Employment Law

ALERT | 5 August 2024

CDH INCORPORATED

In this issue

SOUTH AFRICA

- What would the *"reasonable employer"* do?
- Labour Court judgment on retrenchment: must i issue a written notice?

For more insight into our expertise and services

What would the *"reasonable employer"* do?

On 8 July 2024 the High Court of South Africa, Free State Division, Bloemfontein delivered judgment in the decade-long case of *Louw v Fourie NO and Another* (3074/2016) [2024] ZAFSHC 137.

The matter involved Tilana Alida Louw, a theatre manager at Netcare Universitas Hospital in Bloemfontein who was pursuing a claim for damages under the *actio iniuriarum* in the amount of R627,000 (with interest and costs) against Dr S P Grobler, the first defendant, and Netcare Universitas Hospital, the second defendant. Grobler had conducted a private practice at Netcare and had performed surgeries at the hospital's surgical theatres, making use of its staff.

Why is this case important for employers?

The *actio iniuriarum* remedy is available for wrongful and intentional injury to a person's bodily integrity or reputation.

Although the court does not make any substantive ruling on damages, the court discusses in some detail the expectations from a *"reasonable employer"* to defend a delictual claim arising from a failure to create a working environment where its employees are not subjected to verbal abuse and humiliating and degrading conduct.

Relevant facts

Louw alleged that she endured severe verbal abuse from Grobler, a surgeon alleged to be known for his aggressive behaviour. Despite numerous complaints, Netcare purportedly failed to adequately address the alleged abuse. Louw alleged that this was because Grobler was a *"money spinner"* for Netcare.

Louw alleged further that several scrub nurses declined to work with Grobler, and other staff members were not permitted to file complaints against a medical doctor.

Grobler had passed away and the dispute between Louw and Grobler's late estate (Fourie N.O.) was resolved via a confidential settlement agreement. Louw's delictual claim against Netcare proceeded to trial.

Relief sought

Louw contended that Netcare's lack of action violated its obligation to maintain a safe work environment, leading to psychological trauma, including post-traumatic stress syndrome and a major depressive disorder. Netcare refuted any breach of its duty to Louw and claimed that it had taken steps against Grobler.

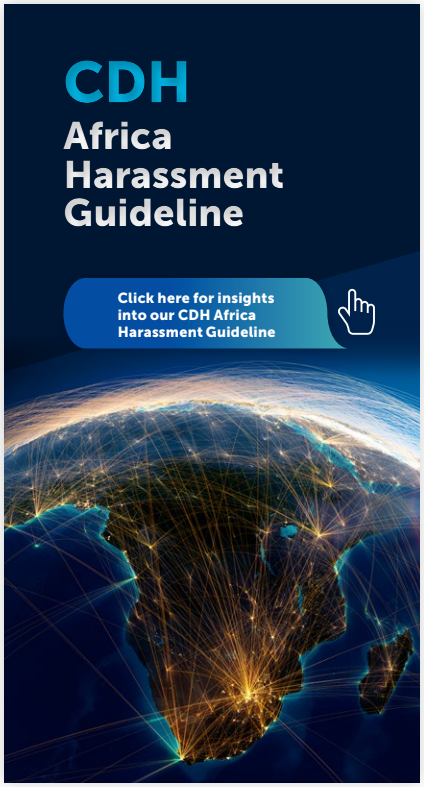
In addition to monetary damages, Louw *inter alia* sought a public apology from Netcare, to be published in the Volksblad newspaper, together with a punitive costs order.

Netcare's open tender

Netcare maintained its alleged defence against Louw's delictual claim for seven days of trial, after which Netcare presented an open tender for settlement of the matter (a with prejudice offer). The tender included a public apology, R300,000 in damages, for *inter alia* Louw's past and future medical expenses, together with a contribution to Louw's legal costs.

What would the *"reasonable employer"* do?

CONTINUED



Louw accepted Netcare's tender to pay her damages and the 50% contribution to legal costs up to the date of settlement being reached with Grobler's late estate (Fourie N.O.). However, Louw rejected the apology in the tender due to her dissatisfaction with the wording. She also rejected Netcare's proposed contribution to her legal costs incurred after the settlement with Grobler's late estate (Fourie N.O.).

Therefore, all that remained for the court to decide was whether (i) Louw made out a case for the relief relating to an apology; and (ii) the scale of costs to be awarded from the date of settlement between Louw and Grobler's late estate (Fourie N.O.).

Apology as a remedy

In considering Louw's delictual claim against Netcare, the court considered what a reasonable employer in Netcare's position would have done and held *inter alia* that Netcare did not meet that standard.

In reaching this conclusion the court considered Netcare's failure to implement and to review its policy that doctors' use of the hospital's facilities may be revoked for, among other things, *"abusive behaviour or harassment"*. The court reasoned further that given Netcare's zero-tolerance approach to harassment, a reasonable employer in Netcare's position would have warned Grobler about his conduct on the first occasion and would have terminated its contract with him on at least the third occasion.

Having found that Netcare failed to comply with the requisite standard of care, the court was tasked with deciding whether the *actio iniuriarum* remedy, which grants relief for impairment of the person, dignity or reputation, may extend to require a public apology. The court found that this remedy focuses on monetary considerations and may not be extended to require a public apology.

What would the *"reasonable employer"* do?

CONTINUED

Although our courts have re-introduced a court-enforced apology for actions based on the *actio iniuriarum* as damages in defamation cases, the court found that Louw's argument for broadening this remedy to encompass a public apology in cases unrelated to defamation, lacked adequate justification. The court cautioned that expanding the remedy in this way could open the door for plaintiffs to demand apologies in a wide range of unrelated situations, such as wrongful detentions or insults, which deviates from its original purpose.

Punitive costs

This notwithstanding, the court considered the content of Netcare's apology to determine whether to award a punitive costs order. The court agreed with Louw that the apology did not convey genuine regret and remorse.

The court exercised its judicial discretion and held that Netcare's conduct warranted a punitive cost order. As a result, Netcare was ordered to pay Louw's taxed or agreed costs incurred after the settlement date up to arguments, together with two expert witness fees.

Key takeaways

Employers should be cognisant of their duties to create and to maintain a safe work environment that is free from harassment. To meet these obligations, employers should draft, implement and review policies, including harassment policies. Significantly, employers should understand that how the court views and will assess the conduct of the reasonable employer in their position would be informed by these very policies. This would include that where employees are exposed to conduct that is in breach of the employer's harassment policy, for example, the employer would have a duty to act to prevent, manage and to eliminate the problematic conduct from the workplace.

Hugo Pienaar, Leila Moosa and Muhammad Amanjee

Labour Court judgment on retrenchment: must I issue a written notice?

Must an employer issue a written notice in terms of section 189(3) before initiating a retrenchment process? Some commentators suggest that the case in *Padayachee v Serere and Others* (JR1162/21) [2024] ZALCJHB 254 (20 June 2024) is authority for the view that you may do so provided certain facts are present. The message from us: ISSUE THE SECTION 189(3) WRITTEN NOTICE BEFORE EMBARKING ON A RETRENCHMENT PROCESS. This is the cautious approach.

The court held that a written notice was not strictly required because the employer had substantially complied with section 189(3) through communication with the union, which was involved in the consultation process and did not demand the formal written notice.

Facts and court's assessment

The employer failed to issue a section 189(3) notice on the basis that (1) the employee's trade union was involved in the consultation process and was aware of the details of the proposed restructuring, and (2) the employee did not challenge employer's failure to issue a section 189(3) notice.

The court found that the arbitrator's determination was reasonable, in that the employer substantially complied with sections 189(1), 189(2) and 189(3)(a) of the LRA despite not issuing a section 189(3) notice. This conclusion was supported by the court's finding that there was a genuine consensus seeking process and the employer's failure to issue a 189(3) notice was acceded to by the trade union. Furthermore, the court found that the employer substantially complied with section 189 of the LRA and accordingly there was adequate compliance, and a mechanical process or tick box exercise is not required.

Important considerations and key takeaways

Section 189(3) of the LRA mandates that an employer must issue a written notice to the employee or their representative inviting them to consult and disclose all relevant information regarding the contemplated retrenchment. Historically, the Labour Court has viewed this notice as the formal start of the retrenchment process, emphasising strict adherence to these requirements. In *SASBO The Finance Union obo Fourie v Nedbank Limited* (2020) 41 ILJ 500 (LC), the court indicated that the "*requirement to issue a notice in terms of s 189(3) is peremptory*" and "*it is a significant statutory trigger for a number of events and options.*"

In *Padayachee*, the court was careful to state that its decision to permit a departure from the mandatory issuing of a section 189(3) notice was specific to the context of this case and does not set a general precedent. Each case must be evaluated on its own facts to determine whether there has been substantial compliance with section 189 and section 189(3) in particular.

The prevailing view is that an employer is obliged to issue a 189(3) notice to potentially affected employees as soon as it contemplates retrenchments, and our recommendation is that employers comply with this procedural step.

Nadeem Mahomed, Aadil Patel and Peter-Wallace Mathebula

OUR TEAM

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

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

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

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

Jose Jorge
Director:
Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Fiona Leppan
Director:
Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

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

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

Yvonne Mkefa
Director:
Employment Law
T +27 (0)21 481 6315
E yvonne.mkefa@cdhlegal.com

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

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

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

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

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

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

Jean Ewang
Counsel:
Employment Law
T +27 (0)11 562 1499
E jean.ewang@cdhlegal.com

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

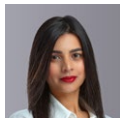
OUR TEAM

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

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

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

Lee Masuku
Senior Associate:
Employment Law
T +27 (0)11 562 1213
E lee.masuku@cdhlegal.com



Leila Moosa
Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com

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

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

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

Lynsey Foot
Associate:
Employment Law
T +27 (0)11 562 1429
E lynsey.foot@cdhlegal.com

Malesela Letwaba
Associate:
Employment Law
T +27 (0)11 562 1710
E malesela.letwaba@cdhlegal.com

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

Thato Makoaba
Associate
T +27 (0)11 562 1659
E thato.makoaba@cdhlegal.com

Thato Maruapula
Associate:
Employment Law
T +27 (0)11 562 1774
E thato.maruapula@cdhlegal.com

Sashin Naidoo
Associate:
Employment Law
T +27 (0)11 562 1482
E sashin.naidoo@cdhlegal.com

Alex van Greuning
Associate:
Employment Law
T +27 (0)21 481 6309
E alex.vangreuning@cdhlegal.com

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

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

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

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

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

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

CDH INCORPORATED