NORTON ROSE FULBRIGHT

Labour Law by the Book volume 1:

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

July 2024

Introduction

Dearest Reader

Welcome to Volume 1 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 and judgments. 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 parental rights, cannabis use by employees, employees' rights to challenge procedurally unfair retrenchments, police liability in failing to assist employers during strike action and practical guides on how to handle sick leave, business and human rights and strikes. 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 forthcoming volumes on our website.

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Part 1: Developments arising from case law

1. The impending shift in the parental leave and benefits regime

The current status of the litigation

The Constitutional Court is expected to hear a challenge to the parental leave and benefits legislative regime in the coming months. After a defeat in the High Court, wherein the High Court found the current regime unconstitutional, the Minister of Employment and Labour, who did not oppose the application, has deferred to the Constitutional Court.

The Constitutional Court has been asked by various parties, including the Commission for Gender Equality, to declare various aspects of the *Basic Conditions of Employment Act* and the *Unemployment Insurance Fund Act* unconstitutional on the basis that they unjustifiably limit the rights to equality, dignity, children's rights and the right to social security.

The date of the hearing has not been set yet but all parties have filed their arguments.

The challege before the Court

The crux of the challenge is that under the current employment and social security regime, not all parents and sets of parents, whether birth, adoptive, or surrogacy commissioning, are afforded the same benefits and protections by virtue of being parents.

The current system provides that biological mothers are afforded four months parental leave, biological fathers are eligible to receive two weeks parental leave; one parent in an adoptive/commissioning relationship is afforded ten weeks and the other parent two weeks; and adoptive parents of a child two years old and above are not afforded any parental leave. Parents whose employers do not provide remuneration during their parental leave qualify for unemployment insurance benefits.

In its submissions before the Constitutional Court, the CGE argues that, while the present state of affairs may appear to be advantageous to women who are biological mothers, in fact, the legislative framework exacerbates gender inequity in the workplace and home and reinforces gendered stereotypes which make it challenging for women to participate fully and meaningfully in the workplace. In addition, the CGE submits that the current system perpetuates the unequal treatment faced by historically marginalised groups including parents who cannot have children biologically, and their children.

The Minister has not provided any justification for the exclusion of parents of adopted children two and older from the full ambit of the regime's protection. The CGE argues that this is irrational, discriminatory and is not in the best interests of the adopted child.

Looking ahead: what to expect

Until the Constitutional Court has ruled on the issue, the status quo remains.

Should the challenge be successful we can expect to see greater flexibility for families on how they share childcare responsibilities. The Constitutional Court has been asked to implement an interim leave and benefits system which will undoubtedly guide Parliament when it considers the required long-term legislative amendments. One proposal is that parents share a total parental leave of 19.32 weeks (the traditional four months maternity leave plus the two weeks parental leave).

Non-discriminatory changes may make it easier for employers to attract and retain a more inclusive and gender diverse workforce.

Employers are advised to start considering how their paid parental leave policies may need to be amended to ensure that paid benefits are equitably shared between parents who qualify for such benefits in an affordable manner. The current litigation does not challenge the unpaid nature of parental leave and employers retain the discretion to pay their employees during parental leave or assist them in applying for an unemployment insurance benefit. However, it is important that employers' paid parental leave policies are reasonable, fair and do not discriminate against employees based on their gender or how they came to be a parent.

Should a new parental leave framework be implemented, the Minister is expected to consider the affordability of unemployment insurance benefits and to ensure that benefits are equitably distributed between parents.

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)

2. Labour Appeal Court overturns dismissal for testing positive for cannabis

In April 2024, in *Enever v Barloworld Equipment*, the Labour Appeal Court held that the dismissal of an employee after testing positive for cannabis was unfair because the employer's zero tolerance policy unfairly discriminated against the employee who occupied a typical desk job.

Although the Constitutional Court in *Minister of Justice and Constitutional Development and Others v Prince* (CCT108/17) [2018] ZACC 30 ruled that adults may possess and consume cannabis in the privacy of their own homes, the effect this judgment has on the use of cannabis by employees within the workplace has remained unanswered.

The employer's business entails the supply of earthmoving equipment and power systems primarily to its customers in the mining and civil engineering industries. Due to the hazardous environment within which many employees work and the employer's obligation to maintain a safe working environment for employees, customers and stakeholders, the employer implemented a zero-tolerance policy to the possession and consumption of drugs and alcohol in the workplace. Even after the *Prince* judgment, the strict zero-tolerance policy was maintained given the employer's view that the workplace is not a private space.

The employee, who occupied a desk job, was tested for drugs and alcohol pursuant to routine testing to afford employees access to the employer's premises. The employee was required to vacate the premises and return for testing every seven days. Following the employee testing positive for cannabis on four more occasions, the employer instituted a disciplinary hearing for non-compliance with the policy. The employee pleaded guilty on the basis that she consumed cannabis for medicinal and recreational purposes outside of work and would continue to do so. The employee was summarily dismissed.

The employee took the view that the employer had unfairly discriminated against her on the basis of her spirituality, conscience and belief and on arbitrary discriminatory grounds and approached the Labour Court with an automatically unfair dismissal and unfair discrimination dispute. The Labour Court found that there was no unfair discrimination and that the employee's dismissal amounted from ordinary misconduct which arose as a result of her wilful breach of the policy (see our blog on the Labour Court's decision here).

The employee appealed the decision to the Labour Appeal Court (LAC). The employee persisted with her view that she had been unfairly discriminated against her on the basis of her spirituality, conscience and belief and on arbitrary discriminatory grounds.

The LAC highlighted that while alcohol intake similarly takes place in the privacy of a home, this is where that similarity ends. A key differentiating factor between the consumption of alcohol and cannabis is that while alcohol dissipates from the blood stream quickly, cannabis remains in the system for a longer period of time. The length of time cannabis remains in the body effectively means that the only way to comply with the policy is for the employee not to consume cannabis at all.

Based on the above, the LAC found that, while there was no discrimination on a listed ground of discrimination, there had been a violation of the employee's dignity and privacy as the policy prevented her from engaging in conduct that had no impact on the employer per se, yet it allowed the employer to compel her to choose between her job and the exercising of her rights.

Moreover, the employer had not been able to show that the employee was intoxicated at work, that her work was adversely affected or that she had created an unsafe working environment for herself, her fellow employees, or other people at the workplace. The use of blood tests alone without proof of impairment is not sufficient to justify dismissal.

The LAC found that the zero-tolerance approach followed by the employer was irrational and an unjustifiable infringement of the employee's right to privacy and declared that the employee had been automatically unfairly dismissed.

Importantly, however, the LAC specifically emphasised that the outcome might have been different if the employee had been impaired during working hours or had been required to operate heavy or dangerous machinery as opposed to the desk job she occupied. Therefore, this decision does not apply uniformly to all employees at all workplaces, but only to those employees who are impaired to the extent that their work is adversely affected or the impairment creates an unsafe working environment.

Key Takeaways for Employers

- The use of cannabis in private is allowed but this can still impact upon safety, industrial accidents and the employer's obligations under the Occupational Health and Safety Act.
- When drafting or implementing substance abuse polices, employers must keep in mind the difference between the effects of cannabis and alcohol and the longevity of the two different substances in the human body.
- Where a zero-tolerance policy is adopted, the implementation thereof should not unjustifiably impact the rights of their employees, specifically the right to privacy and dignity.
- The adoption of a zero-tolerance policy must be linked to the work performance and maintenance of safety within the workplace.
- If a policy is a zero-tolerance policy, proving the employee was tested positive for drug use may not be enough to discipline the employee. An employer will need to prove in addition that the employee could not perform their duties or created a dangerous situation, depending on the nature of the employee's job.
- Zero-tolerance policies may no longer be extended to office employees simply because the broader working environment is hazardous. Cases are to be treated individually.

The Constitutional Court has refused the employer's application for leave to appeal the LAC judgment.

Enever v Barloworld Equipment South Africa, A Division of Barloworld South Africa (Pty) Ltd (JA86/22) [2024] ZALAC 12; [2024] 6 BLLR 562 (LAC); (2024) 45 ILJ 1554 (LAC) (23 April 2024)

3. Landmark Constitutional Court decision: Labour Court's jurisdiction to adjudicate on procedural unfairness of large-scale retrenchments and remedies for procedural unfairness

In the May 2024 decision in *Regenesys Management v Ilunga*, the Constitutional Court (CC) addressed two important questions relating firstly, to the Labour Court's jurisdiction to adjudicate disputes relating to the procedural fairness of retrenchments, and secondly, the circumstances in which it would be appropriate for the Labour Court to grant compensation for procedural unfairness in large-scale retrenchments.

Section 189A of the LRA regulates large-scale retrenchments, where an employer employs more than 50 employees and contemplates retrenching the numbers of employees set out in section 189A.

Section 189A(13) of the LRA permits a party, who believes that a fair procedure has not been followed in a large-scale retrenchment, to approach the Labour Court to grant one of three orders to compel compliance with a fair procedure, or alternatively to grant compensation for procedural unfairness if one of the other three orders is not appropriate.

Section 189A(18) provides that the Labour Court may not adjudicate a dispute about the procedural fairness of a retrenchment referred to it in terms of section 191(5)(b)(ii) of the LRA, namely the general unfair dismissals section in terms of which disputes relating to a retrenchment may be referred to the Labour Court.

When addressing the first question the CC considered earlier judgments of the Labour Court, Labour Appeal Court and CC which held divergent views as to the Labour Court's jurisdiction to determine the procedural fairness of large- and small-scale retrenchments.

The CC rejected several of the earlier findings and held that the correct interpretation of section 189A(18), as read with sections 191(5)(b)(ii) and 189A(13) is as follows:

- section 189A(18) does not oust the jurisdiction of the Labour Court to adjudicate a dispute about the procedural fairness of small-scale retrenchments brought in terms of section 191(5)(b)(ii);
- section 189A(18) does not oust the jurisdiction of the Labour Court to adjudicate disputes about the procedural fairness of large-scale retrenchments brought in terms of section 189A(13); and
- section 189A(18) only ousts the jurisdiction of the Labour Court to adjudicate disputes about the procedural fairness of large-scale retrenchments brought in terms of section 191(5)(b)(ii) because the LRA provides a special procedure and special remedies in section 189A(13) for these disputes.

Turning then to the second question, the CC considered sections 189A(13)(a) to (d) and the remedies for procedural unfairness in a large-scale retrenchment. Section 189A(13) empowers the Labour Court to (a) compel an employer to follow a fair procedure; (b) interdict or restraint the employer from dismissing an employee prior to following a fair procedure; (c) direct the employer to reinstate the employee until a fair procedure has been followed; or (d) award compensation if any of the orders listed in (a) to (c) are not appropriate.

Prior to this CC judgment there were conflicting views as to whether compensation under section 189A(13)(d) may be claimed as a stand-alone remedy. The leading position was that section 189A(13) had a single purpose, namely, to compel an employer to comply with a fair procedure prior to retrenching employees. In line with this position several judgments found that if the consultation process could not be put back on track by an order of the court, then none of the remedies provided for in section 189A(13) may be ordered. As a result, 189A(13)(d) was only relied upon as an alternative remedy when the consultation process could theoretically be put back on track but the orders provided for in subsections (a) to (c) were otherwise inappropriate. The effect being that compensation for procedural unfairness under section 189A(13)(d) was held not to be a remedy available well after dismissals had been effected.

The May 2024 judgment of the CC rejected the earlier interpretation and held that section 189A(13)(d) is a standalone remedy and that compensation under subsection (d) is only valid where relief in terms of subsections (a), (b) or (c) is not appropriate. Employees must comply with the 30 day time period to refer the dispute or obtain condonation for non-compliance.

In accordance with the CC's interpretation if the consultation process is capable of being put back on track the relief provided for in subsections (a) to (c) must be ordered. However, if putting the consultation process back on track is no longer possible then subsection (d) may be relied upon as a stand-alone remedy. This standalone remedy holds an employer, who has retrenched employees finally without following a fair process, accountable.

Given the finding of the CC, employees and trade unions who dispute that an employer has followed a fair consultation process are not restricted to seeking urgent and temporary relief from the Labour Court. This judgment enables them to seek final relief in the form of compensation for procedural unfairness after the retrenchments have been effected.

Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and Others **(CCT 220/22) [2024] ZACC 8**

4. Police liability for failing to assist an employer in handling industrial action

In *Minister of Police v Umbhaba Estates*, the Supreme Court of Appeal (SCA) had to decide an appeal concerning the conduct of members of the South African Police Services in response to criminal acts committed by the employees of Umbhaba Estates (Pty) Ltd (Umbhaba) during industrial action.

During July 2007, some of Umbhaba's employees participated in a prolonged strike at one of its operations. The strike was characterised by acts of intimidation, assaults, malicious damage to property, vandalism, theft, launching petrol bombs and looting. The striking employees also blockaded some of the entrances to parts of Umbhaba's operations making it impossible for the non-striking employees to perform their day-to-day duties. These acts were captured on video footage and photographs.

The striking employees' acts resulted in Umbhaba's management team repeatedly and consistently asking the police for assistance to prevent the striking employees from continuing to commit unlawful acts, to ensure compliance with the court orders, and to generally maintain public order. The police presence caused the striking employees to calm down. The police left Umbhaba's premises shortly thereafter. Umbhaba pleaded with the police to maintain a presence given that the violence escalated whenever they were not present. The police declined and left Umbhaba's premises. Notwithstanding multiple further calls, namely 69 calls over 9 and 24 July 2007 to the police, they failed to respond adequately to assist Umbhaba handle the industrial action that was unfolding.

Umbhaba obtained various court interdicts, which it shared with the police who ultimately turned a blind eye and failed to take adequate steps to help Umbhaba.

In considering whether the police conduct was wrongful, the SCA held that the police response was not fit for purpose and thus fell short of the required standards. The SCA was satisfied that the conduct of the police was unacceptable and accordingly wrongful.

In considering whether the police were negligent, the SCA considered the test set out in *Kruger v Coetzee* (1966) 2 SA 428 (A), which consists of two legs: reasonable foreseeability and reasonable preventability of harm and damage in the circumstances. It was evident from the video footage that from the inception of the strike, the situation was volatile and that it was reasonably foreseeable that violence could erupt again. The SCA held that the need for police presence was self-evident but that the police intervention was inadequate. The least the police could have done was to patrol regularly; this was not done and no explanation for this failure was proffered. The steps taken by the police officers fell far short of the steps that reasonable police officers would have taken to comply with the court orders that were issued by the Labour Court, and in general in compliance with constitutional imperatives. The SCA was satisfied that both the foreseeability and preventability legs of the negligence test have been met, and the police was therefore negligent.

Causation was deferred for later adjudication and the SCA was therefore not faced with considering whether there was any causal link between the police negligence and the damage that consequently ensued.

The SCA confirmed that the police wrongfully and negligently failed to prevent striking employees from causing damage to Umbhaba's property and from injuring a non-striking employee.

This judgment highlights the support that employers should receive from the police when handling industrial action. Police have a constitutional and legal duty to assist employers to prevent harm or injury to person and property as soon as such harm becomes foreseeable, and the police must take reasonable and adequate steps to prevent against such harm from realising. If the police fail to fulfil this duty, they may be held liable.

***Minister of Police and others v Umbhaba Estates (Pty) Ltd and others* (2023) 44 ILJ 2462**

Part 2: "How to" Guides

1. The Ins and Outs of Sick Leave

All employees, apart from those who work less than 24 hours a month for an employer, are entitled to sick leave in terms of the Basic Conditions of Employment Act, 1997 (the BCEA).

Paid sick leave entitlement

Sick leave is regulated in terms of section 22 of the BCEA. An employee who qualifies for sick leave is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks with a sick leave cycle running for three years. An employees who work five days a week is entitled to 30 days paid sick leave every three years.

During the first six months of employment, an employee is entitled to one day of paid sick leave for every twenty-six days worked and after six months they are entitled to the full number of days permitted, or the balance of what remains of the days.

An employee should be paid the wage or remuneration they would ordinarily have received for work on the day, subject to the requirements relating to medical certificates set out below.

Proof of incapacity

To prevent abuse of sick leave, an employer may require an employee to produce a valid medical certificate if the employee is off sick for more than two consecutive days or on more than two occasions during an eight-week period.

If no medical certificate is produced, an employer is not required to pay the employee for the days off work.

An employer may not, as a matter of general policy, require employees to produce a medical certificate before paying employees for a day's sick leave taken on a Monday, Friday or on the day before or after a public holiday. However, if employees are regularly absent on those days such that they are absent on more than two occasions in an eight week period an employer may require a medical certificate.

Requirements of a valid medical certificate

A medical certificate should be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament, such as the Health Professions Council of South Africa.

The medical certificate should state that the employee was unable to work for the duration of the employee's absence due to sickness or injury.

Issuing of certificates by traditional healers

In terms of section 23 of the BCEA, medical professionals who are entitled to practice as such in terms of the Health Professions Act, 1974 including doctors, dentists and certain psychologists and other persons who are certified to diagnose and treat patients, such as nurses, may issue medical certificates, provided that they are registered with a professional council established by legislation, such as the Health Professions Council of South Africa.

In an endeavour to comply with the abovementioned requirement the Traditional Health Practitioners Act, 2007 was introduced which provides for the establishment of the Interim Traditional Health Practitioners Council of South Africa. Despite a proclamation by the President in 2014 which gave effect to this provision, to date the regulation establishing the Council has not been promulgated by the Minister of Health. In the circumstances, there is currently no statutory obligation on employers to accept medical certificates issued by traditional healers. Despite this and in the case of *Kievits Kroon Country Estate v Mmoledi*, the Supreme Court of Appeal considered a certificate from a traditional healer which was submitted to the employer by an employee as proof of her illness. The employer had considered the certificate from the traditional healer as 'meaningless' and rejected it as proof of illness. The Supreme Court of Appeal expressed the view that had the employer understood it to be equivalent to a medical certificate, or tried to understand its importance by asking the employee to explain its meaning the employer may have accommodated the employee's request for leave.

The Supreme Court of Appeal held that the employee's dismissal was unfair in the circumstances as the employee's failure to report to work was justifiable and reasonable. However, the court did caution that employers are not expected to tolerate prolonged absences from employees and may dismiss employees in such circumstances on incapacity grounds.

Medical certificates as hearsay evidence

A medical certificate constitutes hearsay evidence. An employer is within its rights to request evidence to verify the content of a medical certificate. This is clear from the decisions in *Mgobhozi v Naidoo NO NUMSA v Kaefer* which held that an employer is not compelled to accept an employee's medical certificate in the absence of an affidavit from the medical practitioner confirming the contents of the medical certificate.

Medical certificates are often presented to avoid or delay the start of a disciplinary hearing. However and given that they constitute hearsay evidence an employee cannot rely on the mere existence of a medical certificate to justify their absence.

Abuse of medical certificates

The abuse of medial certificates and fraudulent medical certificates is a growing concern.

In *Woolworths (Pty) Ltd v CCMA* an employee took a day off work and submitted a medical certificate stating that he was too ill to work. Despite this and that same day he attended a rugby match. The employee was dismissed for abusing sick leave. The Labour Appeal Court confirmed that the employee's conduct in attending a rugby match while claiming to be sick was dishonest, damaged the trust relationship and justified dismissal.

In *Epibiz (Pty) Ltd v CCMA* the Labour Court called for legislative intervention in relation to medical certificates due to the daily use (and abuse) to perpetuate exaggerated or feigned illness.

More recently the Labour Appeal Court in *Woolworths (Pty) Ltd v CCMA* found that the fact that a medical practice may have certain untoward happenings, such as the selling of medical certificates, does not amount to sufficient proof that an employee is in possession of a fraudulent medical certificate. The fact that other persons bought false medical certificates from the doctor was found to be irrelevant, in the absence of proof that the employee in question had done likewise. The Labour Appeal Court concluded that it cannot be said that the employee had used an irregular medical certificate without proof, at the very least, that the medical certificate was fake or that it had been tampered with.

Mgobhozi v Naidoo NO and Others (2006) 27 ILJ 786 (LAC)
National Union of Metalworkers of SA & Others v Kaefer Energy Projects (Pty) Ltd (JS567/2018) [2021] ZALCJHB 280; (2022) 43 ILJ 181 (LC) (7 September 2021)
Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (PA12/2020) [2021] ZALAC 49 (10 December 2021)
Epibiz (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JR 616/18) [2023] ZALCJHB 207; (2023) 44 ILJ 2226 (LC); [2023] 11 BLLR 1188 (LC) (17 July 2023)
Woolworths (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (JA90/22) [2024] ZALAC 29 (13 June 2024)

2. Is Business and Human Rights for Me?

The terms Business and Human Rights (BHR) and Environmental, Social and Governance (ESG) are rapidly becoming part of the South African regulatory landscape. Norton Rose Fulbright South Africa offers uncommon expertise in these areas and we are witnessing a noticeable demand for human rights due diligences exercises as part of our clients' corporate cultures. We have set out in this piece why BHR matters and when you should consider the need to conduct a human rights due diligence exercise.

What is BHR?

The concept of BHR was pioneered by John Ruggie as Special Representative to the Secretary General of the United Nations. Ruggie developed a set of 31 principles which were ultimately adopted by the United Nations Human Rights Council on 16 June 2011 to become the *UN Guiding Principles on Business and Human Rights*. The Guiding Principles are organised into three pillars, namely:

- The duty of the state to protect human rights;
- The corporate responsibility to protect human rights; and
- The access to remedies for those harmed by human rights abuses.

The Guiding Principles constitute guidelines or responsibilities that operate on a consensual basis. Although they are not legal obligations history has demonstrated the power of a 'soft-law' approach as the Guiding Principles have been incorporated in both national and international legislation such as the Australian Modern Slavery Act, 2018; the United Kingdom's Modern Slavery Act, 2015 and, most recently, the European Union Corporate Sustainability Due Diligence Directive (see our post here).

The United Nations Global Compact was established on 26 July 2000. This is a non-binding UN pact whereby businesses can subscribe to the ten Global Compact Principles in the regulation of their activities. Certain companies are required to monitor and report on their activities in relation to the ten Global Compact Principles, in terms of the South African Companies Act, 2008 and its regulations. Today, over 25 000 participants from all over the world have subscribed to the Global Compact, 110 of which are South African corporates. These include: large corporates such as: PepsiCo, ABSA, Growthpoint, Bidvest, Clicks, Sibanye-Stilwater, Sibanye Gold, Imperial, SAP, Old Mutual, UCT, Discovery, Sun International, Woolworths, Aspen Pharmacare, Distell, Netcare, Investec and many small to medium enterprises. The ten Global Compact Principles are organised into three focus areas, namely:

- Human rights;
- The environment;
- Employment rights; and
- Anti-corruption.

What does BHR require big corporates to do?

Businesses must respect human rights. They must avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. At a minimum this includes those rights expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

Specifically, businesses must:

- Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur and;
- Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, their products or services by their business relationships, even if they have not directly contributed to those impacts.

All businesses are required to have a publicly available human rights policy (approved by senior management) which underpins all other operational policies and communicates the expectations of all stakeholders, in terms of the UN Guiding Principles on Business and Human Rights. Further, businesses are required to conduct ongoing human rights due diligences to identify, prevent, mitigate, and account for how they address, their impacts on human rights and to adopt a remediation process where they have caused or contributed to human rights impacts.

Importantly, businesses must consider human rights impacts across their entire value chains, inclusive of the businesses that supply them and the customers to whom they sell their products. The obligation is a global one and not restricted to the value chain as it exists in the businesses' domicile.

But does this apply to South Africa?

The answer is "yes" and "no". Although South Africa has a progressive Bill of Rights, it does not have dedicated BHR legislation as is the case in Australia and the United Kingdom for example. BHR is however indirectly enforceable in the following ways:

- Companies that are required to implement a Social and Ethics Committee (SEC) by Regulation 43 of the Companies Regulations, 2011, to the Companies Act, 2008 must give consideration to, inter alia: the ten Global Compact Principles; the Organization for Economic Co-operation and Development's recommendations regarding corruption; good corporate citizenship, including the promotion of equality, prevention of unfair discrimination, the reduction of corruption, and the contribution made to the developments of associated communities; and the environment, health and public safety. The SEC is required to report annually to the company's shareholders.
- Much of our local legislation gives effect to BHR commitments, such as: the Bill of Rights contained in the Constitution; employment law legislation; anti-corruption and money laundering legislation; environmental legislation and anti-discrimination legislation.
- South Africa continues to have a strong and active civil society presence which routinely calls corporates to account for any failure to adhere to their obligations in respect of human rights and for any complacency towards abuses by role players in their supply chain.
- Local businesses that are part of a global value chain might be contractually obliged by their overseas counterparts or holding companies to implement or commit to BHR obligations. As South African corporates are highly dependent upon sales to the Global North, this is a significant push factor.
- Local business may have voluntarily subscribed to the Global Compact as a best practice.
- Many customers are concerned about the human rights track record of the entities with which they do business. Reputational risk is leading corporates to be aware of human rights standards adopted both internally and throughout their value chain.

Which issues should be keeping me awake at night?

In practice we have identified the following human rights risks that may be typical in any organisation:

- Exposure to suppliers with poor human rights commitments, particularly those who do not comply with accepted labour standards;
- Discrimination and harassment in the workplace, coupled with the absence of adequate reporting mechanisms;
- Health and safety issues in businesses that operate in the resources and manufacturing sectors;
- Environmental concerns, particularly pollution of the air and water resources;
- Impacts on local communities and the absence of an (effective) stakeholder grievance mechanism; and
- Corruption, particularly in businesses who contract with the State.

Who is responsible for BHR in my organisation?

BHR cuts across a number of specialisations and will be of importance to those working in compliance, risk management, human resources, legal, environmental and occupational health areas. Ultimately it is important for BHR to be driven from the top of any organisation.

What practical steps can we take?

We believe that businesses can benefit from a focused BHR due diligence. This will evaluate:

- Your policy framework to determine if you have provided for the main human rights risk areas;
- Your operations to determine whether these meet local legislation, your policy framework and the core BHR principles; and
- Your value chain, to determine whether you are exposed to any BHR risks, both up and down the value chain.

The due diligence should be followed by a report identifying the main areas that pose risks and how they can be remediated. We recommend the adoption of a plan of action, which can be revisited periodically and assessed in detail on an annual or bi-annual basis, typically by the SEC.

All businesses should implement a human rights policy setting out the main business specific goals and commitments. These will typically be centred on the Global Compact Principles and the UN Guiding Principles.

You should review your service level agreements with your value chain participants to ensure that they are contractually bound to meet the human rights commitments that your business has made.

Finally, businesses should constantly review their operations, value chain and policy framework.

How can we take this further?

Please reach out to your Norton Rose Fulbright South Africa contacts to find out more and to explore what a human rights due diligence looks like in your context.

3. Practical tips for employers to handle strikes

It is imperative for employers to manage strikes carefully to ensure safety, maintain operations as far as possible, and comply with legal requirements. Here are some practical tips for employers.

1. Review the legal obligations of both the company and its employees when employees embark on strike action. This includes understanding the strike notice requirements as set out in section 64(1)(b) of the *Labour Relations Act*, 1995 and the grounds for a lawful strike.
2. Verify that all surveillance cameras are functioning correctly to monitor the premises for any unusual activity or security breaches. This will help to identify employees who misconduct themselves during the strike and assist to take disciplinary action against specific employees afterwards.
3. Maintain open lines of communication with employees; both those striking and non-striking. Strikes often present uncertain situations and may be difficult to navigate for some employees. Employers can consider providing clear, factual updates about the situation. Non-striking employees are often faced with a difficult time balancing their work on the one hand with threats of intimidation and violence on the other hand. It is helpful for everyone to always know the status of the strike.
4. Enhance security measures to protect company property and ensure the safety of all employees and visitors. This may include hiring additional security personnel to patrol the premises and to monitor the area where the strike is taking place.
5. Balance the rights of striking employees with the operational needs of the business. Employers should activate contingency plans to maintain critical operations, which might involve cross-training employees, hiring temporary workers, or redistributing tasks amongst the non-striking employees.

6. Have discussions with union representatives to understand their demands and to negotiate a resolution. Aim to maintain a respectful and constructive dialogue. In practice, it is often the case that employers do not always understand the union's demands fully, and it is consequently unlikely that the parties will reach a resolution that works for everyone. Courts often favour employers who demonstrate a willingness to negotiate fairly.
7. Ensure as far as is reasonably practicable that employees who choose not to strike can work without fear of harassment or intimidation. This includes providing secure access to the workplace and possibly employee transport to and from work. Many employees live in communities where they face threats to their life and safety and that of their families.
8. Keep a contemporaneous strike diary. Ensure that all actions taken during a strike maintain order and discipline within the workplace. Address any acts of violence or intimidation swiftly and within legal boundaries. Keep detailed records of all communications, incidents, and steps taken during the strike. This documentation is crucial for legal and operational purposes. The documentation will greatly assist and expedite the process of bringing an interdict against strike violence and will play a big part in any disciplinary action employers may wish to take against employees who misconduct themselves during a strike.
9. Prepare statements and designate a spokesperson to handle media inquiries. Ensure that public communications are consistent and factual. Be aware of external groups that might get involved, such as advocacy organisations or political parties, and prepare to address any external pressures or influences.
10. Ensure that company policies on strikes, picketing, and related issues are up to date and communicated to all employees. These policies should cover the company's approach to situations where employees want to work but cannot get to work out of fear of intimidation and violence.
11. Use the strike as an opportunity to address underlying issues and to improve long-term labour relations. This includes engaging in meaningful dialogue to consider changes that could prevent future strikes.

By following these tips, employers can better manage the challenges that arise during a strike and work towards a resolution that minimises disruption and maintains a positive work environment.

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