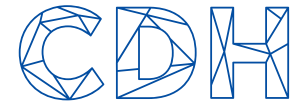


Employment Law



ALERT | 17 February 2025

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Respecting the CCMA Commissioner

This year marks 30 years of workplace dispute resolution under the auspices of tribunals such as the Commission for Conciliation, Mediation and Arbitration (CCMA). Arbitration is the primary format of dispute resolution where conciliation fails. What was intended to be a “*quick and easy*” process of arbitration has not been the reality, with there being major contestation at arbitration and beyond. After all, the issues ventilated at arbitration involve the livelihood of workers and, usually, the safeguarding of some form of commercial interest for employers. The principles we discuss in this alert apply to both the CCMA and bargaining councils.

When the CCMA was first established, it was intended in general terms that lawyers would be excluded from arbitration proceedings, with the terrain being left to parties such as unions and employer organisations who would do ‘gentle battle’ in arbitration before independent commissioners. To this end, it was imperative that commissioners would control of the proceedings to ensure the administration of workplace justice through the process. It was and remains imperative that the public have confidence in these dispute resolution bodies. But what happens when emotions run high at arbitration, which often happens, and disrespect is shown to opponents or the arbitrator?

Lawyers are trained to observe decorum in the battle theatre of litigation, even to the point of defeat. The same cannot automatically be said of persons who do not have legal training. The Labour Relations Act 66 of 1995 (LRA), particularly section 142(8), provides that a person commits contempt of the CCMA if they:

- wilfully hinder a commissioner in performing any function under the LRA;
- insult, disparage or belittle a commissioner, or prejudice or improperly influence the proceedings or improperly anticipate the commissioner’s award; or
- wilfully interrupt the proceedings or misbehave.

Defining contemptuous behaviour

Recently, in the case of *Harmse NO and Another v Mphahlele* [2024] ZALCJHB 490 the Labour Court had to determine whether the conduct in arbitration proceedings of Mr Ephraim Mphahlele, a union official of the National Transport Movement, was contemptuous.

During the arbitration, Mphahlele interrupted Transnet’s representative and the commissioner on several occasions, was disruptive and even disrespectful. Even after the commissioner’s ruling on certain points or objections, Mphahlele refused to accept the commissioner’s ruling and went to on debate and be critical of the commissioner.

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Respecting the CCMA Commissioner

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This conduct hampered the progress of the arbitration proceeding. The court found that Mphahlele was contemptuous. As a result, he was suspended from representing any party at the CCMA or any bargaining council anywhere in the country for a period of four months. Mphahlele was fortunate to have escaped a cost order or a longer period of suspension.

The *Harmse* judgment emphasises the point made in the Labour Court decision of *Bargaining Council for the Clothing Manufacturing Industry and another v Prinsloo* [2007] 9 BLLR 825 (LC); [2007] 28 ILJ 1754 (LC) that there are consequences for disruptive and disrespectful behaviour.

As the court observed in *Prinsloo*:

- There should not be a perception that if someone conducts themselves in a contemptuous manner, their conduct will not amount to a serious offence.
- Rather, there should be no doubt that if anyone conducts themselves in a contemptuous manner “*they will be treated appropriately by being suspended from appearing in these forums, or by imposing fines and, in extreme cases by possibly being imprisoned*”.
- A serious sanction is imposed against contemptuous conduct with the aim of “*hopefully deterring the perpetrating by other parties of such conduct*”.

Screaming, shouting, being vulgar and leaning across the table to intimidate a party can all amount to contemptuous behaviour.

The recent Labour Court order against Mphahlele should be a reminder to anyone who steps into a CCMA venue (for conciliation or arbitration) that despite the casual set up, commissioners are servants of workplace justice entrusted with ensuring its administration and who command respect by operation of the law.

Their rulings, directives and awards are not open to debate and scrutiny unless a Labour Court is approached to challenge a decision. Proceedings in the CCMA and bargaining councils are meant to be civil, and parties should remember to act accordingly. After all, workplace litigation was not intended to be a “*Rumble in the Jungle*”.

Imraan Mahomed and Khutso Mongadi

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Unchecked AI, unseen dangers: What the DeepSeek breach means for SA companies and POPIA compliance

DeepSeek, a prominent competitor in the artificial intelligence (AI) marketplace, recently faced a significant security incident when an unsecured ClickHouse database exposed over a million lines of sensitive information, including chat histories, secret keys and backend details. This vulnerability granted unauthorised access to potentially confidential data and system resources, raising critical concerns about AI security and data protection.

The breach underscores substantial security risks associated with AI companies processing large volumes of user-inputted data, including sensitive content – particularly when users have limited control or oversight over information handling and security protocols.

Global breach, local lessons

The DeepSeek incident illustrates the risk of AI innovation outpacing its legal regulation in the majority of jurisdictions globally. While South Africa has yet to adopt AI-specific laws, businesses are still accountable under existing legislation, including the Protection of Personal Information Act 4 of 2013 (POPIA), which governs personal data protection and security.

Internationally, regulators are taking decisive action. Both Ireland's Data Protection Commission and Italy's Garante have launched investigations into DeepSeek's security failures. These authorities have a track record of issuing substantial penalties for data protection breaches, reinforcing that while AI operates across borders, legal accountability remains within specific geographical locations and their attendant legal structures.

For South African businesses, this underscores the importance of ensuring compliance with data protection laws, particularly in environments where employees increasingly rely on AI tools in the workplace.

POPIA implications for South African employers

The DeepSeek breach highlights a growing concern: how employees interact with AI models in the workplace, particularly when using publicly available tools like ChatGPT for work-related tasks.

POPIA mandates that organisations prevent unauthorised disclosure of personal information to third parties, and this includes AI platforms. POPIA was enacted prior to the accelerated adoption of AI platforms in the workplace and this introduces novel vulnerabilities, requiring specific consideration and guidance.

A single instance of sensitive data being input into a public AI model by an employee could breach POPIA, potentially resulting in financial, reputational and legal consequences.

Essential steps for employers

AI offers significant opportunities but introduces knowledge gaps and compliance challenges. South African employers can proactively implement several measures to protect data while maintaining compliance:

- **Establish a comprehensive AI policy:** Define permissible tools and outline usage guidelines that align with POPIA's conditions, including data minimisation or redaction, valid consent, relevant declarations on AI use and secure data transfers.

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- **Implement regular training programmes:** Conduct ongoing training addressing the risks of using AI platforms, sharing sensitive data with AI models, and ensuring that employees, contractors and service providers understand POPIA principles and legal implications.
- **Create incident response protocols:** Develop clear procedures for identifying, containing and reporting data breaches, emphasising prompt and transparent reporting and action.
- **Maintain regular AI usage audits:** Monitor organisational practices to identify unauthorised AI tool adoption to mitigate risks and ensure compliance with organisational policies.

Employee responsibilities

Employees play a crucial role in preventing AI-related data breaches. Beyond organisational exposure, employees should be aware that negligence in handling sensitive data could result in reputational damage, liability, and disciplinary action. Essential precautions include:

- **Strict policy adherence:** Follow organisational AI usage guidelines meticulously, treating all tools as restricted unless verified.
- **Consultation with management:** Obtain approval before using or implementing any AI tools, including (and especially) widely available public models, for workplace tasks.

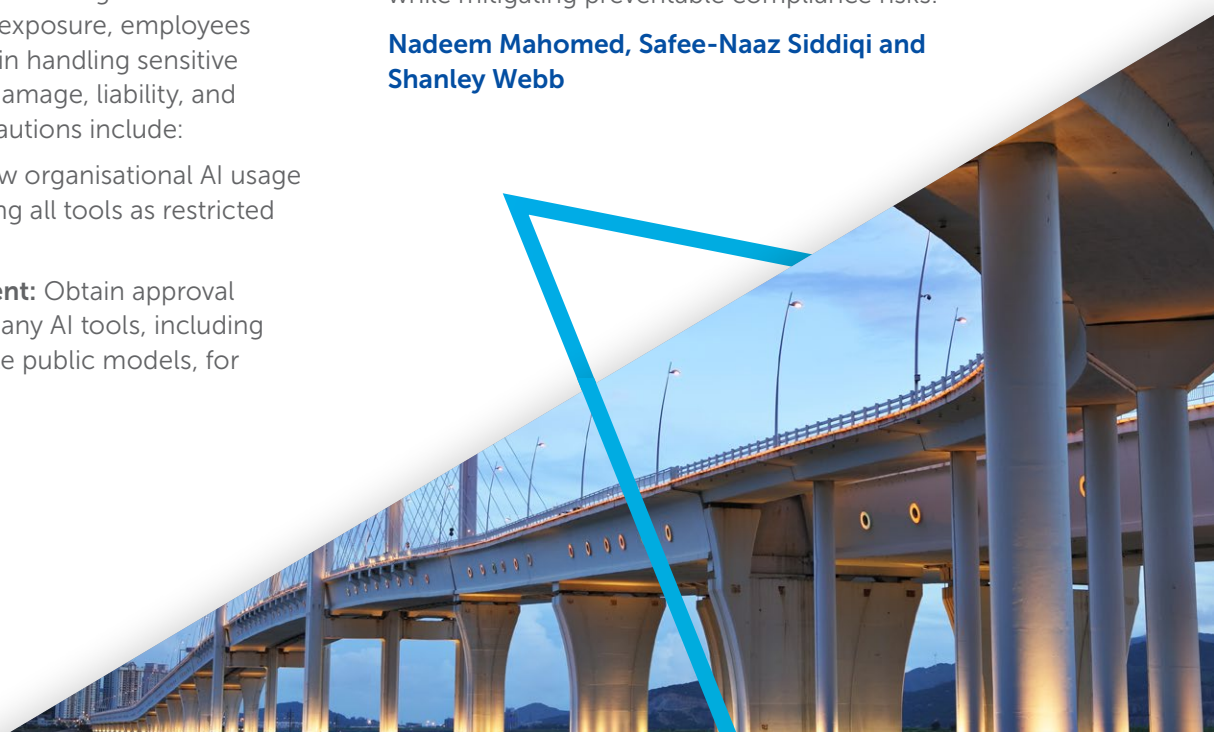
- **Data protection vigilance:** Maintain absolute prohibition on inputting company, client or personal information into unauthorised platforms or authorised platforms where restrictions on usage exist.
- **Proactive security reporting:** Immediately notify management or IT teams of suspected AI-related vulnerabilities.

Staying ahead

The DeepSeek breach is a stark reminder that AI's benefits come with significant risks if security and compliance are neglected. While South African businesses stand to gain from AI-driven efficiencies, data protection and appropriate usage must remain a priority.

By institutionalising clear AI policies and responsible usage guidelines, organisations can harness AI's potential while mitigating preventable compliance risks.

**Nadeem Mahomed, Safee-Naaz Siddiqi and
Shanley Webb**



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The return of assets by an outsourced service provider: Does this constitute a transfer as a going concern

The legal implications of an entity outsourcing provisions through a tender and allowing the outsourced service provider to use its assets in rendering its services has been brought into focus in the case of *King Cetshwayo District Municipality v Water and Sanitation Services South Africa (Pty) Ltd and Others* (10 January 2025). This case examined whether a transfer as a going concern in terms of section 197 of the Labour Relations Act 66 of 1995 (LRA) applied when a municipality outsourcing the provision of bulk water supply through a tender, allowed the outsourced service provider to use its assets. It raised the question of whether the return of the assets belonging to the municipality at the expiration of the tender determined the existence of a transfer.

Key facts

In the *King* case, King Cetshwayo District Municipality (Municipality) awarded a tender to Water and Sanitation Services South Africa (Pty) Ltd (WSSA), which was responsible for the management, operation and maintenance of water and wastewater treatment facilities. This contract extended over three tenders and thereafter was extended annually until another service provider took over.

At the time of the third tender, the Municipality and WSSA concluded a service-level agreement (SLA). WSSA raised the issue of section 197 at the termination of the SLA. It submitted that if its employees were not transferred to the Municipality, then they should be transferred to the new service provider in terms of the SLA which stated: "All affected employees currently employed by [WSSA] will be given the following options: to be redeployed within [WSSA] or to be transferred to the new operator."

Section 197 of the LRA

In order for a section 197 transfer to take place, there needs to be a business, trade, undertaking or service that is transferred as a going concern.

The Labour Court's decision

The Labour Court found that the assets which were owned by the Municipality but used by WSSA such as boreholes, pipes and reservoirs were the essential components of the business of supplying bulk water services. The return of these assets at the termination of the SLA constituted a transfer of a business as a going concern, as these assets were critical to provide the service.

The Labour Appeal Court's decision

The Labour Appeal Court's (LAC) evaluation focused on two points. First, whether the return of assets owned by the Municipality to it by WSSA constituted a transfer for the purposes of section 197. Second, if such a return did constitute a transfer, whether all the necessary assets were returned, as WSSA did not return its own assets that had also been used.

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The return of assets by an outsourced service provider: Does this constitute a transfer as a going concern

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The LAC agreed with the court *a quo's* finding that the *causa* potentially giving rise to the section 197 transfer was the termination of the SLA. Furthermore, that the business and/or services was the provision of the bulk water supply and related services.

The nature of the business is an important consideration as there is a distinction between labour-intensive services and asset-reliant services. The court stated that the fact that employees were not transferred would be of no consideration if it was found that the business was asset reliant.

The business of supplying the bulk water services was found to be a going concern, as there was no difference in how the business was conducted before and after the expiry of the SLA.

The LAC now had to decide whether the business was transferred from WSSA to the Municipality upon the expiry of the SLA. It also had to determine whether the assets that were retained by WSSA were core assets that were required to be transferred in order for the same business to continue operating after the expiry of the SLA.

The LAC agreed with the court *a quo* that the retained assets were not core assets required for the business and therefore all three requirements for a section 197 transfer were present. Therefore, there was a transfer of the business as a going concern from WSSA to the Municipality.

Accordingly, the LAC dismissed the appeal with no order as to costs.

Key takeaways

The application of section 197 is not dependant on the labels that parties give to the transactions. What is important is the role played by either employees or assets, as this is dependent on the facts of the matter. The lack of transfer of either one cannot be conclusive of whether there was a transfer as a going concern or not.

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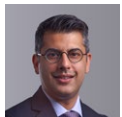
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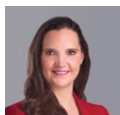
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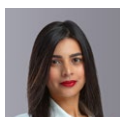
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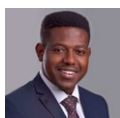
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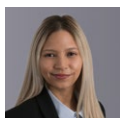
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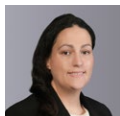
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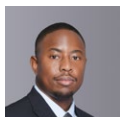
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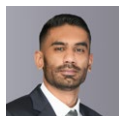
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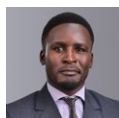
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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