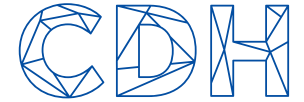


# Employment Law

ALERT | 17 March 2025



## In this issue

**SOUTH AFRICA**

The steps and missteps from employers approaching mental health in the workplace: Lessons from the Court



**For more insight into our expertise and services**

**EMPLOYMENT LAW  
ALERT**

## The steps and missteps from employers approaching mental health in the workplace: Lessons from the Court

Employers are required to balance the relevant support for employees against their operational needs. The Occupational Health and Safety Act 85 of 1993, SANS regulations and South African case law provide a framework for achieving this balance. Recent judgments offer critical insights into managing mental health issues related to misconduct, incapacity and constructive dismissal.

In *Legal Aid South Africa v Jansen* [2020] 41 ILJ 1644 (LAC), the Labour Appeal Court (LAC) considered the employer's approach to misconduct involving mental health issues. The employee, diagnosed with depression, failed to report for work and ignored instructions on multiple occasions. Before the hearing was convened, the employee's psychologist confirmed that his depression had worsened and that this accounted for his conduct. At the hearing, the employee did not dispute the charges against him but maintained that he was suffering from depression and had therefore, acted "out of character". The employer argued that the misconduct was unrelated to the depression.

The court emphasised that employers must address mental health sensitively, and with due consideration for mental health concerns. This, however, does not preclude Courts from disciplining employees for misconduct. Employers should assess whether an employee's condition directly impacts their behaviour and consider all evidence, including medical reports, before taking disciplinary steps. In *Jansen*, the dismissal was deemed procedurally and substantively fair, but the case underscores the importance of engaging with mental health evidence to avoid procedural missteps.

In *Marsland v New Way Motor and Diesel Engineering (Pty) Ltd* [2009] 30 ILJ 169 (LC), the Labour Court criticized the employer for failing to accommodate an employee's mental health condition. Distinguishing between misconduct and incapacity is another challenge when mental health issues arise. Depression, as the court noted in *Jansen*, can qualify as ill health which necessitates an incapacity process rather than disciplinary action. Employers are urged to ensure they follow the correct procedure when faced with workplace issues. This may involve investigating the reasons for absenteeism or a lack of productive work by an employee before categorising behaviour as misconduct.

EMPLOYMENT LAW  
ALERT

## The steps and missteps from employers approaching mental health in the workplace: Lessons from the Court

CONTINUED

If the employee is unable to perform due to incapacity related issues arising from mental health concerns, employers are required to explore reasonable accommodation where this is possible. Such accommodation may include counselling, mentorship systems, performance improvement plans or other interventions, before resorting to disciplinary action. Overlooking these steps creates a possible risk of unfair dismissal, especially when medical evidence suggests an employee's health condition influenced their behaviour.

Medical evidence plays a central role in workplace mental health cases. In *L S v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 35 ILJ 2205 (LC), the Labour Court ruled that ignoring medical evidence during disciplinary proceedings rendered the dismissal procedurally unfair. However, the LAC in *Sanlam Life Insurance Ltd v Mogomatsi* [2023] 44 ILJ 2123 (LAC) clarified that medical certificates alone are insufficient to shift the burden of proof to the employer. Employees must provide credible evidence linking their condition to their workplace issues.

### Constructive dismissal claims

Constructive dismissal claims involving mental health add complexity, as demonstrated in the *Sanlam Life Insurance* case. The employee alleged that workplace stress and anxiety forced his resignation. However, the LAC overturned the Labour Court's finding of constructive dismissal, ruling that the employer had not been made aware of the employee's mental health issues.

The LAC outlined two critical principles:

- 1. Proving intolerable conditions:** Employees must demonstrate that the employer's actions objectively rendered continued employment intolerable. For mental health cases, this requires evidence that the employer knew or should have been made aware of the mental health issues.
- 2. Cumulative impact of conduct:** The court must examine the employer's overall treatment of the employee. In *Mogomatsi*, no evidence indicated indifference or insensitivity to the employee's medical condition.

This case highlights the need for proactive communication, where employees should be advised to inform their employers of circumstances affecting their health, while employers must remain vigilant for signs of distress to mitigate potential claims.



**EMPLOYMENT LAW  
ALERT**

# The steps and missteps from employers approaching mental health in the workplace: Lessons from the Court

CONTINUED

## Tips for employers

Recent case law emphasises a structured and empathetic approach to workplace mental health. Employers can adopt the following practical steps:

- 1. Training and awareness:** Equip managers to recognise early signs of such issues manifesting and provide appropriate support, which must be treated confidentially for privacy reasons.
- 2. Engagement and documentation:** Maintain appropriate communication with affected employees and record these events to ensure fairness.
- 3. Exploring alternatives:** Before pursuing any possible disciplinary steps, consider if that is appropriate or whether incapacity processes should be adopted, with reasonable accommodation and ongoing medical assessments.
- 4. Policy development:** Implement clear mental health policies emphasising prevention, support and workplace adjustments, if feasible.

Mental health challenges in the workplace require employers to balance sensitivity to the issues against operational needs. By adopting a proactive, informed approach, employers can foster a supportive work environment while mitigating risks. South African courts have provided clearer guidance on how employers should align their actions against these principles to navigate this complex terrain effectively.

**Fiona Leppan, Kgodisho Phashe and Dylan Greenstone**



## OUR TEAM

For more information about our Employment Law practice and services in South Africa, Kenya and Namibia, 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



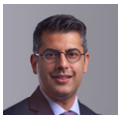
### Fiona Leppan

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



### Njeri Wagacha

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



### Jean Ewang

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



### Thabang Rapuleng

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



### JJ van der Walt

Counsel:  
Employment Law  
T +27 (0)11 562 1289  
E jj.vanderwalt@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, Kenya and Namibia, please contact:



### Daniel Kiragu

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E daniel.kiragu@cdhlegal.com



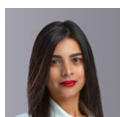
### Jordyne Löser

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



### Onele Bikitsha

Associate:  
Employment Law  
T +27 (0)11 562 1725  
E onele.bikitsha@cdhlegal.com



### Chantell De Gouveia

Associate:  
Employment Law  
T +27 (0)11 562 1343  
E chantell.degouveia@cdhlegal.com



### Lynsey Foot

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



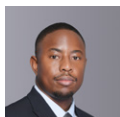
### Thobeka Kalipa

Associate:  
Employment Law  
T +27 (0)11 562 1238  
E thobeka.kalipa@cdhlegal.com



### Kevin Kipchirchir

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E kevin.kipchirchir@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



### Sheilla Mokaya

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E sheilla.mokaya@cdhlegal.com



### Sashin Naidoo

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



### Billy Oloo

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E billy.oloo@cdhlegal.com



### Melisa Wekesa

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E melisa.wekesa@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](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)

**NAMIBIA**

1<sup>st</sup> Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia  
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020  
T +264 833 730 100 E [cdhnamibia@cdhlegal.com](mailto:cdhnamibia@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)

©2025 14476/MAR

