

# EMPLOYMENT ALERT

30 September 2013

## LEGAL DEVELOPMENTS IN DISCIPLINARY PROCEDURE AND THE LAW OF DAMAGES

### Less formal procedures for disciplinary hearings

In recent years we have seen a move by employers towards making use of the criminal justice model of procedural fairness in disciplinary hearings. Companies spend large amounts of resources and time conducting disciplinary hearings as though they were criminal trials. Complex charge sheets are drafted, and hearings are held where witnesses are led, documents are discovered and points *in limine* are often raised.

This is precisely what occurred in the unreported case of *Rand Water v Buckle and Stoop Case Number JS 737/08*. Mr Buckle and Mr Stoop were charged with defrauding Rand Water of R8 million. A complete forensic investigation was conducted by a forensic accounting company and a report was drawn up by the investigator.

Mr Buckle and Mr Stoop were subsequently called to a disciplinary hearing. In an attempt to drag out the proceedings requests for the discovery of documents were repeatedly made.

Mr Buckle and Mr Stoop were initially represented by the same advocate. After realising that there could be a potential conflict of interest the matter was postponed to allow Mr Stoop to arrange for a separate representative.

On resuming the hearing Mr Buckle's representative asked for the recusal of the Chairperson on the basis that he had a relationship with Rand Water. Mr Stoop's representative supported the application. The Chairperson refused the application indicating that his reasons would be given at a later stage.

Mr Stoop's representative subsequently asked for the recusal of Mr Buckle's representative on the basis that he had previously represented Mr Stoop and was aware of his version of events. In response Mr Buckle's representative asked for the recusal of Mr Stoop's representative on the basis that Mr Buckle had consulted with Mr Stoop's representative some time prior to appointing him.

The Chairperson of the hearing adopted a robust approach in dealing with the lawyers as well as the employees. Relying on the case of *Avril Elizabeth Home for the Mentally Handicapped v the CCMA*, the Chairperson excluded legal representation. He further stated that he would conduct the hearing in an interrogatory fashion.



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The Chairperson subsequently proceeded with the hearing and found Mr Buckle and Mr Stoop guilty of fraud. In his written findings the Chairperson addressed both the issue of his recusal and the exclusion of legal representatives. Mr Buckle and Mr Stoop challenged the procedural fairness of the dismissal at the Labour Court.

In the judgment handed down by the Honourable Judge Basson, she states the following:

*"Where an employer does a full investigation (as was done in this case) and obtains a forensic report there is nothing unfair, in my view, if the hearing takes the form of a neutral Chairperson interrogating the report and the employees responses thereto in an interventionist manner and by granting the parties a fair opportunity to question each other on disputed issues. Unfortunately many disciplinary enquiries are allowed to run for months while employees are on suspension with pay because of the fear that employees may claim procedural unfairness if the enquiry was not conducted in the manner as one would conduct a trial. I am, accordingly persuaded that the approach adopted by the Chairperson adequately balanced the need for expedition with the need to do justice between the parties."*

It is evident from the judgement that employers need not adopt a criminal model when conducting its disciplinary enquiries. Furthermore, it is support for the contention that a chairperson may take an interrogatory approach in a disciplinary hearing. Employers are therefore not required to conduct complex lengthy disciplinary procedures so long as the principles of fairness are adhered to.

### **Claims for damages in terms of section 77(3) of the Basic Conditions of Employment Act**

The case of Rand Water v Buckle & Stoop revolved around the dismissal of 2 employees who defrauded Rand Water for an amount of approximately R8 million. The employees referred an unfair dismissal dispute to the Labour Court.

Rand Water subsequently brought a counter claim for the losses incurred in terms of s(3) of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA). Section 77 (3) of the BCEA states that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine:

*"any matter concerning a contract of employment, irrespective of whether any basic contract of employment constitutes a term of that contract."*

At the Labour Court the employees raised a point *in limine* that the Labour Court lacked the jurisdiction to entertain the claim. The employees contended that fraud amounted to a delict and as such a civil claim should be instituted for any damages arising therefrom.

The Labour Court held that the fraud was a delict. The Labour Court further held that the claim of fraud did not have a bearing on the existence of contract of employment, as at the stage of the hearing, the employees had been dismissed and the employment contracts were no longer in existence. As such the Labour Court held that it did not have the jurisdiction to hear the claim.

The matter was taken on appeal to the Labour Appeal Court (LAC) where it was found that it had been demonstrated that the claim arose from the same facts as the employees' unfair dismissal dispute.

The LAC held that the fraud was not committed by people unconnected to Rand Water but rather by its own employees. As such the fraud was connected to the employment contract.

Ultimately the LAC held that the Labour Court has jurisdiction over any claim for damages so long as it is connected to the employment contract.

In the Judgement handed down by the Honourable Judge Basson on 17 September 2013, the Labour Court reaffirms the LAC's position and states:

*"that this Court has concurrent jurisdiction with the Civil Courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. The LAC further confirmed that any order made by the Labour Court may include an order for specific performance, and award for damages or an award for compensation."*

It is now evident that an employee may be successfully sued for damages in the Labour Court even in instances of delict such as fraud.

*Aadil Patel and Inez Moosa*

## LEGISLATION UPDATES

<b>BILL TITLE</b>	<b>Current Status</b> (date of last discussion in Parliament between the brackets)	<b>Expected date of implementation?</b>
Basic Conditions of Employment Amendment Bill B 15B of 2012	Approved in NA. Select Committee intends holding public hearings - Written comments may be submitted to the Select Committee before 25 Sept. 2013 (17/9/2013)	Unknown
Employment Equity Amendment Bill B 31 of 2012	Portfolio Committee (NA) has concluded deliberations, granted in-principle approval with few changes, B version of the Bill to be submitted to NA for approval. (17/9/2013)	Unknown
Employment Services Bill 28 of 2012	The Portfolio Committee is still to schedule further meetings on the Bill (26/8/2013)	Unknown
Labour Relations Amendment Bill B16B of 2012	The Portfolio Committee of the NA has approved the B version of the Bill, and sent it to the National Council of Provinces Select Committee intends holding public hearings - Written comments may be submitted to the Select Committee before 25 Sept. 2013 (17/9/2013)	Unknown
Draft Employment Tax Incentive Bill	Published for comment. Written comments should 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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