assessed. The application of this framework is also illustrated in *Dagane v Safety and Security Sectoral Bargaining Council and Others (Dagane),* where the court considered whether off duty conduct on a social media platform was sufficiently connected to the employment relationship to justify dismissal.

In *Dagane,* a SAPS officer was dismissed for posting racist and genocidal comments on Facebook while off duty. The Labour Court upheld the dismissal, emphasising that racist speech on a semi-public platform constitutes serious misconduct and brings the employer into disrepute, especially given the employee's role as a police officer tasked with protecting all members of the public. The court rejected the argument that the absence of a specific social media policy rendered the dismissal unfair, holding that it is common knowledge that public racist speech is unacceptable.

Off duty conduct, particularly on social media, cannot be viewed as entirely separate from the employment relationship. South African courts have made it clear that where such conduct poses a real or potential risk to the employer's reputation, workplace harmony or operational integrity, dismissal may be justified, even where the conduct occurs outside working hours and on personal platforms.

Edcon Limited v Cantamessa and Others (2020) 41 ILJ 195 (LC)

Dagane v SSSBC and Others [2018] 7 BLLR 669 (LC)

Workplace Investigations 101

By Jason Whyte (Director)

Introduction

The ability to conduct meaningful workplace investigations by an impartial investigator has become an integral part of any employer's business. This is because there is a growing need to be able to conduct investigations that are needed either because an employer wishes to take disciplinary action against an employee or because there is a need to establish the circumstances of a workplace incident or accident.

Whilst investigations are in many cases not obligatory, employment and other legislation places a mandatory obligation on employers to investigate and to report where allegations or suspicions of misconduct have come to light. In this article we provide practical guidance as to what employers can and should do in this increasingly complex regulatory environment. This article will assist you in identifying where you have an obligation to investigate and what you should do at the conclusion of that investigation.

What is an investigation?

An investigation can be described as the process of uncovering the truth or establishing the facts and is thus a key strategy in determining whether these has been misconduct in the workplace or the circumstances of a workplace incident.

Investigations envisage the appointment of an impartial investigator to act on behalf of a business; to assess all evidentiary material, including witness testimonies; and to draw conclusions upon which the business can take remedial action.

Mandatory investigations

Mandatory investigations may arise in a variety of employment contexts. The most common of these are described below.

The Employment Equity Act, 1998 (the EEA)

The EEA has two main purposes. First it protects prospective and existing individual employees from discrimination and harassment at the workplace. Secondly, it seeks to advance affirmative action by requiring employers to take proactive steps to equitably reduce demographic imbalances in the workplace. Each of these purposes trigger separate obligations to investigate.

Section 60(2) provides that where an employer is made aware of any contravention of the EEA (typically a report by an employee of discriminatory conduct or harassment) an employer must take "necessary steps" to eliminate the alleged conduct and to ensure compliance. Where the employer fails to do so, the employer is deemed to be co-liable for the contravention. This can lead to the employer being liable for compensation and damages payable to an employee who has been the victim of discrimination or harassment, even where the employer's management played no direct part in that misconduct. Self-evidently, "necessary steps" would include an appropriate investigation of the alleged misconduct followed by remedial action.

Section 20 of the EEA requires that employers prepare and implement an employment equity plan. As a precursor to this, sections 16-18 of the EEA require an employer to consult with employees and their representatives, following which an employer must conduct an "analysis" in terms of section 19. This analysis involves the investigation of the workplace policies and practices with a view to securing information pertaining to levels of representation of designated groups within the workplace as well as policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.

Conducting these investigations is critical for a business as any findings of non-compliance with the EEA can result in the withdrawal of compliance certifications and the imposition of fines of between 2 and 10 percent of an employer's total annual turnover.

The Code of Good Practice on the Prevention and Elimination of Harassment and Violence in the Workplace, 2022

The Code of Good Practice was promulgated in order to give effect to section 6(3) of the EEA which prohibits harassment on one or more of the prohibited grounds. It requires employers to prepare and implement a policy on harassment and to investigate and act on complaints of harassment if these are reported. The definition of harassment is broad and includes any type of discriminatory treatment, unwanted sexual conduct, and bullying.

Once an employee has reported harassment, an employer is required to conduct an investigation, including consulting all relevant parties. The employer must then take reasonable steps to remediate the misconduct and to ensure that the same type of misconduct does not take place in the future.

Where an employer does not engage in this impartial investigation process, it may be found liable in terms of section 60(3) of the EEA as we have described above.

Protected Disclosures Act, 2000 (PDA)

The rights of whistleblowers have become prominent recently due to the intimidation and even assassination of persons who make disclosures to the authorities in high profile cases. Where whistleblowing takes place within the employment context, the Protection of Disclosures Act of 2000 is applicable. The PDA protects employees who make "protected disclosures" to their employer, these being defined broadly to include almost any form of workplace misconduct that is reported in good faith.

As soon as the report is made by an employee (which includes independent contractors), this triggers the employer's obligation to investigate and to decide how to deal with the report. Importantly, the employer is required to decide within 21 days whether to investigate or not, or to refer the report to another body (such as the SAPS). The employee must be informed of this election in writing. The 21-day period may be extended where it is reasonable to do so.

Once an employer conducts an investigation, it must provide the employee with details of the outcome of the investigation. The outcome of the investigation may also trigger other investigation and remedial steps. For example, if a whistle-blower report and subsequent investigation confirms the existence of discriminatory conduct, then the employer must follow the requirements set out in the EEA.

Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA)

Certain serious forms of misconduct may trigger investigation and reporting obligations under PRECCA. PRECCA provides for a statutory offence of corruption which is widely defined. Broadly speaking it includes and prohibits the paying of bribes and other forms of "gratification" to other persons in exchange for a dishonest return. This would include circumstances, for example, where an employee accepts a bribe or kickback from a supplier in order to prefer the procurement of that supplier's product.

Section 34 requires employers who know, or ought reasonably to have known, about corrupt conduct committed by another person involving an amount greater than R100 000 to report this knowledge of suspicion for the Directorate for Priority Crime Investigation. Failure to do so constitutes an offence. It is thus incumbent upon employers who suspect that their employees are involved in corrupt conduct to investigate and then to report to the DPCI if a suspicion of corruption is evident.

Further, PRECCA was amended in 2005 by the inclusion of section 34A, which introduces the offence of failing to take reasonable steps to prevent the occurrence of corruption in the business. There is thus an ongoing obligation on employers to monitor their workplaces, to investigate, and to introduce policies in order to pro-actively prevent corruption.

Financial Intelligence Centre Act, 2001 (FIC Act)

The FIC Act is of importance to employers operating in the financial services sector. The Act requires management to report on any suspicious transactions which may not have a lawful purpose. As with PRECCA this essentially requires employers to proactively investigate their suspicions of impropriety in the workplace and to report on same to the Financial Intelligence Centre. Failure to do so also constitutes an offence.

Best practice guidance

Although there is no fixed procedure or format for mandatory investigations under these statutes, we have identified a number of key requirements that will ensure that the investigation is appropriate, balanced, thorough and arrives at defensible conclusions.

Choose an investigator

It is important that the person tasked with leading an investigation is impartial. You should avoid making use of an investigator that has some form of interest in the subject matter or outcome of the investigation or even someone who might be perceived as harbouring a bias. Anyone reviewing the investigation procedure must feel that it has been conducted with integrity and that the results can be trusted.

You should ensure that the investigator has the requisite skills. This will depend on the nature of the suspected misconduct at play. You should avoid making use of a junior investigator where senior managers might be implicated.

If you make use of an investigator who is external to the business, we recommend that you appoint a legal representative in order to benefit from legal professional privilege. Such privilege only exists between attorney and client and would not apply where the external investigator is not acting in such a capacity. This can be very important where there are reputational and other consequences that might flow from the investigation.

Set the scope of the investigation and planning

Avoid conducting an investigation that has unlimited or poorly defined scope. Investigations are by their nature intrusive processes that risk creating workplace disharmony if they are allowed to continue for unduly long periods of time.

We recommend that employers first set out the terms of reference for the investigation and the plan and timeline that you intend to implement in reaching your objectives.

For certain investigations it will be important to secure key information, such as IT records, mobile devices and physical documents. You should ensure that you have a plan to minimise the risk of document destruction and that where devices are mirrored or copied that there is a provable chain of custody should they be required in subsequent legal proceedings.

Investigation interviews

Interviews with witnesses to the alleged misconduct should at all times be treated with respect and dignity. Interview questioning must be carefully planned in

advance so as to extract the maximum amount of useful information. Witnesses that feel that they are be treated respectfully are more likely to be forthcoming than those that are afraid.
You may wish to consider resources that are external to the organisation such as experts or private investigators if certain niche fact finding is required to supplement the investigation team. When doing so, be sure that roles and deliverables are clearly defined by the investigation team and always assess the risk of losing privilege.

The investigation report

Once the investigation team has reviewed the investigation documentation and records and has interviewed all interview subjects, it will be in a position to draft the investigation report. This need not be a complicated document, but we recommend that it addresses the following key issues:

- The nature and details of the complaint that has been received or issue identified.
- The dramatis personae of those involved in the investigative process
- The methodology employed in conducting the investigation
- A summary of the evidence reviewed and the persons interviewed
- The findings of fact that you have made
- The legal consequences that could flow from these facts
- Identify any remedial action that needs to be taken, including any mandatory reporting to regulatory authorities.

Conclusion

Having assisted our clients with a number of mandatory investigations under the above statutes, we believe that following this guidance will stand you in good stead. You are also welcome to contact our specialist Investigations team should you require any assistance in successfully completing investigations.

Employer Liability Insurance in South Africa

By Jessica Blunden (Associate), Kriyanka Reddi (Associate) and Donald Dinnie (Director)

What is Employer Liability Insurance?

Employer Liability Insurance is a form of third-party liability cover that indemnifies an employer for damages and defence costs where an employee pursues a civil claim against the employer alleging liability for injury, illness or death arising in connection with employment, and caused by the employer.

Employer Liability Insurance is commonly purchased as a section or extension within a broader commercial liability policy, though standalone arrangements exist.

Coverage and exclusions

The cover is designed as indemnity protection, and generally covers legal liability to pay damages, together with claimant's costs and the employer's defence costs.

Employer liability insurance can cover claims by employees against employers for failure to deal with sexual harassment, discrimination, wrongful termination, wrongful discipline, breach of an employment contract, mismanagement of employee benefit plans, deprivation of career opportunities or promotional prospects, defamation, inaccurate whistleblowing, retrenchments and other risks not covered by COIDA.

Employer Liability Insurance policies typically exclude cover for:

- Standard market exclusions (such as war, political risks, and nuclear risks, asbestos and pollution related claims);
- Claims that are compensable under the Compensation for Occupational Injuries and Diseases Act, 1993 **(COIDA);**
- Liability arising from deliberate or wilful misconduct by the insured;
- Fines, penalties and punitive or exemplary damages; and
- Claims outside designated jurisdictional and territorial limits, unless specifically extended.

What about COIDA?

Employer Liability Insurance is liability cover that protects businesses in circumstances where the statutory compensation scheme, COIDA, does not respond.

COIDA is the primary mechanism for compensating employees for occupational injuries and diseases. When it applies, COIDA channels employee claims into a no-fault compensation fund and removes the

employee's common-law right to sue the employer. It prevents, to some extent, delictual claims against employers.

Employer Liability Insurance operates alongside COIDA, covering residual exposures that fall outside the statutory scheme. For example, COIDA does not apply in instances where an employer conducts business within the Republic, but an employee works outside the Republic for a continuous period of more than twelve months.

An employer may rely on section 35 of COIDA as a defence against liability. However, section 35 does not apply where a court finds that the act giving rise to the injury was not a risk incidental to employment.

- *In Churchill v Premier of Mpumalanga,* an employee was assaulted by protestors at her workplace over labour disputes unrelated to her duties as Chief Director: Policy and Research. The court held that the assault bore no connection, direct or indirect, to her contractual duties. The only link was her physical presence at work, which was insufficient to engage COIDA. The court restated the key principle that the risk must be incidental to the employee's duties, not merely to the location of employment.

- In *I.N and Another v South African National Parks*, a SANParks employee's minor child was killed by a leopard at staff quarters in the Kruger National Park. SANParks raised a section 35(1) defence, but the court dismissed it, holding that there was no causal link between the child's death and the employee's work duties. Although the employee was required to reside in the camp, the presence of wild animals did not render the attack a risk incidental to his employment.

- *In Mafuyeka v Minister of Health and Others*, a nurse was assaulted by a member of the public after a patient died. Relying on Churchill, the court held that the assault was not a risk inherent in the nurse's duties and dismissed the COIDA special plea.

Depending on the wording, policies may respond where a claimant is not considered an "employee" as defined under COIDA, but the claimant alleges that the employer is liable for the employee's injury or disease. The latter is a factual dispute and will determine policy response.

There are thresholds applicable to compensation payable under COIDA, prescribed under Schedule 4 of the Act, and adjusted annually. The thresholds are calculated as a percentage of monthly earnings at the time of the incident (currently a maximum of R633 168 per annum). Having regard to the thresholds for compensation, employers should consider taking out group personal accident cover, or employees should be encouraged to purchase personal accident insurance, to cover any shortfall.

Benefits of obtaining cover

Where liability is defensible, legal costs to investigate, defend and, where appropriate, settle claims can be significant. Employer liability policies fund those defence costs from demand, subject to policy terms.

Claims handling is dealt with by the insurer and insurer-appointed legal teams and adjusters with experience in occupational claims and workplace duty-of-care standards.

For businesses that deploy staff across borders or into varied operating environments, the cover provides a pragmatic hedge against uncertainties at the boundary of the statutory scheme, including disputes about whether an incident arose out of and in the course of employment.

Finally, employers are covered in instances where independent contractors allege an employer-employee relationship, which may not be covered under COIDA.

Churchill v Premier of Mpumalanga [2021] ZASCA 16

I.N and Another v South African National Parks [2025] ZAMPMBHC 90

Mafuyeka v Minister of Health and Others [2025] ZAMPMBHC 118

Employment and labour team

Karen Ainslie
Head of Employment & Labour, Director
Tel +27 11 685 8906
karen.ainslie@deneys.co.za

Gillian Lumb
Director
Tel +27 21 405 1231
gillian.lumb@deneys.co.za

Jason Whyte
Director
Tel +27 21 405 1208
jason.whyte@deneys.co.za

Laura Macfarlane
Director
Tel +27 21 405 1323
laura.macfarlane@deneys.co.za

Murray Alexander
Director
Tel +27 31 582 5640
murray.alexande@deneys.co.za

Cameron Wilson
Director
Tel+27 31 582 5614
cameron.wilson@deneys.co.za

Mohammed Chavoos
Director
Tel +27 11 685 8814
mohammed.chavoos@deneys.co.za

Verushka Reddy
Director
Tel +27 11 685 8603
verushka.reddy@deneys.co.za

Brian Denny
Consultant
Tel +27 31 582 5650
brian.denny@deneys.co.za

Romy Homveld
Senior Associate
Tel +27 31 582 5733
romy.allen@deneys.co.za

Michael Balie
Senior Associate
Tel +27 11 685 8500
michael.balie@deneys.co.za

Frances Barker
Associate
Tel +27 21 405 1287
frances.barker@deneys.co.za

Heidi Davis
Associate
Tel +27 11 685 8959
heidi.davis@deneys.co.za

Raees Halim
Associate
Tel +27 11 301 3497
raees.halim@deneys.co.za

Alycia Pramlall
Associate
Tel +27 31 582 5691
alycia.pramlall@deneys.co.za

Tracey Powell
Associate
Tel +27 31 582 5615
tracey.powell@deneys.co.za

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