

7 NOVEMBER 2016

EMPLOYMENT ALERT

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IN THIS ISSUE

NOT ALL ARBITRATIONS ARE CREATED EQUAL

Private arbitration clauses are a common feature in employment contracts. It is often argued that the private arbitration process provides parties with more control over the entire arbitration process – from choosing the arbitrator, the venue and the time periods, to the exact scope of the arbitrator's powers.



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NOT ALL ARBITRATIONS ARE CREATED EQUAL

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The recent Labour Appeal Court (LAC) case of *Lawrence v Mutual & Federal (Pty) Ltd and another* (JA77/2014) [2016] ZALAC 45, highlights relevant considerations when selecting private arbitration as an alternative form of dispute resolution and highlights certain consequences that arise therefrom.

In brief, Lawrence was a General Manager in the Claims Department of Mutual & Federal. It came to light that whilst Lawrence was managing the claims department, claims to the value of R7.6 million had been allowed to prescribe. As a result, Lawrence was suspended and ultimately dismissed on a charge of gross negligence.

Lawrence believed his dismissal was substantively unfair and referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute was then withdrawn and referred to private arbitration. The parties gave the arbitrator the same powers and functions as contemplated in s135 of the Labour Relations Act, No 66 of 1995 (LRA), which includes powers to attempt to resolve the dispute.

The arbitrator found that Lawrence was guilty of negligence and was not satisfied that dismissal was an appropriate sanction.

Mutual & Federal was ordered to pay six months' compensation to Lawrence as well as half of Lawrence's performance bonus for 2009.

Aggrieved that the arbitrator did not award reinstatement, Lawrence pursued a review application in the Labour Court. Lawrence argued that the arbitrator failed to determine the issue, failed to make a finding on credibility, disregarded material evidence, failed to consider the provisions of s193(2) of the LRA, and failed to provide reasons for halving Lawrence's performance bonus. Section 193 of the LRA provides *inter alia* that if an arbitrator, appointed in terms of the LRA, finds a dismissal to be unfair "the arbitrator must require the employer to reinstate or reemploy the employee" unless certain exclusions set out in the LRA are applicable.

The Labour Court held that in this case the test for review was not the well-known *Sidumo* test. The applicable grounds of review were the grounds set out in s33 of the Arbitration Act, No 42 of 1965 (being misconduct on the part of the arbitrator, gross irregularities in the proceedings, the arbitrator exceeded his/her powers or the award was improperly obtained). The Labour Court dismissed all of Lawrence's grounds of review, upholding only the review relating to his performance bonus.

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On appeal to the LAC, Lawrence persisted with his grounds of review.

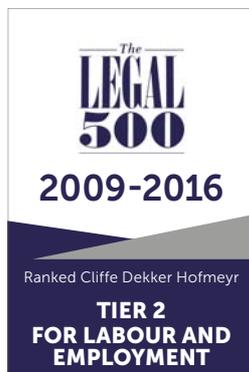
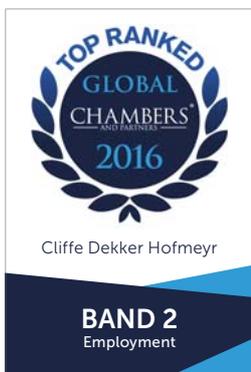
The LAC held that when parties select an arbitrator as the judge of fact and law, the arbitrator's award is final, irrespective of how erroneous, factually or legally, the decision was. Accordingly, the LAC dismissed Lawrence's first three grounds of review.

On the issue of reinstatement, Lawrence argued that because the parties agreed that the arbitrator had the powers contained in s135 of the LRA (which go to resolving disputes), the arbitrator was also required to apply the reinstatement provisions of s193. The LAC disagreed and held that s193 would only have been applicable if the parties had expressly agreed to it being applicable. The arbitrator only had the powers contained in s135,

and no other powers could be ascribed to the arbitrator absent agreement by the parties. Accordingly, the LAC found that the arbitrator had acted in accordance with the terms of reference in the private arbitration agreement and, as such, the appeal had to fail.

If parties wish to select private arbitration, rather than approach the CCMA, they must appreciate that the grounds for reviewing the arbitrator's final award are narrow. Furthermore, the arbitrator will only have the powers that the parties agree to. Whilst private arbitration does bring with it the benefits of control, it also limits the avenues open to a litigant should the award not go in its favour.

Mohsina Chenia and Craig Thomas



Employment STRIKE GUIDELINE

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EMPLOYMENT STRIKE GUIDELINE
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