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EMPLOYMENT ALERT

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Is the BCEA now trending in dismissal disputes?

The recent judgment handed down by the Labour Appeal Court (LAC) in *Pilanesburg Platinum Mines v Lisebo Lerato Pearl Ramabulana* concerned an appeal against a decision of the Labour Court in which it was found that the employer had breached the employee's contract of employment by failing to comply with the provisions relating to termination. The employee (applicant) brought an application to the Labour Court in terms of section 77 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) in terms of which the applicant sought *inter alia* a declaration that the termination of her employment was unlawful and that the respondent had failed to comply with provisions of the contract of employment.

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The Labour Court found in favour of the employee and the employer subsequently appealed against this finding.

The LAC stated that in seeking relief in terms of the BCEA and in not approaching the Commission for Conciliation, Mediation and Arbitration (CCMA), the Respondent had renounced all reliance on the Labour Relations Act 55 of 1995 (LRA). The respondent had therefore relied on contractual law, as opposed to equity and fairness.

The case illustrates the recent trend where it appears to have become fashionable for dismissed employees to approach to the Labour Court in terms of the BCEA and claim for breach of contract seeking either specific performance or damages. There does not seem to be a clear reason that has given rise to this, but the risk associated with claims made in terms of the BCEA, as in this matter before this Court, is enormous. Firstly, unlike in the LRA, the claimant must prove an unlawful breach and not unfairness for the termination of the employment; next in terms of the LRA, reinstatement is generally compulsory where a dismissal is found to be substantively unfair, specific performance consequent upon a breach is not, and generally it is a discretionary relief.

Furthermore, in terms of the LRA, an employee whose dismissal is found to be unfair will receive compensation. In an action in terms of section 77 of the BCEA, if the employee is able to prove a breach by the employer, the only amount s/he will receive is the loss s/he has proved to have suffered as damages. Here s/he must also show that they have tried to mitigate the damages. There is also no way s/he can receive damages equal to the amount they would have earned from the date of the breach to the date that they would eventually have retired.

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Is the BCEA now trending in dismissal disputes?...continued

The judgment highlights the fundamental importance of pleading your case correctly as an applicant must stand or fall by his or her pleaded case.

This absurd prayer, which seems to have become a regular occurrence in dismissal disputes, takes leave of the basic rule that one is awarded damages that are proved and not what the employee would have been paid had he/she remained in the employer's employ until retirement.

The LAC also found that an employee cannot merely state that because the terms of the employment agreement prescribe a process for termination, non-compliance with those terms constitutes a breach of the agreement. In relying upon this argument, the

employee is required to show that the preconditions required for the employer to comply with the clauses of the agreement were present. In this regard, the judgment highlights the fundamental importance of pleading your case correctly as an applicant must stand or fall by his or her pleaded case. Failing to place reliance on the correct preconditions and authorities when seeking specific remedies, denies clients the right to such remedies.

Aadil Patel, Anli Bezuidenhout and Rowan Bromham

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