

# Misconduct vs Incapacity: Mind Over Matter

By **Pierre van der Merwe** (Partner),  
**Thiavna Subroyen-Govender** (Associate)  
and **Christiaan Krog** (Candidate Attorney)

15 April 2026

## INTRODUCTION

In labour law, the classification of a dismissal as either **misconduct** or **incapacity** is pivotal, as it impacts both the required procedure and the substantive fairness of the termination. This distinction rests fundamentally on the presence of **fault** (blameworthiness) versus **ability** (no-fault).

## CORE DISTINCTION

Misconduct assumes that an employee wilfully or negligently breached a workplace rule they could have followed. Conversely, incapacity “has nothing to do with blameworthy conduct but has everything to do with the ability to do the job”<sup>1</sup>. In the matter of *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman*: the test to determine dismissal of an employee is - “Did the employee try but could not?” (Incapacity) versus “Could the employee do it, but did not?” (Misconduct).<sup>2</sup>

## MENTAL ILLNESS: THE “INEXTRICABLY LINKED” TEST

When mental illness manifests as behavioural offenses (e.g., insolvency or absenteeism), the lines blur. The Labour Appeal Court in *Legal Aid South Africa v Jansen* established that if misconduct is “inextricably intertwined” with a mental condition like depression, the employee lacks the volition required for misconduct.<sup>3</sup> In such cases, the dismissal is substantively unfair if treated as disciplinary measure; it must be managed via the non-adversarial, consultative incapacity procedures outlined in Items 10 and 11 of the Code of Good Practice: Dismissal.<sup>4</sup>

## THE ONUS OF PROOF AND “CONATIVE ABILITY”

However, a medical diagnosis is not a free pass. As illustrated in *Pahlanga v Petroleum Oil and Gas Corporation of South Africa*, the onus remains on the employee to prove that their medical condition incapacitated them.<sup>5</sup> If an employee claims illness but cannot prove it affected their **conative ability** (the

willpower to act in accordance with their understanding), the employer may proceed with disciplinary action. Furthermore, as confirmed in *Sanlam Life Insurance Limited v Mogomatsi*, an employer cannot be liable for constructive dismissal or unfair treatment if they were unaware of the employee’s mental condition.<sup>6</sup>

## DISABILITY AND ACCOMMODATION

Employers must also distinguish between **incapacity** and **disability**. As the Labour Court noted in *Standard Bank of SA v CCMA*, dismissing an employee who is incapacitated (unable to work) is fair if accommodation fails, but dismissing an employee who is merely disabled (impairment requiring accommodation) is unfair.<sup>7</sup> The employer is obliged to attempt “reasonable accommodation,” adopting a “pragmatic common-sense approach” to adapt duties or the environment before considering dismissal.

## CONCLUSION

Ultimately, employers must pause disciplinary hearings if there is a credible possibility that the “misconduct” is a symptom of mental illness. They must pivot from an adversarial blame-seeking process to an investigative inquiry into the employee’s medical ability to perform.

*Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated herein.*

<sup>1</sup>Gabers C The New Essential Labour Law Handbook 7th Edition p245.

<sup>2</sup>(2013) 34 ILJ 2347 (LC)

<sup>3</sup>2021 (1) SA 245 (LAC) para 50.

<sup>4</sup>Code of Good Practice on Dismissal (4 September 2025).

<sup>5</sup>(2022) 43 ILJ 212 (LC) para 25.2.

<sup>6</sup>(2023) 44 ILJ 2516 (LAC) para 44.

<sup>7</sup>(2008) 29 ILJ 1239 (LC) para 72.



**Pierre van der Merwe**  
(Partner)



**Thiavna Subroyen-Govender**  
(Associate)



**Christiaan Krog**  
(Candidate Attorney)