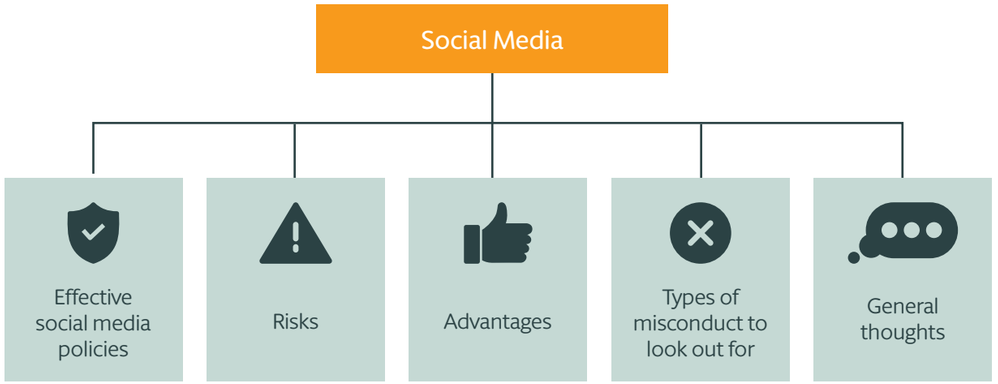
The Changing Workplace

Hogan Lovells

Social media and the workplace

Social media is definitely one of the most significant developments in communication. It has changed the way and speed at which people interact with one another and has naturally infiltrated the working environment.

In noting the impact of social media, Judge Chetty, in the case of *Braithwaite v Mckenzie* 2015 (1) SA 270 (KZP) stated that "in today's world the most effective, efficient and immediate way of conveying one's ideas and thoughts is via the internet... the internet reaches out to millions of people instantaneously. The possibilityof defamatory postings on the internet would therefore pose a significant risk to reputational integrity of individuals".



It is important to know and deal with the risks associated with social media, have effective social media policies in place, and know how to use social media to the advantage of your business.

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Effective social media policies

The social media policy adopted by the employer must be of a practical, reasonable and enforceable nature to ensure that clear guidelines are provided to employees regarding the use of social media for personal and professional usage.

There should be an educational aspect to the policy that imparts to employees the impact of social media on the business of the employer as well as the consequences of misconduct relating to social media.

Due to the expeditious changes that occur in the social media realm, it must be emphasised that employers ensure that the policy is not rigid and allows for enough flexibility to cover the employer for all contingencies.

In the case of *Cantamessa v Edcon Group* [2017] 4 BALR 359 (CCMA) an employee was dismissed, following a disciplinary enquiry, for posting an inappropriate racial comment on Facebook.

The post was made by the employee while she was on annual leave and using her own equipment. The employee's Facebook profile included the name of her employer.

A client brought the racial comment to the attention of the employer. There was a backlash and the employer asserted that the comment placed its reputation at risk and therefore breached the employment trust relationship.

The employer had a social media policy and the employee admitted that she was aware of and understood the policy. However, the policy was basic and did not regulate social media misconduct outside working hours or using private tools.

The consequence of this was that the CCMA held that the employer failed to prove that the employee breached a rule and the summary termination was unreasonable and unfair.

In an article on the social media skills gap the author, Ryan Holmes, states that "[t]he contemporary workforce is woefully underprepared for the challenges… A social media skills gap of epic proportions has opened up, as social media surges forward while formal training and education programs lag seriously behind".

This places huge pressure on employers to ensure that their employees possess social media literacy. Social media literacy was defined by Katlen Tillman as having the proficiency to communicate appropriately, responsibly, and to evaluate conversations critically within the realm of socially-based technologies.

This type of training could go a long way towards avoiding the potential risks employers may face due to employees incorrect usage of social media.

Grey areas eradicated by clear social media policies

When it comes to what employees can and cannot do on social media there are many grey areas.

For example, can an employee follow controversial pages/people on social media or not? If an employer wants to regulate grey areas such as what pages/people an employee can follow on social media to protect the businesses image, culture, values and brand, the best solution for the employer is to set up a social media policy governing such issues.

A social media policy is advisable for all employers as it sets out the guidelines regarding what employees can and can't do on social media and what the repercussions will be should employees not adhere to the policy.

A properly constructed social media policy prevents grey areas on the issue of social media usage, which makes it easier for employees to know what is and isn't acceptable regarding social media usage. This in turn makes it easier for the employer to regulate employees' online conduct.

We therefore stress the importance of a clear and thorough social media policy. Coupled with this is the need to ensure that employees are aware of the policy, understand what constitutes inappropriate behaviour on social media, as well as the consequences of engaging in such behaviour.

Risks

In a survey conducted by Deloitte on strategic risk management, the following were identified as risks that could flow from the use of social media:

- Damage to reputation
- Associated financial risk
- Confidentially and protection of intellectual property
- Defamation
- Time wasting
- Vicarious liability

From an employment perspective, the list of risks can be quite extensive from harassment or discrimination claims to IT systems and software damage; loss of intellectual property to poaching or pickets, strikes or boycotts, depending on the facts of the case.

These risks can be mitigated by ensuring that clear and concise policies are in place and are understood by all employees. The seriousness of social media misconduct must also be vehemently stressed as well as the sanctions that will be imposed for non-compliance with the social media policies, which can include dismissal.

Advantages

Recruitment

Recruiting an employee now goes beyond the realm of a CV or an interview as more and more employers are using social media in their recruitment processes.

Social media serves as a platform for employers to market their business to prospective employees and allows employers to gauge the type of employee they may be hiring.

Marketing

Social media can be used to:

- Advertise job positions on social media platforms - the youth of today spend excessive amounts of time on these platforms. This makes it extremely easy for employers to reach potential candidates using social media as a recruitment tool by placing job advertisements on these platforms thereby increasing their exposure.
- Conduct live recruitment of new employees - social media allows an employer to interview a potential candidate live over the internet from anywhere in the world. This could save costs for both the employer and the employee.
- Find information that may sway their decision in favour of hiring a prospective candidate.

Boost business by employers encouraging employees to post and tweet about the business – this is tantamount to advertising from which the business benefits at no extra cost.

Attract more clients or consumers to buy the product or make use of the services provided by the employer, this in turn grows the business and ensures that employees need not be retrenched for operational requirements.

What about employee rights?

Employees have a right to privacy in the workplace. However this right is far from absolute and there are various instances when this right can justifiably be impaired by the employer. For example employees may be of the perception that private communications between friends by email or other means over the internet aren't accessible by the employer. This is not the case if the employee makes use of a company laptop/computer as the medium for such communications.

In *Van Wyk v Independent Newspapers Gauteng (Pty) Ltd* and others an employee was dismissed for complaining about her employer to a fellow employee; who was also her close friend, by email on a company computer. The employee argued that such communication was of a private and personal nature to which the employer had no right and therefore couldn't use as evidence against her. The commissioner disagreed and held that the dismissal of the employee was fair.

In the case of *Gaertner & Others v Minister of Finance & others* 2014 (1) BCLR38 (CC), the CC confirmed that when "a person moves into communal relations and activities such as business and social interaction, the scope of the personal space shrinks". Accordingly, employees don't have carte blanche to say and post what they want to with impunity.

Employees also have the right to freedom of expression; however, this must be exercised within the parameters of the employer's social media policy. Even the Constitutional Court has confirmed that freedom of expression is not a superior right in South Africa.

This was confirmed in the case of *Le Roux and others v Dey* 2011 (3) SA 274 (CC) where Judge O' Regan stated that, "with us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression... What is clear though and must be stated is that freedom of expressions does not enjoy superior status in our law".

Types of misconduct to look out for

- Bad-mouthing the employer, other employees, executives, directors, customers, clients or suppliers
- Making racist comments
- Bullying or harassing colleagues
- Using or disclosing confidential information or trade secrets of the employer
- Ex-employees failing to update their online profiles .

In the unreported case of *van der Schyff v Danie Crous Auctioneers*, the Pretoria High Court granted an order compelling Mr van der Schyff to update his LinkedIn profile and to pay the costs of the application. Mr van der Schyff had refused to update his LinkedIn profile despite the two years' worth of requests from his ex-employer, Danie Crous Auctioneers.

Whether such misconduct committed by the employee on social media is committed at work or off duty is essentially irrelevant.

The crucial question to ask is whether there is a link between the employee's conduct and the employer's business interests.

If there is and the employee's conduct has a negative impact on the employer's business interests the employer will in all likelihood have a fair reason on which to rely to dismiss the employee.

Privacy settings offer some protection

Employees must remember that if they use social media pages, such as Facebook, and don't activate the privacy settings on their profiles then they are deemed to have waived their right to privacy in respect of the posts they make, and these posts will fall wholly within the public domain.

Should an employee thus post a negative comment about his/her employer on Facebook without having activated the privacy settings on his profile, then such comment falls within the public domain and can negatively affect the employer's business interests and constitute a justifiable ground for dismissal.

However, should an employee activate the privacy settings on his profile then the comments made by him/her won't fall within the public domain and won't be able to jeopardise the employer's business interests and warrant for dismissal.

Furthermore, should the employer somehow access such comments it will probably be inadmissible in respect of any sort of disciplinary proceedings against the employee because of the employees right to privacy.

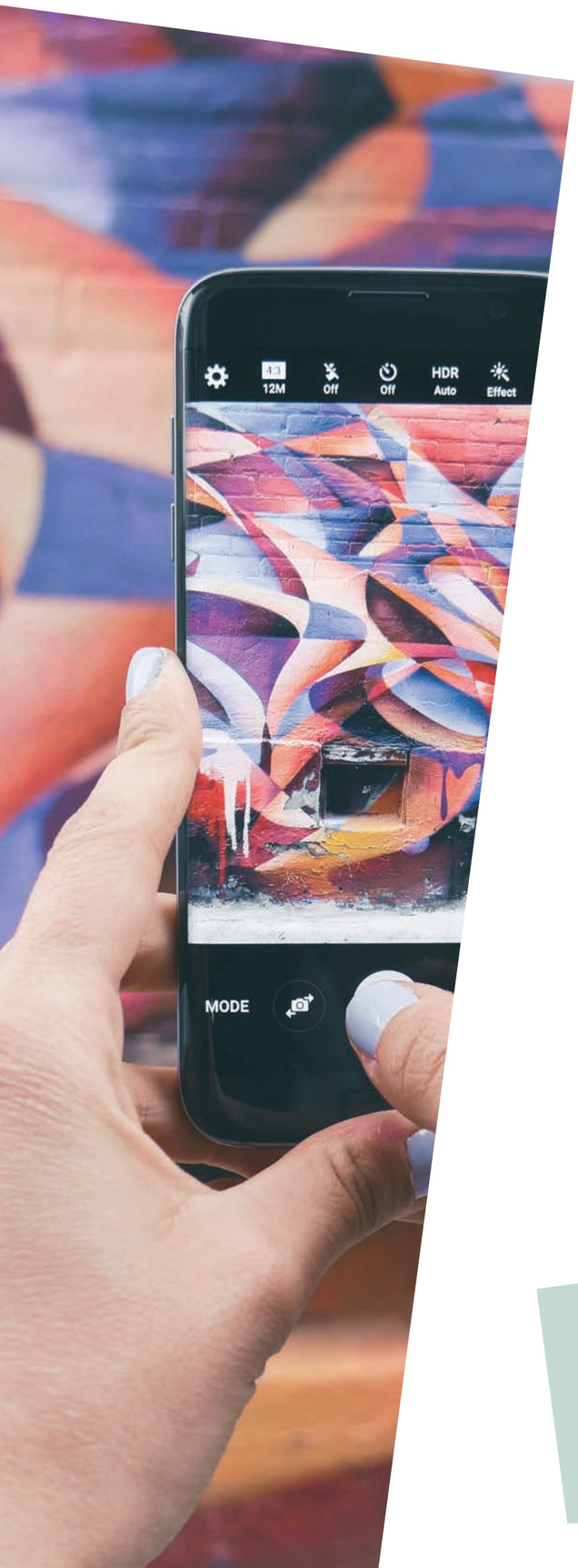
The cardinal test operative in the circumstances is "whether the employee's conduct has destroyed the necessary trust relationship or rendered the employment relationship intolerable".

Duties placed on the employer

An employer has a duty to provide its employees with a safe working environment. This duty does not merely require employers to protect employees from physical harm but also from psychological harm caused, for example, by online harassment and cyberbullying. In the field of social media employers should therefore take reasonable steps to protect employees from online harassment and cyberbullying committed by fellow employees.

This duty applies regardless of whether an employee is subjected to online harassment or cyberbullying by fellow employees during or outside of working hours. Should an employer fail to fulfil this duty they can be held vicariously liable for the damage caused to their employee who has been subjected to online harassment and/or cyberbullying by fellow employees.

In *Otomewo v Carphone Warehouse Ltd* ET/2330554/2011, two employees accessed one of their co-employees (Mr Otomewo) phones at work and posted on his Facebook profile "finally came out of the closet. I am gay and proud of it". The relevant Tribunal then had to determine whether the employer was vicariously liable for such conduct. The Tribunal held that the post was made on Mr Otomewo's phone while he and his two fellow employees were at work, during working hours. Therefore, the Tribunal concluded that the conduct of the two wrongdoing employees fell within the course and scope of their employment. For this reason the employer incurred vicarious liability for their conduct, which amounted to harassment on the basis of sexual orientation.



General thoughts

Though it possesses real risks to the business of the employer, if used correctly, social media can be the tool that promulgates the business to new heights.

The advertising capabilities are endless, as posts can be shared over and over again. Social media further affords employees with the opportunity of firstly, building their own personal brands and secondly, becoming branding agents for their employer.

- This has the advantage of gravitating the employee's followers towards the brand of the business and could potential lead to new business opportunities, more clients and more potential candidates for employment to choose from.
- Imagine having 100 employees all acting as branding agents under the guidance of the social media policy of the business. This is a complete value-add that the business receives at no extra cost, if utilised correctly.

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Amendments to strike law

The amendments provide in broad themes the following:

Conciliation: Picketing agreement

1. A commissioner will attempt to conciliate the dispute and will also consider whether the parties have a collective agreement that contains picketing rules. If no picketing rules exist, the commissioner will attempt to secure an agreement between the parties. Is it sensible to deal with this aspect at conciliation?
2. If no picketing agreement is secured, the commissioner must then determine picketing rules.
3. When determining the rules, the commissioner must consider:
   a) the nature of the premises/workplace and where the employees intend to picket;
   b) the Code of Good Practice: Picketing – the Pro Forma to the Code; and
   c) the representations made by either party.
4. The Commissioner must issue the picketing rules before issuing a certificate of non-resolution. Will this delay strike action?
5. If there are no picketing rules in place when the strike starts, the proposed amendments provide that no picketing will be permitted unless:
   a) the nature of the premises/workplace and where the employees intend to picket;
   b) the Code of Good Practice: Picketing – the Pro Forma to the Code; and
   c) the representations made by either party.

Is this fair and how will it impact labour relations. How is this aspect to dealt with ahead of an approach to conciliation, if at all?

Picketing at a third-party premises

6. When striking employees work at a third-party site and want to picket - the party who owns or controls that site, must be given an opportunity to make prior representations on the picketing rules and where the designated area may be. This is the current law, but this aspect is now further emphasised upfront. Has this historically made any practical difference?
7. A Commissioner is still permitted to allow employees to picket on the employer's premises, but only if the employer unreasonably withholds its consent and, in such cases, regard must still be had to the nature and circumstances of the premises and health and safety factors.

Remedies

8. Is the recourse that will be available in the event that the picketing rules are breached fair/appropriate and will they achieve less violent strikes?

   Labour Court may through an interdict:

   a) compel compliance with the picketing rules;
   b) vary the terms of the picketing rules; and
   c) suspend the picket.

Advisory panel

9. The further remedies that are available to employers who experience strike action, (other than seeking interdicts from the Labour Court and taking disciplinary action), where it is shown to be in the public interest, is the introduction of the establishment of an advisory panel, which will attempt to facilitate a resolution of the dispute. The advisory panel can be appointed upon application from either party, by the CCMA on its own accord, or pursuant to a Labour Court order or by the Minister. Is this a sensible way forward?
10. What would give rise to the appointment of an advisory panel?

Where the strike or lock-out:

a) is no longer conducive to collective bargaining, ie it has continued for a protracted period of time with no end in sight;

b) brings about an imminent threat that constitutional rights may or are being violated or there is a threat of damage to property and/or violence;

c) has the imminent potential to cause or exacerbate a national or local crisis affecting the conditions for normal social and economic functioning of the community or society.

11. Who makes up the advisory award panel?

A senior commissioner who will be the chairperson, together with one assessor appointed by the employer party to the dispute and one assessor appointed by the trade union party to the dispute.

12. What happens if one of the parties fails or refuses to participate in the advisory arbitration?

The director of the CCMA will then appoint a person with the requisite experience to represent the interests of that party during the proceedings.

13. The powers of the advisory arbitration panel are?

a) The panel will have the same powers as a commissioner but must deal with the substantial merits of the dispute and can order the disclosure of relevant information, provided that information is necessary in order to make a factual finding.

a) If an advisory arbitration panel is appointed, the strike and lock-out will continue during this period.

14. What would the advisory arbitration award seek to address? It would include a report on the findings, recommendations for the resolution of the dispute and a motivation as to why the recommendations ought to be accepted.

a) The advisory arbitration award is not immediately binding? An award is only binding on a party to the dispute if the parties have accepted or are deemed to have accepted the award.

b) A party will be deemed to have accepted the advisory arbitration award, if after seven days a party to the dispute fails to indicate either its acceptance or rejection of the award.

c) If a party rejects the advisory arbitration award, it must provide a motivation for its rejection.

d) Once a party becomes bound by the advisory arbitration award it cannot strike or lock-out.

Is the innovation of the advisory panel a move in the right direction or is it too cumbersome?

Strike ballots

15. Finally, section 95(5)(p) of the LRA, provides that a trade union and employer's organisation that seek registration have to make provision in their constitutions requiring a ballot of members before embarking on a strike or a lockout.

16. The new section 95(9) of the LRA has been inserted to clarify that a ballot means any system of voting by members that is recorded and secret.

17. Section 99 of the LRA, which deals with records that registered trade unions and employers' organisations must keep and which includes ballot papers, has also been amended to include the attendance register and other prescribed records and other forms of documents or electronic records of a ballot. Does this mean, as reported in the press, that before a union may embark on a protected strike, its members must have participated in a recorded and secret ballot?

Case law summaries

1. DERIVATIVE MISCONDUCT – NATIONAL TRANSPORT MOVEMENT (NTM) AND OTHERS V PASSENGER RAIL AGENCY OF SOUTH AFRICA LIMITED (PRASA) [2018] 2 BLLR 141 (LAC)

Derivative misconduct lies in an employee's failure to offer reasonable assistance to an employer to disclose information about individuals who are responsible for the primary misconduct. Derivative misconduct therefore provides an employer with grounds for dismissal when there is no direct evidence that the employee in question committed the primary misconduct.

Where derivative misconduct is present, dismissal is justified because in instances where employees possess information that would enable the employer to identify wrongdoers and those employees fail to come forward when requested to do so, these employees violate the trust upon which the employment relationship is founded.

In instances where an employer relies on derivative misconduct to dismiss an employee the employer, must on a balance of probabilities, prove the following:

a) the employee knew or ought to have known of the primary misconduct; and

b) that the employee without justification elected not to disclose the information to the employer.

c) the employer must have specifically asked for the information in the context of duty of good faith owed to the employer.

In *NTM V PRASA* employees engaged in a protected strike in support of a demand for organisational rights. Following the strike, numerous trains and train coaches were burnt down, which PRASA suspected was caused by the striking employees and/or persons acting in association with the striking employees. PRASA's suspicions were based on inciting statements made by union officials at gatherings. During these gatherings, the striking employees were informed by the union officials that they should do all in their power to stall train activities even if this meant burning down trains. Inevitably and in light of the burnt down trains and train coaches, PRASA sought to dismiss the striking employees and invited them to make representations as to why they should not be dismissed. Pursuant to receiving the representations, PRASA rejected the furnished reasons and dismissed the employees.

It is critical to note that there was no direct evidence that the striking employees or persons associated with the strike were responsible for the burning and damage caused to the trains. PRASA accordingly relied on the concept of derivative misconduct to dismiss the employees. According to PRASA, it was of the view that the striking employees must have had knowledge of the employees who were responsible for the primary misconduct and their failure to disclose such information breached the relationship of trust, warranting the dismissals.

The court held that despite the fact that the burnings took place during or immediately after the strike, PRASA failed to prove that the burnings were committed by the striking employees or the persons associated with the striking employees. Nor did PRASA prove that the striking employees had knowledge of the misconduct or the persons responsible for burning the trains. Furthermore, in the notice given to the striking employees by PRASA, PRASA never requested the employees to specify who was responsible for the primary misconduct but merely to provide reasons as to why they should not be dismissed. For the reasons set out above, the Labour Appeal Court held that PRASA's reliance on derivative misconduct as a ground for dismissal was misplaced.

2. DERIVATIVE MISCONDUCT - NUMSA OBO NGANEZI & OTHERS V DUNLOP MIXING AND TECHNICAL SERVICES (PTY) LTD & OTHERS DA16/2016 [2018] ZALAC 19 (17 JULY 2018)

In this case Dunlop dismissed its entire workforce for strike related misconduct and a category of employees were dismissed for derivative misconduct because of their failure to provide Dunlop with information concerning the identities of the perpetrators of violent acts during the strike.

The principle of derivative misconduct was addressed by the Labour Appeal Court (LAC) which also had to determine whether the employees charged with derivative misconduct must be identified by the employer or whether the employer must prove the employees' presence during the misconduct to be in a position to infer that they have actual knowledge of the perpetrators and whether their silence is in breach of their duty of good faith towards their employer.

In the CCMA, and based on the principle of derivative misconduct, the Commissioner was of the view that the failure to positively place each employee at the scene where the misconduct occurred was detrimental to the employer's case.

The Labour Court rejected the approach taken by the CCMA and held that sufficient evidence on a balance of probabilities placed the dismissed employees on the scene of the misconduct and drew an inference that on a balance of probabilities, the employees had knowledge of the perpetrators.

Disgruntled by the Labour Court's ruling, NUMSA appealed to the LAC. The LAC held that the arbitrator did not give due consideration to the fact that the employees' presence and knowledge was capable of proof by means of indirect evidence, or by inference, and, accordingly, did not determine whether those facts had indeed been proven by inference.

The LAC further stated that the arbitrator adopted a narrow approach to the evidence by requiring the individual identification of each employee as being present as a *sine qua non* for the employees falling into a category of employees implicated on the basis of derivative misconduct. On the premise that presence or absence had to be established on a balance of probabilities, it must follow that indirect evidence in the form of inferences drawn from the whole body of evidence was a necessary category of evidence to assess.

The LAC found that there was nothing in the evidence to reject the inference that, on a balance of probabilities, each of the employees were present for at least some of the time and it was equally probable, that they were each present most of the time. From these circumstances, the LAC held that an inference could be drawn that it was improbable that each and every one of the employees could not have acquired actual knowledge of the misconduct perpetrated. The LAC thus upheld the Labour Court's judgement and dismissed the appeal.

3. DISCRIMINATION (SWART MAN CASE) - RUSTENBURG PLATINUM MINES V SAEWA OBO MEYER BESTER [2018] ZACC 13

In this case, the Constitutional Court had to determine whether referring to a fellow employee as a "swart man" (black man) was racist and derogatory and whether it was unreasonable for the CCMA commissioner, to find that the use of the term was racially innocuous. If it is found to be racist and derogatory the further enquiry is whether the sanction imposed by the employer, namely dismissal, was appropriate.

The applicant dismissed Mr Bester on grounds of insubordination and the making of racial remarks.

The facts giving rise to Mr Bester's dismissal are as follows:- the applicant provided specified parking bays to certain employees. The applicant's chief safety officer, Mr Ben Sedumedi, allocated a parking bay to Mr Bester. At some stage, Mr Sedumedi allocated the adjacent parking bay to Mr Solly Tlhomelang, an employee of a sub-contractor at the Mine. During the beginning of April 2013, Mr Bester found a large 4x4 vehicle similar in size to his own vehicle, parked in the adjacent parking bay. Though parking in a limited space was possible, it was difficult to reverse and he was concerned that the vehicles may be damaged in the process. Mr Bester decided to take the matter up with Mr Sedumedi in an effort to arrange for the other vehicle to be parked elsewhere. Mr Bester made repeated efforts to raise the issue with Mr Sedumedi, which included phoning and emailing him, but without success.

The applicant's version is that Mr Bester stormed into a meeting while it was in progress, pointed his finger at Mr Sedumedi and said, in a loud and aggressive manner, that Mr Sedumedi must *"verwyder daardie swart man se voertuig" (move that black man's vehicle),* otherwise he, Mr Bester, would take the matter up with management. According to Mr Bester there was no meeting in progress, rather Mr Sedumedi and Mr Van der Westhuizen were casually discussing jogging routes. When they had finished chatting, Mr Bester raised his parking difficulty with Mr Sedumedi but he responded by saying that he would not speak to a C5 grade employee. According to Mr Bester, Mr Sedumedi said *"jy wil nie langs 'n swart man stop nie . . . dit is jou probleem" (you don't want to stop next to a black man. . . that is your problem).* Mr Bester said he told Mr Sedumedi not to turn the matter into a racial issue and that he intended taking the matter up with senior management.

The applicant subsequently suspended Mr Bester, pending the outcome of a disciplinary enquiry. The chairperson found Mr Bester guilty of two charges of misconduct, firstly for disrupting a safety meeting and secondly, for making racial remarks by referring to a fellow employee as a "swart man". The matter was then referred to the CCMA and the commissioner held that the dismissal of Mr Bester was both substantively and procedurally unfair. The commissioner thus ordered that the applicant reinstate Mr Bester with retrospective effect to his position as a senior training officer and awarded him back pay in the amount of ZAR191 834.21.

The Labour Court was of the view that the commissioner's failure properly to resolve the material dispute of fact before him resulted in factual findings that are entirely arbitrary. The Labour Court

further noted that the undisputed evidence before the commissioner was that the applicant adopted a zero tolerance approach to the use of derogatory and abusive language. It was thus held that Mr Bester had committed an act of serious misconduct that warranted dismissal.

The Labour Appeal Court stated that an objective test had to be used to determine whether the use of the words *"swart man"* was derogatory, abusive and in contravention of the applicant's disciplinary code. It reasoned that in order to determine whether the words *"swart man"* is derogatory, the use of the words must be looked at in the context in which they were uttered.

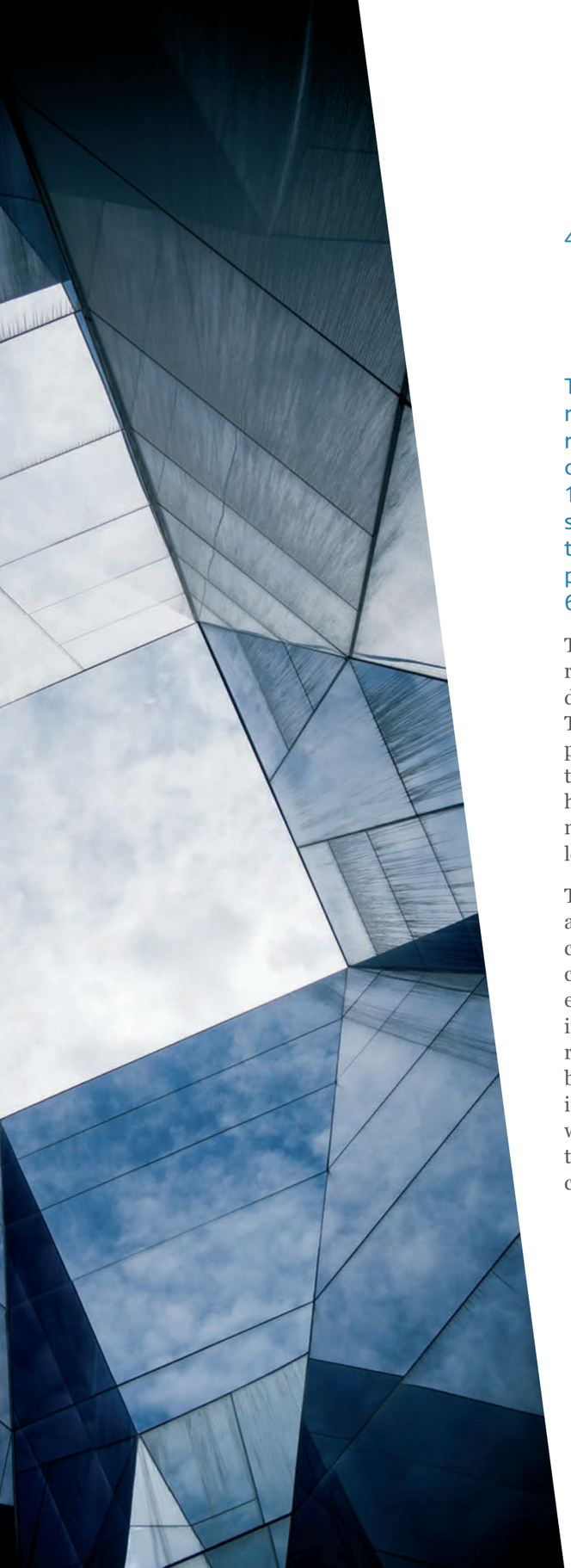
The Labour Appeal Court concluded that even though Mr Bester was charged with making racial remarks by referring to a fellow employee as a *"swart man"* the context disclosed that the perception that the words were derogatory and racist was certainly not the only plausible inference that could be drawn from the proven facts and the probabilities. The inference that Mr Bester used the words *"swart man"* in the context, to describe Mr Tlhomelang, whose name he did not know, was equally plausible.

The Labour Appeal Court held that the Labour Court had erred in reviewing and setting aside the award of the commissioner. It confirmed the conclusion of the commissioner that the dismissal of Mr Bester was both substantively and procedurally unfair. In addition, the Labour Appeal Court held that a racist remark made in the workplace is a serious offence which warrants dismissal.

The Constitutional Court found that it was never Mr Bester's defence that he used the words *"swart man"* as a descriptor or that he did not mean to "demean" any person. He denied using the words and conceded that if he had done so, it could be a dismissible offence. There was no evidence in the record justifying a finding for Mr Bester on the basis that the Labour Appeal Court did.

The Constitutional Court held that by sanitising the context in which the words were used, the Labour Appeal Court incorrectly applied the test to determine whether the words used are derogatory, in the context of this matter, to the facts in this matter. The Labour Appeal Court, as well as the commissioner, failed to approach the dispute in an impartial manner taking into account the "totality of circumstances". Not only was *"swart man"* as used here racially loaded, and hence derogatorily subordinating, but it was unreasonable to conclude otherwise. It was unreasonable for the commissioner, within this context, to find that using *"swart man"* was racially innocuous.

The Constitutional Court also held that Mr Bester's lack of remorse indicated that he had not learnt to conduct himself in a manner that respects the dignity of his black co-workers and further held that by his actions, he had shown that he had not made a break with the apartheid past and embraced the new democratic order where the principles of equality, justice and non-racialism reign supreme. The Constitutional Court was thus satisfied that dismissal was an appropriate sanction in the circumstances.



4. EFFECT OF PROMOTION ON ORIGINAL RESTRAINT OF TRADE - PROFIBRE PRODUCTS (PTY) LTD V GOVINDSAMI (J1448/18) [2018] ZALCJHB 240

This was an application brought to enforce restraint undertakings furnished by the respondent to the applicant in terms of a contract of employment. The respondent was employed on 15 December 2005 as a quality and product support manager. In 2011, he was appointed to the position of key accounts executive, the position he held at the time of his resignation on 6 March 2018.

The applicant sought undertakings from the respondent, who had access to strategic information during his employment, which were not forthcoming. The respondent was subsequently observed at the premises of Fibre Panels, who is in direct competition to the applicant. The respondent argued that when he was promoted as a quality and product support manager, the restraint and the entire contract was no longer binding on him.

The Labour Court completely rejected the aforesaid argument and held that the restraint in the employment contract remains enforceable despite the employee's change in roles (and different responsibilities and exposure to trade secrets). The court made an order in the terms that the respondent is interdicted and restrained from advising, consulting to, being employed by or having any interest in, any concern that trades in competition with the applicant. The respondent was further interdicted and restrained from disclosing to any unauthorised third party any trade secrets or confidential information of the applicant.

5. RIGHTS OF MINORITY TRADE UNION – ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION (AMCU) AND OTHERS v ROYAL BAFOKENG PLATINUM LTD AND OTHERS (JA23/2017) [2018] ZALCJHB 208 (26 June 2018)

The case involved employees who were served with section 189(3) notices when they attempted to report for duty at the mine. Neither the employees nor the minority union, AMCU, were consulted prior to the retrenchment of the employees. The National Union of Mineworkers (NUM) and the United Association of South Africa (UASA) were the representative trade unions at the mine and were consulted by the employer about the retrenchments.

Following the events set out above, AMCU launched an application, as a minority trade union, against Royal Bafokeng Platinum to challenge the constitutionality of sections 189(1)(a)(c) and 23(1)(d) of the Labour Relations Act, which provides that where an employer enters into a retrenchment agreement with representative trade union(s), such an agreement will extend to minority trade unions in terms of section 23(1)(d).

The retrenchment process followed by Royal Bafokeng Platinum excluded consultations with AMCU, who contended that sections 189(1)(a)(c) and 23(1)(d) were unconstitutional on the basis that they infringed on a number of the employees' constitutional rights and International Conventions. AMCU also contended that section 189(1)(a) be interpreted in such a manner that individual employees and minority trade unions may also be consulted irrespective of the existence of a collective agreement between the employer and the majority trade union(s) and that the extension of retrenchment agreements, without involving minority unions or non-members, in terms of section 23(1)(d) is irrational and offends the rule of law.

In analysing the contentions made by AMCU, the Labour Appeal Court (LAC) held that the Legislature had made a policy choice of Majoritarianism in order to facilitate orderly collective bargaining, minimise union rivalry and to foster democratisation of the workplace by avoiding a multiplicity of consulting parties, a proliferation of unions and industrial discontent.

Thus section 189 of the LRA is also a manifestation of the policy choice that the legislature made. This policy choice in favour of majoritarianism is based on the fact that retrenchments are usually collective in nature. Section 189 recognises that the interests of the employees are best served by the most representative entity at the workplace.

The LAC held further that the exclusion of minority trade unions because they have not met the threshold agreed upon, does not mean that their members are not represented. If the representative union acts unfairly or discriminatory against an employee and such conduct leads to the unfair retrenchment of the employee, such employee has the right to challenge the fairness of his or her individual retrenchment.

Furthermore, section 23(1)(d) does not require expressly or implicitly that a minority union should be consulted before a collective agreement is extended. The representative union would generally be in a better position to consult with the employer because it will have all the necessary information at its disposal. To grant a minority trade union the right to be heard in circumstances where the representative union has, by means of collective bargaining, acquired the right to be the only bargaining agent would be subversive to collective bargaining and the principle of majoritarianism which underpins section 23(1)(d). The extension of a collective agreement without affording a minority union or non-union members a hearing is rationally related to the achievement of the purpose of the section 23(1)(d) process. It facilitates orderly collective bargaining; it avoids the multiplicity of consulting parties and it fosters peace and order in the workplace. It was on this basis that the LAC dismissed AMCU's constitutional challenge of sections 189(1)(a) and 23(1)(d).

The LAC also dismissed AMCU's procedural challenge based on section 189A (13) on the basis that AMCU, as the minority union, did not have *locus standi* to challenge the procedural fairness of the retrenchments.

6. ACCRUED LEAVE – BESTER V SELFMED MEDICAL SCHEME(C171/2015) [2018] ZALCCT 25 (31 July 2018)

Mrs Marthie Bester (Bester), an erstwhile employee of Selfmed, claimed that she was contractually entitled to 218 days' (alternatively 213.5 days) accrued leave pay as was reflected on her payslip for December 2014. Selfmed disputed Bester's claim and submitted that she was only entitled to 45 days' leave pay when she resigned and consequently paid her that amount.

Bester relied on two claims. Firstly, she contended that she was owed 213.5 leave days which was calculated in terms of the Selfmed Leave Policy. The 213.5 leave days amounted to ZAR1 470 562.38, comprising of a capital sum together with interest.

Bester's second claim related to the interest on the unpaid emoluments for the periods when the payments became due each month until they were paid in June 2014. This amounted to ZAR20 619.74, together with further interest on that amount from 27 June 2014 until date of payment.

In respect of her first claim, Bester experienced difficulty in situating her claim for accrued leave however; she maintained that Selfmed's Leave Policy had not been changed since it was adopted in September 2005.

Mr Becker, who testified on behalf of Selfmed, experienced difficulty in explaining why he based his calculations on Bester only being entitled to 45 days' accrued leave. When he first did the calculation, he was not even aware of the amended Leave Policy that was adopted in September 2005. He only became aware of this policy in preparation for the first sitting of the trial, prior to September 2017.

In respect of Bester's second claim for interest on the unpaid emoluments, the background to this claim is as follows:

Bester was required to leave Selfmed's premises, placed on suspension and was only paid her basic salary pending a disciplinary enquiry. This was in terms of a High Court order granted against Bester in an application she was not party to. In terms of theHigh Court Order, Selfmed was ordered not to disburse any further amounts, other than her basic salary, pending the finalisation of the disciplinary enquiry. On 21 February 2014, Selfmed withdrew all of the disciplinary charges relating to misconduct against Bester and lifted the suspension. In light of the suspension being lifted, the *status quo* ought to have been restored by Selfmed, ie paying Bester her basic salary and benefits. Selfmed argued that it was only obliged to pay Bester interest on the emoluments that were unpaid during her *de facto* suspension from 21 February 2014 to the actual date of payment. That was argued as being the date upon which the payments became due and payable.

The Labour Court held that the aforesaid argument could not withstand scrutiny because when Bester's suspension was lifted, the *status quo* was restored. The emoluments became due and owing each month that they were withheld. Interest thus ran from each of those dates. That is the date on which Selfmed was *in mora* each month in terms of the common law.

Arising from the above, the Labour Court held that in respect of the accrued leave, Selfmed had to pay an amount of ZAR1 189 140.30; capitalised interest that accrued at the then prevailing rate of 9% per year on the sum of ZAR1 470 562.38 during the period 25 December 2014 to 17 February 2015, which amounted to ZAR19 218.03; and interest on the total amount of ZAR1 208 358.33 from 17 February 2015 to date of payment at the prevailing prescribed rate of interest.

In respect of the unpaid emoluments interest, Selfmed was ordered to pay Bester an amount of ZAR20 619.76 in respect of capitalised interest, together with interest thereon from 28 June 2014 until date of payment at the prescribed rate of interest of 15,5% per year as well as the costs of the suit.

7. DUAL EMPLOYER V SOLE EMPLOYER INTERPRETATION - ASSIGN SERVICES (PTY) LIMITED V NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA AND OTHERS [2018] ZACC 22

In 2015, Assign Services (Pty) Ltd and the National Union of Metalworkers South Africa (NUMSA) referred a matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) for clarification on the meaning of section 198A(3)(b). Assign Services considered section 198A(3)(b) to create a "dual employer" relationship, where placed workers remain employees of Assign Services for all purposes, but are also deemed to be the client's employees for the purposes of the LRA. NUMSA on the other hand contended that the client became the only employer of the placed workers once section 198A(3)(b) was triggered. The CCMA Commissioner found in favour of NUMSA's "sole employer" interpretation. This means that, once a placed worker has spent more than three consecutive months with a particular client of the TES, they are no longer considered "temporary workers" and are deemed to be employees of that client.

Assign Services then instituted a review application in the Labour Court to have it reviewed and set aside. The Labour Court found that there was nothing in section 198A(3)(b) that could be read as invalidating the contract of employment between the workers and Assign Services, as section 198A(3)(b) simply created a dual set of rights and obligations to be exercised by both the client and Assign Services. The Labour Court set aside the CCMA's award.

NUMSA appealed to the Labour Appeal Court (LAC). In overturning the Labour Court's award, the LAC held that the purpose of section 198A(3)(b) was not to transfer the contract of employment between Assign Services and the placed workers to the client, but to create a statutory employment relationship between the client and the placed workers. The purpose of the amendment must be to upgrade the temporary service to standard employment, and to free the vulnerable workers from atypical employment. As such, a dual employer relationship would be nonsensical.

Assign Services, aggrieved by the LAC's finding, appealed to the Constitutional Court (CC). The CC held that section 198 A (3) (b) Labour Relations Act (LRA), when interpreted in context, supports the interpretation that when employees are not performing a temporary service, as defined, they are deemed to be employees of the TES client. This landmark judgement applies to TES employees who earn below the Basic Conditions of Employment Act (BCEA) threshold of ZAR205 433.30 and prescribes that these employees, who are contracted by TES to client(s) for longer than three months then become permanent employees of the client. These employees are employed on the same contractual terms as other employees of the client, performing the same or similar work; are afforded the same benefits, as well as, the same prospects of growth and job security.

Articles

Saftu “must be in Nedlac” for input on labour policy

There is a real likelihood of a constitutional challenge to the labour law amendments, and “the challenge will probably come from Saftu”.

The exclusion of the South African Federation of Trade Unions (Saftu) from the National Economic Development and Labour Council (Nedlac) is a serious anomaly that needs to be rectified, as the new federation could make vital input on labour policy formulation, an employment law expert says.

Imraan Mohamed, of Hogan Lovells, added there was an arguable case to be made by the union movement, including Saftu, on aspects of the proposed labour law amendments the government is pushing through. He was elaborating on an article he wrote on the new labour amendments that Saftu is challenging.

“For the first time since 1996, when the current labour dispensation came into effect, there is a real likelihood that government will face a constitutional challenge to all, if not a substantial portion, of the amendments to the Labour Relations Amendment (LRA) Bill, limiting the right to strike, and the introduction of the National Minimum Wage (NMW) Bill. This challenge will probably come from Saftu,” he wrote.

The Basic Conditions of Employment Amendment (BCEA) Bill, the LRA Bill and the NMW Bill have been referred to the National Council of Provinces after passing in the National Assembly.

Mohamed said the amendments were meant to address violence and prolonged strikes and to promote collective bargaining. But Saftu demanded they be scrapped as they “legitimise a poverty minimum wage and undermine workers’ and trade unions’ independence and democratic rights”.

Mohamed did not see enforcement of ballots prior to strikes happening, adding that it could be challenged as an encroachment on workers’ constitutional rights. But he said: “Balloting is a good idea … to gauge if the majority supports a strike.”

A Constitutional Court challenge could delay the changes as it could take two to three years. “This will leave uncertainty around changes to labour laws, which is undesirable.”

The Congress of SA Trade Unions and the Federation of Unions of SA accepted the minimum wage as a starting point.

Saftu is the second biggest labour federation in SA with about 800 000 members. It was refused Nedlac membership as it has not been in existence for a year.

“Saftu is a big player, it should not be excluded. But this debate should be at Nedlac itself,” Mohamed said.

***Citizen* 27 July 2018**

More legal fights expected after broker ruling

More litigation challenging the country’s labour laws should be expected following Thursday’s landmark ruling that found that the clients of labour brokers are the sole employers of workers, dealing a blow to brokers.

In a majority judgment, the Constitutional Court found in favour of the National Union of Metalworkers of SA (NUMSA), dismissing with costs an appeal application brought by labour broker Assign Services, which had argued that the Labour Relations Act deemed them “dual employers”.

Dual employment means the absorbed temporary workers would be in an employment relationship with both the labour brokers and the broker’s clients.

The ruling follows years of disputes between employers and labour unions on the interpretation of section 198A of the act, which was amended in 2014 to force companies to permanently hire contract workers earning less than ZAR2 500 a month, after three months of continuous service.

The intention of the changes was to regulate temporary employment after labour unions campaigned for the removal of brokers due to the exploitative conditions low-paid workers were being subjected to, with some serving as perpetual contract workers.

While the ruling brings clarity to workers and business, it is unclear how it will function in relation to other labour laws.

Labour experts said provisions in the Basic Conditions of Employment Act, among others that still recognise labour brokers as employers, were likely to lead to more disputes.

“We will see litigation seeking to align the Basic Conditions of Employment Act and other laws with the Labour Relations Act amendments,” said Hogan Lovells partner Jean Ewang.

Other far-reaching implications meant companies would now pick up the financial burden of having to employ contract workers permanently, while labour brokers would ultimately feel the financial impact as their clients would be free to end their agreements after the workers are absorbed.

Delivering the ruling, Acting Judge Daniel Dlodlo said: “When interpreted in context, [the contested section] supports the sole employer interpretation. It certainly is also in line with the purpose of the 2014 amendments, the primary object of the LRA [Labour Relations Act] and the right to fair labour practices in section 23 of the Constitution.”

Constitutional Court Judge Azhar Cachalia was not in agreement with the bench on the ruling, saying that by declaring labour brokers as dual employers, workers would enjoy added benefits.

He argued that while the amended sections were clear that the client “is deemed to be the employer” of an employee, “certain employer duties may be enforced against either or both the temporary employment services (TES) and the client.

“This gives the employees added protection by allowing them to enforce their employment rights against two employers. The section makes no sense otherwise.”

Craig Kirchmann, the attorney representing Assign Services, said while they were disappointed by the ruling, labour brokers were still a significant contributor to the country’s economy, as was the case elsewhere across the world.

A 2016 Human Sciences Research Council report on the economic contribution of temporary employment services found that it contributed about 9% to GDP in 2013.

***Business Day* 27 July 2018**

Expect constitutional challenge from labour

For the first time since 1996, when the current labour dispensation came into effect, there is now a real likelihood that government will face a constitutional challenge to all if not a substantial portion of the amendments to the Labour Relations Amendment (LRA) Bill, limiting the right to strike, and the introduction of the National Minimum Wage (NMW) Bill.

This challenge will probably come from the South African Federation of Trade Unions (Saftu). The federation has demanded the scrapping of these pieces of legislation as they "legitimise a poverty minimum wage and undermine workers' and trade unions' independence and democratic rights".

On 29 May the National Assembly passed the Basic Conditions of Employment Amendment (BCEA) Bill, the LRA Bill and the NMW Bill. These bills will now go to the National Council of Provinces for concurrence. The bills are unlikely not to be passed by the council.

To address violence and prolonged strikes and to find ways of strengthening and promoting-collective bargaining, the LRA Bill, 2017 seeks to amend the Labour Relations Act, 66 of 1995.

The amendments seek, among others, to provide that the registrar of labour consider the extension of collective agreements to non-parties, with the minister no longer assuming such role. Furthermore, in terms of picketing arrangements, the bill amends the Labour Relations Act in various other ways. The bill therefore has a strong focus on easing collective bargaining and regulating industrial action.

The NMW Bill sets a minimum wage of ZAR20 per ordinary hour worked and will apply to all workers, although employees of the South African National Defence Force, the National Intelligence Agency, the South African Secret Service and volunteers are excluded.

Farm workers, domestic workers, learners employed in terms of the Skills Development Act and workers on expanded public works programmes have different minimum hourly rates, and these will be applicable from a date to be fixed by the president.

According to the government, the NMW Bill will "advance economic development and social justice by improving the wages of the lowest-paid workers, protecting them from unreasonably low wages, promoting collective bargaining and supporting economic policy".

It will also "ensure that the pervasive, entrenched exploitation of workers in various sectors of the economy is put to a stop".

The BCEA and the Labour Relations Act are being amended. The amendments to the BCEA, among others, seek to repeal provisions dealing with sectoral determinations and to provide for daily wage payments applicable to certain employees to bring the BCEA in line with the NMW Bill.

According to Saftu, the Department of Labour ignored the submission it made to the portfolio committee and it believes that the department was "hellbent on pushing through its own policies and ignoring any contrary views".

Saftu demands a "living" minimum wage be introduced "which will rescue all workers from poverty and enable them to live a decent life and become fully part of the country's economy".

There remain key areas of disagreement, which have been highlighted by the strike on 26 April, in which the unions have made it abundantly clear that they are not in agreement with some of the proposed amendments, specifically in relation to the holding of compulsory strike ballots, new picketing rules and the extension of the period of conciliation, which may make going out on strike more difficult.

A constitutional challenge can easily take two to three years before it is finalised. This will leave uncertainty around changes to labour laws, which is undesirable.

Saftu flexed its muscle on 26 April when it had its first protest against the minimum wage. The federation showed that it has significant support and it will maintain its momentum by taking the government to the Constitutional Court to challenge the amendments.

By Imraan Mahomed

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