DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

11 February 2013

MOVEMENT OR PROGRESS? AMENDMENTS TO THE LABOUR RELATIONS ACT: REVIEW OF CCMA ARBITRATION AWARDS

The Labour Relations Amendment Bill seeks to effect various several changes to the current Labour Relations Act, No 66 of 1995 (LRA).

The Bill is being considered by Parliament and is expected come into effect during the final quarter of 2013. Over the course of the February and March 2013 we will highlight important aspects of the amendments that warrant further attention by employers.

Among other aims, the Bill proposes streamlining the review of CCMA arbitration awards granted. It further discourages litigants from instituting review applications as a tactical ploy to frustrate or delay compliance with the award.

New time limit to prosecute review applications:

The amended s145(5) of the LRA provides that a person who institutes a review application must arrange for the matter to be heard by the Labour Court (court) within six months of commencing proceedings. However, the court has been given the power to condone a failure to comply with this provision on good cause shown.

In terms of a new s145(6) judges are required to hand down judgment in review applications 'as soon as reasonably possible'. This provision reiterates the need for the speedy resolution of review applications. One of the original aims of the current LRA has been the speedy resolution of labour disputes. Sixteen years after its promulgation this aim has sadly not been realised. While there are numerous reasons for the delays in finalising labour disputes, any positive steps to reduce litigation time should be welcomed.

If review applications are to be finalised speedily, litigants will have to adhere to the timelines provided for pleadings. We expect that, given the renewed imperative to quickly dispose of matters, the court will be less inclined to grant condonation for failure to comply with these timelines. This should especially assist employers who find themselves at the mercy of slow ex-employees who fail to timeously review arbitration awards handed down against them.

Employers should, however, similarly take care in managing their own review applications. They should take all necessary steps to progress the matter to avoid censure for delays in the proceedings. Employers who institute review proceedings, and then unnecessarily delay the matter, will face an increased risk of having the review application dismissed.

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No need to interdict

As things currently stand, instituting a review application does not automatically suspend the operation of an arbitration award. In the normal course, an employee who has obtained relief under an arbitration award is entitled to enforce that award unless the employer brings an urgent application in the court to stay the award pending the outcome of the review application.

New s145(7) and (8) dispense with the necessity of approaching the court to stay the execution of an arbitration award. The effect of these sub sections is that the operation of an arbitration award will automatically be suspended once an application to review the award has been launched. However, this suspension is conditional on the applicant furnishing security to the satisfaction the court.

New obligation regarding security of costs

Unless the court directs otherwise, the security that the applicant is required to furnish must be equivalent to 24 months' remuneration in the case of an award granting re-instatement or re-employment, and equivalent to the amount of compensation granted in the award.

Change for the better?

These provisions are intended to discourage CCMA litigants from availing themselves of review proceedings merely for the purposes of delay. Furthermore, a litigant would have to be fairly confident of its prospects of success if it is willing to put up as much as 24 months' security.

Clarity is still required on practical details relating to some of these amendments. For instance, the exact manner of furnishing security is not specified.

While the jury is out on the impact of all the proposed amendments on workplace relations, any changes that will result in more expeditious dispute resolution should be welcomed.

Johan Botes and Mark Meyerowitz

LABOUR COURT RULES ON REQUIREMENTS FOR EXTENSION OF A COLLECTIVE AGREEMENT TO NON–PARTIES

Section 32 of the Labour Relations Act, No 66 of 1995 (LRA) regulates the extension of a collective agreement concluded in the bargaining council to non-parties.

In particular, s32(1) allows the bargaining council to request the Minister of Labour to extend a collective agreement concluded in the council to any non-parties within its registered scope and identified in the request.

Once the minister has received the request for extension from the bargaining council, the minister must, within 60 days of receiving the request, extend the collective agreement if the requirements listed in s32(2) have been met.

However, s32(5) gives the minister with discretion to extend a collective agreement if

- the parties to the bargaining council are sufficiently represented within the registered scope of the bargaining council and
- the minister is of the view that a failure to extend the agreement will undermine collective bargaining at a sectoral level or the public service as a whole.

The recent Labour Court (court) case of the National Employers' Association of South Africa and Others v Minister of Labour and Others [2012] 2 BLLR 198 (LC) deals, in depth, with the pre-requisites for extension of the collective agreement to non–parties within the registered scope of the bargaining council.

On 18 July 2011, trade unions and employers' organisations falling within the registered scope of the Metal and Engineering Industries Bargaining Council (MEIBC) concluded an agreement regulating employment-related matters in the sector until the year 2014. The applicants, the National Employers' Association of South Africa, Plastic Converters Association of South Africa and Riverpark Crane Hire CC did not sign the collective agreement. They were thus not party to the agreement. On 22 July 2011, the MEIBC, in terms of s32(1), wrote to the Department of Labour, requesting that the minister extends the collective agreement to the non–parties (the applicants) within the MEIBC's registered scope. Importantly, in its correspondence, the MEIBC enclosed a certificate issued by the Registrar of Labour stating that the MEIBC was 'a representative council'.

On 23 September 2011, by way of a Government Gazette, the Minister extended the collective agreement to the non-parties in terms of s32(2). In deciding to extend the agreement, it appears that the minister relied solely on the certificate of representativity issued by the Registrar. The applicants approached the court

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and argued that the minister's decision to extend the collective agreement to non–parties was invalid for lack of compliance with the provisions of s32(b) and (c). In terms of these sections, the Minister to be satisfied that:

- The majority of all the employees who, on extension of the collective agreement, will fall within the scope of the agreement, are members of the trade unions that are parties to the bargaining council.
- The members of the employers' organisations that are parties to the collective agreement, be found to employ the majority of all the employees who fall within the scope of the collective agreement.

The court, per Judge van Niekerk, agreed with the applicants and held that requirements of s32(3)(b) and (c) were not met when the minister decided to extend the collective agreement to non-parties. The minister was required, the court remarked, to make an assessment of representativity within the scope of the collective agreement upon extension, and not within the registered scope of the council. The minister (in extending the collective agreement) relied on the certificate of representativity. The court held that this certificate was irrelevant for the purposes of the requirements of representativity established by s32 (3) of the LRA. Therefore, the court concluded that the minister had neither the information regarding the number of employer organisations to the council nor that pertaining to the number of employees who upon extension would be found to be the members of the trade union parties to the council.

In the result, the court reviewed and set aside the minister's decision to extend the collective agreement to non–parties. However, the court suspended its order for a period of four months in order to afford the Minster an opportunity to consider whether or not to make a decision to extend the collective agreement to non- parties in terms of s32 (5) of the LRA.

Subsequent to the above judgement, the minister has, by way of a Government Gazette notice dated 1 February 2013, invited "potentially affected parties" to make submissions relating to the possible extension of the agreement to non-parties in terms of s32(2) read with s32(5) of the LRA by no later than 15 February 2013. The submissions must contain contact details and may be delivered either by email in a scanned PDF format, faxed or hand delivered to the Department of Labour, the details are as follows:

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