DLA CLIFFE DEKKER HOFMEYR

27 FEBRUARY 2012

EMPLOYMENT ALERT

PROTEST ACTION PLANNED FOR 7 MARCH 2012

Employers are advised to make contingency plans in light of planned protest action. A number of employees are expected to heed the call from COSATU to join in nationwide protest action. Significant disruption may be caused when workers opt to join the protest rather than go to work. The trade union federation has announced plans for general protest action on 7 March 2012. The protest action is in support of a ban on labour brokering and scrapping of the e-Toll system in Gauteng.

For the protest action to be protected NEDLAC must first consider the subject matter thereof. According to the NEDLAC website, the matter was declared "considered" in a meeting held on 30 January 2012. The media reported that NEDLAC has confirmed that there was a deadlock between the various parties on the matter.

The Labour Relations Act defines protest action as the partial or complete refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers.

A strike, on the other hand, has the purpose of remedying a grievance or resolving a dispute in respect of a "matter of mutual interest".

It is not collective bargaining that is at stake when employees embark on protest action as protest action involves not only the rights of employees and employers, but also the interest of the public at large and, in certain instances, the effect on the national economy.

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A call for the outright banning of labour brokering in South Africa is an issue of State policy and general socio-economic concern, and not a demand to any specific employer or employer parties, which makes it protest action.

Any employee may legally participate in protected protest action once the formalities have been complied with at NEDLAC.

Participating employees may not be disciplined and the principle of "no-work, no-pay" will apply.

Faan Coetzee

WHAT'S THE PURPOSE OF HAVING YOUR CAKE IF YOU CAN'T EAT IT?

The Labour Court recently confirmed that an employer cannot escape an order of reinstatement where its own conduct resulted in the continued employment being made intolerable. Reinstatement is the primary remedy provided in the Labour Relations Act for substantively unfair dismissals. Where an employee seeks reinstatement following a substantively unfair dismissal, the employer can only escape reinstatement being awarded where the circumstances surrounding his dismissal makes the continued employment relationship intolerable or that it is not reasonably practicable for the employer to re-instate or re-employ the employee.

In *Lubbe v Roop & Others (as yet unreported Labour Court case; judgment delivered on 20 January 2012; case number JR 1303/09),* Lagrange J commented on the lengthy process preceding the latest review application. The employee (Lubbe), previously dismissed from the South African Police Service (SAPS), had already once been involved in an application to review and set aside an arbitration award ordering his reinstatement.

When the matter was remitted back to arbitration, a different Commissioner also concluded that Lubbe's dismissal was substantively unfair, but ordered that he be paid compensation instead of awarding him reinstatement, as he requested. The Commissioner held that Lubbe was not entitled to reinstatement as his representative consistently argued that there was a conspiracy against his client which was the true reason for the dismissal, and that there is a seven year gap since his original dismissal "*...a period during which the SAPS did undergo many changes must reflect a workplace very different to that which Lubbe left in 2002, and it is inconceivable that he could simply go back and that it would be business as usual.*"

Lubbe sought to review this finding of the Commissioner, arguing that there was no evidence of the breakdown of the employment relationship before the Commissioner. The Judge considered the judgment of the Supreme Court of Appeal (the SCA) in *Edcon v Pillemer NO & others (2009) 30 ILJ 2642 (SCA)* where the SCA agreed that it was not sufficient for the employer to present argument on the breakdown of the employment relationship.

The Judge stated as follows:

"*If an employee who was unfairly dismissed contends that his employer sought to get rid of him for improper reasons, does that necessarily entail a breakdown in the trust relationship of the type which justifies not reinstating him? It would be somewhat perverse if an employer wishing to assert that the employment relationship had been rendered intolerable, on the basis that its own bad faith in dismissing the employee had instilled distrust of it in the employee, were able to avoid an order of reinstatement on that basis. Equally, there is no basis for permitting an employer to avoid an order of reinstatement merely because the employee's representative accuses it of acting in bad faith.*"

The review application succeeded with the SCA replacing the Commissioner's award with one reinstating Lubbe. The SCA, in essence, confirmed that reinstatement cannot be avoided merely by arguing that the relationship between the parties had broken down irretrievably or by creating the intolerable circumstances on which you then later seek to rely.

It thus seems that the old adage is true: you cannot have your cake and eat it – especially where you baked it yourself.

Johan Botes

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DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Employment practice and services, please contact:

Aadil Patel
Director
National Practice Head
T + 27 (0)11 562 1107
E aadil.patel@dlacdh.com

Fiona Leppan
Director
T + 27 (0)11 562 1152
E fiona.leppan@dlacdh.com

Sherisa Rajah
Senior Associate
T + 27 (0)11 562 1181
E sherisa.rajah@dlacdh.com

Gillian Lumb
Director
Regional Practice Head
T + 27 (0)21 481 6315
E gillian.lumb@dlacdh.com

Tim Mills
Director
T + 27 (0)11 562 1160
E tim.mills@dlacdh.com

Mabasa Sibanda
Senior Associate
T + 27 (0)11 562 1182
E mabasa.sibanda@dlacdh.com

Johan Botes
Director
T + 27 (0)11 562 1124
E johan.botes@dlacdh.com

Gavin Stansfield
Director
T + 27 (0)21 481 6314
E gavin.stansfield@dlacdh.com

Mark Meyerowitz
Associate
T + 27 (0)11 562 1125
E mark.meyerowitz@dlacdh.com

Faan Coetzee
Director
T + 27 (0)11 562 1600
E faan.coetzee@dlacdh.com

Michael Yeates
Director
T + 27 (0)11 562 1184
E michael.yeates@dlacdh.com

Lerato Phashe
Associate
T + 27 (0)11 562 1202
E lerato.phashe@dlacdh.com

Melanie Hart
Director
T + 27 (0)11 562 1179
E melanie.hart@dlacdh.com

Pranisha Maharaj
Senior Associate
T + 27 (0)21 481 6460
E pranisha.maharaj@dlacdh.com

Ndumiso Zwane
Associate
T + 27 (0)11 562 1231
E ndumiso.zwane@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T + 27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T + 27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

5th floor Protea Place Protea Road Claremont 7708, PO Box 23110 Claremont 7735 South Africa
Dx 5 Cape Town
T + 27 (0)21 683 2621 **F** +27 (0)21 671 9740 **E** ctn@dlacdh.com

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