

EMPLOYMENT ALERT

21 October 2013

TRADE UNION LIABLE FOR NEGLECTING TO PROSECUTE MEMBERS' CLAIMS – CONSTITUTIONAL COURT

On 9 October 2013, the Constitutional Court held that a trade union cannot avoid liability for its neglect to prosecute claims by its members merely because the union has a constitutional right to determine its own administration.

In determining its own administration - in accordance with s23(4)(a) of the Constitution - the union does not have the right to withdraw its representation of its members with impunity; it still had to act in a manner that does not cause prejudice to its members. The judgment in *FAWU v Ngcobo NO and Mkhize* represents a victory for members against negligent conduct by their trade union representatives.

In 2002, the Food and Allied Workers Union (FAWU) agreed to represent two employees of Nestle South Africa (Pty) Ltd who claimed that they were unfairly dismissed. FAWU duly referred a dispute, alleging unfair dismissal of their two members, to the Commission for Conciliation, Mediation and Arbitration (CCMA). When the dispute could not be resolved at conciliation, the CCMA issued a certificate confirming this. FAWU was then entitled to refer the dispute for adjudication to the Labour Court within 90 days of the certificate being issued. It advised the two members that it would do so. However, the union did not refer the dispute.

When the two members eventually obtained legal advice, their attorneys demanded that FAWU refer the dispute to the Labour Court and apply for condonation for the late filing. The union did not respond to the demand. The attorneys issued summons on behalf of their clients.

continued

ANNUAL EMPLOYMENT LAW UPDATE

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The High Court awarded the two members consolation payment (solatium) of 12 months' remuneration as being just and equitable. The Court held that the union had an obligation to prevent prejudice to its members where it agreed to assist them.

FAWU appealed the judgment. The Supreme Court of Appeal (SCA), in a split decision, held in favour of the two members. It held that the union agreed to assist the members under a contract of mandate. As such, it was obliged to perform its functions faithfully, honestly, and with care and diligence. FAWU's failure to, firstly, refer the dispute and, having failed to do so, then to apply for condonation, was in breach of its duty to act honestly or diligently.

In proceedings before the Constitutional Court, FAWU argued that it enjoyed special protection under the Constitution and LRA. The argument went as follows:

- The Constitution allows a trade union to determine its own administration (s23(4)(a));
- The LRA allows the union to act in its own interest, on behalf of any of its members or in the interest of any of its members (s200(1));
- The union's own constitution permitted it to provide legal assistance to members ... where it deems it in the interest of the union to do so (clause 5.110);
- Where it is not in the union's interest to represent members, the union's contractual liability (to the members it undertook to represent is) is limited.

The Constitutional Court unanimously rejected this argument. It held that the union could not pursue its own interests, with impunity, when it has caused injury to members by failing to represent them properly. The union's own constitution suggested that the union will take responsibility for the negligent action of those acting on its behalf. The court stated that, even if the trade union was permitted to withdraw from a matter where it agreed to represent its members, it was still obliged to take such a decision in good faith and inform the members timeously. It was obliged to act in good faith and could only withdraw if the members could fulfil the mandate previously given to the trade union.

The judgment is an important reminder of the responsibility shouldered by trade unions in representing its members. The union attracts liability for its actions where it agrees to act on behalf of its members and then fails to carry out that mandate diligently and in good faith. It is likely that we will see an increase in the number of claims brought against trade unions by disgruntled members.

Trade unions should guard against negligent conduct by its officials or office bearers. It may be forced to obtain indemnity insurance against such claims by members, as suggested during the proceedings in the High Court. The judgment sends a clear signal that members are not without remedy when faced with negligent conduct by its labour representatives. If the effect of this judgment is greater care applied to the management of labour disputes by trade unions, everybody stands to gain. The diligent prosecution of claims before the CCMA or Labour Court can only lower the employee relations climate from its current heightened temperature.

Johan Botes

EMPLOYMENT BILLS - STATUS AS AT 18 OCTOBER 2013

Bill Title	Current Status (date of last discussion in Parliament between the brackets)	Expected date of implementation?
Basic Conditions of Employment Amendment Bill B 15B of 2012	Approved in National Assembly (NA). Select Committee intends holding public hearings - written comments had to be submitted to the Select Committee before 25 Sept. 2013 (17/9/2013)	Unknown
Employment Equity Amendment Bill B 31 B of 2012	Portfolio Committee (NA) has adopted the Bill with amendments. The B version of the Bill will be transferred to the National Council of Provinces (NCOP) Select Committee i.(15/10/2013)	Unknown
Employment Services Bill 28 of 2012	The Portfolio Committee (NA) is still to schedule further meetings on the Bill (26/8/2013)	Unknown
Labour Relations Amendment Bill B16B of 2012	The Portfolio Committee (NA) has approved the B version of the Bill, and sent it to the NCOP Select Committee intends holding public hearings - written comments had to be submitted to the Select Committee before 25 Sept. 2013 (17/9/2013)	Unknown
Draft Employment Tax Incentive Bill	Published for comment. Written comments had to be submitted to the National Treasury by the close of business on Friday, 11 October 2013 (20/9/2013)	Expected to commence on 1 January 2014

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