NORTON ROSE FULBRIGHT

Labour Law by the Book volume 2:

A collection of articles related to South African Employment and Labour law and regulations

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Introduction

Dearest Reader

Welcome to Volume 2 of Norton Rose Fulbright's *Labour Law by the Book*, a collection of articles related to South African Employment and Labour law and regulations.

There is no shortage to labour and employment rulings, judgments and legislative and regulatory updates. It is admittedly difficult to keep track of all the changes and to stay up to date with recent developments. This volume includes articles on recent developments relating to employment equity and best practice for dismissals; on what employers should be aware of in respect of annual leave, constructive dismissals, full and final settlement agreements and CV fraud; and what local courts have said about trade union constitutions and what a foreign court has ruled on regarding parental leave. There is something for everyone and we trust it will guide you to do things "by the book"!

You can access soft copies of this and other volumes here.

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Part 1: Recent amendments to labour law

1. Navigating the Employment Equity Amendment Act: What Employers Need to Know

Employment equity and affirmative action have undergone significant changes with the promulgation of the Employment Equity Amendment Act, 2022 on 1 January 2025. The changes are aimed primarily at achieving a more equitable representation of designated groups across specific sectors of the economy.

Designated employer

One of the most notable changes is to the definition of "designated employer". Employers with fewer than 50 employees are now exempt from implementing affirmative action measures, regardless of their annual turnover. This change reduces the administrative burden on smaller businesses, allowing them to focus on growth and sustainability without the added compliance requirements.

People with disabilities

The definition of "people with disabilities" has been expanded to include individuals with long-term or recurring physical, mental, intellectual, or sensory impairments whereas previously only physical and mental impairments were specified. This aligns with the United Nations Convention on the Rights of Persons with Disabilities, 2007.

Compliance certificate

Compliance with the Employment Equity Act, 1998 (EEA) is especially important for employers who want to contract with the State. In order to obtain a certificate of compliance which is to accompany an offer to conclude a state contract, an employer must:

- Meet the sectoral targets for their sector or demonstrate a reasonable ground for non-compliance;
- Submit employment equity reports to the Department of Employment and Labour (DOL); and
- Ensure they have not received any adverse awards from the CCMA or any judgment of a court related to unfair discrimination in the preceding 12 months or an award from the CCMA relating to non-payment of the national minimum wage in the preceding 12 months.

Sectoral numerical targets

Section 15A of the Amendment Act empowers the Minister of Employment and Labour to set numerical targets within specific sectors. These targets are designed to address the unique needs and challenges within a sector, ensuring that employment equity is not a one-size-fits-all approach. On 1 February 2024 the Minister published draft regulations which set out proposed 5-year sectoral targets for 18 sectors, including Agriculture, Mining, and Manufacturing.

The draft regulations also provide guidance on how designated employers should develop their employment equity plans. While the draft regulations have yet to come into force key provisions will include the following:

Minimum Targets: The proposed five-year sectoral numerical targets are minimum targets. Employers must aim to meet or exceed these targets to ensure compliance.

Annual Numerical Targets: Employers must set annual numerical targets for all underrepresented groups in each of the top four occupational levels. If an employer exceeds the target for a specific race or gender, they must set targets to achieve the economically active population (EAP) representation.

Provincial EAP: Employers operating in multiple provinces who choose to use the Provincial EAP may choose to use the EAP of the province in which the majority of their employees are based.

To assist with compliance, we would recommend that employers:

Identify your sector

While the draft regulations are not yet in effect, determine which sector your business falls under and understand the sector numerical targets as currently proposed.

Assess your workforce

Compare your current workforce profile with the proposed sectoral numerical targets and identify gaps. Conduct a thorough analysis of your workforce demographics, including race, gender, and disability status to identify areas where you need to improve representation.

Develop an action Plan

Start developing measures to achieve the sectoral numerical targets as currently proposed, such as targeted recruitment, training, and development programs. Consider partnering with educational institutions, community organizations, and other stakeholders to create pipelines for underrepresented groups.

Stay informed

Keep abreast of any updates or changes including the status of the draft regulations and ensure timely submission of employment equity reports to the DOL. Regularly review your employment equity plans and adjust them as needed to stay compliant with the evolving regulatory landscape.

If you need assistance navigating these changes, our Employment and Labour team is happy to assist.

2. Draft Code of Good Practice on Dismissal: Proposed changes of which employers should take note

On 22 January 2025, the Department of Employment and Labour published a draft Code of Good Practice on Dismissal (Draft Code) for public comment. The Draft Code provides guidance on dismissals for misconduct, incapacity and operational requirements. It is open for comment till 23 March 2025.

When compared to the existing Code of Good Practice: Dismissal (Existing Code), which was last amended in 2002, the Draft Code includes a number of important proposed changes to the Existing Code. The proposed changes include:

- The introduction of guidelines on dismissals based on an employer's operational requirements together with an example of a notice to initiate a retrenchment consultation process.
- Small businesses may adopt a more informal and less onerous approach to discipline. This is in recognition of the fact that they cannot reasonably be expected to undertake time consuming investigations or pre-dismissal processes and that they do not have human resources departments with skilled and experienced employees. This does not mean that small businesses can abandon a fair process altogether, but they are not held to the same standard as larger employers.
- Unlike the Existing Code which provides that all employers should adopt disciplinary rules that establish the standard of conduct required of their employees, the Draft Code provides that it is preferable for employers, especially medium and large employers, to adopt written disciplinary rules and procedures.
- The factors to be considered when determining whether a sanction for misconduct is fair are expanded upon to include the importance of the rule or standard in the workplace, and the actual or potential harm or damage caused by the employee's breach of the rule or standard.
- Additional factors to be considered when determining whether a dismissal is unfair include the nature and requirements of the job, the nature and seriousness of the misconduct and its impact on the business; whether progressive discipline might prevent repetition of the misconduct; any acknowledgment of wrongdoing by an employee and willingness to comply with the employer's rules and standards; and the employee's circumstances, including length of service, disciplinary record and the effect of dismissal on the employee.
- Dismissal is considered an appropriate sanction if a continued employment relationship is intolerable.
- The purpose of a fair procedure is to ensure a genuine dialogue and an opportunity for reflection before a decision is taken.
- A fair procedure includes affording an employee an adequate and reasonable opportunity to respond to the alleged misconduct.
- An investigation or enquiry does not have to be formal. The nature of an investigation or enquiry should be appropriate to the circumstances, including the nature of the alleged misconduct and the nature and size of the employer.
- The procedure prior to dismissal should include, where reasonably possible, the opportunity to communicate in a language with which the employee is comfortable.
- Exceptional circumstances may justify an employer not following some or all of the procedures before a dismissal. If an employee then challenges the fairness of the procedure the employer will be required to justify any non-compliance.

- Detailed guidance is provided on addressing employees who participate in an unprotected strike, including the possibility of collective representations when dealing with collective misconduct.
- Probation enables an employer to assess an employee's performance and suitability for continued employment.
- Once again smaller employers may follow less onerous processes when dealing with an employee on probation, including providing reasonable guidance appropriate to the nature and size of the employer and the job.
- A person determining the fairness of a dismissal for misconduct or incapacity, including poor work performance, during or on expiry of a probation period ought to accept, taking into account the purpose of probation, reasons for dismissal that may be less compelling than would be the case if the dismissal took place after the probation period.
- When determining whether a dismissal for poor work performance is unfair, consideration should be given to the required performance standard and whether it was reasonably achievable.
- Depending on the circumstances, an employer may not be required to warn an employee of the possibility of dismissal if the employee's performance does not improve. Managers and senior employees have knowledge and experience which enable them to judge whether their performance is adequate and employees with a high degree of professional skill need not be warned of possible dismissal where a deviation from the high standard would have severe consequences which would justify dismissal.
- Incapacity is expanded to include not only ill health and injury but other forms of incapacity such as imprisonment and incompatibility, namely an employee's inability to work in harmony with an employer's business culture or with fellow employees.

The draft code can be accessed here.

Part 2: Common employment issues: "What employers need to know"

1. The Ins and Outs of Annual Leave

Annual leave is a topic which often invites questions from both employers and employees.

Annual leave is regulated by section 20 of the Basic Conditions of Employment Act, 1997 (BCEA) and is an entitlement afforded to all employees who work more than 24 hours a month for the same employer.

We have set out in this piece the answers to some common questions arising from the annual leave entitlement.

The information below only applies to the statutory minimum leave provided for in the BCEA. Any leave afforded in excess of the statutory minimums is not directly regulated by the BCEA and employers are advised to ensure this leave is regulated by contracts or policies.

How much leave is an employee entitled to?

All employees are entitled to 21 consecutive days of annual leave on full renumeration within a 12-month cycle. This translates to 15 working days. Alternatively, by agreement, the employer and employee may agree that the employee will be granted one day of annual leave for every 17 days the employee worked or was entitled to be paid or one hour of annual leave for every 17 hours the employee worked or was entitled to be paid. In this regard, the annual leave entitlement starts accumulating immediately following an employee's commencement of employment and starts accumulating anew upon the commencement of each leave cycle. Days on which an employee may not work but will still be entitled to be paid includes, amongst others, public holidays, annual leave and sick leave.

What is the purpose of annual leave?

In the cases of *Jooste v Kohler Packaging Limited and Ludick v Rural Maintenance (Pty) Ltd*, the Labour Court has affirmed that the very purpose of the BCEA is to ensure that employees take the annual leave to which they are entitled.

The International Labour Organisation regards annual leave as an extended rest period away from work which is essential to employees' wellbeing and serves the purpose of ensuring that employees rest and recuperate.

The aim of annual leave is therefore to allow employees to recover from the mental and physical effort of work and to provide time away from the workplace.

In line with this purpose, the BCEA specially prohibits an employer from requiring or permitting an employee to work during any period of annual leave.

When may an employee take annual leave?

Annual leave which has accumulated can be taken either at any time during the 12-month annual leave cycle or during the first 6 months of the next annual leave cycle. Annual leave may be taken at a time agreed upon between the employer and employee or, if there is no such agreement, at a time determined by the employer. Such agreements most commonly take the form of contracts of employment, binding internal policies or, where applicable, collective agreements.

May an employer refuse to grant an annual leave request?

Unless the contrary has been previously agreed, an employer may refuse to grant an employee's specific annual leave request if it is not operationally possible for the employer to go without the services of the employee for the specific period requested.

If an employer refuses to grant a paid leave request and an employee nonetheless proceeds to take the leave, this may lead to an employee being charged with unauthorised absenteeism, insubordination and/or refusing to obey lawful and reasonable instructions.

If an employee has not taken their annual leave during the 12-month annual leave cycle or has any remaining annual leave, the BCEA compels an employer to allow an employee to take such annual leave during the 6 months after the completion of a leave cycle. This provides protection to employees who might otherwise be denied their annual leave. In *Jardine v Tongaat-Hulett Sugar Ltd*, the Court described this as an obligation on the employer which is enforceable at the instance of the employee.

For example, if an employer refuses to grant an employee their annual leave due to operational requirements during their annual leave cycle, the employer may not refuse to allow the employee to take that accumulated annual leave during the following six months.

May an employer require an employee to take annual leave during their annual shutdown?

Yes, an employee and employer may agree that annual leave will be taken for example during an annual shutdown or, if there is no such agreement an employer may dictate that an employee take their annual leave during any period of shutdown.

If it has been agreed that an employee will not be required to take their leave during the employer's annual shutdown, but the employer now requires such leave to be taken then, the employee and employer would both have to agree to this as an employer is not allowed to unilaterally change any term and condition of employment.

Forfeiture of Leave

A common point of contention is whether accrued annual leave is forfeited by an employee if it is not taken within six months of the end of the annual leave cycle.

There are contradicting judgments from the Labour Court about whether statutory annual leave not taken within six months following the ending of the prior leave cycle is forfeited by the employee.

The court in *Jooste* held that statutory annual leave not taken within the six month of the financial year end would lapse. However, in *Jardine* the Labour Court ruled that leave not taken within six months is not automatically forfeited. In *Ludick*, Judge Van Niekerk considered both cases and seems to favour the position in *Jooste*.

Although the leading view favours the forfeiture of leave, in the absence of clear authority from a higher court, employers are encouraged to regularise their position on forfeiture through policies or contracts of employment, to avoid forfeiture-related claims from arising.

What should an employer do if there is a public holiday while an employee is on annual leave?

An employer must extend an employee's annual leave by one day if a public holiday falls on a day during an employee's annual leave or credit the employee with one day annual leave for every public holiday during the employee's annual leave.

May an employer require an employee to take annual leave during their notice period?

Unless otherwise agreed, an employee may not require or permit an employee to take annual leave during their notice period. To the extent that an employee has accumulated annual leave which has not been taken by the time they begin their notice period, the annual leave will be paid out upon termination of employment.

May an employer pay an employee in lieu of granting annual leave?

The BCEA prohibits an employer from paying an employee for annual leave except upon the termination of employment. An employee must be paid out the value of their accumulated annual leave entitlement when they leave the company, irrespective of the reason for the termination of employment.

Again, there are contradictory views on whether the pay outs of accrued annual leave is limited to the current leave cycle during which termination occurred and the immediately preceding leave cycle or whether employees are entitled to the payment of all annual leave accumulated but not taken for the full length of employment.

The leading view is that upon termination of employment, employers are liable for the payment of only the accrued annual leave of the current annual leave cycle and the annual leave accrued in the cycle immediately preceding that during which termination takes place.

Given that there is not complete certainty on the law in this regard, it is advisable that employers reach agreement, through contracts of employment or policies, on the accrued periods of annual leave which will be paid out upon termination of employment to avoid claims related to the payment of accrued annual leave.

Jooste v Kohler Packaging Ltd [2003] 12 BLLR 1251 (LC)
Ludick v Rural Maintenance (Pty) Ltd [2014] 2 BLLR 178 (LC)
Jardine v Tongaat-Hulett Sugar Limited (2003) 24 ILJ 1147 (LC)

2. When Resignation Means Dismissal: Understanding Constructive Dismissals

What is a Constructive Dismissal?

Under section 186(1)(e) of the Labour Relations Act (LRA), a constructive dismissal occurs when an employee resigns, with or without notice, because the employer's conduct has made continued employment intolerable. Although the resignation is at the employee's initiative, the law views it as a termination of the employment relationship caused by the employer's actions or omissions.

An employee who has resigned under such circumstances may refer an unfair dismissal dispute, claiming that they were constructively dismissed, to the Commission for Conciliation, Mediation and Arbitration (CCMA).

Key elements of Constructive Dismissal

In the case of *Jooste v Transnet Ltd*, it was emphasised by the Labour Appeal Court (LAC) that the circumstances under which constructive dismissal can be said to have taken place "*are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal*". Following the LAC's decisions in *Jooste* and in *Pretoria Society for the Care of the Retarded v Loots*, the employee must prove:

- Resignation: The employee must have terminated the contract of employment.
- Intolerable Work Environment: The resignation must have been due to intolerable circumstances created by the employer.
- Employer's Responsibility: The employer's conduct must have objectively caused the intolerable conditions.
- Employee's Intention: But for the employer's conduct, the employee would not have terminated the employment relationship.
- Internal Remedies Exhausted: The employee must have exhausted all possible remedies available to them before resigning.

If any of these elements is missing, the claim will fail (as confirmed by the LAC in the case of *Solid Doors (Pty) Ltd v Commissioner Theron & Others*).

Objective test for intolerability

The courts assess the intolerability of the situation from the perspective of a reasonable person in the employee's position, disregarding personal idiosyncrasies. Employees must demonstrate that they would have continued working indefinitely if not for the employer's actions.

In *National Health Laboratory Service v Yona and Others*, the court held that "*the conduct of the employer toward the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with*".

Such intolerability appears to have a high threshold. In *Chimphondah v Housing Investment Partners (Pty) Ltd and Others*, the court reiterated the position that "*intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee's tolerance to a breaking point*."

As clarified by the Constitutional Court in *Strategic Liquor Services v Mvumbi NO & Others*, employees are no longer required to show they had no alternative but to resign. However, the case of *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & Others* highlighted that if a reasonable alternative exists, constructive dismissal may not be established.

The importance of exhausting remedies

Employees are expected to exhaust internal grievance or dispute resolution processes before resigning. Failure to do so could weaken their claim of constructive dismissal.

This was particularly emphasised in the case of *Chimphondah*. The court considered whether the termination of the employment of a certain senior employee constituted constructive dismissal, when he had not, prior to resignation, availed himself to the available internal grievance procedures. The court further found that it was "*ill-considered for the employee to resign without warning or giving the employer the opportunity to remedy the cause of the complaint*".

Consequences of a Constructive Dismissal Claim

Where a constructive dismissal dispute is referred to the CCMA, the employee will bear the onus to prove that they did not simply resign, but they were, in fact, constructively dismissed. Once constructive dismissal is proven, in line with the test outlined above, it is deemed a "dismissal" under the LRA. The onus then shifts to the employer to prove that such dismissal was both substantively and procedurally fair (section 192(2) of the LRA).

Defending against a Claim of Constructive Dismissal

Employers can defend against claims of constructive dismissal by demonstrating that:

- The work environment was not objectively intolerable.
- Reasonable alternatives to resignation were available.
- The employer's actions were lawful and justified.

The period between any incident or event which formed the basis of the constructive dismissal claim and the employee's resignation is an important consideration. In *Agricultural Research Council v Ramashowana NO & Others*, the Labour Court found that a delay of 15 months suggested that the working environment was not intolerable. Thus, an employee must have resigned within a reasonable period following the event that allegedly made continued employment intolerable.

Employer best practices

To avoid constructive dismissal claims, employers should:

- Have clear policies in place regarding employee grievances.
- Address and record employee grievances promptly as well as any action taken.
- Maintain a fair and lawful workplace environment.
- Ensure that managerial decisions are objectively reasonable and not unduly harsh.

By fostering a supportive and compliant workplace, with clear and effective grievance procedures, employers can mitigate the risk of costly and disruptive constructive dismissal claims.

Jooste v Transnet Ltd t/a South African. Airways (1995) 16 ILJ 629 (LAC)
Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC)
Solid Doors (Pty) Ltd v Theron NO and Others (CA4/03) [2004] ZALAC 14
National Health Laboratory Service v Yona and Others (PA 12/13) [2015] ZALAC 33
Chimphondah v Housing Investment Partners (Pty) Ltd and Others (JR1195/19) [2021] ZALCJHB 83
Strategic Liquor Services v Mvumbi NO and Others (CCT 33/09) [2009] ZACC 17
Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen and Others (C 272/2010) [2011] ZALCCT 21
Agricultural Research Council v Ramashowana NO and Others (J1342/15) [2018] ZALCJHB 255

3. Understanding 'full and final' settlement agreements: What you need to know

The purpose of a 'full and final' settlement agreement is for the parties to a dispute to extinguish that specific dispute, as well as any potential disputes arising from the relationship between the parties, on mutually agreed terms. Although this seems like a simple exercise on the face of it, it can lead to issues if the parties believe that a dispute has been settled when in reality the terms contained in the settlement agreement did not have the effect of settling the dispute in its entirety.

The issues which can arise from settlement agreements was at the forefront of *Wheelwright v CP de Leeuw Johannesburg (Pty) Ltd*, wherein the Labour Appeal Court had to determine whether a restraint of trade agreement could be enforced despite a 'full and final' settlement agreement having been concluded between the parties, given that the settlement agreement did not specifically preserve the restraint obligation.

The restraint of trade agreement contained a provision restraining the employee from becoming a proprietor of any business or firm conducting the business of quantity surveying or project management within 100 kilometres of the employer's offices for five years and from conducting any business with the employer's clients.

Pursuant to financial difficulties as a result of the Covid-19 pandemic, the employee was retrenched. Following an unfair dismissal referral by the employee to the Commission for Conciliation, Mediation and Arbitration (*CCMA*), the parties concluded a settlement agreement which consisted of the standard CCMA settlement clause which recorded that the agreement was "*in full and final settlement of the dispute referred to the CCMA" and a bespoke annexure which recorded that the agreement was "in full and final settlement of all and any claims which the parties may have against each other whether such claim arises from contract, delict, operation of law, equity, fairness or otherwise*."

Over a year later, the employee was appointed as quantity surveyor for a project in Nigeria which was previously awarded to the employer, based on the employee's assurance that the settlement agreement had released him from the restraint agreement. The former employer was of the view that the employee could not be involved in the project because of the restraint of trade agreement. The former employer sought to enforce the restraint agreement via an urgent application to the Labour Court wherein it contented that the settlement agreement was only meant to settle the dispute referred to the CCMA, which it alleged did not affect the restraint. Conversely, the employee asserted that that the employer had waived its rights to enforce the restraint when it concluded the settlement agreement.

The Labour Court found that the restraint of trade dispute only arose after the signing of the settlement agreement and accordingly was not a claim in existence at the time that the settlement agreement was concluded meaning that the restraint agreement was still in force and the employee had breached it.

On appeal, the Labour Appeal Court held that the wording of the bespoke annexure extended beyond the referral at the CCMA, covering all claims between the parties. The court remarked that although the CCMA standard agreement generally limits settlements to the actual dispute that is referred to the CCMA, the parties had decided to stretch the scope of the standard agreement to include claims that were not incorporated nor envisioned by the CCMA agreement, thus clearly indicating an intention to settle all disputes, not just those referred to the CCMA. Had the employer intended to keep the restraint operative following the settlement, it should have specifically included a clause in the settlement agreement that the employee's obligations under the restraint survived the settlement.

A Cautionary tale

The Wheelwright judgment highlights the need for caution when entering into settlement agreements. Parties must be clear about what is being settled and what rights or causes of action are not intended to be settled. A failure to do so may result in unfavourable and unintended outcomes for one or both parties.

It is critical to assess whether caveats must be built into liability clauses so that any existing rights and entitlements, such as restraints of trade, remain protected following settlement.

Key take aways:

When settling disputes, parties should:

- Utilise clear and concise wording which reflects their true intention about what is being settled;
- Specifically record any rights and obligations which will survive the settlement agreement, including restraints of trade arrangements with employees; and
- Only use broad liability clauses which settle 'all current and future claims in full' in circumstances where you do not envisage any future disputes.

4. "Not-so-pretty" little lies: The dangers of CV Fraud

In today's competitive job market, employees are increasingly tempted to embellish their CVs and job applications with qualifications, skills and achievements that are not factually correct. However, the consequences of CV fraud can be severe, both for the employee as well as for the employer.

CV fraud is not a novelty and there have been many notable instances of it in the media.

In 2014, a Cabinet Minster claimed to have a doctorate, but it was later revealed that he had no tertiary qualifications.

Similarly, an employee of a consulting firm was dismissed after it was uncovered that he had falsely claimed to hold a Bachelor of Commerce in Chartered Accountancy and an MBA; while a former employee of a security company was dismissed for dishonesty after he had failed to disclose a criminal conviction in his application for employment.

In all of these examples, the misrepresentations made by the individuals concerned, were not only damaging to their careers, but subsequently brought upon their employers reputational, financial and operational damage and disruption.

These cases beg the question: Where does the South African labour law landscape stand in relation to such misrepresentations?

Case law

The Labour Courts have consistently upheld dismissals as being fair in instances where the employee has misrepresented their qualifications when applying for a position at a company as this deception constitutes gross dishonesty which goes to the heart of the trust relationship.

The Labour Court, in *Boss Logistics v Phopi and Others*, found that an employment relationship is based on mutual trust, and deceit is incompatible with and destructive to the trust relationship thereto. Moreover, the court remarked that an employee who misrepresents their qualifications or experience is dishonest and is not entitled to be appointed to a position in the first place. This is so because the employer is entitled to rely on the representations made by the employee. When those turn out to be false, that is destructive of the underlying employment contract.

In *Department of Home Affairs & another v Ndlovu & others*, the Labour Appeal Court examined the dishonesty inherent in CV fraud and drew attention to the high premium placed on honesty and the fact that misrepresenting one's qualifications irreparably damages the trust relationship. The court also found that a misrepresentation by employees in relation to their qualifications and skills before the commencement of employment is sufficient to warrant dismissal even if it is discovered some time later and the employee has rendered satisfactory performance in the interim.

Similarly, in *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO & others*, the Labour Appeal Court found that long satisfactory service by an employee does not negate the seriousness of the initial dishonesty and that it would send the wrong message to treat an employee who committed dishonesty at an earlier time differently.

The National Qualifications Framework Act

In addition to being a dismissible offence within the employment sector, CV fraud and any misrepresentations of such nature is also a criminal offence in terms of the National Qualifications Framework Act, 2008.

According to the Act, a person commits an offence if they falsely or fraudulently claim to be holding a qualification registered on the national qualifications framework (NQF), awarded by an educational institution, skills development provider, or obtained from a legally recognized foreign institution. For example, it may be considered an offence to list in your CV that you hold a specific degree from a specified tertiary institution if, in fact, you do not hold such a degree.

If found guilty, the person could face a fine, or imprisonment for up to five years, or both.

This offence is not limited to CV misrepresentations but extends to fraudulent misrepresentations of qualifications on social media platforms.

Job seekers and employees are, thus, cautioned against such misrepresentations, especially when seeking and retaining employment as, not only may it jeopardize their employment relationship, but could result in criminal sanctions.

Solutions for employers

Given the increasing risk of CV fraud, it is important that employers implement thorough vetting processes in respect of prospective candidates. This may include:

- Qualification verification: Always verify that candidates possess the qualifications they claim to possess.
- Employment history verification: Confirm previous employers and positions listed on the CV.
- Criminal background checks
- Reference checks: Speak with previous employers and colleagues to gain insights into the candidate's capabilities.

It is important that the Promotion of Access to Information Act, 2013 is complied with when vetting processes are concluded. We recommend that employers obtain informed consent from their prospective employees before conducting these checks.

Should an employer discover that an employee has misrepresented themselves on their CV or committed fraudulent acts in relation thereto, and where damages have been suffered as a result, the courts have provided for the restitution of such employers and have entitled employers to claim back the benefits that the employee received.

The High Court in *Umgeni Water v Naidoo and Another*, upon finding that the defendant had committed fraud by forging his qualifications ordered the defendant to pay the plaintiff approximately two million rand, this being salaries paid to the defendant and to which he was not entitled.

Conclusion

CV fraud is a serious issue that can have far-reaching consequences for both employees and employers. By understanding the legal landscape and implementing thorough vetting processes, employers can protect themselves from the risks associated with fraudulent qualifications. Job seekers and employees, on the other hand, should be aware of the severe penalties for misrepresentation and strive to present their qualifications and experience honestly.

Boss Logistics v Phopi and Others [2010] 5 BLLR 525 (LC)
Department of Home Affairs and Another v Ndlovu and Others (DA11/2012) [2014] ZALAC 11
G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. and Others (CA2/2015) [2016] ZALAC 55
Umgeni Water v Naidoo and Another (11489/2017P) [2022] ZAKZPHC 80

Part 3: Developments arising from case law

1. Importance of a trade union's constitution in relation to membership and representation

On occasion an employee joins a trade union which operates outside the industry in which their employer operates. The important question as to whether such a trade union has the power under its own constitution to represent the employee in CCMA and Labour Court proceedings was answered in the negative by the Constitutional Court.

In the June 2024 case of *AFGRI Animal Feeds v NUMSA and Others*, the Constitutional Court considered the authority of a trade union to represent dismissed employees where the registered scope of the trade union precludes the employees from becoming its members.

The National Union of Metalworkers of South Africa (NUMSA) had referred unfair dismissal disputes on behalf of former AFGRI employees to the Commission for Conciliation, Mediation and Arbitration and when conciliation failed, to the Labour Court. Before the Labour Court AFGRI challenged NUMSA's representation of the employees and disputed the dismissed employees' membership of NUMSA. It argued that NUMSA was precluded from representing the members given that its registered constitution restricts membership to workers in the metal and related industries, whereas the dismissed employees had been employed in the animal feed industry. The Labour Court upheld the challenge, finding that NUMSA lacked legal standing and that its referral of the disputes was invalid and void.

When the matter came before the Labour Appeal Court the court drew a distinction between a trade union's exercise of organisational rights and its representation of employees in an unfair dismissal dispute. It found that a trade union could represent an employee in an unfair dismissal dispute despite the industry in which the employee was employed falling outside the registered scope of the trade union. The Labour Appeal Court reasoned that when exercising organisational rights, a trade union must establish its right to act on behalf of workers by proving that they are its members. It distinguished this from a dismissal dispute in which workers (and not a trade union) tend to be parties to the proceedings and they have the right to choose their representative. The Labour Appeal Court went on to find that when bargaining collectively on behalf of its members, a trade union relies on its knowledge of the industry in which it operates. However, the considerations differ in an individual dismissal dispute in which fairness and an employee's right to representation are the relevant considerations. Based on this reasoning, the Labour Appeal Court held that NUMSA had legal standing to represent the dismissed employees in the Labour Court proceedings, despite the fact that the industry in which AFGRI operates falls outside the registered scope of NUMSA's constitution.

On appeal before the Constitutional Court, the court considered the following:

- Section 200 of the Labour Relations Act, 1995 (LRA) determines a trade union's legal standing, namely it may act in its own right or interest, or on behalf of any of its members, or in the interests of any of its members. In this instance, NUMSA sought to act in the interests of its members, and not its own interests.
- In accordance with section 95 of the LRA, NUMSA adopted a constitution which complies with the prescribed requirements, including setting out the prescribed qualifications for and admission to membership.
- As a legal personality, a trade union can perform any act in law required or permitted by its constitution. An act which deviates from or is contrary to a trade union's constitution is ultra vires and null and void.
- In terms of section 4 (1) (b) of the LRA every employee has the right to join a trade union, subject to that trade union's constitution.
- A trade union's constitution is a public document.
- A trade union's constitution allows for transparency.

The Constitutional Court concluded that:

- A trade union is bound by its constitution.
- A trade union cannot act beyond its constitution, including operating outside of its registered scope.
- Permitting the joining of a trade union by members who fall outside the registered scope of the trade union is *ultra vires* and invalid.

Applying its conclusions to the facts of the case, the Constitutional Court held that the dismissed employees were not eligible for membership of NUMSA because they were employed outside of NUMSA's registered scope to grant membership to employees in the metal and related industries, not the animal feed industry. As a result, NUMSA lacked authority to represent them in the Labour Court proceedings. Although there is a basis to draw a distinction between a trade union representing employees in relation to organisational rights and representation in an unfair dismissal dispute and that in both instances, a trade union has no powers beyond what is permitted in its constitution.

This judgment highlights the importance of a trade union's constitution in determining the scope of its powers and particularly whether it may restrict a worker's membership of a trade union and in turn, a trade union's representation of a worker.

AFGRI Animal Feeds v NUMSA and Others 2024 (5) SA 576 (CC)

2. Parental leave and developments in South Africa and Spain

The need for a more equitable parental leave framework for all parents is currently the subject matter of litigation in South Africa and Spain.

In South Africa, the Constitutional Court has reserved judgment in the matter of *Van Wyk and others v the Minister of Employment and Labour* in which Norton Rose Fulbright SA Inc's Impact Litigation team is acting on behalf of the Commission for Gender Equality (CGE), the fourth applicant. The case involves a challenge to several provisions of the Basic Conditions of Employment Act, 1997 and Unemployment Insurance Fund Act, 2001 on the basis that the existing parental leave framework is unfairly discriminatory and unconstitutional, is contrary to the interests of the child and impairs the dignity of parents and their children, and warrants legislative reform (see our detailed discussion on the *Van Wyk* matter here).

In the Van Wyk matter, in argument before the Constitutional Court, the CGE has advocated for a system allowing parents to collectively receive four months and two weeks of leave, with flexibility as to how the leave is allocated between them. By contrast, the individual applicants proposed an option allowing one parent to take four months or both parents to split the four months leave between them, and another applicant, Sonke Gender Justice, suggested that each parent receive four months leave.

While we await the decision of the Constitutional Court it is interesting to observe recent developments in relation to parental leave in Spain. On 9 January 2025, a Spanish court ruled that a single mother has the right to the parental leave which would have been due to her partner, in the event that she had a partner. The effect of the ruling is a doubling of leave: 16 weeks maternity leave and an additional 16 weeks' parental leave together with the corresponding economic benefit from social security. In reaching this decision the court considered the interests of the child and that children should be treated the same regardless of whether they are born into a single parent family.

Van Wyk and Others v Minister of Employment and Labour (2022-017842) [2023] ZAGPJHC 1213; [2024] 1 BLLR 93 (GJ); (2024) 45 ILJ 194 (GJ); 2024 (1) SA 545 (GJ) (25 October 2023)

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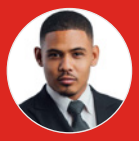

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