

LERASA NEWSLETTER

4TH EDITION 2022

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INSIDE THIS ISSUE:

Welcome to the 4th edition of LERASA's Newsletter for 2022, a publication that includes information highlighting important information relevant to Labour and Employment Relations in South Africa.



LABOUR AND EMPLOYMENT RELATIONS ASSOCIATION OF SOUTH AFRICA

Message from the President

The changes to workplace dynamics brought on by the pandemic is a global phenomenon, South Africa however has its unique challenges; load shedding, infrastructure challenges, poor internet access, connectivity issues and navigating the human factor of the "new normal" poses unique challenges. We are forced to embrace hybrid working, remote and issues relating to productivity. This has really changed the landscape of labour relations in our Country.

As LERASA we encourage you our readers to embrace change. As human beings we are so reluctant to change, the mere mention of the word throws many into a frenzy. By Embracing



change, it means that you see adversity as an opportunity. Winston Churchill said, "To improve is to change; to be perfect is to change often." We need to work together to stare change in the face and adapt no matter how difficult the situation may seem.

Our recent Labour relations conference has many relevant and topical information on labour relations, we urge you to visit the LERASA website and peruse this wealth of knowledge by fraternity experts and will definitely assist with change management. LERASA, in our proactive approach have planned an exciting calendar of events for 2023 and I am proud to announce that the association will be hosting several informative sessions/seminars next year.

As the President of LERASA, I would like to take this opportunity to thank all of LERASA's members and key stakeholders for their continued support & contributions in making 2022 a successful year. We look forward to your backing in the new year. May you and your loved ones have a safe and restful festive season.

- Mr Frikkie De Bruin, LERASA President



CASE LAW

Janusz Jakub Walus v Minister of Justice and Correctional Services and Others

CCT 221/21 Date of hand-down: 21 November 2022

On Monday, 21 November 2022, the Constitutional Court handed down its judgment in an application that was brought by Mr Janusz Walus (applicant) for leave to appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (High Court), in the matter concerning a decision that was taken by the Minister of Justice and Correctional services to reject the applicant's application for parole.

The applicant is Mr Janusz Jakub Walus, a sentenced prisoner currently incarcerated at Kgosi Mam-puru II Correctional Centre. He is serving his sentence of life imprisonment. The first respondent is the Minister of Justice and Correctional Services (the Minister). The second respondent is the South African Communist Party (SACP). The third respondent is Mrs Limpho Hani (Mrs Hani). The fourth respondent is the Minister of Home Affairs. The first intervening party is the Families for Lif-ers NPO. The second intervening party is Tebogo Modise (Mr Modise). The first and second inter-vening parties are acting together for the purposes of this application. The third intervening party is the South African Prisoners' Organisation for Human Rights (SAPOHR).

The applicant was convicted for the murder of Mr Chris Hani on 15 October 1993 on charge of murder and the illegal possession of firearm. He was sentenced to death for the murder, and giv-en five years for the illegal possession of the firearm. The death sentence was commuted to life imprisonment on 7 November 2000. The applicant made numerous applications for parole which were all refused for various reasons. On 16 March 2020, the Minister made a new decision in ac-cordance with the order of Kollapen J emanating from a review application of a previous parole application. The Minister's reasons for refusing parole, were, inter alia, that the positive factors in favour of parole being granted to the applicant were outweighed by the negative factors. The negative factors were the nature and seriousness of the crime in that it was a cold-blooded assassi-nation of a prominent political leader which had the potential to bring about civil war in the country at that time, and the sentencing remarks by the trial courts.

The Minister also considered the fact that, according to the parole regime applicable on the date the offence was committed should the applicant be placed on parole

The applicant once again launched review proceedings in the Pretoria High Court against the Minister's decision which was heard by Kubushi J. The applicant sought an order in terms of sec-tion 8(2) of the Promotion of Administrative Justice Act (PAJA) that the Minister's decision of 16 March 2020 be reviewed and set aside, that he should be placed on day parole, alternatively pa-rol, further alternatively that the matter be remitted to the Minister to make a fresh decision. The court held that, in understanding the remarks of the sentencing court, it is clear that the intention was to keep the applicant incarcerated for life. The court further held that what constitutes a rea-sonable decision on the part of the decision-maker will depend on the circumstances of each case

and in making the determination on reasonableness, the courts should take care not to usurp the functions of administrative agencies. The court in that sense cannot change the factors which the Minister considers to be weightier than the others. Leave to appeal was refused by the High Court and also by the Supreme Court of Appeal on the grounds that the matter has no reasonable prospects of success in an appeal and there is no other compelling reason why an appeal should be heard.

In this Court, the application was brought in terms of section 33 of the Constitution read with section 6 of PAJA. The applicant submitted that the rights enshrined in section 12(1)(e) of the Constitution have been infringed by the refusal to grant parole. He submitted that this constitutes a constitutional matter for purposes of establishing this Court's jurisdiction. Furthermore, it was submitted that there are reasonable prospects that this Court will reverse or materially alter the judgment, with reference to the constitutional point, as well as the administrative law principles which the Minister had to apply when parole application was considered, namely rationality and reasonableness. The applicant asserted that the administrative law issues are constitutional issues in terms of section 33 of the Constitution.

The applicant submitted that he is entitled to parole in terms of the provisions of the Correctional Services Act of 1959 (1959 Act), as it was applicable at the date of commission of the crime. He argued that a prison sentence that is so long that a prisoner has no chance of being released at the expiry of the sentence or on parole amounts to cruel, inhuman and degrading punishment. He further submitted that life imprisonment without the option of parole makes it unconstitutional. He submitted that it denies an offender the possibility of returning to society, it robs the prisoner of all hope and that takes away their dignity and desire for living. Making reference to *S v Bull; S Chavulla and Others*, the applicant contended that a sentence for an indefinite and indeterminate period has been argued to infringe the right guaranteed by section 12(1)(e) of the Constitution. The applicant submitted that if a prisoner has properly and fully completed the punitive period of his or her imprisonment, and becomes entitled to parole thereafter, and their further incarceration is not necessary for the protection of society, the administrative and executive organs of the state will act wrongfully and unreasonably, should they insist on the perpetuation of such incarceration. He submitted that he cannot do anything to further and improve his chances of being placed on parole as the facts will not change in future.

The Minister submitted that it is common cause that the applicant is eligible for consideration for placement on parole, as provided for in section 136(1) of the 1998 Act and Chapter VI(1A)(19) of the B-Order. He further submitted that when considering to place an offender on parole, the decision-maker must take into account: the nature of the crime; crime and background history; behaviour and reaction to treatment; medical, psychological and psychiatric considerations; domestic circumstances and employment opportunities after placement; and, selection for placement on parole.

The Minister argued that in terms of the provisions of section 63(1) of the 1959 Act, the decision-maker is enjoined to have regard "to the nature of the crime and the remarks made by the court at the time of imposition of sentence" for purposes deciding whether or not to place an offender on parole. The importance of the nature of the crime and the remarks made by the court at the time of sentencing was further stressed in the matter of *Derby-Lewis v Minister of Correctional Services and Others* where it was stated that "the judgment of the trial court, not only on the merits, but also on sentence, is of utmost importance for a proper decision on the placement of the

applicant on parole". It was submitted that the remarks made by the trial court and the Supreme Court of Appeal influenced the decision of the Minister to not place the applicant on parole. The Minister highlighted that, his predecessor also refused to place the applicant on parole for the same reasons.

The Minister argued that the murder committed by the applicant involved cold-blooded assassination of a prominent political leader, for which careful preparations were made in advance. Regarding the nature of the decision and the range of factors relevant to it, he argued that "parole decisions are notoriously difficult in reconciling differing interest and imperatives". For those reasons, the applicant's parole application was refused despite the factors in favour of the parole. The Minister argued that the decision not to place the applicant on parole was in no way irrational and unreasonable. The Minister further argued that his decision to not place the applicant on parole was rationally connected to the information before him and the reasons for the decision. He further argued that his decision achieved a reasonable equilibrium between the positive factors in favour of the placement of the applicant on parole, and the negative factors militating against placement on parole. The Minister submitted that he took a reasonable decision in accordance with the law and consistently with the requirements of the controlling legislation.

The SACP and Mrs Hani jointly opposed this application. They submitted that the application is without merit and should thus fail as it would not be in the interests of justice to grant leave to appeal. They argued that the crime committed by the applicant was a crime unlike any other in South Africa in that it shook the very core which South Africa was trying to build at the time – a democratic and free society, its motive was to throw South Africa into a monumental political catastrophe. They argued that the Minister's decision was neither irrational nor unreasonable, and it did not constitute an error of law or evidence of executive bias.

They submitted that the decision that this Court will take should be viewed in light of the nature of the crime. It was further argued that the fact that the Truth and Reconciliation Commission did not see the applicant fit to be granted amnesty is itself telling of the gravity of his crime and its impact. They submitted that the Minister was entitled to take into account the seriousness of the crime and the context within which it occurred, as well as the sentencing remarks. They argued that the gravity of the seriousness of the crime and the potentially catastrophic effects it would have on the democracy outweigh the other positive factors to be considered by the Minister in determining whether to grant parole. They submitted that the decision was well-considered, rational, and lawful.

Families for Lifers NPO applied for admission as an intervening party in this matter. It is a non-profit organisation which seeks to protect the interests of prisoners who serve life sentences and their families. The reading of its affidavit revealed that they are dissatisfied with not only the parole system but also, generally speaking, with the manner in which the Minister and other Correctional authorities delay in taking decisions on prisoners' applications for parole. They also complained that the Minister often arbitrarily overrides recommendations made to him by the Parole Board on applications for parole. Families for Lifers NPO sought a review of the whole parole system. Mr Tebogo Modise also applied for leave to be admitted as an intervening party. His case is the same as that of Families sought the same relief as the Families for Lifers NPO. for Lifers NPO and he also This Court held that both applications fall to be dismissed because the issues they raise fall outside of the ambit matter.

In respect of jurisdiction, this Court held that, at of the issues in this is the decision of the High Court in respect of which the applicant applies for leave to appeal relates to a review application under the Promotion of Administrative Justice Act (PAJA) Constitution which gives effect to section 33 of the this is a constitutional matter. Accordingly, this Court has jurisdiction r espect of leave to appeal, this Court held that the issues that this matter raises . In are issues that do not only affect the applicant imprisonment sentences. , but will affect many other prisoners who serve life This is because this matter raises the issue o f whether there is a point in the life sentence of a prisoner beyond which the nature and seriousness of the crime and the sentencing remarks of the trial court cannot be used to justify denying him or her parole . the result, this Court held that this In matter has reasonable prospects of success, and it found this matter to be in the interests of justice it therefore granted leave to appeal.

In the result, the majority of the Constitutional Court ordered that leave to appeal be granted and that the app eal be upheld. The decision of the Gauteng Division of the High Court High Court of South Africa, Gauteng Division, Pretoria, dismissing the applicant's application is set aside and replaced. The decision of the Minister of Justice and Correctional Servi ces made in March 2020 rejecting declining the applicant's application for parole is reviewed and set aside. The Minister of Justice and Correctional Services is ordered to place the applicant on parole on such terms and conditions as he may deem appropri ate and to take all such steps or cause all such steps as may need to be taken to ensure that the applicant is released on parole within ten (10) calendar days from the date of this order. The Minister of Justice and Correctional Services is ordered to pa y the applicant's costs including the costs of two counsel."



Global Wage Report 2022-23

Geneva: International Labour Office, 2022.
ISBN 9789220365120 (web PDF)

The impact of COVID-19 and inflation on wages and purchasing power

PREFACE:

This year's ILO Global Wage Report, the eighth in the series, presents an in-depth empirical analysis of how concurrent crises – the COVID-19 pandemic followed by the cost-of-living crisis – have impacted on wages and purchasing power across countries and regions. The report shows that, for the first time this century, global real wage growth has become negative while real productivity has continued to grow. Indeed, 2022 shows the largest gap recorded since 1999 between real labour productivity growth and real wage growth in high-income countries. While the erosion of real wages affects all wage earners, it is having a greater impact on low-income households which spend a higher proportion of their disposable incomes on essential goods and services, the prices of which are increasing faster than those for non-essential items in most countries.

The decline in real wages has come on top of significant wage losses incurred by workers and their families during the COVID-19 crisis. Using quarterly data, the report finds that the key factor behind the decline in the total wage bill, particularly during 2020 and the first quarter of 2021, was the loss in employment. Low-wage earners, workers in the informal economy and women wage earners were the groups that suffered most. Furthermore, during the harshest months of the pandemic, the total wage bill declined most at the lower end of the wage distribution. Households that were forced to go into debt to make ends meet during the COVID-19 crisis now face the double burden of repaying their debts at higher interest rates

while earning lower incomes. Overall, the empirical evidence in the report points to the likelihood of increased income inequality both between and within countries. In the absence of countervailing policies, the deterioration of workers' real incomes can be Gilbert F. Houngbo Director-General expected to continue and lead to a fall in aggregate demand. This would increase the probability of a deeper recession, a risk that is already worsening due to the restrictive monetary policies adopted by central banks in their efforts to bring down inflation. This in turn would endanger the economic and employment recovery, further increasing inequalities and fuelling social unrest.



In this time of growing social and economic uncertainties and insecurity, it is vital to rebuild and strengthen people's sense of social justice and social cohesion. The ILO Constitution emphasizes that "universal and lasting peace can be established only if it is based upon social justice" and calls for "equal remuneration for work of equal value" and "policies in regard to wages and earnings (...) to ensure a just share of the fruits of progress to all". The last chapter in this report suggests a series of policy measures that could serve to shape adequate wage policies and therefore contribute to enhancing people's sense of social justice while reducing inequalities in the world of work.

But whereas adequate national wage policies can strengthen labour market outcomes and economies, no community or country can resolve alone the multiple crises of a global nature. More than ever, there is a need for a global response to humanity's common and pressing goals. As the United Nations Secretary-General states in his report, Our Common Agenda: "Humanity's welfare – and indeed, humanity's very future – depend on solidarity and working together as a global family to achieve common goals." Shaping coherent policy responses within the multilateral system is indispensable to making progress toward more inclusive, resilient and equitable societies. In a globalized economy, appropriate and timely wage policies that leave no one behind are an intrinsic part of such policy responses.

Guy Ryder
ILO Director-General

Key findings

"Income inequality and poverty will rise if the purchasing power of the lowest paid is not maintained. In addition, a much-needed post-pandemic recovery could be put at risk. This could fuel further social unrest across the world and undermine the goal of achieving prosperity and peace for all." - ILO Director-General Gilbert F. Hounoubo

Lower-income earners are the most impacted

Evidence for 2022 suggests that rising inflation is causing real wage growth to dip into negative figures in many countries.

The increasing cost of living has the greatest impact on lower-income earners and their households. This is because they spend most of their disposable income on essential goods and services, which generally experience greater price increases than non-essential items.

Inflation is also biting into the purchasing power of minimum wages. Despite nominal adjustments taking place, the real value of minimum wages is quickly eroding in many countries.

Wage employees lost six weeks of wages due to the COVID-19 crisis

The erosion of real wages comes in addition to significant wage losses incurred by workers and their families during the COVID-19 crisis.

Data from some 30 countries covering all regions and income groups show that, on average, wage employees lost about six weeks of wages during 2020-21. The loss was larger among women, workers in the informal economy, low-paid workers and workers in low and middle-income countries.

Minimum wages and social dialogue are key to maintaining wage workers' living standards

There is an urgent need for well-designed policy measures to maintain the purchasing power and living standards of wage workers and their families.

Adequate adjustment of minimum wages could be an effective tool, given that 90% of ILO Member States have minimum wage systems in place.

Strong social dialogue, including collective bargaining, can help to achieve adequate wage adjustments during a crisis.



Read the full report published by the ILO here:

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Hybrid workers are happier, healthier, more productive - global survey



A new report says that returning to the old ways of doing things is not an option for companies serious about competing for the best talent. SA respondents who participate in hybrid working models reported having a positive effect on all areas of employee well-being. Hybrid work has improved employee performance, work-life balance, well-being and company culture.

For South Africans, participating in hybrid work can lead to better mental, physical, and financial well-being. This is according to the latest Cisco Global Hybrid Work Report, a study looking at the impact of hybrid working around the world.

The report, which included a survey of 28,000 full-time employees in 27 countries, reveals that for most people, work performance improved along with employees' relationships and even personal confidence.

Highlights

- According to South African employees surveyed, 86% felt hybrid and remote working had improved all aspects of their well-being, which was above the worldwide average of 78%.
- Just over 60% also reported that this type of work had saved them at least four hours per week, while 27% said working from home had saved them eight or more hours per week.
- India (53.3%), South Africa (47.9%) and Vietnam (44.3%) had the largest numbers of respondents who had seen 'significant improvements in well-being'. At the other end of the scale were Indonesia (14.8%) and Korea (16%).

- The countries with employees most in favour of fully remote work were the Philippines (37.7%); Canada (34.8%), and South Africa (33.5%), while the Netherlands (9.5%); UAE (9.7%) and Mainland China (10.1%) were least in favour of this work model.

“While initially, many employees were challenged by the sudden shift to hybrid and remote working arrangements, our study shows that two years on, as businesses have pivoted to survive, hybrid work has yielded many positive and lasting benefits for both employers and employees. In fact, this mode of working has become the norm and is set to stay,” the report reads.

Survey respondents worked across a wide range of industries, including agriculture; consumer goods; construction and engineering; education; financial services; government and public service; healthcare; IT; technology & telecommunications; media and communications; NGOs, and tourism and hospitality.

Generational contrast

Interestingly, there were some significant differences among the working generations, where over two-thirds (70.3%) of Gen Zs said that their quality of work improved with hybrid work, compared to 49% of baby boomers.

“At last, there is recognition that people are not commodities. Rather than HR standing for human resources, it can be rebranded as ‘human relations’ in the hybrid world. This is because companies realise that happier employees are more productive, and they are therefore investing in mental health, employee well-being and improved lines of communication,” says Joanne Bushell, MD, IWG, South Africa.

“At its best, hybrid working embodies respect and personalisation, meaning that no matter what an employee’s needs are, they will always have a place to work that best suits them and the flexibility to deliver what is required of them outside the confines of a traditional 9-5 working week,” she adds.

With this in mind, the hybrid model naturally aligns with better mental health because people are less frequently forced to compromise their own needs for those of the company. We have already seen employers such as Nike, Bumble, KPMG, The New York Times and LinkedIn giving staff impromptu ‘pop-up’ paid leave to reboot or spend some time on a passion project in a bid to avoid mass burnout.

Stress fractures

The Covid-19 pandemic has transformed the way most of us work. This is because they are realising that stress is a significant problem not just for individual workers but for businesses as well (and the pandemic has been highly stressful for almost everyone). For many, a hybrid future is imminent, says the global consulting firm McKinsey.

Modern life has led many of us to live in a high-speed world, leaving us with little time to spend with our loved ones. Therefore, it is no surprise that more than half (52%) of surveyed South Africans had reinvested extra time from hybrid working into “time with family, friends, and pets”.

Nearly 90% of those surveyed also said hybrid working had improved their family relationships, while 56% said it had improved their relationships with friends.

Just over 80% of South Africans said hybrid working had helped them save money, while 92% believed these savings could be maintained over the long term.

More than 90% of South Africans said hybrid work had made them happier, while 67% said it helped reduce stress levels. Hybrid working was more relaxing and resulted in a less pressurised environment, said 34% of respondents.

Around 70% of surveyed South Africans said they exercise more when working remotely, while 67% said their physical fitness had improved. The eating habits of the majority of surveyed respondents had also improved.

Happy medium

This study shows that employees don't want either end of the extremes – to be back in the office or to be working entirely remotely – they want a middle ground that offers flexibility to achieve their own personal version of work-life integration that works for them and their employer.

Building trust

The study also indicates that managing and maintaining high levels of trust will be critical for businesses to operate as they grow hybrid-working arrangements. While 70.5% of respondents believe their manager trusts them to be productive when working remotely, a far lower number (58.9%) believe their colleagues can be trusted to work remotely.

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Bizcommunity



"More than 90% of South Africans said hybrid work had made them happier, while 67% said it helped reduce stress levels. Hybrid working was more relaxing and resulted in a less pressurised environment, said 34% of respondents."

CASE LAW

Reinhardt Transport v National Bargaining Council for the Road, Freight and Logistics Industry and Others (JA72/2021) [2022] ZALAC 115 (18 October 2022)



Principle

If the reasons given by an arbitrator are not reasonably justifiable considering the evidence led at the arbitration, the Labour Court is not at liberty to simply say fairness is a matter to be decided by the commissioner and refrain from interfering.

Facts

The employer has a fleet of trucks to conduct its transportation business. It has a “Drive Cam Event Recording and Tampering Policy” (drivecam policy) to monitor what is being done by its truck drivers when on duty. A camera is installed in each of the employer’s trucks as a security measure, and provides evidence relating to the functioning of the person in control of the vehicle.

The employee had been employed for 3 years as a truck driver. All the drivers were advised of the policy and its significance. They were aware that if breached, dismissal would follow. Clause 12 of the drivecam policy stipulates: “Drivers shall not block the view of the drive cam recorder in any event or for whatever reason. Any driver found tampering and/or damaging the recorder will be subjected to disciplinary action, up and to termination of employment. All drivers will be instructed to sign this document as an addendum to their existing employment agreement with Reinhardt Group (Pty) Limited.”

It was not disputed that on two occasions on the same day the employee covered the drivecam in the truck he was driving, so that it could not record. He was found guilty of misconduct and dismissed. At the CCMA the commissioner found that the employee breached the policy and was aware of its contents despite his denial. The drivecam policy was part of his conditions of employment. But the commissioner nevertheless appeared to find that the sanction of dismissal was too

harsh, as there was no evidence that the employee had a blemished record. The commissioner found that his dismissal was substantively unfair and ordered reinstatement without back pay.

On review the Labour Court held that the key person to determine fairness of a dismissal is the arbitrator. Because the determination of fairness is a matter to be left to the arbitrator, the review was dismissed with costs.

On appeal the Labour Appeal Court rejected the Labour Court's approach. The LAC said that if the reasons given by an arbitrator are not reasonably justifiable, considering the evidence led at the arbitration, the Labour Court is not at liberty to simply say fairness is a matter to be decided by the commissioner and refrain from interfering.

On the facts of this case, the LAC held that the commissioner did not consider the purpose and the importance of the drivecam rule. He did not appreciate the fact that the employer had consistently applied the rule, and that only in exceptional cases would an employee escape dismissal. He did not consider the fact that the employee expressed no remorse for what he did; instead the employee tried to mislead him by saying he was unaware of the rule. Having found that the rule had been breached, the commissioner did not consider any punishment, save to merely order reinstatement without back pay. The LAC held that covering the drivecam for a reason that is found wanting is serious enough to warrant dismissal. The Court held that the Labour Court erred in dismissing the review without evaluating the circumstances under which the employee was dismissed.

This LAC judgment rectifies a surprising Labour Court judgment which clearly was incorrect. A Labour Court is fully entitled and expected to assess the fairness of a dismissal and decide whether the arbitrator's finding was one that a reasonable decision-maker could or could not reach.



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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

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**Merry
Christmas**
and Happy New Year!

May your festive season be filled with happiness, joy and success.

LERASA would like to thank you for your continued support throughout the year! We look forward to a successful 2023.