SECOND EDITION 2022

# LERASA NEWSLETTER

## INSIDE THIS ISSUE:

Welcome to the second edition of LERASA's Newsletter for 2022, a publication that includes information highlighting important information relevant to Labour and Employment Relations in South Africa.

# CASE LAW

## SOLIDARITY obo GERHARDUS VILJOEN STRYDOM & STATE INFORMATION TECHNOLOGY AGENCY SOC LTD

This case reinforces section 187 (2) (b) of the LRA, which provides that dismissal based on age is fair if the employee has reached the normal or agreed retirement age.

Applicants in this matter were given notice of termination of their employment because they reached the 60 year normal retirement age.

Applicants immediately took issue with the employer arguing that by allowing them to remain in service beyond 60 years, the employer had by implication extended their retirement age to 67. They referred the matter to the Labour Court arguing that they had been automatically unfairly dismissed because of age.

However they conceded in their papers that they had reached their normal retirement age in terms SITA pension fund rules.

The Labour Court dismissed their matter holding that once the applicants conceded that they had reached the normal retirement age, that was the end of the matter and the employer can avail to itself the protection against unfair discrimination claim provided in section 187 (2) (b)of the LRA

The fact that the employees remain in service beyond the retirement age is immaterial as they were now working on borrowed time and without an agreement with the employer.

There were no facts to suggest that the employer agreed to extend their retirement age from 60 to 67 years as they claimed.

# Dismissed, determined doper loses court bid to be reinstated

**Written By:**
**Tania Broughton**

Being fired for using cannabis is not unfair discrimination, court rules.

- The Labour Court has upheld the dismissal of an employee for repeatedly testing positive for cannabis.
- The court ruled that the decriminalisation of cannabis has not given protection to those who breach a company's policy.
- The company had a "zero tolerance" policy and it was irrelevant whether the employee's performance was impaired or not.

A long-serving employee who was fired after repeatedly testing positive for cannabis, in breach of the company's rules, has failed in her bid to be reinstated.

Bernadette Enever, who had been employed in an office position at Barloworld Equipment since 2007, said she used cannabis oil for medicinal reasons and smoked it recreationally for "spiritual reasons".

She wanted the labour court to declare her dismissal in April 2020 to be grounded in "unfair discrimination" and automatically an unfair dismissal.

But Johannesburg Labour Court Acting Judge Makosho Ntsoane has dismissed her application, saying the company treated all employees the same. If Enever needed to use cannabis for medicinal purposes, she should have presented evidence of that. Instead she had only made the claim as an "afterthought", after she had been caught out.

In a summary of evidence, the judge said Enever had an unblemished disciplinary record when she first tested positive in January 2020.

Enever told of how at one stage, due to various ailments, she was taking up to 10 prescription drugs a day. Following the decriminalisation of cannabis for personal use by the Constitutional Court, she had weaned herself off the pills using cannabis oil. She also smoked rolled cannabis every evening to assist with insomnia and anxiety which had improved her "bodily health, outlook and spirituality".

The judge said the company had a zero tolerance policy towards alcohol and drugs and required employees to undergo regular tests.

When Enever had first tested positive, she was placed

on seven-day "cleaning up" leave, a process which entailed that the test would be repeated weekly until she tested negative.

It was common cause, the judge said, that when she tested positive, she was not "stoned" or unable to perform her usual desk duties. She was also not in possession of cannabis.

Enever continued to fail the weekly tests for a month and she was charged with breaching the company's Alcohol and Substance Abuse Policy.

Following a hearing, she was fired, the chairperson indicating that there was no point in giving her a final written warning because she had "unequivocally refused to give up consumption of the cannabis".

Enever, in her case before the Labour Court, claimed the policy was unfair and discriminatory.

Judge Ntsoane said the unchallenged evidence was that she was at all times aware of the policy. The company had led evidence that it had been applied consistently to all employees.

"Indeed, everyone is entitled to use cannabis in their own space and for recreational purposes. Similarly everyone is entitled to consume alcohol in their own private space and time. This however does not mean that if an employee who consumed alcohol the previous night happens to test positive, the (company) would have to take cognisance of the fact that such alcohol was consumed in the employee's private space and time.

"It also does not matter that (Enever) was not impaired when she tested positive. She has to comply with the rules."

He said in light of the dangerous environment, the company was entitled to its zero tolerance policy and the Constitutional Court judgment did not offer any protection to employees against disciplinary action should they breach company policies.

He said Enever had argued that the company "should understand" that cannabis and alcohol were different in that alcohol could clear out of someone's system quickly, while cannabis can stay for days or weeks.

But, he said, she had been treated the same way as other employees and if she were treated differently "it would be seen to be creating a precedent" and would place an unfair burden on the company.

On the issue of her medical condition, the judge said there had been no "persuasive evidence" of this, and prior to testing positive she had not volunteered this information to the company but only sought to raise this as a defence "after she was caught".

"Even if I were to accept the medicinal argument, which I don't, then why would I accept the recreational drug consumption when either or both will in any event lead to positive tests?"

Regarding the sanction of dismissal, Judge Ntsoane said Enever had indicated that she would not stop using cannabis and the hearing chairperson had correctly found that a final written warning would serve no purpose.

He dismissed her claims of discrimination and automatically unfair dismissal, but made no order as to costs.

**Read the full judgement here:**

https://www.groundup.org.za/media/uploads/documents/cannabis.pdf

# Invalid or unfair? No shortcuts to the Labour Court

The Labour Court has confirmed in a recent judgment that terminating a contract of employment can be invalid, but it does not always follow that employees are entitled to jump the queue at the Labour Court for redress, and certainly not in circumstances in which the true dispute relates to an unfair dismissal claim governed by the Labour Relations Act.

The Labour Court is routinely called upon to consider urgent applications brought by employees seeking to vindicate their rights on the basis of an unlawful termination of employment. The distinction between an unlawful dismissal and an unfair one was again considered in the recent judgment of Nehawu obo LH & others v Unisa & another (2022). The ruling again cautions that there is not always a shortcut to the Court when the Labour Relations Act (LRA) provides well-defined recourse for dismissal claims.

Ongoing tensions between Nehawu and Unisa reached a head in April 2022 and following the disruption of many graduation ceremonies and other violent and unlawful conduct by Nehawu members seeking to disrupt the day-to-day operations of the university across its various campuses. Unisa reacted, inviting the five members of Nehawu's branch committee at the university (the branch committee members) to provide written reasons why their employment should not be summarily terminated, inter alia for their part in participating in, or orchestrating, the alleged unlawful conduct. Written representations were provided and, these notwithstanding, the employment of the branch committee members was summarily terminated.

Nehawu launched an urgent application in the Labour Court seeking reinstatement of the branch committee members. Nehawu relied on section 77(3) of the Basic Conditions of Employment Act (BCEA) and contended that the termination was unlawful, null and void given, so it said, the contractual right of the branch committee members to be dealt with in terms of Unisa's disciplinary code and the recognition agreement between Unisa and Nehawu, as well as their constitutional right to fair labour practices.

Represented by Webber Wentzel, Unisa opposed the application on the basis that it was not urgent and, in any event, that Nehawu had not established a contractual right on the part of the branch committee members and, as such, the Labour Court lacked jurisdiction to entertain the application. The application was argued on 26 May 2022 and written reasons were handed down on 21 June 2022.

The court dispensed with Nehawu's argument that the application was urgent, confirming that:

- challenging dismissals as unlawful and then relying on that unlawfulness as the basis of urgency in itself, was misguided and
- relying on financial hardship is not a sufficient ground to establish urgency, and certainly not in circumstances in which the alleged financial hardship was "pithily pleaded".
-

Rather than strike the matter from the roll for want of urgency, the Court then addressed the other aspects of the opposition to the application for finality.

The Court accepted that Nehawu had not presented evidence to support a contractual claim and, in any event, held that the branch committee members faced a further difficulty, even if the court found that there was a contractual right to be dealt with under Unisa's disciplinary code. Concurring with another recent decision of the Labour Court in Noxolo Matoti v Komatsu Mining Corp and one other, the Court held that the wording of section 77(3) contemplates an existing contract, while the employees' contracts had already been terminated. A cancelled contract is incapable of being enforced unless the right to cancel, not the effect of the cancellation, is disputed.

Nehawu's reliance on a constitutional right to fair labour practices took its argument no further, with the Court confirming this argument was undermined by the principle of subsidiarity.

Turning to the argument that it also had jurisdiction in terms of section 158(1)(a)(iv) of the LRA, the Court accepted that Nehawu has impugned the unfairness of the conduct of Unisa, and not even attempted to disavow a reliance on such unfairness. On this basis, the Court accepted that it lacked such jurisdiction, quoting with approval the concluding remarks in Singala v Ernst and Young Inc and another: "To my mind the Labour Court, being a creature of the LRA, lacks jurisdiction to entertain claims of unlawful dismissals. An employee ... must pursue the remedies as per the LRA. This disavowal business should not be encouraged by this court. As pointed out above it should be resisted as it brings to the fore a state of lawlessness."

Simply, the Court found that Nehawu's attempt to seek the invalidity of dismissals, that had already happened, was nothing more than a repackaged claim for reinstatement for unfair dismissal under the LRA. Nehawu's application was accordingly dismissed.

The judgment serves as a cautionary reminder to dismissed employees and their representatives that they may be better served seeking to vindicate their rights under the LRA, rather than circumventing these by rushing off to the Labour Court, which is likely to be unsympathetic to pleas of invalidity. At the very least, proper consideration should be given to whether, or to what extent, a contractual right to urgent redress will be capable of being established on the papers in application proceedings.

**Written By:**
**Brett Abraham**

# Harassment in the workplace: Are your policies up to code?

The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (new Code) became effective on 18 March 2022, replacing entirely the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (old Code). The new Code gives effect to South Africa's recent ratification of the International Labour Organisation Convention 190 and provides a framework and accompanying guidelines for employers and employees to attain a workplace free of harassment and violence.

These developments will require a total overhaul of sexual harassment and harassment policies that South African employers currently have in place as well as how these policies are implemented. Any policies that: fail to address persons who perpetrate harassment or those subjected to it; fail to grapple with the various forms of harassment that can occur in the workplace and outside of the workplace; and which lack the necessary information regarding the more expansive test for sexual harassment.

**The provisions of this new Code are broader than the old Code with far-reaching effects. Most notably the new Code:**

- addresses more than sexual harassment and includes gender-based violence and harassment, bullying, and racial, ethnic or social origin harassment;
- accounts for new ways of working as it identifies the need to address harassment outside the workplace, particularly, where employees are working virtually from their homes or any place other than their physical workplace;
- acknowledges victims of harassment, include women, men, persons who are part of the LGBTQIA+ community as well as other vulnerable persons who have poor access to labour rights;
- extends the perpetrators and victims of harassment to persons who are volunteers, persons in training, customers and clients and other persons who have dealings with the business, which could extend beyond the employer-employee relationship; and
- clarifies the test for sexual harassment specifically. The old Code merely indicated the factors which need to be taken into account when assessing whether sexual harassment has taken place, however, the new Code goes further to indicate the type of assessment that needs to be made, providing that sexual harassment "is unwelcome conduct of a sexual nature, whether direct or indirect, that the perpetrator knows or ought to know is not welcome". It envisions that there ought to be subjective and objective components to the test for sexual harassment – an approach consistent with that adopted by the Courts. The subjective assessment is whether the sexual harassment "may be offensive to the complainant, make the complainant

feel uncomfortable or cause harm or inspire the reasonable belief that the complainant may be harmed". The objective assessment, in relation to all harassment including sexual harassment, is an evaluation as to whether a reasonable person in the circumstances of the complainant would have held similar views regarding the harassment complained of. The latter test requires a careful assessment, during the investigation phase into the complaint of sexual harassment, as every case of sexual harassment should be assessed on a case-by-case basis and what may constitute harassment for the complainant in question, may not constitute harassment for another person. Therefore, employers should err on the side of caution when applying this component of the test.

The new Code also alludes to the creation of an approach to dealing with harassment cases that is not rigid and is more holistic. Such an approach requires the employer to consider the implementation of: better education and information regarding harassment, particularly sexual harassment; training as to how to properly deal with and counsel complainants of sexual harassment; an inquiry into the sexual harassment that is inquisitorial rather than adversarial; and a workplace environment that is aware of harassment and its effects and that does not enable perpetrators to harass, but rather enables complainants to speak up without fear of reprisal.

Given the prevalence of all forms of harassment in the workplace, employers must ensure that they take active steps to prevent and eliminate harassment in the workplace lest they become liable for damages in terms of vicarious liability. This risk of such liability is greatly increased under the new Code particularly for those employers who neglect to update their policies and practices in this regard.

Employers need to cultivate a workplace culture that focuses on educating all employees on the seriousness of harassment in the workplace and training persons in the human resources department on how to appropriately deal with complainants in cases of harassment striving toward a safe and respectful work environment, free of discrimination for all employees.

**Written By:**
**Pamela Stein, Joani Van Vuuren & Jamie Jacobs**

*"Given the prevalence of all forms of harassment in the workplace, employers must ensure that they take active steps to prevent and eliminate harassment in the workplace lest they become liable for damages in terms of vicarious liability."*

# New Covid-19 code: What has changed?

**Written By:**
**Anastasia Vatalidis & Sandile Tom**

On the heels of the Minister of Cooperative Governance and Traditional Affairs terminating the national state of disaster and in doing so repealing all regulations and directions made in terms of section 27(2) of the Disaster Management Act (old Regulations), on 15 March 2022 the Minister of Employment and Labour (Minister) published the Code of Practice: Managing Exposure to SARS-CoV-2 in the Workplace, Government Notice No. 46043 (old code), after consideration by Nedlac in terms of section 203(2A) of the Labour Relations Act (LRA).

On 24 June 2022, the Minister published the Code of Practice: Managing Exposure to SARS-CoV-2 in the Workplace, Government Notice No. 46596 (new code). In the introduction to the new code, the Minister confirms that the old code was made in error and is liable to be set aside. The new code was published in terms of section 203(1) of the LRA whereas the old code was published in terms of section 203(2A) of the LRA. The stark difference being that in terms of section 203(1) of the LRA, Nedlac may prepare, issue and change or replace codes of good practice (such as the new code) on its own accord, whereas in terms of section 203(2A) of the LRA the Minister is required to consult with Nedlac prior publishing any new codes of practice.

While the old and the new code are not substantially different, employers and employees should note the following provisions contained in the new Code when developing a risk assessment and plan in the workplace in terms of the new code and the Occupational Health and Safety Act (OHSA):

1. The risk assessment must make provision for the adoption of special measures to mitigate the risk of infection or serious illness or death arising from Covid-19. These measures include the vaccination of employees and/or the wearing of Personal Protective Equipment (PPE) such as masks in the workplace.
2. This plan must be based on the employer's workplace requirements and the outcome of the risk assessment. Should an employer conclude a plan contemplated by the code and decide that its safety requirements are, inter alia, that its employees must be vaccinated or wear facecloth masks in the workplace, such employees will be obliged to follow these requirements.

Although it is no legal requirement for employees to wear masks in order to enter an employer's premises, Covid-19 is still categorised as a Group 3 hazardous biological agent under Hazardous Biological Agents Regulations (published in terms of section 43 of the OHSA) and employers still have an obligation to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of workers. In view of these factors, an employer may still require its employees and third parties, such as customers and clients, to wear masks or other PPE specific to Covid-19 if these safety requirements are deemed necessary in terms of the employer's risk assessment and plan.

In the final analysis, the new code essentially is not materially different to the old code and is not couched in prescriptive terms. This, in our view, allows employers to apply the new code in accordance with their particular safety requirements. This view finds support in clause 2(4) of the new code which provides that "the code is intentionally general because workplaces and their requirements differ." Accordingly, departures from the non-obligatory provisions of this code may be justified in appropriate circumstances.

# Court confirms that employers may be able to claim damages from an employee's pension fund


**Written By: Samantha Bonato**

If an employee causes an employer damage through dishonesty, theft, fraud or misconduct, the South African Pension Funds Act, 1956 provides that the employer may, in certain circumstances, recover losses from the benefits payable to that employee when the employee ceases to be a member of the fund or retires.

However, this will only apply if the employee has admitted liability in writing to the employer or if a judgment has been given against the employee in any court.

An employer could, however, encounter problems if the employee has not admitted guilt and demands payment of their benefit in circumstances where the employer has yet to obtain a judgment against the employee. In this situation, the courts have held that, in appropriate circumstances, the trustees of the fund may withhold the payment of the benefit, or a part thereof, pending the employer obtaining a court order.

In the past, the Pension Funds Adjudicator has been hesitant to sanction the withholding of retirement benefits from employees in the absence of a court order being obtained by the employer against the employee, unless extremely compelling reasons to do so existed.

In the recent High Court case of Jacobs v Telkom, the employee launched an application requesting that his retirement benefits be paid to him after resigning from his employer, Telkom. Telkom opposed this application and instituted a counter-application in terms of which it sought an order against the retirement fund interdicting it from paying the relevant funds to the employee, pending the finalisation of a civil action that it was pursuing against the employee.

The High Court referred to the Pension Funds Act, as well as the rules of the relevant fund which allows the fund to retain benefits where legal proceedings have been instituted, or where criminal charges have been laid against an employee, until the matter has been determined by a competent court of law. This provision was subject to there being a prima facie case and a reason to believe that the employer has a reasonable chance of success.

The employee based his claim that he be paid his pension monies on the fact that the delay in finalising the action that the employer was taking against him was unreasonable. However, the court found that the delay was caused by various factors and could not be solely attributed to the conduct (or lack thereof) by the employer. It also emphasised the duty of the employee to not contribute to any delay.

The court considered the employee's contention that he required the money to meet his existing financial obligations, but found that, if the employee was paid the pension monies, he would (on his own version) use the money for these obligations and thus leave Telkom with no recourse. Any judgment that Telkom secured against the employee would therefore be of no value.

The High Court granted the interim interdict

to Telkom. This confirmed the possibility of an employer successfully (and at least temporarily) precluding a pension fund from paying benefits in terms of a pension fund rule to an employee upon the termination of their employment, notwithstanding that the requirements of section 37D of the Pension Funds Act have not been met.

This is because section 37D allows a deduction to be made, but requires an admission of liability on the part of the employee, or a judgment to be made against the employee. In the event that pension amounts become payable before any litigation is finalised, there must be some recourse for an employer to ensure that the payment of any amounts are withheld until the finalisation of such litigation.

In short, this judgment has confirmed that money held by pension funds to be paid to employees upon their termination of employment is not untouchable. This should serve as a warning to employees in this regard as well as a reminder to employers of the possible recourse they have against employees for monetary claims.

*Reviewed by Peter le Roux, and Executive Consultant in ENSafrica's Employment department.*

*"In short, this judgment has confirmed that money held by pension funds to be paid to employees upon their termination of employment is not untouchable. This should serve as a warning to employees in this regard as well as a reminder to employers of the possible recourse they have against employees for monetary claims."*

# Become a LERASA Member

**Purpose of this form:** Kindly complete the below form for your year's subscription to LERASA

| LERASA MEMBERSHIP APPLICATION FORM | | |
|---|---|---|
| | | |
| **Organisation and Job Title** | | |
| **Title** | | |
| **Initials, Surname** | | |
| **First Name** | | |
| **Physical Address** | | |
| **Postal Address** | | |
| **City or Town** | | |
| **Province/ Country** | | Postal Code: |
| **Email** | | |
| **Contact numbers** | Work: | Cell: |
| **Fax** | | |
| **Previous IRASA member?** | ☐Yes<br>☐No | |
| **Category of membership and fees** | ☐Corporate (including trade unions, employer organisations, tertiary institutions) R1, 600<br>☐Individual R330<br>☐Full-time unionist R180<br>☐Full-time learner R180<br><br>*Please provide student number and institution* | |
| **Method of payment** | ☐Direct deposit into Standard Bank, Centurion Branch (Branch Code 012645), Current Account No: 310332826<br><br>*Please print your name as deposit reference and email the deposit slip to us*<br><br>☐Cheque (to be made out to LERASA)<br><br>☐PayFast (access this on the website) | |

**LERASA, c/o Public Service Bargaining Council Centre, 260 Basden Avenue, Lyttelton, Centurion, Pretoria 0176**

**P.O. Box 3123, Lyttelton South, 0176**

**Tel: +27 12 644 8019** **Fax: +27 12 664 5834**

**Email: info@lerasa.org.za** **Website: www.lerasa.org.za**

# VISION

To become a vibrant Organisation enhancing Employment Relations through debate and dialogue.

# MISSION

- To facilitate an ongoing forum for constructive relationship building
- To deal with themes of relevance to the South African Employment Relations community
- To enhance the understanding, knowledge and practices of Employment Relations at National, Regional and branch levels in South Africa

## CONTACT US

**260 Basden Avenue,**
**Lyttelton, Centurion 0176**

**TEL:** 012 644 8100
**EMAIL:** info@lerasa.org.za