Employment Law

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CDH INCORPORATED

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SOUTH AFRICA

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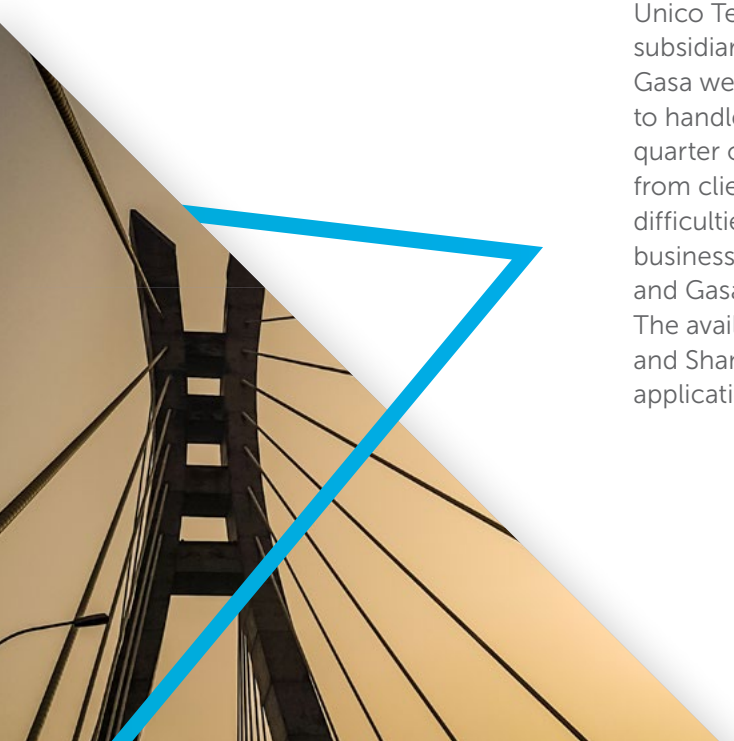
The duress dodge: How to spot and shut down bogus duress claims



Unfortunately, labour relations in South Africa have become very litigious. The instances of employees agreeing to settlements or accepting voluntary severance packages, only to allege duress, undue influence or misrepresentation later, is far too common. This alert focuses on one such case.

On 20 May 2024, the Durban Labour Court handed down judgment in *Shange and Another v Unico Tec (Pty) Ltd* (D577/2021) [2024] ZALCD 14 (20 May 2024), upholding voluntary severance agreements which had been concluded between the employer, Unico Tec (Pty) Ltd (Unico Tec), and its erstwhile employees, Shange and Gasa, who had alleged that they concluded the agreements under duress.

Unico Tec manufactures brake fluid and anti-freeze. It is a subsidiary of The Energy Company (Pty) Ltd. Shange and Gasa were employed as filling operators at the company to handle the packaging of its products. By the second quarter of 2021, the company had lost significant business from clients including BP, Shell and Sasol. Facing financial difficulties, it announced its intention to restructure the business. The intended restructuring impacted Shange and Gasa, since fewer filling operators would be required. The available posts for filling operators were advertised and Shange and Gasa were unsuccessful in their applications for the positions.

Instead of retrenchment, Shange and Gasa were offered voluntary severance agreements, which, over and above their statutory severance entitlements, included an additional ex gratia payment of one month's remuneration, in full and final settlement of all disputes, claims and rights of action arising from the termination of their employment. The agreements were read to both of them by an external labour consultant, and they were given time to consider the agreements before signing them.

After receiving the benefit of the severance payments, Shange and Gasa sought to have the settlement agreements set aside. They claimed that they had signed the contracts under duress, as their manager threatened them with dismissal and no payment unless they signed. They also contended that they were not afforded an opportunity to read the agreements and that the terms had not been explained to them.

Proving duress

To prove duress, Shange and Gasa had to prove the following elements:

- a threat of imminent evil (i.e. harm);
- that the threat was unlawful; and
- that the threat induced the threatened person to enter into the contract or to agree to terms to which they would not have agreed in other circumstances.

The duress dodge: How to spot and shut down bogus duress claims

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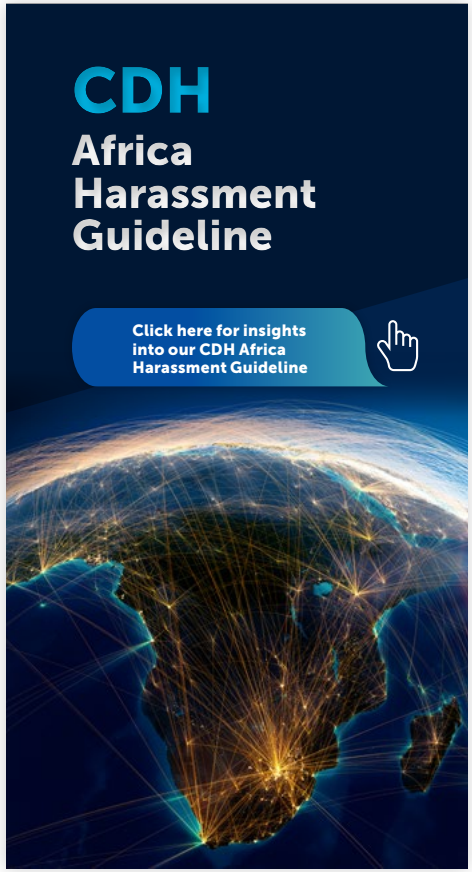

The court considered these elements in the context of financial and economic duress. It referred to the Supreme Court of Appeal case in *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* [2005] 4 All SA 16 (SCA). In this case, the court considered that English and American law recognise that economic pressure may constitute duress, but that principle has yet to be authoritatively accepted in South African law. In this regard, the court held:

> *"While there would seem to be no principled reason why the threat of economic ruin should not, in appropriate circumstances, be recognised as duress, such cases are likely to be rare. For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy."*

The court in *Medscheme* held further that:

> *"[H]ard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more … would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress."*

Ultimately, the Labour Court found that Shange and Gasa had made out a poor and unconvincing case. In the judge's words, *"They were evasive when confronted with important questions and their factual case suffered from material contradictions."*

It was to the company's credit that it could lay out a cogent sequence of events, which included the facts that the voluntary severance agreements were read out to the employees and that they were given the opportunity to consider the proposed agreements before signing anything.

Concluding advice

Although settlement agreements, validly concluded, should be the end of the matter, employers should not take it for granted. Unfortunately, that is not always the case in practice.

To insulate themselves against this risk, employers should clearly document the process leading to the conclusion of a settlement agreement. Employees should be afforded proper time to consider any proposed settlement agreement (or voluntary severance package, as was the case here), and where appropriate, the employer should read the agreement to the employees and explain the legal implications to them.

It is always good practice to minute any settlement meetings with employees and to confirm the content of the meeting in writing with the employee thereafter. This will assist the employer to rebut any accusation of duress at a later stage.

Jose Jorge and Alex van Greuning

The impact of NHI for employers

On 15 May 2024, the President signed the National Health Insurance Bill. The National Health Act 20 of 2023 (NHI Act) will take effect on a date proclaimed by the President in the Government Gazette. The stated purpose of the NHI Act is to eradicate inequalities regarding access to healthcare.

The NHI Act outlines a phased approach to implementation and transitional arrangements. Ultimately in the future, the full implementation and operation of the NHI Act may have tax and medical health cover benefits implications for employees and employers.

What are the implications for employers and employees?

The point of departure from an employment perspective is the funding of the NHI fund (Fund). The NHI Act lists three primary sources of funding for the Fund. In particular, the NHI Act proposes introducing a payroll tax on employees, raising personal income tax, and ultimately redirecting most of the roughly R250 billion spent on private medical aid schemes to the Fund.

South Africa has a skills mismatch and the race for talent is fierce. Employers in South Africa compete with both local and international competitors in a shallow talent pool for workers who have valuable, industry-specific skills.

To attract and retain employees, employers often offer perks such as private healthcare. The NHI Act may in time require employers to think of alternative creative perks to attract employees due to the dilution of the benefit of private medical health insurance.

With the introduction of the NHI Act, the membership benefits of private medical aid schemes will be significantly limited as the NHI Act prohibits private medical aid schemes from offering services that are already covered by the Fund. Private medical aid schemes will only offer extra services that are not covered by the Fund.

The Fund will pay for healthcare services for eligible people from accredited healthcare service providers. These people will, however, be excluded from the ambit of the Fund:

- people with no right to healthcare services purchased by the Fund in terms of the NHI Act;
- people who violate the referral pathways prescribed by a healthcare service provider or health establishment;
- people who seek services not considered medically necessary by the Benefits Advisory Committee; or
- people who seek treatment that is not included in the "*formulary*." The "*formulary*" comprises the Essential Medicine List and Essential Equipment List as well as a list of health-related products used in the delivery of healthcare services as approved by the Minister of Health in consultation with the National Health Council and the Fund.

The impact of NHI for employers

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The practical implications of the hybrid healthcare system remains unclear, and it may mean that employees will have to contribute towards the Fund and elect to contribute to a private medical aid scheme to access healthcare services excluded from the Fund. It is envisaged that the employer's role in this regard will be like that of the Unemployment Insurance Fund model in respect of the Fund contribution.

Employers that contribute towards their employees' medical aid benefits may potentially continue to contribute towards both the Fund and private medical aid schemes. Any extra costs will likely affect profitability.

Finally, employers would be expected to update their health policies and benefits to reflect the coverage offered by the Fund and their chosen medical scheme, if any.

It is important to note that for now, and until the NHI Act can be implemented, the *status quo* remains and there is no immediate impact on private medical aid schemes, members of private medical aids, and private medical healthcare benefits offered by employers.

Employment Law practice

Chambers Global 2024 Results

Employment Law

Chambers Global 2014–2024 ranked our Employment Law practice in:
Band 2: Employment.

Aadil Patel ranked by Chambers Global 2024 in **Band 1**: Employment.

Fiona Leppan ranked by Chambers Global 2018–2024 in **Band 2**: Employment.

Imraan Mahomed ranked by Chambers Global 2021–2024 in **Band 2**: Employment.

Hugo Pienaar ranked by Chambers Global 2014–2024 in **Band 2**: Employment.

Chambers TOP RANKED Global 2024
Cliffe Dekker Hofmeyr

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