

CASES / VONNISSE

DISMISSAL ARISING FROM FLOUTING COVID-19 HEALTH AND SAFETY PROTOCOLS

Eskort Limited v Stuurman Mogotsi
[2021] ZALCJHB 53

1 Introduction

The Labour Court judgment handed down by Tlhotlhemaje J in *Eskort Limited v Stuurman Mogotsi* (JR1644/20) (2021) ZALCJHB 53 (*Eskort Limited*) on 28 March 2021 raised the topical issue of fairness regarding the dismissal of an employee for gross misconduct and negligence related to his failure to follow and/or observe COVID-19-related health and safety protocols put in place at the workplace (*Eskort Limited supra* par 1).

In light of the above, the objectives of this case note are twofold. First, it examines the parameters under which the employer can discipline an employee for flouting the COVID-19 safety protocols and regulations. Secondly, it also considers the extent to which the employer can take appropriate action against an employee who wilfully refuses to obey the lawful and reasonable instructions of the employer during COVID-19 times.

2 Overview of the factual matrix

The employee (Mr Mogotsi) was employed as Assistant Butchery Manager by Eskort Limited (employer). Subsequently, the employee was charged with the following offences (*Eskort Limited supra* par 4): first, gross misconduct related to his alleged failure to disclose to the employer that he had taken a COVID-19 test on 5 August 2020 and was awaiting his results; secondly, gross negligence, in that after receiving his COVID-19 test results (which were positive), he had failed to self-isolate, had continued working on 7, 9 and 10 August 2020, and had consequently placed the lives of his colleagues at risk. It was further alleged that in the period during which he had reported for duty, he failed to follow the health and safety protocols at the workplace, including adherence to social distancing (*Eskort Limited supra* par 4).

Subsequent to his dismissal, the employee referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). At the arbitration hearing, the employer led the evidence of two witnesses to prove that the employee (Mr Mogotsi) was guilty of the allegations that had precipitated his dismissal. Similarly, the employee also

led evidence in his case (*Eskort Limited supra* par 6). The employer's first witness testified that it was common practice for the employee (Mr Mogotsi) to travel to and from work with a colleague, Mr Mchunu, in a private vehicle. On 1 July 2020, Mr Mchunu did not feel well and consulted with a medical practitioner, who booked him off sick from 1 to 3 July 2020 and extended his sick leave on 4 July 2020. Mr Mchunu was subsequently admitted to a hospital on 6 July 2020 and was informed on 20 July 2020 that he had tested positive for COVID-19 (*Eskort Limited supra* par 6.1). The witness further testified that at about the time that Mr Mchunu initially fell ill, his colleague Mr Mogotsi also started experiencing chest pains, headaches and coughs. According to the witness, the employee then consulted a traditional healer, who booked him off on 6 and 7 July 2020 and from 9 to 10 July 2020 (*Eskort Limited supra* par 6.2).

Upon being booked off by the traditional healer, the employee (Mr Mogotsi) was informed by management to stay at home. He nonetheless reported for duty after 10 July 2020. This was even after he became aware of Mr Mchunu's positive results (*Eskort Limited supra* par 6.3). The employee took a COVID-19 test on 5 August 2020 and was informed on 9 August 2020 via "SMS" that he had tested positive. The employer was unimpressed with the employee's conduct and raised a concern that despite having taken a COVID-19 test on 5 August 2020 and being informed of his positive results on 9 August 2020, he had reported for duty on 7, 9, and 10 August 2020, and came to the premises to hand in a copy of his results (*Eskort Limited supra* par 6.4).

In addition to the above, the second witness of the employer placed on record certain fundamental issues. First, the employer had COVID-19 policies, procedures, rules and protocols in place, and all employees had been constantly reminded of these through memoranda and various other means of communication posted at points of entry and also through emails (*Eskort Limited supra* par 6.5). Secondly, the employee was a member of the in-house "Coronavirus Site Committee", and was responsible, *inter alia*, for informing all employees [about their duties] if they suspected that they might have been exposed to COVID-19 (*Eskort Limited supra* par 6.6).

Furthermore, when the employer conducted its own investigations after the employee's test results were made known, it was discovered that on 10 August 2020, a day after he had received his results, he was observed in video footage at the workplace walking in the workshop without a mask, and hugging a fellow employee (Ms Milly Kwaieng) (*Eskort Limited supra* par 6.7). Upon his test results being known, and after further investigations and contact tracing, a number of employees who had contact with him had to be sent home to self-isolate, including Kwaieng and others who had other comorbidities (*Eskort Limited supra* par 6.8).

Under cross-examination, the employee testified that he received the test results on 9 August 2020 but alleged that he did not know he needed to self-isolate. He conceded having hugged Kwaieng on 10 August 2020, and having walked on the shop floor without a mask. His excuse was that he was on a phone call at the time and that he needed to remove his mask to have a clearer conversation with his caller. His main contention was that, despite asking for direction after he had reported ill and informing management that

he had been in contact with Mr Mchunu, nothing was done, as business had continued as usual when he reported for duty (*Eskort Limited supra* par 6.11).

3 The decision of the CCMA and the Labour Court

Given the above evidence and having regard to relevant provisions of the Labour Relations Act (66 of 1995), the CCMA Guidelines, the Code of Good Practice: Dismissal, and relevant cases, the CCMA commissioner held that the employer had failed to justify the sanction of dismissal in light of its own disciplinary code and procedure, which called for a final written warning in such cases; it had thus deviated from its own disciplinary code and procedure (*Eskort Limited supra* par 7.4). Consequently, this made the dismissal of the employee unfair.

Aggrieved by the decision of the CCMA commissioner, the employer lodged an application to review the commissioner's award on various grounds, including that he had failed properly to apply his mind to the evidence placed before him, and had made findings that were not those of a reasonable decision maker (*Eskort Limited supra* par 8). The Labour Court, per Tlhotlhemaje J, held that the findings of the commissioner on the issue of the appropriateness of the sanction and the relief granted were entirely disconnected from the evidence placed before him, and consequently this made his award reviewable (*Eskort Limited supra* par 9).

Tlhotlhemaje J also cautioned that the CCMA commissioner/s ought to be wary of refusing

“to determine disputes involving dismissals for ordinary misconduct, simply because the employee (in most times unrepresented and throwing everything in the mix), happened to have alleged that he/she was victimised, harassed, discriminated against, or any other allegation that would divest the CCMA of jurisdiction.” (*Eskort Limited supra* 7 par 11)

In the Labour Court's view, where such allegations are made, a commissioner is duty bound to look at the real nature of the dispute, irrespective of how the parties label the cause of a dismissal, before deciding whether the CCMA has jurisdiction to determine the dispute. The Labour Court held further that the mere mention of “victimisation” or “discrimination” by an employee at arbitration proceedings is not a gateway to the Labour Court (*Eskort Limited supra* par 11).

The Labour Court held that an important consideration in this case is that the commissioner had decisively concluded that the employee's conduct was “extremely irresponsible” in the context of the pandemic, and that he was therefore “grossly negligent”. According to the court, that conclusion on its own, given the facts of this case, ought to have been the end of the matter, and the dismissal ought to have been confirmed (*Eskort Limited supra* par 12).

In its conclusion, the Labour Court held that the CCMA commissioner had failed to take into account the totality of circumstances as stated in *Sidumo v Rustenburg Platinum Mines Ltd* (2008 (2) SA 24 (CC)) (*Sidumo* case). The *Sidumo* case reads, in the relevant part:

“In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal. ... [O]ther factors will require consideration. For example, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his/her long-service record. This is not an exhaustive list.” (*Sidumo* case par 78)

To this end, the Labour Court held that the sanction of dismissal was appropriate. In the first place, the employee was aware that he had been in contact with Mr Mchunu, who had tested positive for COVID-19. On his own version, he had experienced known symptoms associated with COVID-19 as early as 6 July 2020. Be that as it may, the employee had recklessly endangered not only the lives of his colleagues and customers at the workplace, but also those of his close family members and other people he may have been in contact with (*Eskort Limited supra* par 17.1). Secondly, the employee’s conduct came about in circumstances where, on the objective facts, and by virtue of being a member of the “Coronavirus Site Committee”, he knew what he ought to do in an instance where he had been in contact with Mr Mchunu and where on his own version, he had experienced symptoms he ought to have recognised. He nonetheless continued to report for duty as if everything was normal, despite being told on no less than two occasions to stay at home during July 2020 (*Eskort Limited supra* par 17.2). Thirdly, the Labour Court held that the employee’s conduct was not only irresponsible and reckless but was also inconsiderate and nonchalant in the extreme (*Eskort Limited supra* par 17.3). He had ignored all health and safety warnings, advice, protocols, policies and procedures put in place at the workplace related to COVID-19, of which he was aware of given his status not only as a manager but also part of the “Coronavirus Site Committee”.

According to the Labour Court, the evidence presented before the CCMA commissioner showed that the employee was not only grossly negligent and reckless, but also dishonest. He had failed to disclose his health condition over a period of time, sought to conceal the date upon which he had received his COVID-19 test results, and completely disregarded all existing health and safety protocols put in place not only for his own safety but also for the safety of his co-employees and the applicant’s customers (*Eskort Limited* 10 par 17.6).

Lastly, the Labour Court held that the egregious nature of the employee’s conduct was such that “a trust and working relationship between him, the applicant, and his fellow employees, cannot by all accounts be sustainable” (*Eskort Limited supra* par 17.7). The Labour Court declared that the dismissal of the employee was procedurally and substantively fair. The court made an order setting aside the award of the CCMA commissioner, and substituting it with an order that the dismissal of the employee was substantively fair (*Eskort Limited supra* par 21).

4 Analysis of *Eskort Limited v Stuurman Mogotsi*

4.1 *The employer's duty to ensure a safe working environment*

The Labour Court judgment is welcomed as it compels employers to take the existing COVID-19 health and safety measures and protocols seriously. COVID-19 has taken dreadful control of the world and is described as an invisible enemy. It is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The disease was first identified in 2019 in Wuhan, the capital of Hubei, China, and has since spread globally, resulting in the 2019–2020 coronavirus pandemic (Musa, Sivaramakrishnan, Paget, and El-Mugamar “COVID-19: Defining an Invisible Enemy Within Healthcare and the Community” 2021 42(4) *Infection Control & Hospital Epidemiology* 495–497; Chauhan, Jaggi, Chauhan and Yallapu “COVID-19: Fighting the Invisible Enemy with MicroRNAs” 2021 19(2) *Expert Rev Anti Infect Ther.*137–145).

COVID-19 typically spreads during close contact and via respiratory droplets produced when people cough or sneeze. The WHO keeps a live count of the numbers of those who have perished. As of 6 May 2021, there had been 154 815 600 confirmed cases of COVID-19, including 3 236 104 deaths as reported to the WHO (WHO “WHO Coronavirus (COVID-19) Dashboard” <https://covid19.who.int> (accessed 2021-04-07)).

The drive to curb the COVID-19 pandemic, and its global health and economic effects, is unprecedented (WHO “Impact of COVID-19 on People’s Livelihoods, their Health and our Food Systems” (13 October 2020) <https://www.who.int/news> (accessed 2021-04-07)). South Africa has not been spared. As of 6 May 2021, South Africa’s confirmed mortality cases owing to COVID-19 stood at 54 620 deaths (National Institute for Communicable Diseases (6 May 2021) <https://www.nicd.ac.za> (accessed 2021-05-07)). With the third/fourth wave approaching, the death toll was expected to rise dramatically as elsewhere in the world (Buthelezi “A Third of SA’s Covid-19 Survivors May Be at Risk of Reinfection, Warns Discovery” (6 May 2021) <https://www.news24.com/fin24/companies/health/a-third-of-sas-covid-survivors-may-be-at-risk-of-reinfection-warns-discovery-2021050>; *BusinessTech* “South Africa’s Third Covid-19 Wave Could Hit Earlier Than Expected: Expert” (18 April 2021) <https://businesstech.co.za/news> (accessed 2021-05-07)).

Henceforth, employers have a duty to take reasonable care for the safety of their employees in all conditions of employment (*Joubert v Buscor Proprietary Limited* 2013/13116 (2016) ZAGPPHC 1024 (9 December 2016) par 16 and 26; see also Lewis and Sargeant *Essentials of Employment Law* 8ed (2004) 23; Denyer *Employer’s Common Law Duty to Take Reasonable Care for the Safety of His Worker’s Industrial Law and its Application in the Factory* (1973) 47-48). The duty to provide a safe workplace relates to the employer’s responsibilities imposed by the common law to ensure that the workplace is reasonably safe. In contrast, the employer’s duty to provide a safe work system relates to ensuring that the actual mode of conducting work is safe (*SAR & H v Cruywagen* 1938 CPD 219 229; Tshoose

“Employer’s Duty to Provide a Safe Working Environment: A South African Perspective” 2011 6(3) *Journal of International Commercial Law and Technology* 165; Tshoose “Placing the Right to Occupational Health and Safety Within a Human Rights Framework: Trends and Challenges for South Africa” 2014 47(2) *Comparative and International Law Journal of Southern Africa* 276–296). There is no specific legislation dealing with COVID-19; however, the Disaster Management Act 57 of 2002 (as amended) is the overarching legislation regulating and dealing with issues arising from COVID-19 (Tshoose and Ndlovu “COVID-19 and Employment Law in South Africa: Comparative Perspectives on Selected Themes” 2021 33(1) *SA Mercantile Law Journal* 25-56).

Section 24(a) of the Constitution of the Republic of South Africa, 1996 guarantees the right of everyone to an environment that is not harmful to their health or well-being. To give effect to the constitutional provision above, various overarching pieces of legislation were passed in South Africa to regulate employees’ safety and compensation in the workplace. These are the Occupational Health and Safety Act (85 of 1993) (OHSA), Compensation for Occupational Injuries and Diseases Act (130 of 1993) (COIDA), Mines Health and Safety Act (29 of 1996) (MHSA), and the Occupational Diseases in Mines and Works Act (78 of 1973) (ODIMWA).

The overall objective of these pieces of legislation is to protect employees with regard to their safety in the workplace. However, viewed individually, they serve different purposes. OHSA and the MHSA deal with the health and safety of employees in the workplace. In contrast, COIDA and ODIMWA deal with the aftermath of injury or disease – for example, payment of compensation to injured employee/s. This approach is informed by the ILO conventions regarding employment injuries. They include the ILO’s Minimum Standards Convention 102 of 1952 and its Employment Injury Benefits Recommendation 121 of 1964. The above pieces of legislation guarantee the right of everyone to a safe environment.

The Disaster Management Act Regulations set out other specific measures to be taken by employers – for example, social distancing, screening of employees, sanitising and disinfecting the workplace, monitoring and ensuring that employees wear their cloth masks. Similarly, employees are obliged to comply with measures introduced by their employer as required by the Regulations (Directive by the Minister of Employment and Labour in terms of Regulation 10(8) of the regulations issued by the Minister of Cooperative Governance and Traditional Affairs in terms of s 27(2) of the Disaster Management Act 57 of 2002).

Section 8(1) of OHSA places an express obligation on the employer to maintain a working environment that is safe and healthy. On the issue of a healthy working environment, the employer must ensure that the workplace is free from any risk to the health of its employees as far as is reasonably practicable. There is a clear obligation on the employer to manage the risk of contamination in the workplace, specifically considering COVID-19 (Olivier “The Coronavirus: Implications for Employers in South Africa” (6 March 2020) <https://www.webberwentzel.com/News/Pages/the-coronavirus-implications-for-employers-in-south-africa.aspx> (accessed 2020-04-14)). Practically, the employer can ensure a healthy working environment by

keeping the workplace clean and hygienic, promoting regular hand-washing, promoting vaccination of employees, proper ventilation, and keeping employees informed on developments related to COVID-19 (WHO “WHO Healthy Workplace Framework and Model: Background and Supporting Literature and Practices” (2010) https://www.who.int/occupational_health/healthy_workplace_framework.pdf (accessed 2020-04-14) 15–16).

4.2 *The employee’s duty to disclose his/her COVID-19 status under POPI Act and other relevant laws*

Since the advent of the COVID-19 pandemic, information relating to infected employees has become a vital resource in managing the spread of the disease, and in protecting other employees and members of the community. Consequently, it is important also to unpack briefly how this confidential personal information is handled and disclosed in terms of the Protection of Personal Information Act, and its Regulations (Protection of Personal Information Act 4 of 2013 (POPI Act)).

The purpose of the POPI Act is to regulate the processing (including collection, use, transfer, matching and storage) of personal information by public and private bodies. The POPI Act gives effect to the constitutional right to privacy. In so doing, it balances the right to privacy with other rights and interests, including the free flow of information within South Africa and across its borders. The POPI Act adopts a principle-based approach to the processing of personal information. It sets out eight conditions for the lawful processing of personal information: accountability, processing limitation, purpose specification, further processing limitation, information quality, openness, security safeguards, and data subject participation. These principles apply equally to all sectors that process personal information. The Act prescribes certain conditions for the lawful processing of personal information. Personal information relating to a person’s health is considered to be special personal information, owing to its sensitive nature, and a higher degree of protection is afforded to such information (De Bruyn “The POPI Act: Impact on South Africa” 2014 13(6) *International Business & Economics Research Journal* 1315–1334; for further reading on the POPI Act, see Burns and Burger-Smidt *A Commentary on the Protection of Personal Information Act* (2018) ch1–18).

Similarly, section 14(1) of the National Health Act provides that all patients have a right to confidentiality (National Health Act 63 of 2001 (NHA)). This is consistent with the right to privacy provided for in section 9 of the Constitution. Notwithstanding the above, section 14(2)(a)–(c) of the NHA makes an important exception to the general rules of absolute confidentiality set out in the POPI Act and the Health Professions Council of South Africa Guidelines (Health Professions Council of South Africa “Guidelines for Good Practice in the Health Care Professions” (2016) (HPCSA Guidelines) <https://www.hpcsa.co.za/pdf> (accessed 2021-05-06)).

Specifically, if the non-disclosure of a patient’s medical information would pose a serious threat to public health, then the medical information must be disclosed. For the disclosure to be justified, the risk of harm to others must

be serious enough to outweigh the patient's right to confidentiality and privacy (s 14(2)(a)–(c) of the NHA). Collecting important information about the spread of COVID-19, while also protecting the patient's identity, is in line with both the POPI Act, and the Constitution. In terms of the POPI Act, information must be de-identified as soon as it has been used for the purpose it was collected. The de-identified data can then be disclosed to the public to keep it informed of the spread of the disease (Schindlers Attorneys "Testing Positive for Covid-19: Public Health vs Privacy" (2020) <https://www.schindlers.co.za/2020/testing-positive-for-covid...11257> (accessed 2021-05-06)).

The gist of the matter is that a patient's right to privacy and confidentiality is a priority. However, since the COVID-19 pandemic has been declared a national state of disaster under section 27(1)–(3) of the Disaster Management Act (57 of 2002), the right to privacy must be weighed against the risk of harm to the public health. The POPI Act, HPCSA Guidelines, the NHA, and the Constitution are amenable to the conclusion that public health outweighs the protection of personal information and the right to confidentiality and privacy (Donaldson and Lohr *Health Data in the Information Age: Use, Disclosure, and Privacy* (1994) 136–179).

In summary, it is clear that an employee has a duty to disclose his/her COVID-19 status in the following cases: first, where the risk of harm to others outweighs the patient's right to confidentiality and privacy; and secondly, where such a disclosure will play a role in assisting the government to find effective solutions to deal with the health, economic, and social impacts of COVID-19.

The first and second points (raised above) affect the duty of the employee to disclose his/her COVID-19 status. Section 36 of the Constitution provides that there is no absolute standard that can be laid down for determining the reasonableness and necessity of infringing fundamental rights in a democratic society; these circumstances have to be balanced on a case-by-case basis (*S v Makwanyane* 1995 (3) SA 391 par 104). In this balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; and the extent of the limitation, its efficacy, and (particularly where the limitation has to be necessary) whether the desired ends could reasonably be achieved through other means less damaging to the right in question (*S v Makwanyane supra* par 104).

4.3 *Dismissal arising from flouting COVID-19 regulations*

Generally, an employer cannot discipline an employee for what is done in the employee's private space and spare time (Van Niekerk, Christianson, McGregor, and Van Eck *Law@Work* 4ed (2017) 301) unless it can be shown that the conduct of the employee amounts to criminal misconduct that in some or other respect affects the business of the employer, or could be likely to affect other employees' rights to a safe working environment (*Edcon Limited v Cantamesa* (2020) 41 ILJ 195 (LC); *Moloto and Gazelle Plastics*

Management (2013) 34 ILJ 2999 (BCA); *Khutshwa v SSAB Hardox* (2006) 27 ILJ 1067; *Ibbett & Britten (SA) (Pty) Ltd v Marks* (2005) 26 ILJ 940 (LC); see also Van Niekerk *et al* *Law@Work* 302).

That said, there are circumstances in which an employer can dismiss an employee for acts of misconduct committed outside the scope of his/her employment – for example, for flouting the COVID-19 rules and regulations. The case in point involves cases where the employee commits misconduct. Generally, misconduct is the most common ground upon which employers seek to justify dismissal of an employee. In these instances, the employee is disciplined for conduct that contravenes a disciplinary rule of the employer (Collier, Fergus, Cohen, Du Plessis, Godfrey, Le Roux and Singlee *Labour Law in South Africa: Context and Principles* (2018) 207–209). In order to show that the employee has been fairly dismissed, the employer must show that it has acted both substantively and procedurally fairly (on the procedural fairness requirement, see *Schwartz v Sasol Polymers* (2017) 38 ILJ 915 (LAC) par 16; *Opperman v Commission for Conciliation, Mediation and Arbitration* (2017) 38 ILJ 242 (LC) par 18; *Hillside Aluminium (Pty) Ltd v Mathuse* (2016) 37 ILJ 2082 (LC) par 71–72; *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration* (2014) 35 ILJ 656 (LAC) 34; *Rennies Distribution Services (Pty) Ltd v Bierman NO* (2008) 29 ILJ 3021 (LC) par 24; on substantive fairness, see *Mathabathe v Nelson Mandela Bay Metropolitan Municipality* (2017) 38 ILJ 391 (LC) par 22; *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration* (2006) 27 ILJ 1644 (LC) 1654).

In respect of substantive fairness, the employer ought to have a good reason for the dismissal, while on the procedural fairness front, the employer ought to follow the proper procedure before an employee can be dismissed or disciplined (McGregor, Dekker, Budeli-Nemakonde, Germishuys, Manamela and Tshoose *Labour Law Rules* (2021) 125–129). If the employer is unable to prove the misconduct on a balance of probabilities, then the employer may not dismiss the employee.

Furthermore, it should always be borne in mind that an employee should only be dismissed for gross or repeated serious misconduct. Likewise, the merits of a Policy of Progressive Discipline and the Code of Good Practice, which appears in Schedule 8 of the Labour Relations Act (66 of 1995), ought to be considered. Thus, the gravity of the offence concerned and its impact on the employment relationship needs to be assessed in light of the circumstances of each case (Tshoose and Letseku “The Breakdown of the Trust Relationship Between Employer and Employee as a Ground of Dismissal: Interpreting LAC Decision in *Autozone*” 2020 1 *SA Mercantile Law Journal* 156–174). The seriousness of the misconduct will determine whether or not dismissal is warranted (Tshoose and Letseku 2020 *SA Mercantile Law Journal* 156-174).

In a case where the employee has flouted COVID-19 regulations – for example, where an employee openly attends mass/social gatherings and posts about it (e.g., posting the name of his/her employer) on their social media, and continues to attend the office as normal. This has the potential not only to endanger the health and safety of employees who share a workspace, but also to damage the employer’s reputation. The employer

would be justified in taking disciplinary action against such employee/s in this situation. In fact, the Labour Court judgment in *Eskort Limited* has shown that in such circumstances the dismissal of an employee is warranted.

Manamela asserts that an employer may dismiss an employee who fails to comply and obey lawful and reasonable instructions in the form of an operational requirement dismissal (Manamela “Failure to Obey Employer’s Lawful and Reasonable Instruction: Operational Perspective in the Case of a Dismissal: *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd*” 2013 25(3) *SA Mercantile Law Journal* 418–435). Proving an employee has not complied with the COVID-19 regulations in these kinds of situations is not always easy but, where there are suspicions and concrete evidence, formal disciplinary sanctions could be applied where an employer, following fair investigation, has a reasonable belief that misconduct warranting action has been committed.

With regard to the issue of misconduct committed outside working hours, the jurisprudence of the South African courts and academic discourse has shown that a link between an employee’s off-duty misconduct and the employer’s business can exist (*Edcon Limited v Cantamesa* 2020 41 *ILJ* 195 (LC); *Moloto and Gazelle Plastics Management* (2013) 34 *ILJ* 2999 (BCA); *NEHAWU obo Barness v Department of Foreign Affairs* (2001) 6 *BALR* 539 (P); *Khutshwa v SSAB Hardox* 2006 27 *ILJ* 1067; cf Tshoose “The Employers’ Vicarious Liability in Deviation Cases: Some Thoughts From the judgment of *Stallion Security v Van Staden* 2019 40 *ILJ* 2695 (SCA)” 2020 34(1) *Speculum Juris Journal* 42–50). Courts have found that such a link exists where the employee’s conduct had a detrimental or intolerable effect on the efficiency, profitability, or continuity of the business of the employer (*NEHAWU obo Barness v Department of Foreign Affairs supra*). In the absence of the aforementioned link, the employer cannot discipline the employee as it is then regarded as non-work-related conduct. As discussed above, the employer will have to prove that the misconduct affected the business negatively, or that the business lost or could lose clients or even that it could bring the company name into disrepute. In short, the employer will have to prove it has a legitimate interest in the matter (Le Roux “Off Duty Misconduct: When Can It Give Rise to Disciplinary Action?” 2011 20(10) *Contemporary Labour Law* 91–97).

In light of the above discussion, it becomes clear that an employer can discipline an employee for flouting the COVID-19 regulations. In fact, the Labour Court in *Eskort Limited v Stuurman Mogotsi (supra)* has conspicuously outlined the circumstances under which the employer can take appropriate action against an employee who wilfully refuses to obey the lawful and reasonable instructions of the employer in the time of COVID-19.

5 Concluding remarks

COVID-19 is a terrifying pandemic that may endanger humanity if it spreads and cannot be controlled. Following the Labour Court judgment in *Eskort Limited*, it is now clear that should an employer issue a lawful and reasonable instruction to its employees, even in the midst of a pandemic, the

employee is obliged to adhere to it and could face dismissal for failure to comply (*Botha v TVR Distribution* (2020) 12 BALR 1282 (CCMA)). The Labour Court judgment advances the need for more to be done at both the workplace and in our communities in ensuring that employers, employees, and communities be sensitised to the realities of COVID-19, and to further reinforce the obligations of employers and employees in the face of, or in the event of exposure to, this pandemic (*Eskort Limited supra* par 2). To conclude, employers are encouraged to update their policies to include specific guidelines on the conduct of employees during COVID-19 and to make it clear to employees that what they do during these times of the pandemic could “cost them their job”.

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