THE EMPLOYMENT LAW REVIEW

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Editor
Erika C Collins

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PREFACE

Every winter we survey milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. At that time, I read the Preface that I wrote for the first edition back in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. This continues to hold true today, and this ninth edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see *The Employment Law Review* grow and develop over the past eight years to satisfy the initial purpose of this text: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

Our first general interest chapter continues to track the variety of employment-related issues that arise during cross-border merger and acquisition transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2017 in nations across the globe, and this is the topic of the second general interest chapter. In 2017, many countries in Asia and Europe, as well as South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulation to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals remain under-protected and under-represented in the workforce, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. Mobile devices and social media have a prominent role in and impact on both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement 'bring-your-own-device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy.

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Bring-your-own-device issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

In 2015, we introduced the fourth and newest general interest chapter, which discusses the interplay between religion and employment law. In 2017, we saw several new, interesting and impactful cases that further illustrate the widespread and constantly changing global norms and values concerning religion in the workplace. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this ninth edition of *The Employment Law Review* includes 46 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all of our contributors and my associate, Marissa Mastroianni, for her invaluable efforts to bring this edition to fruition.

Erika C Collins
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ERIKA C COLLINS

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Erika Collins is a partner in the labour and employment law department and co-head of the international labour and employment law group of Proskauer Rose, resident in the New York office. Ms Collins advises and counsels multinational public and private companies on a wide range of cross-border employment and human resources matters throughout the Americas, Europe, Africa and Asia.

Ms Collins represents US and non-US employers in all aspects of company growth and restructuring, from office openings, executive hires and workforce expansions to company downsizing, employment terminations, mass lay-offs and office closures. She advises clients on preparing competitive employment packages and agreements, such as separation, expatriate and consulting agreements, that are compliant with local laws, as well as on payroll, benefits and vacation issues. Ms Collins regularly conducts multi-country audits of employment laws and practices in order to provide advice to clients regarding compliance with data privacy, fixed term contracts, outsourcing, and working time and leave regulations among numerous other issues.

Additionally, Ms Collins advises employers on sexual harassment and other misconduct allegations, as well as cross-border investigations. She also is experienced in conducting due

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diligence on international subsidiaries and advising on applicable business transfer laws and employee transition issues in cross-border M&A transactions.

Ms Collins is the editor of *The Employment Law Review*, which covers employment laws in 46 countries. In addition to authoring numerous articles on international employment topics, Ms Collins is a regular speaker at the International Bar Association and the American Bar Association. Topics on which she has written and spoken recently include: cross-border transfers of executives; global mobility issues for multinationals; employment issues in cross-border M&A transactions; the landscape of issues in international employment law; global diversity programmes; the intersection of EU privacy and anti-discrimination laws; and cross-border investigations.

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Chapter 40

SOUTH AFRICA

Stuart Harrison, Brian Patterson and Zahida Ebrahim[1]

I INTRODUCTION

South Africa's Constitution[2] entrenches fundamental rights and contains several provisions that are relevant to employment and labour, which confer upon everyone the right to fair labour practices, provide for freedom of association for workers and employers and the right to participate freely in the activities of a trade union or employers' organisation. Trade unions and employers' organisations have the right to form and join federations and to engage in collective bargaining. The Constitution provides for the enactment of national legislation to, *inter alia*, regulate collective bargaining, and the legislation so enacted is the Labour Relations Act No. 66 of 1995 (LRA).

The LRA also provides for resolution of labour disputes through, *inter alia*, the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA), industry bargaining councils, the Labour Court and the Labour Appeal Court (LAC), which is, in principle at least, the final court of appeal for labour matters. However, where the dispute involves a constitutional issue, or the Constitutional Court is of the view that a matter raises an arguable point of law of general public importance which ought to be considered by that court, it is still possible to take the matter to the Constitutional Court. Employees can also enforce contractual employment rights in the normal civil courts.

The LRA provides protection for employees against unfair dismissal and unfair labour practices, with further guidelines supplied in Codes of Good Practice. The LRA extensively regulates dismissals on the basis of the operational requirements of the employer (retrenchments), and the rights of employees and the obligations of employers in the context of the transfer of a business (or part of a business) as a going concern.

Minimum conditions of employment are regulated by the Basic Conditions of Employment Act No. 75 of 1997 (BCEA). The BCEA applies to all employers and employees except 'soldiers and spies' and unpaid volunteers working for charity. The BCEA regulates working time, leave, particulars of employment and the keeping of records regarding remuneration, termination of employment (notice and severance pay), and the prohibition of child and forced labour. It provides for basic conditions to be varied in different ways. For example, a particular sector or industry can regulate its own terms via a bargaining council agreement, which then takes precedence over the BCEA (subject to some limited exceptions). A bargaining council comprises representative employers and unions in the

1 Stuart Harrison, Brian Patterson and Zahida Ebrahim are directors at ENSafrica. Susan Stelzner was also a director of ENSafrica. She sadly passed away on 5 January 2011 but this chapter continues to reflect her invaluable contribution and it remains dedicated to her memory.

2 The Constitution of the Republic of South Africa, 1996.

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industry concerned. In addition, the Minister of Labour (the Minister) may make sectoral determinations setting basic conditions for a specific sector and area, a number of which have already been made.

Discrimination and affirmative action issues are regulated by the Employment Equity Act No. 55 of 1998 (EEA). The Occupational Health and Safety Act No. 85 of 1993 (OHSA) imposes on all employers a general duty to provide and maintain a working environment that is safe and without risk to employees' health. In addition, there are a number of specific regulations published under the OHSA. Work-related injuries and illnesses are covered by the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993.

Unemployment benefits are regulated by the Unemployment Insurance Act No. 63 of 2001 and the Unemployment Insurance Contributions Act No. 4 of 2002.

Skills development in the workplace is regulated by the Skills Development Act No. 97 of 1998 (SDA) and the Skills Development Levies Act No. 99 of 1999, which requires compulsory contributions by employers to a statutory fund with the opportunity for employers to get refunds against the contributions if they implement workplace skills development plans and the like.

Save for a section regulating the registration of private employment agencies, the provisions of Employment Services Act No. 4 of 2014 (ESA) came into effect on 9 August 2015. The purpose of the ESA is to increase productivity within South Africa, decrease levels of unemployment, and provide for the training of unskilled workers. While the ESA has various mechanisms for improving employment levels in the country and training the workforce, it remains to be seen whether these mechanisms will fulfil their legislative objective. Retirement funding and provision for medical insurance in South Africa is private unless regulated under a bargaining council agreement.

The employment of foreign nationals who are not asylum seekers, refugees or permanent residents is governed by the Immigration Act No. 13 of 2002 (Immigration Act) as amended and the Regulations published pursuant thereto on 26 May 2014, as well as various practice directives issued by the Department of Home Affairs which influence the execution and application of the law.

II YEAR IN REVIEW

The past year signalled the start of a period of adjustment and legal uncertainty while employers, employees and the courts have grappled with the significant changes to the employment legislation introduced by recent amendments to the EEA, LRA and BCEA.

The amendments to the EEA and its regulations (which, *inter alia*, introduced a more onerous regime for employers that have to comply with affirmative action obligations and more detailed pay discrimination protections) have had far-reaching practical consequences for employers as they are required to review and adapt the manner in which they address issues of recruitment, remuneration and benefits, administering employment terms and conditions or managing affirmative action compliance.

Perhaps the most prominent matter has been the coming into effect of the amendments of the LRA in January 2015, which has introduced stricter regulation of forms of 'atypical employment', particularly the use of agency workers (i.e., employees engaged through a temporary employment service or labour brokers), fixed-term and part-time employees. Employers who make extensive use of atypical employees earning below the BCEA earnings threshold (which, as of 2015, is 203,433.30 rand) have had to reconsider their staffing and

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operational requirements in light of the restrictions on the use of such employees and the liability for which the amendments provide. In relation to agency workers, in terms of the amendments to the LRA, if the worker is not performing a 'temporary service' for the client (e.g., work lasting less than three months, replacing an absent employee), then not only is the client deemed to be the employer of the temporary worker with joint unfair dismissal liability, but the worker is also entitled to be treated on the whole as favourably as an employee of the client performing the same or similar work, unless there is a 'justifiable reason' for different treatment. A 'justifiable reason' is limited to the application of a system that takes into account: seniority; experience or length of service; merit; the quality or quantity of work performed; or other criteria of a similar nature.

Employers can now only employ employees earning below the BCEA earnings threshold on a fixed-term contract or a successive fixed-term contract for longer than three months if the nature of the work is of a genuinely limited or definite duration, or if the employer can demonstrate a justifiable reason for fixing the term of the contract. Justifiable reasons are defined and include replacing, *inter alia*, a temporarily absent employee, meeting a temporary increase in the volume of work, seasonal work, etc. If the fixed-term employment does not meet these requirements, the employee is deemed to be employed indefinitely and must be treated equally to an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment. These protections do not apply, however, to workers earning above the BCEA earnings threshold and to small or new employers, namely employers employing less than 10 employees or employing less than 50 where the business has been in operation for less than two years. Part-time employees are afforded similar protection.

Apart from stricter regulation of flexible employment arrangements, organisational rights have become more accessible to unions, as departures from the established majority and sufficient representation thresholds for the different types of organisational rights are provided for in the 2015 amendments. Clients of labour brokers and landlords can also now be bound by organisational rights (such as access to the premises to recruit members) awarded to unions.

Since the Marikana massacre of 2012, protracted strike action (often accompanied by acts of violence) has become regular across various industries in South Africa. There has also been a significant rise in popular protests against unmet expectations on social and economic transformation. Unprecedented protests have been staged in the rural areas, and October and November 2015 saw what has been referred to as the largest protest in post-apartheid South Africa with South Africa's largest higher learning institutions being shut down because of protests against tuition fee increases. Though President Jacob Zuma announced that there would be no increase in tuition fees for the year 2016, the protests continued with students across the country also rallying for the abolishment of outsourced services at the universities and with many universities capitulating to these demands and agreeing to 'in-source' services that had been previously outsourced. Amidst this civil action, the historic partnership between the country's powerful labour movement and the governing African National Congress (ANC) has begun to unravel with the National Union of Metalworkers of South Africa, the largest trade union in the country, withdrawing its support for the ANC.

It seems that until poverty, inequality and unemployment (which some say lies at the heart of a lot of the labour and social unrest) is addressed more meaningfully, this type of mass action will be a predictable part of South Africa's future.

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Early in 2017 an agreement was reached between the relevant national stakeholders on a minimum wage of 20 rand per hour. In November 2017, a draft National Minimum Wage Bill was approved by the Cabinet, confirming a national minimum wage of 20 rand per hour to be reviewed annually. The Bill was tabled in Parliament very shortly thereafter, despite the period for public consultation and comment not having expired. If the Bill is passed it is expected that the national minimum wage will take effect on 1 May 2018. The Constitutional Court further confirmed that functionality (in the employer's operations) (and not the geography of locations of places where employees work) is relevant when determining what constitutes the 'workplace' for purposes of the granting of organisational rights. Throughout the course of the year the Department of Labour embarked upon an exercise of enforcing compliance with the requirements of the EEA by investigating more than 70 companies listed on the Johannesburg Stock Exchange for compliance with their employment equity and affirmative action obligations, and publishing in the national media the identities of non-compliant employers. The Department has shown new determination to make examples of high-profile employers and to enforce the maximum fines for non-compliance, which can be significant (some fines involve percentage of turnover, starting from 2 per cent and ranging up to 10 per cent).

The status of Uber drivers (i.e., whether they are employees or independent contractors) also received some well-publicised attention when a group of Uber drivers approached the CCMA with claims that they were, in reality, employees of Uber and that they were in effect unfairly dismissed when they were 'deactivated' by Uber. These drivers were successful in establishing that they were employees of Uber and with their unfair dismissal claims in the CCMA, but a review application in the Labour Court has been brought by Uber challenging this outcome, which is currently pending and was scheduled to be argued before the Labour Court during December 2017.

The most significant of the changes introduced by the National Minimum Wage Bill are the following:

a The regulations introduced stricter identification methods for children, such as requiring the production of unabridged birth certificates and other consent and identification documentation in respect of minors travelling to or from South Africa. Child travel requirements are currently being revised by the Department of Home Affairs and are expected to be less onerous.

b Where a traveller, such as an academic, business person or frequent visitor has established himself or herself as a *bona fide* visitor, they may be issued with a two- to three-year multiple entry visa.

c Although applications for a critical skills visa must be accompanied, in terms of the regulations, by a letter confirming skills, post-qualification experience and qualifications from a professional governing body, board or government department, the Department of Home Affairs has issued a directive that provides that if an application for critical skills is accompanied by proof of application for professional registration then it need not be accompanied by such letter owing to the difficulty obtaining such letters.

d Existing holders of two-year intra-company transfer visas are allowed to either extend their visas in the country for a further two years or apply in their home country for a new four-year intra-company transfer visa.

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III SIGNIFICANT CASES

In *Impala Platinum Limited v. Jonase & others*,[3] the Labour Court was called upon to pronounce on whether a policy applicable to pregnant women who occupied jobs at a mine, which may impact the health and safety of the employee and her unborn child, constituted unfair discrimination. The employer had a policy that provided that, where reasonably practicable, employees who fall pregnant will be placed in suitable alternative employment outside the mine to prevent risk to the employee or her unborn child. Two employees were not provided with alternative employment straight away as it was not available at the time. As such, and according to their policy, the employer placed them on four months paid maternity leave, with an option of an additional six months unpaid maternity leave. These employees referred an unfair discrimination claim in terms of the EEA, claiming that they were unfairly discriminated against on the basis of their pregnancy, and sought to be treated similarly to other pregnant women. The CCMA found that the dismissal was unfair. The employer took the award on appeal to the Labour Court. On appeal, the Labour Court held that the fact that the comparators that the employees used were also pregnant women, negated their allegation of unfair discrimination on the basis of pregnancy. The Labour Court found that they were accordingly not treated differently because of their pregnancy, but because they lacked the skills to obtain suitable alternative positions outside the mine. It was further held that in the absence of suitable alternative positions, an employer is not obligated to create positions for pregnant employees, and the employer in this case acted lawfully in immediately placing these employees on maternity leave.

In *Manyetsa v. New Kleinfontein Gold Mine (Pty) Ltd*[4] the Labour Court was again called upon to decide this issue. The Labour Court reiterated that employers are statutorily obliged to provide pregnant employees who work in hazardous environments with suitable alternative employment, if it is available. Insofar as the employee alleged that she was discriminated against on the basis of her pregnancy, the employer was statutorily obligated to remove her from the hazardous work, and she no longer complied with the inherent requirements of the job, which is a valid defence to discrimination.

In *Liberty Group Limited v. M*,[5] an employee referred an unfair discrimination dispute to the CCMA after she resigned from her employment. The employee's resignation letter stated that 'due to ongoing and continued sexual harassment' by her manager, her working environment was intolerable and that she had reported the sexual harassment to management but that her employer failed to act thereon to assist her in dealing with the issue. The CCMA found that it did not have jurisdiction to deal with the dispute so the employee referred the matter to the Labour Court in terms of Section 60 of the EEA. The employee's evidence at the Labour Court was that her manager had sexually harassed her four times. During a conversation with Mr H, the employee reported the sexual harassment to him. Her evidence was that she was told to look at the employer's sexual harassment policy to see whether the conduct she complained of constituted sexual harassment and how to go about lodging a complaint. Mr H then reported the issue to the human resources consultant at the employer, who unsuccessfully attempted to set up a meeting and contact the employee. The employee did not lodge the sexual harassment complaint. The Labour Court found that

3 [2017] ZALCCT 39.

4 Unreported Labour Court Judgment: (JS706/14 – 7 November 2017).

5 (JA105/2016) {2017} ZALAC 19 (7 March 2017).

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sexual harassment had occurred. It also found that the employer was made aware of the sexual harassment and failed to take the necessary steps. The court found that the employer failed to protect the employee as required in the EEA. The employer took the matter on appeal. The Labour Appeal Court referred to Section 60 of the EEA and the employer's obligations therein. The Labour Appeal Court found that the Labour Court could not be faulted for finding that sexual harassment had occurred. Regarding whether the conduct was reported, the Labour Appeal Court found that although there was a delay of weeks in reporting the sexual harassment by the employee, the requirement that it must be reported 'immediately' must be 'given a sensible meaning'. It further found that the employee's complaint of sexual harassment constituted a report as required in Section 60(1) of the EEA and the Labour Court was correct in finding that the employer failed to 'consult with the relevant parties' and take steps to eliminate the alleged conduct and 'comply with the provisions of the Act'. The appeal was dismissed and the employer was ordered to pay damages of 250,000 rand.

In *NUMSA v. Assign Services*[6] the Labour Appeal Court was called upon to interpret the provisions of Section 198A(3)(b)(i) of the LRA, which provides that an individual who is employed by a labour broker or temporary employment service (TES) and provides a temporary service for the client of the TES for a period exceeding three months is deemed to be an employee of the client on an indefinite basis. The Labour Court had previously held that the 'deeming provision' created a dual employment relationship with both the TES and the client being regarded as employers of the TES employee for purposes of the LRA. The Labour Court's decision was taken on appeal. A group of 22 employees had been placed by the TES with the client for a period exceeding three months and the TES arrangement was to continue into the foreseeable future. While there was pay parity between the placed employees and the employees of the client, the placed workers sought to assert their right to be treated as being employed solely by the client, which had the potential to create labour unrest. The TES contended that the correct interpretation of the deeming provision was that the provision created a dual employment relationship and that both the TES and the client were employers of the placed workers where the TES arrangement continued for a period exceeding three months. The Labour Appeal Court disagreed and found that the purpose of the deeming provision was to ensure that the placed employees are fully integrated into the enterprise as employees of the client, and to restrict the use of a TES to genuinely temporary employment. As such, the Labour Appeal Court held that the plain language of the provision unambiguously favours the interpretation that the client is the sole employer of the placed workers once the three-month period has elapsed. The judgment of the Labour Appeal Court has been taken to the Constitutional Court on appeal.

In *Woolworths (Pty) Ltd v. SACCAWU and others*[7] the Labour Appeal Court was required to establish which remedies were available to employees where their dismissal for operational requirements was found to be unfair. The employer had retrenched its employees to give effect to its economic needs. The Labour Court found the dismissal was substantively unfair as the employer had not considered the alternatives to dismissal that were available. The Labour Court, however, found the dismissal to be procedurally fair. In the circumstances, the Labour Court ordered that the employees be reinstated unconditionally. The matter was appealed, and the Labour Appeal Court overturned the Labour Court's award of unconditional reinstatement. The Labour Appeal Court found that in circumstances where it

6 [2017] ZALAC 44.

7 [2017] ZALAC 54.

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was proven that restructuring was required to give effect to the employer's operational needs, and redundancy was established, reinstatement was not an appropriate remedy, particularly because the dismissal was procedurally fair. The Labour Appeal Court substituted the Labour Court's order of unconditional reinstatement with an order of compensation in the amount of 12 months' remuneration.

In *South African Correctional Services Workers Union (SACOSWU) v. Police and Prisons Civil Rights Union (POPCRU) and others*,[8] POPCRU was the majority union representing the employees of the Department of Correctional Services (DCS). POPCRU had concluded a threshold agreement with the DCS wherein it agreed to the minimum representation required for obtaining organisational rights. SACOSWU, a minority trade union, approached the DCS seeking basic organisational rights. As SACOSWU had insufficient membership it wished to accrue such rights by means of a collective agreement. The DCS entered into a collective agreement with SACOSWU. POPCRU in turn challenged the legitimacy of the DCS decision alleging that in doing so the DCS undermined its collective agreement with POPCRU. The arbitrator before the General Public Service Sectoral Bargaining Council found in favour of SACOSWU. POPCRU elected to review the decision before the Labour Court. In upholding POPCRU's concerns the Court found, *inter alia*, that the issue in dispute is a balancing of the freedom of association in the one instance and the sanctity of collective agreements on the other hand. Furthermore, the aim of the granting of organisational rights in the LRA is to facilitate the right to bargain and the conclusion of collective agreements. As such, the terms of collective agreements can supersede the provisions of the LRA in certain instances. In addition, it was clear from the structure of the LRA that preference was given to the rights of majority unions. Therefore, where a majority union had entered into a collective agreement with an employer where organisational rights are regulated, minimum thresholds are expressly prescribed for organisational rights and such thresholds have been made binding on non-parties, then the minority union is debarred from entering into a collective agreement with the employer. The minority union must instead seek to comply with the provisions of the majority trade union's threshold agreement if it wishes to obtain organisational rights; in the instance where there are two conflicting incompatible collective agreements in place, the majority trade union's collective agreement will take preference. This case reconfirms the principle that the LRA favours a majoritarian approach to collective bargaining within the workplace. To that extent, majority unions and employers can legitimately curtail and regulate the rights of minority unions to be granted organisational rights within the workplace.

In *Association of Mineworkers and Construction Union (AMCU) and others v. Chamber of Mines of South Africa and others*,[9] the extension of a 2013 wage collective agreement to AMCU members in terms of Section 23(1)(d) of the LRA was considered. The judgment follows a prior judgment in the Labour Court, which AMCU took on appeal to the Labour Appeal Court, and then to the Constitutional Court after the Labour Appeal Court dismissed its appeal. AMCU's primary challenge to the previous judgments in the Labour Court and Labour Appeal Court was that Section 23(1)(d) of the LRA is unconstitutional. Section 23(1)(d) allows parties to a collective agreement to extend the agreement to, and bind, employees who are not members of the trade unions that entered into the collective agreement – including employees who are members of minority unions that are not party to the collective agreement.

8 (JA87/2015) [2017] ZALAC 30 (31 May 2017).

9 (CCT87/16) [2017] ZACC 3 (21 February 2017).

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In 2013, the Chamber of Mines agreed with the National Union of Mineworkers (NUM) and two other unions that a collective agreement regulating terms and conditions of employment applicable to Harmony Gold, AngloGold Ashanti and Sibanye Gold be extended to, and bind, AMCU's members employed by these companies within certain defined recognition units. AMCU, which had been party to the negotiations but had refused to sign the wage agreement, gave notice that its members would strike in support of wage demands higher than those contained in the collective agreement. The Chamber successfully interdicted the strike on the basis that AMCU was bound by the collective agreement. The most important argument raised by AMCU was that, in broad terms, Section 23(1)(d) of the LRA is unconstitutional because it restricts the constitutional right to strike and violates the rule of law insofar as it envisages the unrestricted exercise of a public power by private bodies. AMCU also contested the interpretation attached to the word 'workplace' by the Chamber (i.e., that all the mining operations of each mining house taken together constituted a single workplace for each company). AMCU contended that each mining operation of each company should be considered a separate workplace for purposes of the interpretation of Section 23(1)(d) and that the relevant wage agreement could therefore not be extended to AMCU members at those mining operations of each employer where AMCU had majority status.

The Constitutional Court held that Section 23(1)(d) of the LRA is not unconstitutional. The Court accepted that one of the effects of an extension of a collective agreement in terms of Section 23(1)(d) is to restrict the right to strike. This was held to be the case because the extension of a wage agreement to minority unions and their members who are not party to the agreement limits the right of such unions and their members to pursue their own wage demands by means of strike action, as the subject matter of a potential wage strike is then covered by the terms of a binding collective agreement. However, the court also accepted that the need to maintain the principle of majoritarianism in industrial relations justifies the restriction of the constitutional right to strike. The Court further found that the concept of a workplace is intentionally decoupled by the legislature from mere geographical location and has a legal meaning that is informed by functional organisation. The intrinsic possibility of locational multiplicity for a single workplace thus exists in the definition. The court therefore held that AMCU's contention could not be upheld and that the functional organisation of the operations of the mining companies in question had to take primacy over the fact of geographically separate mining operations. Owing to the centralised and integrated nature of the operations of the mining companies involved, the workplace in this context was not each individual mining operation, but the operations of each mining house collectively.

The Draft White Paper on International Migration in South Africa was approved by the Cabinet in March 2017.

The White Paper recommended strategic interventions in eight policy areas that will be managed. The areas are: admissions and departures; residency and naturalisation; migrants with skills and capital; ties with South African expatriates; international migration within the African context; asylum seekers and refugees; integration process for international migrants; and enforcement. In *Minister of Home Affairs v. Ahmed*, the SCA held that holders of asylum seeker permits in terms of Section 22 of the Refugees Act 130 of 1998 are precluded from applying for status under the Immigration Act while they are within South Africa. Asylum seekers may, however, apply for waiver of the requirement to apply abroad, or they could bring such an application abroad.

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IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The existence of an employment contract is not a prerequisite for an employee to qualify for statutory employment rights. The definition of an employee under most South African employment legislation is wide enough to include persons (excluding independent contractors) who assist in carrying on or conducting the business of the employer even though they may not be formally employed by the employer. Most employees in South Africa are, however, employed under employment contracts.

The BCEA obliges employers to provide their employees with written particulars of their employment conditions once the employee commences employment. Signatures on a contract are not legally required, subject to two limited exceptions, namely for written employment contracts under the Merchant Shipping Act No. 57 of 1951 and contracts relating to learners (i.e., apprentices) under the Skills Development Act.

The conditions of employment provided for under the BCEA constitute the basic terms of any employment relationship except to the extent that any other law or terms of the employment contract provide for more favourable terms, or where the basic condition has been varied in terms of the BCEA. Collective agreements, where applicable, can also vary the terms of employment contracts between the employers and employees who are bound by them.

Under South African law, employers and employees are generally free to conclude their contract of employment either for a fixed term or an indefinite period. Recently enacted amendments to the LRA (which at the time of writing are not in effect) place certain restrictions on the use of fixed-term contracts for employees earning below the BCEA earnings threshold.[10]

Parties to an employment contract can only amend the contract by agreement. Agreement is obtained either through negotiation or, if this fails, after taking certain procedural steps parties can resort to industrial action (i.e., a strike in the case of employees or a lockout in the case of employers) aimed at compelling the other party to agree.

It is mandatory that all offers of employment to foreigners who require work visas be made subject to the employee procuring such a work visa before commencing employment.

ii Probationary periods

Probationary periods are permitted for newly hired employees in order to afford the employer an opportunity to evaluate the employee's performance and suitability for employment before confirming his or her appointment. An employer must still have a fair reason and follow a fair procedure before effecting the dismissal of a probationary employee. The minimum notice periods for termination of employment described in Section XII.i also apply to employees on probation.

iii Establishing a presence

A foreign employer can hire employees and engage independent contractors in South Africa without being required to set up a local entity. A foreign employer may, however, be required to register as an external company (commonly referred to as a 'branch') with the South African Companies and Intellectual Property Commission if it 'conducts business'

10 As of 1 December 2017 this is 205,433.30 rand per annum.

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within South Africa as contemplated by the South African Companies Act No. 71 of 2008. A company is deemed to be conducting business in South Africa if it is (1) a party to one or more employment contracts within South Africa, or (2) engaging in a course of conduct that would 'lead a person to reasonably conclude that the company intended to continually engage in business' within South Africa.[11]

A non-resident employer is not obliged to withhold employees' tax from remuneration (provided that it does not have a 'representative employer' as defined in South Africa). The employees themselves will be required to settle their tax liabilities in respect of the remuneration they receive from the non-resident employer for the services that they render in South Africa. This will be done through provisional tax payments.

If a foreign employer appoints a South African resident agent to pay remuneration on behalf of the foreign employer, the South African agent will be regarded as a representative employer of the foreign employer in South Africa and will be required to register as an employer with the South African Revenue Service and withhold employees' tax from remuneration paid to employees of the foreign employer.

A foreign employer will be liable for income tax on its South African-sourced income. However, if there is a double taxation agreement in place between South Africa and the jurisdiction within which the foreign employer is resident (for the purposes of the double taxation agreement), and the income of the foreign employer comprises business profits, then the double taxation agreement would allocate taxing rights to the country in which the foreign employer is a resident, unless the foreign employer carries on business in South Africa through a permanent establishment. Most of South Africa's double taxation agreements are based on the Organisation for Economic Co-operation and Development Model Tax Convention on Income and Capital (the Model Tax Convention).

The existence of a permanent establishment is determined with reference to Article 5 of the Model Tax Convention. Generally, however, what is required for permanent establishment is a fixed place of business through which the business of an enterprise is wholly or partly carried on. There must be a fixed location or facility with a certain degree of permanence which is used for the conduct of business activities of the enterprise, and it must be utilised on a regular basis for business operations. Generally, business is regarded as being carried out through the employees of the enterprise, but a business may also be carried on through agents or other representatives of the enterprise, particularly where those representatives are dependent on the enterprise.

Therefore, if employees of a foreign employer spend significant periods of time in South Africa and carry on the business of the foreign employer in South Africa, these employees may create a permanent establishment for the employer in South Africa. If so, then the profits of the foreign employer that are attributable to the permanent establishment may also be taxed in South Africa.

If a South African-resident company employs employees in South Africa, whether the employees are foreign or local, employees' tax must be deducted from remuneration at source and the employer is responsible for reporting and withholding the employees' tax. Employers are required to provide few statutory benefits.

11 Section 23(2) of the Companies Act.

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V RESTRICTIVE COVENANTS

Restraint of trade (i.e., non-compete or restrictive covenant) clauses can be included in employment contracts. Such clauses are in principle valid and enforceable and, as such, many restraints are enforced in South African courts every year. Nevertheless, when the employer seeks to enforce restraint provisions, the courts retain discretion as to whether to enforce the restraints and they will not enforce them if, in a particular case, such enforcement would be unreasonable or contrary to the public interest.

The reasonableness of a restraint is judged both on the broad interests of the public and the interests of the contracting parties themselves. Reasonableness as between the parties themselves depends on many factors, the most important of which is whether the employer has a proprietary interest that may legitimately be protected by means of a restraint agreement. Proprietary interests include confidential information and customer connections. The geographical area and duration of the restraint must also be reasonable.

It is not a prerequisite for the employer to financially compensate the employee in exchange for the employee undertaking restraint of trade obligations, although where such payments are made, this may enhance the enforceability of the restraint.

VI WAGES

i Working time

Generally, no employee may work more than 45 ordinary hours a week and nine hours a day if he or she works a five-day week. Alternatively, the employee may not work more than eight hours a day if he or she works a six-day week. Total working hours may not exceed 12 hours a day. Wage-regulating measures specific to industries can have different provisions regulating working hours.

Night work (i.e., work performed after 6pm and before 6am the next day) may only be done with the employee's consent and he or she must be compensated with an allowance, which may be a shift allowance or a reduction of normal working hours, and transport must be available between his or her residence and the workplace at the commencement and conclusion of the shift. If employees perform night work on a regular basis (i.e., work for longer than one hour after 11pm and before 6am at least five times a month or 50 times a year), the employer must inform them of health and safety hazards associated with night work and of their right to request a medical examination at the employer's expense. If a regular night worker suffers from a health condition associated with the performance of night work, the employer must transfer the employee to suitable day work within a reasonable time if it is practicable to do so.

ii Overtime

Employees generally enjoy the following statutory overtime benefits (excluding those who are not senior managerial employees, sales staff who travel to customers' premises and regulate their own working hours, employees who work for fewer than 24 hours a month, or employees who earn above the BCEA earnings threshold):

a An employer can only require an employee to work overtime where the employee's agreement to do so has been obtained. If the employee's agreement is obtained on commencement of employment or within three months thereof, the consent shall lapse after 12 months and must be secured again by the employer, after which the

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consent does not lapse. An employer must pay an employee at least one-and-a-half times the employee's wage for overtime worked or grant the employee paid time off (e.g., 90 minutes off for every 60 minutes overtime worked).

b Employees are not permitted to work more than 10 hours overtime a week or three hours overtime in a day if they work a nine-hour day.

A national minimum wage of 20 rand per hour (with slightly lower minimums for farm and domestic workers) has been agreed between the relevant stakeholders. In November 2017 a draft National Minimum Wage Bill was approved by the Cabinet confirming a national minimum wage of 20 rand per hour (to be reviewed annually). The Bill was tabled in Parliament very shortly thereafter, despite the period for public consultation and comment not having expired. The Bill envisages the new minimum wage being effective from May 2018.

VII FOREIGN WORKERS

The employment of non-South African citizens who are not asylum seekers, refugees or permanent residents (foreign workers) is governed by the Immigration Act 2002, as amended, as well as the regulations thereto.

The Act and regulations impose obligations on any person or organisation that employs a foreigner, regardless of the business's size or number of employees, although stricter compliance is required of any employer with more than five employees or that has been found guilty of a prior offence under the Act.

An authorisation to work is required irrespective of the duration for which services will be rendered within South Africa. A business visitor's visa is suited to temporary placements of less than 90 days. Where a traveller, such as an academic, business person or frequent visitor, has established himself or herself as a *bona fide* frequent business visitor, they may be issued with a two- to three-year multiple entry visa, usually for visits of 30 days. Longer placements require a temporary residence work visa such as an intra-company transfer, a general work visa, a critical skills visa or corporate worker visa, or another appropriate visa authorising the work. There is no restriction on the number of foreign workers that an employer may employ or on the number of categories under which work visas may be applied for. Nonetheless, the work visa process guards against employing foreign workers in positions that can be filled by local people.

By way of example, the regulations provide that a company wishing to obtain a corporate visa or a business visa must have a workforce that is made up of at least 60 per cent South Africans, and that an application for a general work visa must include a certificate from the Department of Labour confirming that, despite a diligent search, the employer has been unable to find a South African citizen or permanent resident with equivalent qualifications and skills or experience. The Department of Labour's application process for such certification includes the submission of proof of advertisement of the position as well as a letter of motivation from the employer and from a recruitment agency detailing the labour market test and disclosing the details of all unsuccessful applicants for the position and justifying the need to employ a foreign worker in that position.

No labour market testing is required when applying for a critical skills visa, which facilitates applications for foreigners who meet the minimum qualifications and experience listed on the critical skills list published in terms of the Regulations.

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Similarly, no labour market testing is required when applying for an intra-company transfer work visa. However, an undertaking must be given to develop a skills transfer plan.

Intra-company transfer work visas may be issued for a maximum of four years and cannot be renewed. Upon expiry of the visa, the holder must either depart from South Africa or apply for a change of conditions to a different category of visa, if they are required to remain in South Africa.

There is no general legislative cap on the period for which a foreign worker may be employed in aggregate, although the Immigration Act does provide maximum periods for which certain categories of work visas may be granted. In general, work visa holders become eligible to apply for permanent residence after holding a temporary residence work visa for a continuous period of five years, provided that they have received a permanent offer of employment. Critical skills holders may apply for permanent residence sooner. Although not legislated, the Department of Home Affairs would usually insist on proof of (usually at least five years) work experience in the relevant area of skill.

Any foreigner worker needs to obtain a work visa to render services in South Africa irrespective for the time frame for which they are required to render services locally and notwithstanding the fact that they may be employed through a foreign entity. Foreign workers and their employers can be fined, jailed, or both, for non-compliance with their obligations in this regard.

South African employment laws are of universal application for employees that fall within their jurisdiction. They therefore apply to foreign workers working in South Africa, even if they are working illegally in contravention of their visa status.

To ensure regulatory compliance, an employer in South Africa must maintain documentary records for each foreign employee for two years after the termination of employment. The employer must also report to the authorities the termination of a foreign worker's employment and any breach by the worker of his or her status. Employers must also make a reasonable effort in good faith to ensure that they have no illegal foreigners in their employ and to ascertain workers' status or citizenship.

South African immigration laws provide for strict identification methods for children, such as requiring the production of unabridged birth certificates and other consent and identification documentation in visa applications, and when travelling to and from the country with accompanying minors.

VIII GLOBAL POLICIES

Employers are under no legal obligation to have written internal discipline rules and individual employers may decide whether they want to establish written rules to regulate conduct in the workplace.

In general, an employer does not require the approval or agreement of its employees or their representative body when deciding to introduce discipline rules, unless the rules form part of their employment contracts and the employer wishes to amend the rules. Approval and agreement may also be required where there is a collective agreement between the employer and the representative body stipulating that employees or their representative body must approve or agree to discipline rules before the rules may be introduced or amended. There is also no requirement for the rules to be filed with or approved by any government authorities but such disciplinary rules must be lawful and fair.

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Although there are no mandatory discipline rules, issues of discrimination and sexual harassment are prohibited by specific legislation, most notably the EEA and codes published pursuant to the EEA. Employers must also report acts of corruption to the authorities.

There is no requirement that the rules governing discipline in the workplace be signed. It is nonetheless good practice to get employees to sign some form of acknowledgement that they are aware of the existence of the rules and have been given an opportunity to familiarise themselves with them. This may be done electronically.

The rules should be accessible to all employees and, if possible, copies of the rules should be given to all employees. If this is not possible, then copies should be available from designated persons, such as human resources managers, for inspection by employees. An intranet site is insufficient if the employees do not have access to it or do not know how to access it.

Individual employers are free to decide whether or not they want to incorporate the disciplinary rules into employees' employment contracts, but generally it is not advisable to do so. In cases where the disciplinary rules are incorporated into the employee's contract of employment, any minor breach of the rules will constitute a breach of contract that may be actionable. In addition, the rules will then become part of the employees' terms and conditions of employment and may not be changed without the employees' consent.

IX TRANSLATION

There is no legal requirement that employment-related documents be translated, unless the employee is not able to understand them, in which case the employer should ensure that the contents of the documents are explained to the employee in a language and in a manner that the employee understands.

There are no penalties if the document is not translated. However, if it is not translated (in circumstances where it is required as described above), the risk is that the employer may be directed by the Department of Labour to translate the documents or they may be unenforceable against the employee in question.

X EMPLOYEE REPRESENTATION

Employees are permitted to form and join a registered trade union of their choice. Employees, through their trade unions, are also permitted to establish workplace forums in their workplace where the employer employs more than 100 employees to consult on numerous defined workplace issues. Such workplace forums are rare.

A majority union in a workplace in which at least 10 of its members are employed may elect union representatives from its members in accordance with the following ratio:

a 10 members in the workplace: one representative;

b more than 10 members: two representatives;

c more than 50 members: two representatives for the first 50 members plus one representative for every additional 50 members (up to a maximum of seven);

d more than 300 members: seven representatives for the first 300 members plus one representative for every additional 100 members (up to a maximum of 10);

e more than 600 members: 10 representatives for the first 600 members plus one representative for every additional 200 members (up to a maximum of 12); or

f more than 1,000 members: 12 representatives for the first 1,000 members plus one representative for every additional 500 members (up to a maximum of 20).

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Unions that do not have majority representation may nonetheless elect union representatives from their members if a collective agreement is concluded with the employer concerned that allows for this. The constitution of the trade union (together with any constraints and obligations that may exist in terms of a collective agreement, if any) will govern the nomination, election, term of office and removal from office of the representatives. It will also regulate the holding of meetings and the issues related thereto. In terms of the recent amendments to the LRA, any registered trade union that represents a 'significant amount' or a 'substantial number of employees' in the workplace may be entitled to be recognised for organisational rights, irrespective of a collective agreement to the contrary.

Representatives have the right to assist and represent employees in grievance and disciplinary proceedings, to monitor the employer's compliance with labour laws and any collective agreements, and to report any contraventions of these laws and agreements. They also have the right to perform any other functions as agreed with the employer and to take reasonable time off work for trade union activities. Representatives may not be discriminated against in any way, or dismissed, for their involvement in trade union activities. However, representatives remain employees of the employer, and generally remain subject to its rules on discipline and its other workplace rules.

Depending on the level of representation of the union, an employer must allow it access to the workplace in order to recruit members, communicate with them, hold meetings, and otherwise serve them and grant stop orders due to the union from the employees' wages.

XI DATA PROTECTION

i Requirements for registration

Comprehensive legislation regulating data protection was published in 2013 in the form of the Protection of Personal Information Act 4 of 2013 (POPIA), but this has not fully come into effect. The many substantive obligations provided for in the POPIA are thus not yet binding or applicable, and it is unknown when they will come into operation, although the likely date appears to be closer than was previously the case given the development referred to below. Once the substantive provisions of the POPIA are made effective, companies will be given a one-year grace period to comply with its provisions, which may be extended. Once operative, the POPIA will place restrictions on what information may be collected from employees and applicants and processed by employers. The POPIA does not require employers to register with a data protection agency or other government body, but an employer can only collect and store personal information about its employees if it has notified the Information Protection Regulator and the employees, and it is necessary or related to a lawful and permitted purpose under the legislation. In September 2017 draft regulations were published for public comment. As of November 2017 the regulations had not yet been enacted by Parliament. The Information Regulator intends to submit the finalised regulations to Parliament for enactment in February or March 2018.

Personal information may only be collected by an employer directly from and with consent of the employee, who must be informed of the purpose of any collection and who the intended recipients are once the information is collected. Personal information should not be kept for longer than necessary to achieve the (permitted) purpose for which it was collected and it must be distributed in a way that is compatible with the purpose for which it was collected. The employer must take reasonable steps to ensure that the information is accurate, up to date and complete.

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Under the POPIA the employer must ensure that the employee's information is protected against risks of loss, damage destruction or unauthorised access. The employee must also be allowed to access his or her personal information and can demand that the information be corrected if it is found to be inaccurate.

ii Cross-border data transfers

The POPIA prohibits cross-border (and onward) transfers of personal information to countries that do not have substantially similar protections for the information (except under limited circumstances). Notification of transfers of sensitive personal information or the personal information of children must be given to the Information Regulator, and an employer must obtain the Information Regulator's prior authorisation before processing such information. The employee's consent to the transfer is generally required. The transfer must also be necessary under contractual arrangements involving the employee. Authorisation from the Information Regulator need only be obtained once and not each time that personal information is received or processed, except where the processing departs from that which has already been authorised.

iii Sensitive data

The POPIA considers the following information to be 'special personal information' for which additional protections are required: information concerning children; religious or philosophical beliefs; race or ethnic origin; trade union membership; political persuasion; health, sex life or biometric data of a data subject; and criminal behaviour in certain instances.

This special personal information may not be processed by an employer unless specifically permitted under exemptions provided for in the legislation. An example of an exemption would be the processing of racial information because the employer is required to comply with laws designed to protect or advance persons from groups historically disadvantaged by unfair discrimination (in terms of the EEA).

iv Background checks

Background checks are generally permitted provided they do not involve checks that amount to unfair discrimination under the EEA.

A Code of Good Practice issued under the EEA stipulates that an employer should only conduct an integrity check – such as contacting credit references and investigating whether the applicant has a criminal record – if this is relevant to the requirements of the job. The National Credit Act No. 34 of 2005 also stipulates that a credit bureau can only issue a credit report to a prospective employer when the employer is considering the candidate for a position that requires trust and honesty and entails the handling of cash or finances, and only with the prior consent of the candidate.

Medical testing is only permitted if legislation permits or requires it or if it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. Testing an employee for his or her HIV status is prohibited unless determined to be justifiable by the Labour Court. Psychological testing and other similar assessments are also prohibited unless the test has been scientifically shown to be valid and reliable and that it can be applied fairly to all employees and is not biased against any employee or group of employees.

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The Immigration Act and regulations thereto provide that medical reports and chest X-rays must be submitted in support of temporary and permanent residence visa applications. Police clearance certificates are also required from all countries where the temporary or permanent residence visa applicant has resided for more than a year since their 18th birthday.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Employees in South Africa may not be dismissed without cause as dismissals are required to be for a fair reason and effected pursuant to a fair procedure.

There are no requirements to notify government authorities of dismissals. In some instances, an employer must consult a trade union about pending dismissals, for example where the employee is a trade union representative or where union members are to be made redundant.

The grounds upon which an employer can fairly dismiss an employee are misconduct, incapacity (which can be in the form of medical incapacity or poor performance) and the operational requirements of the employer (i.e., redundancy, which is dealt with below in more detail). Dismissal may be summary where this is warranted (e.g., in cases of serious misconduct) but otherwise the employee must be given notice (the BCEA stipulates minimum notice periods of one week for employees with less than six months' service, two weeks for employees with service between six months and one year, and four weeks for employees with service over one year). Employers may pay their employees in lieu of notice.

An employee whose employment is fairly terminated for misconduct or poor performance is not entitled to any separation or severance pay. For the severance pay requirements in cases of redundancy, see subsection ii, below. It is possible for employers to conclude separation or settlement agreements with departing employees.

The employer is obliged to notify the Department of Home Affairs upon discontinuation of the employment of a work visa holder.

ii Redundancies

An employee may be dismissed for a reason relating to the employer's 'operational requirements', namely, requirements based on the employer's economic, technological, structural or similar needs. A dismissal based on operational requirements must be both procedurally and substantively fair, as is the case with any other dismissal in South Africa.

The process that must be followed when considering dismissals for operational reasons is set forth in Section 189 or 189A of the LRA. The basic Section 189 provisions apply to all retrenchments and Section 189A imposes additional procedural requirements, where large businesses conduct large-scale retrenchments. An employer is a large employer if it employs 50 or more employees.

Section 189 requires consultation with the employees who may be affected or their representatives (e.g., trade union, workplace forum) on the proposed retrenchments. There is no requirement to notify a works council or the government.

The employer must commence the consultation process as soon as it contemplates retrenchments. The employer must consult on ways to avoid retrenchment, to minimise the number of retrenchments, to change the timing of retrenchments, to mitigate the hardships caused to employees who are retrenched, to select the employees to be retrenched, and on severance pay. Consultation must commence with the employer issuing a written notice

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inviting the other party to consult and disclosing relevant information to enable the other consulting party to engage in the consultation process. Facilitation is an additional process available to the parties to a large-scale retrenchment on request. Facilitation occurs alongside the normal consultation process and is essentially consultation with the assistance of a commissioner appointed by the CCMA. The facilitator's job is to help the parties with their discussions and their attempts to reach agreement on as many issues as possible in relation to the proposed retrenchment.

If the employer falls under a bargaining council, it is advisable to check whether or not the bargaining council agreement has any special provisions relating to retrenchment with which it must comply.

No social plan is required but as part of its duty to avoid retrenchment wherever possible the employer must explore alternatives to retrenchment. Where the employer has alternative work that an affected employee can do (even if some training is required), the employer should accommodate the affected employee. The employer must also consult about the method of selecting employees to be retrenched and in the absence of agreed criteria must adopt fair and objective criteria. There is no category of employee protected by law from retrenchment where genuine operational requirements exist.

There are statutory rights to severance pay for retrenched employees. An employer must pay an employee dismissed for operational requirements severance pay equal to at least one week's remuneration for each completed year of continued service with that employer. Where the employer and employee have agreed, in advance or otherwise, to a higher amount of severance pay, the rights under such agreement are unaffected by the lower statutory minimum. Employees who unreasonably refuse offers of alternative employment with the retrenching employer, or any other employer, are not entitled to severance pay.

The employer must consult about the possibility of rehiring retrenched employees if business picks up or if it is later considering hiring people for the sort of work that the retrenched employee performed. Usually the parties agree on how long the rehiring arrangement will apply and make it subject to the employees remaining contactable.

Employers may conclude settlement agreements with retrenched employees that entail a release of claims from the former employee.

XIII TRANSFER OF BUSINESS

In terms of Section 197 of the LRA, if a transfer of a business takes place, unless otherwise agreed, the new employer is automatically substituted in place of the old employer in respect of all employment contracts in existence immediately before the date of transfer and all rights and obligations between the old employer and an employee at the time of the transfer continue to be in force, as if they had been rights and obligations between the new employer and the employee.

Various statutory requirements must be met in order for a transaction to fall within the ambit of Section 197 of the LRA. Whether Section 197 of the LRA applies to a specific transaction, depends on the following:

a the relevant business transaction must be a 'transfer' envisaged by Section 197 (which means that the business must be transferred as a 'going concern'); and

b the entity being transferred must be a 'business' (which is defined to include a part of a business, a trade, an undertaking or a service).

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The test for whether or not there is a going-concern transfer is an objective one, where the substance of the transaction is considered, rather than its form. The courts have formulated a test that involves taking a 'snapshot' of the entity before the transaction and assessing its components. This is then compared with a snapshot picture of the business after the transaction is concluded to establish whether it is essentially the same business but in different hands. There is, however, no inflexible test and each transaction is considered on its own merits.

The buyer of the transferred business (the new employer), must provide employees with terms and conditions that are generally not less favourable than those that applied before the transfer. However, the buyer can transfer employees to different retirement plans or similar schemes. Employees cannot be dismissed because of the transfer of a business or any reason related to the transfer.[12] A dismissal that breaches this provision is automatically unfair.

It is possible to contract out of the provisions of Section 197 but only if the requirements of Section 197(6) are met. This means that the employers must negotiate with the same body that would have had to be consulted in the event of a retrenchment and must make full disclosure of all relevant information during the negotiation process.

Work visas are employer and position specific, and a work visa holder may not continue working on the existing work visa but must apply for an amendment to the visa to authorise work for the new employer.

XIV OUTLOOK

The proposed changes to South African employment legislation, by way of the proposed amendments to the LRA, BCEA and the introduction of the National Minimum Wage Bill (which is anticipated to be enacted by May 2018), will have a profound effect on the South African employment landscape, particularly in relation to the enforcement of the national minimum wage.

The National Minimum Wage Bill will see the establishment of a national minimum wage of 20 rand per hour, which will be reviewed annually. Employers will be statutorily obliged to pay no less than the minimum wage.

The stated aim of the National Minimum Wage Bill is to reduce the levels of inequality, unemployment and poverty. However, it is only once this bill is enacted and implemented that it will be possible to assess whether the introduction of the national minimum wage will in fact have this effect. There is a likelihood that small businesses and enterprises may not be in a position to pay its employees the national minimum wage, creating the need to retrench employees to maintain profitability. The national minimum wage may even result in many small businesses being eliminated from the market entirely, thereby creating further unemployment and inequality.

While the National Minimum Wage Bill does establish an exemption process, in which employers may apply for an exemption from paying national minimum wages, it is unclear what this process will entail and what factors must be present in order to justify an employer's exemption from paying the national minimum wage. If the requirements that an employer will have to meet to qualify for an exemption are stringent, this may result in many small

12 Section 187(1)(g) of the LRA.

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businesses being unable to pay the minimum wage, which will increase the unemployment rate and poverty. On the other hand, if the requirements for an exemption are lenient, the National Minimum Wage Bill will be of no force and effect, and will be rendered a paper tiger.

Furthermore, the enforcement of the National Minimum Wage Bill will be dependent on the Department of Labour and its inspectors. In its current form, the Bill prescribes a fine that is the greater of either twice the value of the underpayment or twice the employee's monthly wage. We will have to wait and see to what extent the Department of Labour increases its workforce to enforce compliance with the national minimum wage and whether it will have sufficient resources to do so.

Fortunately, the Department of Labour is not exclusively tasked with ensuring compliance with the National Minimum Wage Bill. Employees will be able to refer disputes to the CCMA, the Labour Court, the High Court or the Small Claims Court to ensure their employer's compliance. We anticipate that there will be a significant increase in employment litigation on the basis of non-compliance with the national minimum wage, which will likely create a backlog of cases in the courts. We further anticipate that there may be some teething issues as to which forum is the most appropriate to institute claims for non-compliance with the national minimum wage, and look forward to the jurisprudence developing in this regard.

The proposed amendments to the LRA have been put forward with the aim of reducing strike violence, which has become a national issue. The amendments make it mandatory for the CCMA to attempt to secure agreement on picketing rules in relation to a strike or lockout before the expiry of the 30-day conciliatory period. In the event that there is no collective agreement, or an agreement secured by the CCMA, the Commissioner conciliating the dispute must determine the picketing rules. The Commissioner will take into account the circumstances applicable, representations made, as well as the draft code of good practice that has been proposed.

While the aim is to curb strike violence, the draft code of good practice and the accord that has been entered into at NEDLAC, provides common sense guidelines on how to manage a strike situation to prevent strike violence. It is rare for common sense to prevail during strike situations when emotions and tensions are running high. Furthermore, the accord is not a binding document, and it cannot be enforced in court. It can only provide guidelines on behaviour during strikes. As such, the effectiveness of this document has been called into question. Time will tell whether these legislative amendments will in fact be effective in curbing strike violence.

Interestingly enough, the LRA has also been amended to provide for ballots within trade unions to be by way of secret vote, particularly when voting on whether strike action should be instituted. This may have the potential of reducing strike action as a whole, particularly given that it is commonplace for members of trade unions to be intimidated into participating in strike action.

South Africa is anticipating an election in 2019. In addition to the ordinary political instability that arises in anticipation of an election, the country is experiencing significant political instability, and is faced with a potential ratings downgrade. This, in conjunction with the introduction of the national minimum wage, will undoubtedly significantly influence the labour and employment sphere.

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Appendix 1

ABOUT THE AUTHORS

STUART HARRISON

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Stuart Harrison is a director at ENSafrica in the employment law department. He specialises in all aspects of employment law, including executive appointments and dismissals, disciplining employees involved in procurement irregularities and who contravene the Public Finance Management Act, as well as restraint of trade matters.

He has acted and appeared for clients in various litigious matters in the labour courts, the High Court and the Commission for Conciliation, Mediation and Arbitration and he has conducted extensive eviction litigation in the Land Claims Court.

Stuart's experience includes drafting split employment contracts for employees rendering services in multiple jurisdictions, litigation against former executives for the recovery of unauthorised expenditure incurred in breach of fiduciary duties, test case litigation on second generation outsourcing, drafting agreements for clients with labour brokers and preparing and revising constitutions for employers' organisations and bargaining councils. He also has experience in drafting bargaining council main agreements, dealing with the eviction of dismissed employees and other occupiers under the onerous security of tenure legislation and litigating on discrimination law. He has also worked extensively on issues around restructuring in the public sector and the employment law consequences relating to mergers and acquisitions. He has extensive advisory experience, having assisted in dealing with disciplinary, poor performance, absenteeism and other forms of incapacity matters and rooting out theft rings operating within workforces, as well as successfully running large-scale retrenchment exercises for employers. He also has experience in employee benefits and pension law.

He is the author of the chapter on pension law in Juta's annual labour law publication. He is the co-author of chapters on South African labour law for a number of international comparative employment law publications, such as the *Littler Mendelson Guide to International Employment and Labour Law*, Law Business Research's *Employment Law Review* and the Centre for International Legal Studies' *International Employment Law* publication. He has also contributed to *Labour Law for Managers: A Practical Handbook*. He has served as an independent trustee for commercial umbrella funds as well as pension, provident, preservation and retirement annuity funds. Stuart regularly presents at client seminars, training courses, workshops, and has been a speaker at various public seminars and conferences on numerous issues, including labour brokers, second generation outsourcing, white-collar crime, pension law and ensuring legal and tax compliance in employment contracts and policies.

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Stuart is recognised as a leading/recommended lawyer by: *Chambers and Partners Global Guide to the World's Leading Lawyers* 2017, 2016, 2015, 2014 – employment (South Africa); *The Legal 500 EMEA* 2017, 2016, 2015 – labour and employment (South Africa); *Best Lawyers* 2018, 2017, 2016 – labour and employment (South Africa); and *Who's Who Legal: Labour and Employment* 2016 (South Africa).

BRIAN PATTERSON

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Brian Patterson is the head of ENSafrica's employment department. He specialises in integrated employment solutions, international split employment contracts, global mobility, executive terminations, restructuring and retrenchments, transfers of business, employment equity and unfair discrimination, collective bargaining, employment-related pension law matters, and drafting and enforcement of restraint of trade agreements, as well as the law relating to confidentiality and privacy.

Brian has done extensive African employment law work and significant international employment law work in the United States and the United Kingdom, and for many overseas law firms. He is qualified in South Africa and the United Kingdom.

Brian has acted for numerous African and international clients and has provided advice to corporate clients in most sectors, including the financial services, retail, hospitality/gaming, pharmaceutical, mining, metal engineering, ITC and chemical industries. He has also dealt with the South African aspects of restructuring/mergers of multinationals in respect of a number of jurisdictions.

In addition, Brian's experience includes giving tactical and strategic individual and collective employment law advice, and he has extensive litigious and corporate employment law experience. He also engages in alternative dispute resolution mechanisms when necessary.

Brian has been involved with some of the leading employment law cases reported in southern Africa since the inception of employment law, and he has personally argued many matters in the Labour Court and the Labour Appeal Court. Brian has also acted as a judge of the Labour Court and was an assessor of the Labour Appeal Court.

Brian is co-author of the South African chapter of the *International Labour and Employment Compliance Handbook* and *The Employment Law Review* and has contributed articles in many local and international publications. He is a regular speaker on employment and labour law issues and has appeared on many television programmes over the years.

Brian is recognised as a leading/recommended lawyer by: *Chambers and Partners Global Guide to the World's Leading Lawyers* 2017, 2016, 2015, 2014 – employment (South Africa); *The Legal 500 Guide to Outstanding Lawyers* 2016, 2015, 2014 – labour and employment (South Africa); *Who's Who Legal: Labour and Employment* 2016, 2014 (South Africa); and *Best Lawyers* 2017, 2016 – labour and employment (South Africa).

ZAHIDA EBRAHIM

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Zahida Ebrahim is a director in ENSafrica's dispute resolution department, and heads up the firm's immigration unit.

She offers an extensive range of immigration and civic services to individuals and multinational companies, including large corporates and top-tier South African and international companies, as well as to various business chambers and professional bodies.

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Zahida's specialist immigration knowledge and experience enable her to offer an all-encompassing range of immigration and civic services, including relating to temporary and permanent residence applications; applications for waiver of regulatory requirements; applications to the South African Department of Trade and Industry and the Department of Labour for immigration-related certifications; applications to the South African Qualifications Authority for evaluation of foreign tertiary qualifications; citizenship-related matters, including applications for naturalisation, determination of citizenship status and resumption of citizenship; liaison with the Department of Home Affairs and foreign missions; as well as compliance audits and due diligence investigations.

Zahida actively lobbies for immigration reform by preparing representations to the South African Department of Home Affairs on new and proposed legislative changes, including the amendments to South African immigration legislation in May 2014, where she advised various business chambers and professional bodies on their submissions to government. She previously served on a panel of specialist advisers to the Minister of Home Affairs.

In recognition of Zahida's expertise, she has been invited to speak at various immigration law seminars. This includes the American Immigration Lawyers Association conference (Las Vegas, 2016 and Maryland, 2015) and the International Bar Association's Nationality and Immigration Conference (London, 2015 and 2013).

Zahida has also contributed to a number of texts and publications, including a chapter on immigration issues for: *Labour Law for Managers: A Practical Handbook*; the South African chapter in *The Employment Law Review* and *Getting the Deal Through: Labour and Employment*; *Global Mobility Handbook*; and Oxford University Press's *Corporate Immigration Guide*.

From a dispute resolution perspective, her experience includes advising on policy wording reviews, compliance with South African insurance legislation, insurance due diligence assessments, as well as high court litigation relating to commercial and insurance disputes.

Zahida is recognised as a leading/recommended lawyer by: Business Women's Association's Regional Business Achiever Award 2016 – Professional category; and *Who's Who Legal: Corporate Immigration* 2014 (South Africa).

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