

EMPLOYMENT ALERT

29 April 2013

EMPLOYMENT FEATURES – APRIL 2013

JURISDICTION OF JUSTICE MINISTER IN THE PROPOSED AMENDMENTS TO THE LABOUR RELATIONS ACT

During the month of April the jurisdiction of the Minister of Justice over the Labour Courts was considered.

A proposed amendment to the Labour Relations Act Amendment Bill, 2012 which would have had the effect of limiting the jurisdiction that Minister of Justice and Constitutional Development, Jeff Radebe, has over the Labour Court, has been removed.

Clause 31 of the Labour Relations Amendment Bill, 2012 granted the power of appointing the Rules Board for the Labour Court to the Minister of Labour as opposed to the Justice and Constitutional Development Minister.

Currently the Rules Board of the High Court determines the rules relating to all High Courts. The Rules Board of the Labour Court would determine rules specifically for the Labour Court.

The reason for the removal of clause 31 is that it is important that the administration of justice is uniform and consistent throughout the system. As such, the powers regulating the administration of justice should remain with the Minister of Justice and Constitutional Development. The Department of Justice stated that "it made no sense to have two Rules Boards under two ministers, particularly as the point was to identify and monitor any gaps."

The Department of Labour agreed to the removal of the clause on condition that the Rules Board meets once every two years.

IN THIS ISSUE

- **Jurisdiction of Justice Minister in the proposed amendments to the Labour Relations Act**
- **Interesting new judgments**
- **International news**

Currently the Rules Board has met infrequently. This has affected the smooth operation of the Labour Court. To enhance efficiency and operations in the Labour Court a new practice manual has been issued.

Practice manual

As of 2 April 2013 a new practice manual has been implemented in the Labour Court. The practice manual sets out the procedural manner in which matters are to be brought before, and handled by the Labour Court.

Representations on earnings threshold

The Minister of Labour, Mildred Oliphant, recently announced that the Employment Conditions Commission is to consider representations on increasing the earnings threshold in the Basic Conditions of Employment Act, 1997. Since June 2012 the threshold has been R183,008 per year.

Interested parties have until 7 May 2013 to make representations to the Commission to advise the Minister on matters concerning the basic conditions of employment.

The threshold is important to both employer and employees. It is particularly important to employers as it determines which employees enjoy the benefit of certain basic conditions of employment.

To name a few examples, employees earning below the threshold are entitled to overtime, meal intervals, and additional payment for work done on Sundays and public holidays. The effect of increasing the threshold will be that employees that currently do not enjoy the benefits of these rights will be included within the threshold.

The number of employees enjoying these rights will therefore increase should the threshold increase. This in turn will affect the labour costing of businesses.

INTERESTING NEW JUDGMENTS

The definition of a 'benefit'

The recent decision of *Apollo Tyres South Africa (Pty) Limited v CCMA & Others* (unreported) handed down on 13 February 2013 deals with the definition of the word 'benefit' for the purposes of lodging a dispute in terms of s186(2)(a) of the Labour Relations Act, No 66 of 1995 (Act).

The Labour Appeal Court was required to determine whether an employee who alleges that their employer committed an unfair labour practice in relation to the provision of benefits will only have a remedy if such employee can prove that they have a right or entitlement to the benefit by virtue of contract, statute or collective agreement.

The third respondent, Hoosen, had been employed by the employer, Apollo, who initiated an early retirement scheme to reduce the number of employees. Hoosen applied for early retirement but was refused entry into the scheme.

The Labour Appeal Court followed the decision made in *Protekon (Pty) Ltd v CCMA and Others (2005) 26 ILJ 1105 (LC)* in which the judge stated that one should examine the nature of the dispute to decide whether the dispute is one which may be settled by the way of industrial action or adjudicated.

In essence a dispute over this provision falls within two categories namely:

- Where the dispute concerns a demand by employees that benefits are granted or reinstated, irrespective of whether the employer's failure to grant or the employer's removal of the benefit is considered to be unfair. This category of dispute may be settled by industrial action.
- Where the dispute concerns a determination on the fairness of the employer's conduct. This category of dispute may be settled by way of adjudication.

The Labour Appeal Court held that the CCMA or Bargaining Council must determine whether the employee is attempting to gain access to new benefits, remuneration or policies not previously provided by the employer. If the answer is in the affirmative the CCMA or Bargaining Council will not have the power to adjudicate the dispute. The employee must embark on industrial action in this instance.

The Labour Appeal Court held that the CCMA or Bargaining Council has the power to adjudicate a dispute over benefits in two instances:

- Firstly where the employer fails to comply with the obligation it has towards an employee; and
- Secondly where the employer has provided the employee with an advantage or privilege, which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion.

The Labour Appeal Court held that the CCMA or Bargaining Council has the power to determine the fairness of an employer's conduct even in instances where the employer is entitled to exercise discretion when granting the benefit.

The Labour Appeal Court concluded that Hoosen qualified to participate in the scheme and was unfairly disallowed to participate therein. The Labour Appeal Court was of the view that the appellant committed an unfair labour practice by not granting Hoosen's request to go on early retirement.

Claims for damages in terms of s77(3) of the Basic Conditions of Employment Act

In the recent judgment of *Rand Water v Buckle & Stoop* the Labour Appeal Court held that the Labour Court has the requisite jurisdiction to entertain a claim for damages in terms of s77(3) of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) where such damages are linked to the employment contract.

The employees had been dismissed for defrauding Rand Water of approximately R8 million and referred unfair dismissal disputes to the CCMA. Rand Water brought an application to have the matter referred to the Labour Court based on the complexity of the matter and their intention to bring a counterclaim for losses incurred.

At the Labour Court the employee's raised a point in limine that the Labour Court lacked the jurisdiction to entertain the dispute.

The Labour Court (the court a quo) held that a claim arising from fraud amounts to a delict. Section 77(3) provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine "any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

The Labour Court held that for the claim to "concern a contract of employment" it should have a direct bearing or effect on the employment contract. The claim of fraud did not have a bearing on the existence of the contract of employment as at the stage of the hearing the employment contract was no longer in existence. The court held that it did not have the requisite jurisdiction to entertain the counter claim.

On appeal the Labour Appeal Court held that on the pleadings it was demonstrated that the counter claim arose from the same facts as the employees' dismissal dispute. The Labour Appeal Court held that the fraud was not committed against Rand Water by people unconnected to it but rather by employees' abusing the positions that they held at Rand Water.

The Labour Appeal Court held that the Labour Court has concurrent powers with the High Courts in relation to matters concerning an employment contract. As such the Labour Court

has jurisdiction over any claim for damages so long as it is connected to an employment contract. Claims are not limited to a specific category (liquid or illiquid) and as such all categories of damages are included. Furthermore a counter claim does not have to be connected to the claim in reconviction.

As a result the Labour Court has the requisite jurisdiction to entertain any claim for damages connected to an employment contract.

INTERNATIONAL NEWS

Social media and recruitment

The United Kingdom's first youth police and crime commissioner resigned from her post after she was found to have used racist, homophobic and violent language on the social media network, Twitter.

A leading law firm in the United Kingdom (UK) has cautioned employers from conducting social media background checks and in particular searching for personal information such as religion and age. The concern is that this may constitute unfair discrimination in terms of the UK's Equality Act 2010.

The UK's Employment Practices Data Protection Code also makes recommendations to employers in relation to social media background checks. According to the code potential employees should be afforded the opportunity to make representations and provide comments on any information the employer has obtained.

[Aadil Patel and Inez Moosa](#)

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@dclacdh.com



Hugo Pienaar
Director
T + 27 (0)11 562 1350
E hugo.pienaar@dclacdh.com

Kirsten Caddy
Associate
T + 27 (0)11 562 1412
E kirsten.caddy@dclacdh.com



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



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

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



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



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

Inez Moosa
Associate
T + 27 (0)11 562 1420
E inez.moosa@dclacdh.com



Mohsina Chenia
Director
T + 27 (0)11 562 1299
E mohsina.chenia@dclacdh.com



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

Mandlakazi Ngumbela
Associate
T + 27 (0)21 481 6460
E mandlakazi.ngumbela@dclacdh.com



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



Nicholas Preston
Senior Associate
T + 27 (0)11 562 1788
E nicholas.preston@dclacdh.com

Zinhle Ngwenya
Associate
T + 27 (0)11 562 1119
E zinhle.ngwenya@dclacdh.com



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



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

Lauren Salt
Associate
T + 27 (0)11 562 1378
E lauren.salt@dclacdh.com

Andrea Taylor
Associate
T + 27 (0)11 562 1687
E andrea.taylor@dclacdh.com

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

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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@dclacdh.com

CAPETOWN

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@dclacdh.com