

Employment Law

ALERT | 29 July 2024



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Decoding “internship” realities: An analysis of *Forum for Good Governance and Human Rights v TSC and Two Others*

The Employment Act, CAP 226 (Employment Act) confirms in section 2 that apprentices and indentured learners are considered as employees. However, what happens when a duly trained and qualified employee is employed as an intern to otherwise perform the full duties? The recent case of *Forum for Good Governance and Human Rights v TSC and Two Others* [2024] KEELRC stood out as a beacon of clarity in this murky terrain.

This alert delves into the intricate legal analysis and far-reaching implications of the Kenyan court’s verdict and references the consistency of the court’s verdict with developments under South African law.

Background and brief facts

The case was filed by the Forum for Good Governance and Human Rights, challenging, *inter alia*, the Teachers Service Commission’s (TSC) practice of recruiting and employing duly trained and qualified teachers as interns.

The petition, filed before the Employment and Labour Relations Court sought, among other things, a declaratory order that TSC contracts recruiting and employing duly trained and qualified teachers as interns were unconstitutional; a declaratory order that fair labour practices and the right to fair remuneration of the teachers recruited and employed as interns by TSC were violated; and a mandatory order compelling TSC to reissue substantive letters of appointment to the teachers who were appointed as interns.

Issues for determination

The main issues for determination included:

- i. whether interns are employees for purposes of the law of employment and labour relations;
- ii. whether the trained and duly qualified teachers styled as interns were “*indentured servants*” or “*apprentices*”; and
- iii. whether the employment of qualified teachers as interns amounted to unfair labour practices.

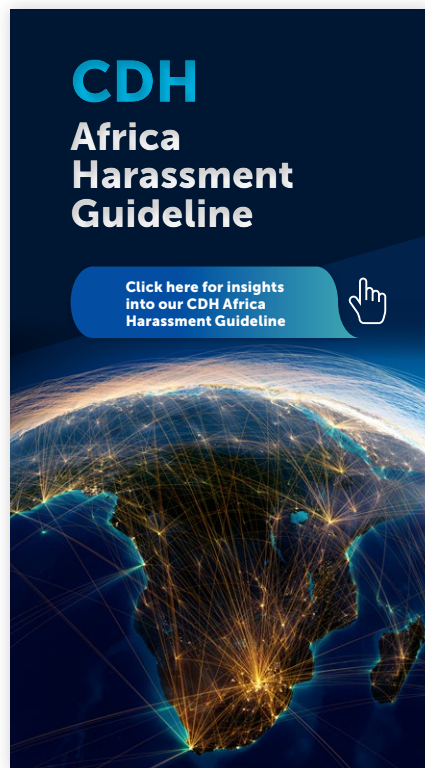
Court’s analysis and determination

First issue: Whether interns are employees

The court, while making reference to section 2 of the Employment Act, reiterated the position that the definition of an “*employee*” includes apprentices and indentured learners. Further, it confirmed that a contract of service encompasses a contract of apprenticeship and indentured learnership. The court also referenced Black’s Law Dictionary, 9th Edition, which defines an “*apprentice*” as a person bound by an indenture to work for an employer for a specified period to learn a craft, trade or profession; and a learner in any field of employment or business especially, one who learns by hands-on experience or technical on the-job training by one experienced in the field.

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Second issue: Whether the trained and duly qualified teachers styled as interns were “indentured servants” or “apprentices”

The court scrutinized the circumstances surrounding the designation of trained and qualified teachers as interns. It confirmed that they were employed to teach as duly qualified teachers, and hence were not indentured servants or apprentices.

The court consequently found that TSC’s act of designating the teachers as interns was designed to circumvent the inescapable effect of the employment relationship and legal safeguards. It held that while there is freedom to contract between parties, the chains of the right to fair labour practices envisaged in Article 41 of the Constitution, 2010 (Constitution) must always be considered. Therefore, TSC could not claim that the affected teachers agreed to the terms of the fixed-term contracts.

The court’s conclusion was that employment is a fact that is established by evidence and disguising employment to circumvent the effect of employment laws and the constitutional or statutory safeguards of employers and employees cannot pass the chains of social justice in employment or work relationships.

Third issue: Whether the employment of qualified teachers as interns amounted to unfair labour practices

Drawing upon constitutional provisions and international conventions, the court confirmed that the employment of qualified teachers and interns was unfair and discriminatory. It highlighted that the same was averse to Article 41(2)(a) and (b) of the Constitution, which enshrines the right to fair labour practices.

Additionally, it underscored the breach of Article 27 on freedom from discrimination and equality before the law. The court also referenced section 5 of the Employment Act, which mandates employers to promote equal opportunities and refrain from unfair treatment and discriminatory practices. Furthermore, it placed reliance on the International Labour Organization (ILO) Convention 100, that is, the Equal Remuneration Convention, to emphasise the principle of equality of pay for work of equal value.

The implication of the court’s decision

The decision serves to reiterate the settled position that interns are indeed employees for purposes of the law of employment and labour relations. More importantly, it clarifies that trained and duly qualified personnel who are employed to perform full duties cannot be considered as indentured servants or apprentices. Consequently, any differential treatment to such trained and duly qualified personnel who are employed to perform full duties (under the designation of “interns”) would amount to unfair treatment and discrimination.



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Internships, learnerships and apprenticeships are a crucial part of developing and improving the skills of a nation’s work force. Legislation such as the TVET Act (Kenya) CAP 210A and Skills Development Act 97 of 1998 (South Africa) have been specifically promulgated to give effect to this objective.

In some instances, differential treatment of employees may be justified in order to achieve the objectives set out in national policies giving rise to national skills development, as was expressed by the South African Labour Appeal Court in the matter of *MISA and Another v Great South Autobody CC T/A Great South Panel Beaters* (2022) 43 ILJ 2326 (LAC). This matter confirmed that an employer retains the right to fairly dismiss an employee who has passed an agreed or normal retirement age as this also allows an employer to create work opportunities for younger members in society.

However, employers are cautioned against taking advantage of the young and unskilled. The South African Basic Conditions of Employment Act 75 of 1997, for instance, provides that vocational trainees are entitled to the same protections as permanent employees.

It bears mentioning that the court’s verdict in the Kenyan matter is also consistent with article 16 of the ILO Quality Apprenticeships Recommendation, 2023 (No. 208) which dictates that measures should be taken to ensure that apprentices are afforded the same and/or similar conditions of employment as permanent employees.

Employers are cautioned against invoking the defence of freedom of contract where the right to fair labour practice is potentially infringed. As such, employers need to know that employment is a fact established by evidence and structuring an employment contract to escape the effect of employment laws and the constitutional or statutory safeguards of parties cannot pass the chains of social justice in employment or work relationships.

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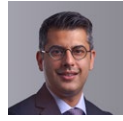
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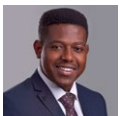
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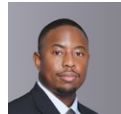
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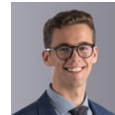
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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

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