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EMPLOYMENT MATTERS

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Do not stop at the CCMA, pass and proceed directly to the Labour Court

Ordinarily, employees who wish to challenge their dismissals for misconduct must approach the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation followed by arbitration.

In the recent decision of *Ngutshane v Arivia Kom (Pty) Ltd t/a Arivia Kom & others* the Labour Court (the Court) considered whether it has jurisdiction as a court of first instance to review the decision of a public employer to dismiss the employee.

Ann Ngutshane (the employee) was an employee in the public sector. She was dismissed for allegations of fraud. After her dismissal, the employee sought to review her employer's decision and approached the Court, prior to exhausting the dispute resolution procedures of the CCMA.

The employee relied on section 158 (1) (h) of the Labour Relations Act, 66 of 1995 (the LRA) which provides "*the Labour Court may review any decision or any act performed by the State in its capacity as employer, on such grounds as are permissible by law.*"

The Court found that it had no jurisdiction because the reason for the termination was misconduct. Accordingly, the nature of the dispute was the fairness of the dismissal and as such, the dispute should be conciliated and arbitrated.

Relying on the judgment of *Chirwa v Transnet Ltd & Others*, the Court found that a hierarchy of forums exist in terms of the dispute resolution procedures prescribed by the LRA.

In the instance of dismissal disputes, an employee must first approach the CCMA and only once the dispute resolution procedures are exhausted, may the employee approach the Court. The provisions of section 158(1)(h) of the LRA apply only in circumstances where the LRA offers no other remedy e.g. where employment terminates by operation of law.

The application was launched on an urgent basis. The Court found that "*dismissed employees should also not be allowed to steal an advantage by launching urgent applications to review decisions to dismiss and thereby cut the queue of dismissal cases....*"

The Court further held that it would also be discriminatory to allow public sector employees the option to both review and to conciliate and arbitrate dismissal disputes; whilst private sector employees are without (and perhaps cannot afford) such remedy.

Whilst the case deals with the public sector employee, the principles expounded therein are equally applicable to private sector employees. *Chirwa* confirmed per Ngcobo, J that "*There is no longer a distinction between private and public sector employees under our Constitution.*"

The effective resolution of dismissal disputes for misconduct is through conciliation and mediation under the auspices of the CCMA of Bargaining Council. Employees may not steal an advantage and approach the Court directly, except where there is no other appropriate redress.

Melanie Hart and Neil Comte

Don't give up on the possibility of proceeding in the High Court in labour disputes in the public sector

If anybody thought that the Constitutional Court, in the matter of *Chirwa v Transnet Ltd & Others*, brought a definitive close to the possibility of proceeding in the High Court whenever a dispute arises between an employer and an employee in the public sector, think again.

The question of jurisdiction remains one that should be considered when evaluating where to proceed.

In *Mlokoti v Amathole District Municipality & Another*, an applicant for the position of Municipal Manager successfully approached the High Court for assistance when he was unsuccessful in his application.

Mr. Mlokoti was, by all accounts, the stronger of the two applicants eventually considered for the position. However, a decision was made to appoint the alternative applicant, Mr. Zenzile. This was apparently based on a decision taken by the ANC regional executive committee - outside of the deliberations of the special council meeting of the Amathole District Municipality where the municipal manager was appointed. The decision was then confirmed in a council meeting, without a vote being taken. Moreover, the decision was taken contrary to an adopted policy applicable to the appointment.

Various interesting questions arose from these facts, such as whether the decision to appoint a municipal manager was an administrative act, capable of being reviewed by the High Court, or whether it was a political decision of the Amathole District Municipality, not capable of review. The High Court determined that the decision was an administrative one, capable of review, and in fact reviewed and set aside the decision to appoint Mr. Zenzile, and appointed Mr. Mlokoti in his stead.

From the viewpoint of whether the High Court or the Labour Court should have jurisdiction, the judgment is also of interest. Judge Pickering found that Mr. Mlokoti was an external candidate for employment (he was previously employed by the Amathole District Municipality, but had not been in its employ for a while). As an external employee, he did not have any remedies under the Labour Relations Act. He did not rely on any rights contained in section 23(1) of the Constitution. As such, *Chirwa* was of no application to his case. The High Court could, therefore, hear his application to review the decision of the Amathole District Municipality not to appoint him as its municipal manager. The function of the Municipality when making such appointment was considered and found to have been administrative action.

Judge Pickering went further and evaluated the extent to which the earlier judgement of the Constitutional Court in *Fredericks v MEC for Education and Training*, Eastern Cape survived the decision in *Chirwa*. In *Fredericks* it was held that the Labour Court did not have exclusive jurisdiction in all matters arising from an employment relationship. The learned Judge concluded that *Fredericks* did survive and that an employee can still proceed in the High Court, depending on how she phrased her dispute.

It may, therefore, be possible to avoid *Chirwa's* limitations by formulating a claim carefully to fall outside of the Constitution or the Labour Relations Act. This may be achieved, for instance, if the administrative decision to be attacked was taken contrary to an existing policy, such as was the case in this Mlokoti decision.

Retha Beerman

Two bites of the same apple?

The Employment Equity Act (the EEA) and the Labour Relations Act (the LRA) are both integral to our employment law legislation. The EEA promotes equality in the workplace, whilst the LRA governs workplace relationships. It is, therefore, inevitable that situations may arise where both statutes apply.

In *Ditsamai v Gauteng Shared Services Centre*, the employee referred an unfair dismissal dispute to the CCMA. He was successful and was awarded compensation. Once he was paid, the employee approached the Labour Court (the Court) alleging unfair discrimination in terms of the EEA. This application was based on the same facts and circumstances as that which led to his dismissal. The employer therefore argued that the application was *res judicata* i.e. that the matter was previously resolved.

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The Court confirmed that a matter is *res judicata* where it involves the same subject-matter, is based on the same grounds and involves the same parties.

The Court referred to *Dial Tech CC v Hudson and Another*. Here, an employee, who had successfully obtained compensation for constructive dismissal based on sexual harassment, was later entitled to claim compensation for that harassment.

The Hudson case emphasised that, although the causes of action in each case arose from the same facts and circumstances, their remedies were found in different statutes. The LRA governs constructive dismissal disputes, while the EEA regulates sexual harassment claims. The court also discussed the procedural differences in adjudicating these matters.

The key principle of *Hudson* is that, although the causes of action in both matters arose from the same facts and circumstances, the subject matter of each dispute differed. The constructive dismissal dispute dealt with unfair dismissal, while the EEA claim related to unfair discrimination.

In *Ditsamai*, the employer accepted the differences between unfair dismissal and discrimination, but argued that the *Hudson* approach would result in a duplication of claims. This is exactly what *Chirwa v Transnet Limited* sought to prevent. The employer argued that *Hudson* was incorrectly decided and, in accordance with *Chirwa*, litigants should not be permitted to use different pieces of legislation to forum-shop.

The employer argued that the employee's true cause of action was a dismissal dispute and the remedy available was to challenge his dismissal in either the Labour Court or the CCMA. The employee, therefore, had an election and exhausted his remedies by electing to refer a dispute to the CCMA. He could not thereafter formulate another claim based on the same facts.

The court rejected this argument and upheld the *Hudson* approach. It found that this approach is supported by overseas jurisdictions whose legislative framework and structure are similar to ours. The court cited the judgment of the Australian Court of Appeal in *Pradeep Deva v University of Western Sydney* in this respect.

The court further found that our own authorities support the Hudson approach. Additionally, our courts follow a *Pradeep Deva* approach, by distinguishing between unfair labour practices and unfair discrimination. The court therefore found it clear that there were separate issues - the award granted by the CCMA was governed by the LRA provisions regarding unfair dismissal, while the present application dealt with unfair discrimination under the EEA. Consequently, the complaint lodged under the EEA was not *res judicata*.

This judgment therefore grants employees two claims based on the same facts where unfair discrimination is the underlying issue.

Johan Botes & Kerry Plots

Witnesses sitting in during the proceedings

As a general rule, witnesses are not permitted to sit in proceedings whilst they are not giving evidence. The rationale for the rule is that there is a risk that the witness would tailor his evidence to either exonerate himself or to lend support to the party he is giving evidence for. This affects the reliability of the evidence and the credibility of the witness.

In the arbitration that led to the review application in *C/K Alliance (Pty) Ltd t/a Greenland v Mosala NO & others*, the employer wanted someone to give evidence and act as representative. The employee objected to this and the employer's witness/representative enquired whether she should leave the proceedings. The commissioner held that she was not required to leave and that either she or the other representative could lead the evidence of the employer's witnesses.

Despite the above decision, the commissioner subsequently ruled that the witness/representative was not permitted to give evidence on behalf of the employer. The commissioner's ruling was based on the fact that she sat in on the proceedings and had made the opening statement on behalf of the employer.

On review, the Labour Court (the Court) confirmed the general rule that witnesses should not be permitted to sit in during the proceedings, but stated that this would not necessarily disqualify that witness from giving evidence.

The Court confirmed that the rule is generally not as firmly enforced in arbitration proceedings. The appropriate approach is that

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commissioners are duty bound to warn potential witnesses of the possible consequences of their presence during the testimony of other witnesses.

The commissioner should allow the witness to testify and then evaluate at the end of the proceedings when assessing his testimony as to whether his version may have been influenced by the version of the other witnesses who testified while present in the hearing. This can be tested during cross-examination.

The danger of excluding a witness simply because he sat in during the testimony of others, is that such an approach may prejudice a party's right to a fair hearing. It may be that the witness would have testified on an entirely different issue or in fact not support the previous testimony.

On conclusion of the arbitration, the commissioner must decide on the probative value of the evidence, which will depend on the extent to which the witness may have sought to tailor-make his evidence with those who testified before him. It is not difficult to imagine the problems stemming from the additional processes of analysis and weighing up of evidence on arbitrators and commissioners.

The Greenland decision confirms the earlier decision of *Natal Shoe Components CC v Ndawonde*. The Court, per Revelas J, found it was a reviewable defect where the commissioner failed to warn witnesses of the possible effect of the consequences of their presence arbitration proceedings whilst another witness testified and subsequently rejecting the witness's evidence on the basis of her presence.

Melanie Hart

Section 52 of the MPRDA and retrenchments

A recent amendment to the Mineral and Petroleum Resources Development Act, Act 28 of 2002 (the MPRDA) is likely to significantly affect mining operations intending to undergo a large scale retrenchment exercise.

Section 52 of the MPRDA provides that the holder of a mining right must notify the Minister of Minerals and Energy (the Minister) -

(a) where prevailing economic conditions cause the profit to revenue ratio of the relevant mine to be less than 6% on average for a continuous period of 12 months, or

(b) if any mining operation is to be scaled down or to cease with the possible effect that 10% or more of the workforce or more than 500 employees whichever is the lesser, are likely to be retrenched in any 12 month period.

The Minister may then, in consultation with the Minister of Labour and any registered trade union or affected persons or their nominated representatives where there is no such trade union, direct the holder of a mining right to take such corrective measures subject to the terms and conditions which the Minister may determine.

It is only once such corrective measures have failed, the holder of a mining right would then be entitled to embark on a retrenchment exercise as envisaged in the Labour Relations Act, 66 of 1995 (the LRA).

In respect of the ensuing retrenchment, a new subsection has been inserted into section 52 of the MPRDA by the recent amendment.

This subsection provides that the holder of a mining right remains responsible for the implementation of the processes provided for in the LRA pertaining to the management of downscaling and retrenchment, until the Minister has issued a closure certificate to the holder concerned.

It thus appears that the holder of a mining right cannot finalise the retrenchment exercise until such time as the closure certificate has been issued by the Minister. This may prolong large scale retrenchment exercises beyond the 60 day period prescribed in section 189A of the LRA.

The amendment is not yet in effect and will only come into effect on the date fixed by the President by proclamation in the Gazette.

Melanie Hart

Constitutional Court declines to rule on legal representation at CCMA arbitration

The Constitutional Court (the Court) recently declined an opportunity to rule whether refusing to allow a party the right to legal representation at the CCMA infringes on that party's constitutional rights to fair labour practices, just administrative action or access to the courts.

In *Netherburn Engineering cc t/a Netherburn Ceramics v Mudau & others*, the Court considered an appeal from the Labour Appeal Court (the LAC). In the original proceedings before the CCMA, the employer defended a claim of unfair dismissal (misconduct). The employee was represented by a trade union official at the arbitration proceedings. The employer applied to be represented by an attorney. The Commissioner ruled against the employer and refused the postponement then requested.

The employer brought an application to review the eventual arbitration award. The LAC, like the Labour Court before it, declined to review the Commissioner's ruling on legal representation. The Court agreed that the issue of legal representation at CCMA arbitration proceedings raised a constitutional issue. However, it held that the current application is moot in the light of the legislative change on the right to legal representation. Section 140(1) of the Labour Relations Act was repealed in August 2002. This section gave direction to the CCMA Commissioners on when to admit legal representation during unfair dismissal arbitration proceedings. Parties are generally entitled to be represented by legal practitioners at CCMA arbitration proceedings except where the dispute is one of the unfair dismissal of an employee relating to his conduct or capacity. In such disputes the Commissioner can exercise discretion as to whether or not to allow legal representation.

With Section 140(1) repealed, the CCMA dealt with legal representation in its Rules for the Conduct of Proceedings before the CCMA. Rule 25 now contains the legal framework for permitting or refusing legal representation. The Court noted that, whilst there is similarity between the provisions of the repealed Section 140(1) and Rule 25, there were notable differences as well. It held that any determination on the Constitutionality of Section 140(1) would not be determinative of a challenge to Rule 25.

In terms of Rule 25, the Commissioner should consider the factors below before concluding whether it would be unreasonable to expect a party to deal with the dispute without legal representation:

- The nature of the questions of law raised in the dispute;
- The complexity of the dispute;
- The public interest;
- The comparative ability of opposing parties or their representatives to deal with the dispute.

There are encouraging signs that Commissioners are exhibiting greater willingness to allow legal representation at arbitration. In our experience, proper preparation by legal representatives can assist in ventilating the true issues in dispute before the Commissioner. Legal representatives can identify the true burning issues to be decided and limit unnecessary evidence placed before the CCMA. Proper cross-examination of witnesses also allows for the veracity of testimony to be thoroughly tested where it may otherwise go unchallenged. This may lead to greater acceptance of arbitration awards issued by the CCMA as the parties know that their issue has been properly aired and debated. Allowing legal representation can cut down on the number of review applications brought to the Labour Court. We look forward to the Court ruling on this issue when it is placed before it in future. In the meanwhile, we will continue to implore Commissioners to allow legal representation where they have the discretion to do so.

Johan Botes

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