DLA CLIFFE DEKKER HOFMEYR

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EMPLOYMENT ALERT

THE PROPOSED AMENDMENTS TO LABOUR LEGISLATION: SENIOR EMPLOYEES - A POTENTIAL END TO COSTLY LITIGATION

The proposed amendments to the Labour Relations Act and the Basic Conditions of Employment Act have been criticised by both business and labour. Questions about the constitutionality of some of the provisions in the amendments have already been put forward.

Should the amendments be passed into legislation and survive constitutional scrutiny, one amendment will mean that terminating the employment of senior employees will be simpler. No longer would there be long, drawn out disciplinary enquiries followed by equally lengthy arbitration proceedings. This could at least, in theory, ensure that once a senior employee's employment is terminated, an organisation regains its stability fairly quickly in that it can focus its energy on the business instead of keeping one eye on the dispute resolution process following the dismissal.

The proposed amendment to the Labour Relations Act inserts a provision (s188B) entitled "dismissal of employees earning above a threshold". In essence, it provides that employees earning above a threshold as determined by the Minister may be terminated on three months' notice or such other period as determined in their contracts of employment. The proposal at present is that this provision will apply to employees earning above R1 million per annum. This amount must still be negotiated at Nedlac.

Once notice is provided to the senior employee, the termination will be deemed to be procedurally and substantively fair. The proposed amendment will apply to contracts of employment concluded before the commencement of the Section. However, it will only be effective two years after the commencement date of the s188B. The commencement date of the proposed section will be determined by the legislature.

The question as to whether senior employees may despite this provision rely directly on the Constitution to protect them against "unfair dismissal" remains to be seen. The debate on the development of the common law and contract of employment in the light of the exclusion from statutory protection against unfair dismissal will certainly heat up again as well.

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Should this amendment come into effect the employment contracts of senior employees will need to be revisited. New contracts of employment would have to be carefully drafted so as to ensure a balance of power between the interests of employers and employees.

Aadil Patel

SUSPENSIONS PENDING THE CONCLUSION OF DISCIPLINARY ENQUIRIES

Increasingly, employers are engaged in protracted pre-dismissal proceedings. Delays in finalising these proceedings, often brought about by the accused employee seeking postponements, have significant financial implications for employers.

The employer is straddled with having to pay not only the costs of the proceedings, but also the salary of the employee while on suspension pending the proceedings being finalised.

Employers may be tempted to convert the employee's suspension from one with remuneration to one without remuneration as an incentive to end the proceedings quickly and avoid wasted costs arising from postponements.

In *SAEWA obo Members and Aberdare Cables ((2007) 2 BALR 106 (MEIBC))* and *Msipho and Plasma Cut ((2005) 26 ILJ 2276 (BCA))*, it was held that where a postponement of proceedings is initiated by the employee, "an employer may not be liable for remuneration between the date of postponement and the following date of hearing".

Msipho took the point further, noting that "it would be unfair to hold the employer responsible for the employee's actions".

While these views of the bargaining councils may seem to be advantageous for employers, they do not reflect the current South African legal position, since decisions of bargaining councils are of no binding force under the doctrine of precedent.

The legal position on the point of suspension without pay was illustrated in *SAPPI Forests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others (2009) 30 ILJ 1140 (LC).* It held that an "employer may suspend [an employee] without pay if the employee so agrees or legislation or a collective agreement authorise the suspension."

Relying on SAPPI, should an employer unilaterally implement a suspension without pay (be it during the pre-dismissal proceedings or as a sanction), this would constitute breach of contract and expose the employer to risk.

Melanie Hart and Nyoko Muvangua

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

www.cliffedekkerhofmeyr.com

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