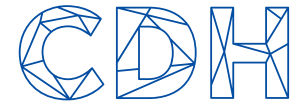


# Employment Law

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## Strict liability and employers' approach to the Occupational Health and Safety Act: Lessons from *Joubert v Buscor Proprietary Limited*

*In Joubert v Buscor Proprietary Limited (2013/13116) [2016] ZAGPPHC 1024, the application of strict liability under the Occupational Health and Safety Act 85 of 1993 (OHSA) remains significant. This case underscores the obligations of employers not only to their direct employees but also to third parties and subcontractors who may be impacted by their activities.*

Strict liability is a legal doctrine under which a party can be held liable for their actions or omissions causing damages regardless of fault or intent. Unlike negligence or intention, where the plaintiff/applicant must prove that the defendant acted with carelessness or intent to cause harm, strict liability applies even if the defendant took precautions and did not intend to cause harm.

In this case, Joubert (the applicant) sought to enforce the principle of strict liability against Buscor, following the death of her husband as a result of exposure to hazardous conditions at Buscor's premises. The deceased was employed as an electrician by a subcontractor but was carrying out work on Buscor's premises when he was exposed to toxic and hazardous conditions that led to his death. The crux of Joubert's argument was that Buscor failed in its statutory duty under the OHSA to ensure the safety of all people, not just its own employees, who might be affected by its operations.

The High Court was faced with determining whether the OHSA imposed a strict liability on Buscor for the death of the applicant's husband and whether the applicant was excluded from instituting a claim based on a breach of duty of care at common law simultaneously with the breach of the OHSA. The applicant argued that the duty under section 9(1) of the OHSA is broad enough to include strict liability, particularly considering the intrinsically risky nature of the work environment at Buscor. The High Court acknowledged that, while the OHSA is largely preventative in nature, its provisions could support a strict liability claim, particularly when a failure to follow standards imposed by the OHSA results in substantial harm.

### **Key provisions from the OHSA relevant to strict liability**

The OHSA outlines specific duties that employers must adhere to when ensuring the safety of people affected by their activities. Section 9(1) of the OHSA is especially relevant, as it states that every employer must conduct its undertaking in such a way to ensure that people are not exposed to health and safety concerns. This provision broadens the duty of care to include subcontractors, visitors and even third parties.

The OHSA, through its regulations, establishes employer responsibilities when dealing with confined spaces, which are areas with limited entry and exit points that may represent considerable risks owing to hazardous substances or conditions. Employers must ensure that such areas are only entered following adequate testing and certification of safety by a qualified and competent individual.

**EMPLOYMENT LAW  
ALERT**

## Strict liability and employers' approach to the Occupational Health and Safety Act: Lessons from *Joubert v Buscor Proprietary Limited*

CONTINUED

Employers must recognise that their responsibilities will often extend beyond their immediate employees to people who may be impacted by their business operations, including subcontractors and the general public. Given the potential for strict liability under the OHS Act, employers must adopt a comprehensive approach to workplace safety.

**Fiona Leppan, Kgodiso Phashe and Onele Bikitsha**



## Pre-arbitration minute or not?

The recent judgment of the Labour Appeal Court (LAC) in *Mbeje and Others v Department of Health: KwaZulu-Natal and Others* (DA33/2022) [2024] ZALAC highlighted the role, and binding nature of, pre-arbitration minutes in labour disputes.

The court was seized with an appeal against the judgment and order of the Labour Court (LC or the court *a quo*). The LC dismissed the review of the arbitration award that found the employees' dismissal to be fair.

### Facts

The appellants (the employees) were employed by the KwaZulu-Natal Department of Health in its Emergency Medical Services Unit and performed an essential service. Notwithstanding that essential services may not strike, the employees engaged in an unprotected strike, for which they were dismissed.

Prior to their dismissals, the employees were given a first and then second ultimatum to return to work, together with a notice to attend a disciplinary hearing. The employees who complied with the second ultimatum were given final written warnings. However, the employees who failed to heed the employer's demands to return to work, were dismissed. The second group of employees referred alleged unfair dismissal disputes to the relevant bargaining council.

### Pre-arbitration minute

The employees were represented by the National Union of Public Service and Allied Workers at arbitration. The parties agreed in their pre-arbitration minute that the dispute exclusively concerned "*the harshness of the sanctioning in relation to the nature of the offence*".

In other words, the issues before the bargaining council at arbitration were limited to only the appropriateness of dismissal as a sanction in the circumstances.

### Arbitration

However, notwithstanding the scope agreed to in the pre-arbitration minute, the employees raised a new issue before the arbitrator. The employees alleged that the employer had applied discipline inconsistently by dismissing them while the striking employees who returned to work received final written warnings. This, the employees claimed, was because they had not received the ultimatums or the notice to attend the disciplinary hearing and therefore could not have complied with them. The arbitrator entertained such evidence despite the content of the pre-arbitration minute.

Notwithstanding such evidence, the arbitrator found that the violence and the damage which arose from the unprotected strike meant that the actions of the employees "*were of such a serious nature that they warrant a sanction of dismissal*".

### LC review and LAC appeal

On review of the award by the union, the LC upheld the arbitration award. That said, the dispute before the LC concerned the receipt of the ultimatums and the consistency of discipline and not the appropriateness of the sanction, being the agreed sole issue in dispute in terms of the pre-arbitration minute.

On appeal to the LAC, the LAC held that deviation from the pre-arbitration minute by the employees, in raising the issue of inconsistency, was impermissible. The LAC dismissed the appeal and found that the outcome reached by the arbitrator was reasonable.

## Pre-arbitration minute or not?

CONTINUED



### The importance of pre-arbitration minutes

In terms of Rule 20(1) of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration, parties must hold a pre-arbitration conference when they are represented, when they agree to do so, or when they are directed to do so. The purpose of this conference is to reach consensus on, *inter alia*, the facts that are agreed and that are in dispute, the issues to be decided by the arbitrator, and any other issues set out in Rule 20(3).

In terms of Rule 20(4) read with Rule 20(5), the parties must draw up and sign a pre-arbitration minute setting out the facts on which the parties agree or disagree and may also include any other matter listed in Rule 20(3). Accordingly, the parties are not obliged to enter into a pre-arbitration minute except in one of the above three scenarios, and the minute needs to only set out, at a minimum, the facts which are agreed or disputed.

In *Mbeje*, the LAC confirmed the position in our law that the pre-arbitration minute is a document that binds both the parties and the arbitrator to the issues embodied in the document. This involves an important and highly beneficial narrowing of the scope of issues from those already pleaded, if any.

The obvious benefit of a pre-arbitration minute is to identify the substantive and procedural matters that are common cause and to limit the issues in dispute. This prevents a party from going on a fishing expedition by introducing a litany of issues at the arbitration proceedings to secure some sort of relief.

A pre-arbitration minute assists a party in the following ways:

- in deciding how to prepare a defence;
- in identifying and limiting the witnesses to be called; and
- in the preparation of cross examination.

A significant risk of not having a pre-arbitration minute is that a party may go into the proceedings without certainty of what to defend. As a result, the scope of the dispute may become intractably wide as the parties may go into a hearing without even agreeing on what the issues are or what the nature of the dispute is.

### Conclusion

The importance of a pre-arbitration minute cannot be understated. This judgment by the LAC emphasises the status and the binding effect of the pre-arbitration minutes on the parties and on the arbitrator. The pre-arbitration minute can make an immense difference in saving time and costs occasioned by protracted and potentially unnecessary proceedings by limiting the issues to be decided by the arbitrator from the very first step. This will allow the parties to direct their preparation based on the key issues and to place themselves in the best position for putting forward a successful case.

**Hugo Pienaar and Denzil Mhlongo**



## 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



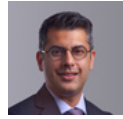
### Fiona Leppan

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.patel@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



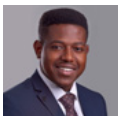
**Leila Moosa**

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



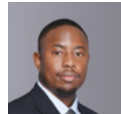
**Taryn York**

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

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**JOHANNESBURG**

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

**NAIROBI**

Merchant Square, 3<sup>rd</sup> 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](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

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