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EMPLOYMENT ALERT

IN THIS ISSUE

CONDONATION, SPECIFIC PERFORMANCE AND REINSTATEMENT AWARDS: WHAT'S THE LATEST NEWS FROM OUR COURTS?

The courts are clamping down on applications for condonation. In a recent decision of *Makuse v Commission for Conciliation, Mediation and Arbitration and Others* (JR2795/11) [2015] ZALCJHB 265, the court emphasised that the primary object of the Labour Relations Act, No 66 of 1995 (LRA) is to provide the effective and expeditious resolution of labour disputes.

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In arriving at its decision to refuse condonation, the court noted that any delays in resolving labour disputes could be detrimental to both workers and employers; and that courts should be cautious before granting condonation, particularly delays in the launching of s145 review applications, especially in the context of individual dismissals

Importantly, the court in this case considered whether the applicant tendered a compelling excuse for the delay and found that the applicant had not provided a reasonable and acceptable explanation for the delay. In the absence of a satisfactory explanation for the delay, an applicant's prospects of success are considered immaterial and need not be considered. The above case is contributory to the already established principle that labour disputes should be dealt with expeditiously in the interests of both the employee and employers.

In another decision of *Somi v Old Mutual Africa Holdings (Pty) Ltd* (Case no: J2828/14, 3 July 2015) the applicant (employee) sought to declare her dismissal without notice and without having been preceded by a performance enquiry, to be unlawful and invalid or null and void

and claimed compliance with the contract of employment between the parties. The applicant based her cause of action on breach of contract instead of unfair dismissal as she wished to enforce the provisions of the contract.

While it was argued by the respondent (employer) that the applicant had an alternative remedy of an unfair dismissal claim, the court confirmed that the remedy for specific performance is a separate remedy from unfair dismissal provided for in the LRA, in the case of an alleged contractual breach of employment. The right not to be unlawfully dismissed in terms of the common law remains despite the introduction of the unfair dismissal concept by the LRA. The court held that an employee has an election to either accept the breach of contract and sue for damages or enforce the contract (the remedy of specific performance) if the employee's contract of employment has been unlawfully terminated.

The above case is a lucid re-enforcement of the decisions of numerous cases, some of which were before the Supreme Court of Appeal, declaring that the rights contained in the LRA are not an exhaustive composition of what an employee may

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claim. The common law rights still have a place in the employment relationship.

In a case involving a reinstatement order, *Coca Cola Sabco (Pty) Limited v Van Wyk* (JA11/2013) [2015] ZALAC 15 (5 May 2015), the court held that the effect of a reinstatement order is to revive the contract of employment which was terminated by a dismissal, therefore a reinstatement award does not cover the period between the award and its implementation. An employee will only

have a contractual claim against the employer should an employer fail to pay the employee during this period. The employee has to set out sufficient facts to justify their contractual claim for payment of the amounts post the date of the award until the implementation date. The employer also retains all of its contractual defences at its disposal.

Katlego Letlonkane

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The 21st World Congress promises to provide a platform for a stimulating discussion on labour and social security law in a global environment where sustained economic and social uncertainty appears to have become the norm.

The main keynote speakers are Professor Alain Supiot, Doctor in Law at the Collège de France in Paris and Professor Sir Bob Hepple, Emeritus Master of Clare College at the University of Cambridge.

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