

IKHOWUDI YOKUZIPHATHA KUTHINTELO NASEKUPHELI SWENI KOKUXHATSHAZWA EMSEBENZINI

“Kuphelise Ngoku ukuxhatshazwa eMsebenzini!”





IKHOWUDI YOKUZIPHATHA KUTHINTELO NASEK- UPHELISWENI KOKUXHATSHAZWA EMSEBENZINI

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employment & labour

Department:
Employment and Labour
REPUBLIC OF SOUTH AFRICA



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Ngoba kutheni le Khowudi?

Le Khowudi ikhokelwa yiMvumelwano ye-ILO 190 kunye nesiPhakamiso esinxulumene nokupheliswa kobuNdlobongela nokuXhatshazwa kwiHlabathi loMsebenzi, 2019; IMvumelwano (iNgqesho noMsebenzi) yoCalulo 111 ka-1958 (iMvumelwano 111); kunye neMvumelwano ILO 151 enxulumene neMpilo noKhuseleko eMsebenzini.

IKhowudi irhoxisa iKhowudi yokuSebenza kakuHle ekuPhathweni kwamaTyala okuXhaphaza ngezeSondo eMsebenzini kwiGazethi kaRhulumente eyiNombolo 27865 we-4 Agasti 2005.

IiNjongo zeKhowudi

Le Khowudi yokuSebenza ijoliswe ukulungisa uthintelo, ukupheliswa, kunye nolawulo lwazo zonke iintlobo zokuxhaphaza ezikhoyo emsebenzini.

Le Khowudi ibonelela ngezikhokelo –

- kubaqeshi, nabasebenzi kuthintelo kunye nokupheliswa kwazo zonke intlobo zokuxhaphaza, njengohlobo olungafanelekanga localulo, emsebenzini; kunye
- nemigaqonkqubo enxulumene nemicimbi yabasebenzi, iinkqubo kunye nezenzo ezinxulumene nokuxhaphaza kunye neenkqubo ezifanelekileyo zokujongana nokuxhaphaza kunye nokuthintela ukwenzeka kwalo kwakhona.

Ngubani ofakiweyo kwiKhowudi?

Nangona le Khowudi isebenza kwimo engqongileyo yasemsebenzini njengesikhokelo kubaqeshi, abasebenzi kunye nabafaki zicelo zengqesho, abenzi bobubi kunye namaxhoba okuxhaphaza anokuquka, kodwa engamiselwanga mda kwaba:

- | | |
|--|---|
| • kubanini; | • amavolontiye; |
| • abaqeshi; | • iiklayenti nabaxhasi; |
| • abalawuli; | • abaniki sitokhwe; |
| • abaphathi; | • abeekontraki; |
| • abasebenzi; | • abanye abasebenza neshishini; kunye |
| • abo bafuna imisebenzi kunye nabo bafaka izicelo zemisebenzi; | • nabantu abakuqeqesho kuquka abo bafundela umsebenzi besemsebenzini kunye nabantui abafundela umsebenzi. |

Zeziphi iimeko esebenza kuzo iKhowudi?

Ukhuselo lwabasebenzi ekuxhatshazweni kusebenza nakweyiphi na imeko leyo umsebenzi asebenza kuyo, okanye okunxulumene nomsebenzi wabo. Oku kuquka, kodwa kungamiselwanga mda koku:

- indawo yokusebenza equka zozibini izithuba ezikawonkewonke nezabucala ezo abantu benzela kuzo umsebenzi wabo;
- iindawo ezo ahlawulwayo, athatha ikhefu okanye atyayo, okanye asebenzisa ezococeko, ukuhlamba okanye ukutshintsha, ukuncancisa kunye nezibonelelo zonyango;
- iihambo ezinxulumene nomsebenzi, ukuhamba, imisitho, okanye imisebenzi yasekuhlaleni;
- unxibelelwano olunxulumene nomsebenzi, kuquka zenziwe zasebenza lulwazi nobuchwepheshe bonxibelelwano kunye namaqonga asekelwe kwi-intanethi;
- indawo yokuhlala enikwa ngumqeshi, equka izindlu; 1
- xa uhamba ubuya okanye usuka emsebenzini ngesithuthi esinikwe okanye esilawulwa ngumqeshi;
- Kwimeko yabasebenzi basemakhaya kunye nabasebenzi bokhathalelo lwempilo abaqeshwe kwiindawo zokuhlala zabaqeshi babo, okanye kwindawo yokuhlala leyo banika kuyo ukhathalelo, indawo yokuhlala yindawo yomsebenzi; kwaye
- kwimeko yabasebenzi abasebenza ngeintanethi bekumakhaya abo, okanye nakweyiphi indawo ngaphandle kwakumhlaba nezakhiwo zomqeshi, indawo abasebenza kuyo yenza indawo yokusebenza.

¹ *Ku-Biggar v City of Johannesburg* (2011) 32 ILJ 1665 (LC).

Yintoni ukuXhaphaza?

Ukuxhaphaza jikelele kuqondwa ukuba:

- kukuziphatha okungafunwayo, okonakalisa isidima;
- okudala imo engqongileyo yasemsebenzini embi okanye eyoyikisayo kumsebenzi omnye okanye ngaphezulu okanye ekubalelwa ukuba, okanye okunesiphumo, esenza ukuthobela ngeziphumo ezingalunganga ngqo okanye ezisongelayo; kwaye
- kunxulumene nomhlaba omnye okanye ngaphezulu ngokunxulumene nalapho luthintelwayo ucalulo ngokwecandelo le-6(1) le-EEA.

Intlobo zokuxhaphaza

Ukuxhaphaza inokuba sisiphumo sokuziphatha okunxulumene nasemzimbeni, ukuthetha, okanye ingqondo.

- Ukuxhaphaza **ngokwasemzimbeni** kuquka ukuhlaselwa emzimbeni, ubundlobongela obulinganiswa okanye obusongelwayo, okanye ukuthetha ngezandla (njengokuphakamisa inqindi ngokungathi uza kumbetha umntu okanye ukuphusela izinto ecaleni komntu).
- Ukugculela **ngokomlomo** kunokuquka iintsongelo, ukuhlazisa, ukuqhula okunobutshaba, ukugweba qho okusoloko kukubi, kunye nesigxeko, okanye ulwimi olucalulayo, oluchasene nesini esithile, okanye oluchasene ne-LGBTQIA+.
- Ukuxhaphaza **ngokwasengqondweni** emsebenzini kunokunxulunyaniswanokuphathwagadalalangokwasemoyeni kwaye kubandakanya ukuziphatha okuneziphumo ezibi ezimandundu engqondweni kum(aba)khalazi ezifana njengoko kuhlala kunjalo kuphatho gadalala ngokuthetha, ukugculela kunye nokuhlanganyelwa.
- **Ukugculela** – apho ukuxhaphaza kubandakanya ukusetyenziswa kakubi kwamandla anyanzelisayo ngumntu okanye liqela labantu emsebenzini. Ukoyikisa – oku kukuziphatha ngenjongo okunokubanga ukuba umntu nje onengqiqo eqhelekileyo oyike umonzakalo okanye ingozi. Ukugculela emsebenzini kunokubandakanya ukuziphatha okuhlaselayo apho umntu abanga ukuba omnye umntu onzakale okanye angakhululeki.
- **Ukuhlanganyela** luhlobo lokuxhatshazwa lweqela labantu okujoloswe kumntu omnye okanye ngaphezulu.
- Ukuxhaphaza **kwi-intanethi** kukuxhaphaza okwenziwa, kuncediswa, okanye kubangwa ngokuyinxenye okanye ngokupheleleyo, kukusetyenziswa kolwazi kunye nobuchwepheshe bonxibelelwano obufana neeselula, ii-smart phones, i-Intanethi, amaqonga onxibelelwano okanye i-imeyile. Ukugculela xa kusenziwa kwi-intanethi kuthiwa kukugculela ngeintanethi.

Imihlaba ethintelweyo

- Ukuxhatshazwa komsebenzi kuthintelwe ngokwecandelo le-6(1) le-EEA, ukuba ukuxhaphaza kunxulumene nomhlaba omnye okanye ngaphezulu, kuquka uhlanga, isini, ubuni, ukukhulelwa, isimo somtshato, uxanduva losapho, imvelaphi yohlanga okanye yentlalo, umbala, indlela okhetha ukuziphilela ngayo ngobuni, ubudala, ukukhubazeka, inkolo, isimo se-HIV, isazela, inkcubeko, uluvo lwezopolitiko, inkcubeko, ulwimi, ukuzalwa okanye nawuphi na omnye umhlaba wongonyamelo.
- Kusenokwenzeka kananjalo kumntu oxhatshaziweyo ukumisela ukuba ukuxhatshazwa ibisisiphumo somhlaba wokungonyamela, njengoko kuxeliwe licandelo le-6(1) le-EEA.

UkuXhatshazwa ngokweSondo

- Ukuxhatshazwa ngokwesondo komsebenzi luhlobo localulo olungafanelekanga kwaye kuthintelwe kwimihlaba yamalungu esini, isini, okanye indlela okhetha ukuziphilela ngayo ngokwesini. Ukuxhatshazwa kwabo banezini ezifanayo kwenza ucalulo ngokusekelwe kumalungu esini, isini, indlela okhetha ukuziphilela ngayo ngokwesinio kunye nokuxhaphaza okusekelwe kwisini.

UkuXhaphaza okuVela kuHlanga, ubuZwe neasekuHlalani

- Ukuxhaphaza ngokohlanga luhlobo lokucalula olungafanelekanga okuthintelwe licandelo le-6(1) le-EEA okunxulumene nobulungu bomntu okanye ubulungu obucingelwanyo beqela elaziwa ngomnye okanye ngaphezulu yemihlaba okanye uphawu oluthintelweyo olunxulunyaniswa neqela elinjalo. Ukuziphatha ngokucalulayo, kuquka ulwimi olwehlisayo, ngokuchaseneyo nemithethosiseko yokuseka yoMgaqo-siseko, ingakumbi iinqobo ezisemgangathweni zokungacaluli, isidima nolingano.
- Ukuxhaphaza ngokohlanga kukuziphatha okungafunekiyo okunokuzingisa okanye isehlo esinye esonzakalisayo, esehlisayo, esihlazisayo okanye esidala imo embi okanye eyoyikisayo. Ukuziphatha okuthathwa ngokuba kwenza ukuba uzehlise ziziphumo ezingalunganga ngqo okanye ezisongelayo kwenza ukuxhaphaza nakuba lo ingengomba uyimfuneko wenkcazo yawo.

Iintlobo zokuxhaphaza ngokohlanga zinokuquka:

- ✓ Ulwimi oluthukayo kunye neziqhulo zobuhlanga, iikhathuni, iimeme, kuquka nonxibelelwano olwenza intetho yenzondo.
- ✓ Imathiriyeli ethukayo kuhlanga ebhaliweyo okanye ebonwayo, kuquka ukuxhatshazwa kwi-intanethi;
- ✓ Ukubiza abantu ngokobuhlanga okanye iingcinga enye engatshintshiyo embi eneempembelelo kwisidima somntu;
- ✓ Ukuziphatha okuthukayo ngokohlobo lobutshaba ebantwini bohlanga okanye ubuzwe obuthile;
- ✓ Ukungaqukwa kancinane okanye ngokucacileyo kwiindibano kunye nemisetyenzana yasemsebenzini kunye nezinye iintlobo zokungasiwa so; kunye
- ✓ Nokuziphatha okusongelayo, okoyikisa umntu okanye okudala imo engqongileyo yasemsebenzini enobutshaba.

ImiThethosiseko eKhokelayo kuThintelo, ukuPheliswa noLawulo lokuXhatshazwa

- **Abaqeshi baphantsi kwesibophelelo ngokweCandelo lama-60 le-EEA ukuba bathatha amanyathelo angaphambili kunye nawokulungisa** ukuthintela zonke iintlobo zokuxhaphaza emsebenzini. La aquka uhlolo lomngcipheko wokuxhaphaza abasesichengeni sawo abasebenzi ngexa besenza imisebenzi yabo ngokufanelekileyo kangangoko kunokwenzeka.
- Abaqeshi kufuneka bangakunyamezeli kwaphela ukuxhatshazwa. Kufuneka badale kwaye bagcine imo engqongileyo yokusebenza leyo sihlonitshwayo kuyo isidima sabasebenzi. Imo emsebenzini kufuneka kananjalo idalwe kwaye igcinwe apho abasebenzi abaphakamisa izikhalazo malunga nokuxhatshazwa bangenakuziva ukuba azihojwa izikhalazo zabo okanye zingento, okanye boyike impindezelo. **Ukuphumeza izikhokelo ezilandelayo kunokunceda ekuphumezeni ezi ziphelo:**
 - ✓ Abaqeshi kunye neemanyano zabasebenzi/abasebenzi banyanzelekile ukuba bazikhwebule ekuxhaphazeni.
 - ✓ Bonke abaqeshi kunye neemanyano zabasebenzi/abasebenzi banendima ekufuneka bayidlale ekufakeni isandla ngokubhekisele ekudaleni nasekugcineni imo engqongileyo yokusebenza leyo ukuxhaphaza kungamkelekanga kuyo. Kufuneka baqinisekise ukuba imigangatho yokuziphatha ayibangi ityala kwaye kufuneka bakutyhafise ukuziphatha okungamkelekanga kwicala labanye.
 - ✓ Abaqeshi kufuneka bazame ukuqinisekisa ukuba abantu abafana nabaxhasi, abaniki sitokhwe, abafaki zicelo zomsebenzi kunye nabanye abasebenza neshishini abaxhatshazwa ngabasebenzi babo okanye nguye nawuphi umntu omele umqeshi.
 - ✓ Abaqeshi kufuneka bazame ukuqinisekisa ukuba abasebenzi abakwingqesho yabo abaxhatshazwa ngamaqela esithathu afana neeklayenti, abaxhasi, abaniki sitokhwe okanye ngabanye abasebenza nomqeshi.
 - ✓ Imigaqonkqubo neenkqubo ezamkelwe ngumqeshi kufuneka zinike ingxelo ecacileyo ngesikhundla somqeshi ngokuphathelene nothintelo, ukupheliswa, kunye nolawulo kweentlobo ezohlukeneyo zokuxhaphaza emsebenzini.

- ✓ Abaqeshi, apho kwenzekayo, ngokuhlangene neemanyano zabasebenzi, kufuneka baphumeze amaphulo oqeqesho okwazisa ukufundisa abasebenzi kuwo onke amanwanaba malunga nokuxhaphaza ukunyanzelisa kunye nokugcina ukuthobela oko kusenziwa ngeenkqubo zokwazisa eziqhubayo.
- ✓ Abaqeshi kufuneka bathathe amanyathelo afanelekileyo ngokungqinelana nale Khowudi apho zenzekayo iimeko zokuxhaphaza kwimo engqongileyo yasemsebenzini.

ImiGaqonkqubo yokuXhaphaza

- Abaqeshi kufuneka, ngokuxhomekeke kuzo naziphi na izivumelwano ezihlanganyelweyo esele zikhona kunye namagatya omthetho asebenzayo ngokunxulumene nokuxhaphaza, bamkele umgaqonkqubo wokuxhaphaza, ekufuneka uthathele ingqalelo kwaye ukhokelwe ngamagatya ale Khowudi.
- Iziqukatho zemigaqonkqubo yokuxhaphaza kufuneka kunxityelelwano ngazo ngempumelelo nabo bonke abasebenzi.
- Ukwamkelwa komgaqonkqubo wokuxhaphaza kunye nokunxibelelana ngeziqukatho zawo nabasebenzi, kufuneka, phakathi kweminye imiba, kuthathelwe ingqalelo ekumiseleni ukuba ingaba umqeshi uzenzile na izibophelelo zakhe ngokungqinelana necandelo elingaphambili lama-60(2) le-EEA.
- Imigaqonkqubo yokuxhaphaza kufuneka ithobele ngamandla amagatya ale Khowudi.
- Iinkqubo ekufuneka zilandelwe ngumfaki sikhhalazo malunga nokuxhatshazwa kunye nangumqeshi xa kusolwa ukuxhaphaza, kufuneka zichazwe kumgaqonkqubo.
- Ukufumaneka kweenkqubo zoluleko ngqondo, unyango, ukhathalelo nenkxaso kubasebenzi kufuneka zichazwe kumgaqonkqubo.

Ukuxela ukuxhatshazwa

- Icandelo lama-60(1) le-EEA libonelela ngokuba nakuphi ukusolwa kokuziphatha ngumsebenzi ekophuleni i-EEA kufuneka kuziswe ngokukhawuleza kwingqalelo yomqeshi.
- INkundla yeziBheno kwezeMisebenzi igcine ukuba igama elithi “ngokukhawuleza” kufuneka litolikwe ngokubhekisele kwinjongo yegatya, ekukuqinisekisa ukuba iimeko zokuxhaphaza ziphandwa ngokwe-EEA, kwaye hayi ngobuchwepheshe. Iintsolo zokuxhaphaza ezenziwe kwixesha elifanelekileyo, kwiimeko, kufuneka ziphandwe kwaye amanyathelo afanelekileyo kufuneka athathwe ukuthintela ukwenzeka kwakhona. Oku kunokuquka indlela yokuthathwa kwamanyathelo ngokubhekisele kubenzi bobubi abasolwayo.²

Ngubani ekufuneka aphuhlise iinkqubo zokujongana nokuxhaphaza?

- Abaqeshi kufuneka baphuhlise iinkqubo ezicacileyo zokujongana nokuxhaphaza ngokwe-EEA. Ezi nkqubo kufuneka zenze kusebenze izigqibo kwiingxaki ngendlela enobuntununtunu kwezesini, enobumfihlo, enempumelelo nesebenzayo. Xa umsebenzi exele isenzo esisolwayo sokuxhaphaza okanye efake isikhhalzo, umqeshi unyanzelekile ukuba aphande ukuxhaphaza okusolwayo okuziswe kwingqalelo yakhe kwaye acebise umfaki sikhhalazo ngeenkqubo ezingekho sikweni kunye nezisesikweni ezifumanekayo ukujongana nokuxhatshazwa.

Ingaba abaqeshi banaso nasiphi na isibophelelo xa iintsolo zokuxhatshazwa ziziswa kwingqalelo yabo?

- Ewe, umqeshi kufuneka:
 - ✓ adibane namaqela abandakanyekayo;
 - ✓ athathe amanyathelo ayimfuneko ukulungisa isikhhalazo ngokungqinelana nale khowudi kunye nomgaqonkqubo womqeshi, apho kwenzekayo, isivumelwano sothethethathethwano esihlanganyelweyo; kwaye
 - ✓ athathe amanyathelo ayimfuneko okuphelisa ukuxhaphaza.

² Kwi-Liberty Group Ltd v M (2017) 38 ILJ 1318 (LAC) kwimihlathi owama48 ukuya kowama-54.

Kwenzeka ntoni ukuba umqeshi uyasilela ukupheliswa ukuxhaphaza?

- Ukusilela ukuthatha amanyathelo awoneleyo ukuphelisa ukuxhaphaza zakube iintsolo zokuxhaphaza zomsebenzi zingeniswe kwixesha elifanelekileyo, kuza kwenza ukuba umqeshi abe noxanduva ngokuziphatha komsebenzi ngokwecandelo lama-60 le-EEA. Le meko injalo nokuba ukuxhaphaza kunesihlo esinye.

Izohlwayo zoluleko

- Umgaqonkqubo wokuxhaphaza womqeshi kufuneka uxele uluhlu lwezohlwayo ezinokuwiswa kumenzi wobubi. Izohlwayo kufuneka zilingane nokuba mandundu kokuxhaphaza okubandakanyekayo, kwaye kufuneka zibonelele ngokuba:
 - ✓ kunokukhutshwa izohlwayo kwiimeko ezingephi zokuxhaphaza. Isilumkiso esikhutshelwe umenzi wobubi kufuneka sichaze ubunjani bokuziphatha okucalulayo;³
 - ✓ kunokulandela ukugxothwa kwiimeko ezingephi eziqhubekayo zokuxhaphaza emva kwezilumkiso, ngokunjalo nokuba mandundu kweemeko zokuxhaphaza;
 - ✓ kwiimeko ezifanelekileyo ekufunyanisweni enetyala lokuxhaphaza, umenzi wobubi unokutshintshwa emsebenzini, okanye atshintshelwe komnye umsebenzi kwinkampani; kwaye
 - ✓ umntu ofake isikhalazo kwinkampani unelungelo lokufaka ityala lolwaphulomthetho okanye amangale ngokubhekisele kumenzi wobubi osolwayo.

Ngubani ekufuneka aqinisekise ubumfihlo?

- Abaqeshi kunye nabasebenzi kufuneka baqinisekise ukuba izikhalazo ezimalunga nokuxhaphaza ziyaphandwa kwaye ziphathwa ngendlela eziqinisekisa ukuba ukwaziwa kwabantu ababandakanyekayo kugcinwa kuyimfihlo ngenjongo yokukhusela ubumfihlo bawo onke amaqela abandakanyekayo.
- Lonke unxibelelwano lwangaphakathi nolwangaphandle olunxulumene nezihlo zokuxhaphaza kufuneka luphathwe ngobumfihlo.
- Ukuthathela ingqalelo ubumfihlo akunqandi ukuba umqeshi athathe amanyathelo afanelekileyo okukhusela ukhuseleko okanye isidima sabasebenzi, mhlawumbi ngenxa yokuqhuba kophando okanye okulandela lona.

Ikhefu lokugula elongezelelweyo

- Xa liphelile ikhefu lokugula anelungelo lalo umsebenzi, umqeshi kufuneka athathe ingqalelo efanelekileyo yokunika ikhefu lokugula elongezelelekileyo elihlawulelwayo kwimeko yokuxhaphaza okumandundu, apho umsebenzi, ngokwecebo lezonyango, afuna ululeko ngqondo lokwenzakala emoyeni.
- Ukuba ukuxhaphaza kukhokelela ekubeni agule umsebenzi ixesha elide kuneveki ezimbini, umsebenzi unokuba nelungelo lokubanga iibhenefithi zesigulo ngokwecandelo lama-20 lomThetho weInshorensi yokungaPhangeli, 2001.
- Kwiimeko ezifanelekileyo, abaqeshi banokukuthathela ingqalelo ukuncedisa ngeendleko zecebo lezonyango kunye noluleko ngqondo nokhathalelo lokwenzakala emoyeni, apho izixa ezinjalo zingahlawulwayo siso nasiphi isiikim soncedo lwezonyango esisebenzayo.

Ngubani ekufuneka anike uLwazi nokuFundisa eMsebenzini?

- Abaqeshi, kwaye apho kwenzekayo imibutho yabaqeshi, kufuneka baquke umba wokuxhatshazwa ngokwesondo kunye nezinye iintlobo zokuxhaphaza kwiinkqubo zabo zoqhelaniso, zokufundisa, nezoqeqesho ngendlela efikelelekayo.
- Iimanyano zabasebenzi, kufuneka ziquke umba wokuxhatshazwa ngokwesondo kunye nezinye iintlobo zokuxhaphaza kwiinkqubo zabo zokufundisa nezoqeqesho kubameli babasebenzi kunye nakubasebenzi ngendlela efikelelekayo.

³ Kwi-Future of SA Workers Union on behalf of AB & others v Fedics (Pty) Ltd & another (2015) 36 ILJ 1078 (LC) kumhlathi we-166.

Ufikelela njani kulwazi olupheleleyo kwiKhowudi?

- Fikelela kulo ngokuya kwiwebhusayithi yeSebe lezeNgqesho neMisebenzi: www.labour.gov.za



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