DLA CLIFFE DEKKER HOFMEYR

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EMPLOYMENT ALERT

SHOULD TOP-EARNERS BE ABLE TO CLAIM DAMAGES FOR UNFAIR DISMISSAL?

Reports indicate that dismissed Bafana Bafana coach, Pitso Mosimane, is threatening legal action following his reported dismissal by the South African Football Association (SAFA). His attorneys are reported to have said that their client may refer a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) should Mosimane and SAFA fail to reach agreement on the matter. Mosimane's fixed-term contract was supposed to continue for another 26 months.

The dismissal of our national coach and threatened litigation raises a number of interesting issues. Earning a reported R800 000 per month, it reignites the debate as to whether top-earners should be able to claim unfair dismissal at the CCMA. The proposed amendments to the Labour Relations Act, No 66 of 1955 (LRA) will allow the Minister of Labour to establish an earnings threshold that will exclude high earning employees.

In the explanatory memorandum to the draft Bill, the Legislature explains that it intends addressing the "disproportionate cost, complexity, and impact on an employer's operations" where high earners' employment is terminated. The Memorandum confirms that there are recognised instances where the services of an executive ought to be terminated for reasons that do not fall cleanly within the defined parameters of the LRA, but the dismissal may still be required for otherwise fair reasons. It lists the example of an employer seeking to replace a senior executive to secure a change in tone and culture within the leadership team as an example where the employer should be able to fairly do so but may be stymied by the provisions of the LRA in achieving this.

While this may provide the business rationale for the changes, there can be little doubt that the prevalence of senior executives claiming unfair dismissal at the CCMA influences the popular view that the hard-fought protections in the LRA were not intended to protect high-rollers, but to protect vulnerable employees who were not in an advantageous bargaining position when negotiating employment contracts, workplace conditions or the termination of their employment. There is a strong view in the market that there are executives who carefully use the CCMA processes to extract additional consideration from their employers. The threat of protracted CCMA proceedings, often involving other executives as witnesses, are often used by disgruntled executives to negotiate favourable settlement terms when their employer seeks to part ways with them. While it is their prerogative at present, the amendments to the LRA will arrest the use of the CCMA by executives to extract more money from their previous employers.

The counter-argument to the amendments is that all employees deserve protection and have a constitutional right to fair labour practices. Eroding this right for senior executives may be seen by some as the thin edge of the wedge. The reality is that, even at present, there are various protections that are not afforded to employees earning above a certain earnings threshold. Employees earning above R183,008 per year do not enjoy statutory right to overtime, maximum working hours or minimum off times, for instance. Benefits under the Unemployment Insurance Fund are also capped for high earning employees.

The amendment should assist employers in achieving workplace change where this involves the removal of executives. Executives should not be significantly worse off when considering that, statistically, employees successful in CCMA unfair dismissal proceedings do not get much more than the three months remuneration to which executives may be automatically entitled should the Bill be promulgated into law.

Mr Mosimane may thus be able to dispute the fairness of his dismissal at the CCMA at present, but the window for other executives to do the same may be closing soon.

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